What VC Fund Settlement Means For DEI Grant Programs

By **Valecia McDowell, Joshua Lanning and Elena Mitchell** (September 17, 2024)

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On Sept. 11, an Atlanta-based venture capital fund that ran a minority grant program, and an advocacy group founded by longtime diversity, equity and inclusion opponent Edward Blum, surprised many DEI advocates by announcing their settlement in American Alliance for Equal Rights v. Fearless Fund Management LLC.[1]

But perhaps no one should have been surprised.

The case has been monitored closely as a bellwether because it was one of the first to be heard by a federal appellate court since suits challenging corporate diversity programs proliferated after the U.S. Supreme Court held that race-conscious college admissions programs violated the 14th Amendment's equal protection clause in last year's Students for Fair Admissions Inc. v. President and Fellows of Harvard College.[2]

How, if at all, should the settlement affect the programming decisions of other grantmakers? Fortunately for DEI supporters, Fearless Fund's decision to settle, based on the specific details of the challenged program, leaves the legal landscape wide open for organizations with grant programs supporting historically disadvantaged people and communities to chart their own path forward.

Fearless Fund also avoided risking the creation of potentially "bad law" in the U.S. Court of Appeals for the Eleventh Circuit for like-minded organizations.

Background on the Fearless Fund Case

In a June 3 decision in the case,[3] a three-judge panel of the Eleventh Circuit granted a preliminary injunction and effectively shuttered a Fearless Fund grant program favoring minority-owned businesses pending a resolution of the case.[4]

Fearless Fund was left with three litigation options: (1) Honor the ruling and continue to litigate the underlying case on the merits; (2) request a rehearing or rehearing en banc before the full Eleventh Circuit; or (3) appeal to the Supreme Court. Rather than pursue any of those options, however, the parties choose to settle based on a filing entered by the parties in the U.S. District Court for the Northern District of Georgia.[5]

In the case, the American Alliance for Equal Rights challenged under Section 1981 of the Civil Rights Act of 1866, Fearless Fund's Strivers Grant Contest, a grant competition for Black women-owned businesses.[6] In August 2023, the trial court denied American Alliance for Equal Rights' motion for preliminary injunction, finding that although applying to the contest created a contractual relationship between Fearless Fund and applicants, the contest was protected expression under the First Amendment.[7]

However, days later, the Eleventh Circuit reached the opposite conclusion and temporarily enjoined Fearless Fund "from closing the application window or picking a winner" while American Alliance for Equal Rights' appeal was pending.[8]

This June, a three-judge panel reversed the trial court and granted American Alliance for Equal Rights' preliminary injunction request, concluding injunctive relief was appropriate because the contest was likely to violate Section 1981, was unlikely to enjoy First Amendment protection, and inflicted irreparable injury.[9]

Initially, Fearless Fund signaled intention to move for a rehearing or rehearing en banc when it moved for an extension of time to file such a petition.[10] On Sept. 3, Fearless Fund sought an extension of time to respond to the American Alliance for Equal Rights' complaint, suggesting a strategy to litigate on the merits in lieu of asking for a rehearing or appealing.[11]

But in the end, the parties filed a succinct joint stipulation of dismissal stating only: "The parties have settled. Per Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Plaintiff and Defendants jointly stipulate to the dismissal of this case with prejudice."[12]

The American Alliance for Equal Rights Position on the Settlement

Although details of the parties' settlement have not been made public, the American Alliance for Equal Rights released a statement saying that as of Sept. 11, "Fearless Fund has permanently closed the grant contest and will never reopen it."[13]

The statement also quotes Blum as calling "[r]ace-exclusive programs like the one the Fearless Fund promoted ... divisive and illegal," and states that although the American Alliance for Equal Rights "encouraged" Fearless Fund to open its grant contest to non-Black women, Fearless Fund "decided instead to end it entirely."[14]

The statement concludes with a quote from Blum that: "Opening grant programs to all applicants, regardless of their race, is enshrined in our nation's civil rights laws and supported by significant majorities of all Americans."[15]

Fearless Fund Likely Settled Due to Pragmatic and Strategic Considerations

Alphonso David, one of Fearless Fund's attorneys, issued a statement clarifying that Fearless Fund's Strivers Grant Contest "was already in its final stage" when the parties agreed that Fearless Fund would cease the program.[16] David further described the parties' settlement agreement as "very narrow," and expressly noted that it "does not restrict ... any other investment or charitable activity of the Fearless Fund" on a going-forward basis.[17]

According to its website, Fearless Fund "invests in under-resourced entrepreneurs including women of color led businesses seeking pre-seed, seed level or series A financing."[18]

Arian Simone, Fearless Fund's CEO, also issued a statement characterizing the settlement as "a WIN and positive outcome for the Fearless Fund and our community."[19] This was due, in part, to the fact that the settlement allowed Fearless Fund to avoid a potentially unfavorable ruling on the merits becoming binding precedent in the Eleventh Circuit, which could then be wielded against other like-minded organizations in the Eleventh Circuit and beyond:

> We strategically avoided a Supreme Court ruling (the deadline to appeal our appeal has passed) because a ruling not in our favor at the Supreme Court would've ended minority based funding across the country and that would not be wise, we have already seen the Supreme Court ruling for the colleges end affirmative action for all colleges in schools and admissions.[20]

David echoed this sentiment in his statement, stating: "The impact of resolving this matter is significant in that a decision by two judges on the 11th Circuit will not bind the country."[21]

And then there are the practical implications of the announcement. Litigation would have represented a significant drain of time, talent and funds that likely could have been more meaningfully deployed to fulfill Fearless Fund's core mission.

Post-settlement, Fearless Fund can move forward, avoiding additional costs and headaches of a lawsuit and inevitable appeals that likely would have spanned years. Now, the organization's full focus can return to the underlying work.

What the Settlement Means for the Rest of Us

Notwithstanding the settlement, the law is far from settled in this area. Fearless Fund's decision to resolve the matter without a final adjudication on the merits leaves other, like-minded grant programs free to craft program eligibility criteria prioritizing support for historically underfunded or under-resourced individuals without running afoul of a final ruling from the Eleventh Circuit.

For many organizations, this will involve crafting thoughtful, mission-driven, race-neutral eligibility requirements; for others, it will entail deploying gift dollars rather than contractual grant dollars, thereby mitigating litigation risk under Title 42 of the U.S. Code, Section 1981.

But whatever the chosen path, organizations can, and should, continue to live their values by thoughtfully investing in their communities.

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[1] Joint Stip. Dismissal, No. 1:23-cv-03424-TWT (N.D. Ga. Sep. 11, 2024), ECF No. 147.

[2] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

[3] Valecia McDowell, Joshua Lanning and Elena Mitchell, What 2 Rulings On Standing Mean For DEI Litigation, Law360, available at https://www.law360.com/articles/1852331/what-2-rulings-on-standing-mean-for-dei-litigation.

[4] No. 23-13138, 2024 WL 2812981 (11th Cir. June 3, 2024).

[5] See supra note i.

[6] 2024 WL 2812981, at *1.

[7] 2023 WL 6520763, at *1.

[8] Id.

[9] 2024 WL 2812981.

[10] Unopposed Mot. Ext. Time File Pet. Reh'g En Banc, Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC, No. 23-13138 (11th Cir. June21, 2024), ECF No. 129.

[11] Unopposed Mot. Ext. Resp. Deadline, Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC, No. 1:23-cv-03424-TWT (N.D. Ga. Sep. 3, 2024), ECF No. 144.

[12] See supra note i.

[13] American Alliance for Equal Rights Concludes Lawsuit Against the Fearless Fund's Black-Only "Strivers Grant Contest," PR Newswire, available at https://www.prnewswire.com/news-releases/american-alliance-for-equal-rights-concludes-lawsuit-against-the-fearless-funds-black-only-strivers-grant-contest-302245067.html.

[14] Id.

[15] Id.

[16] Alphonso David (@alphonsodavid), https://www.instagram.com/alphonsodavid/ (last visited Sep. 12, 2024).

[17] Id.

[18] About, Fearless Fund, avialable at https://www.fearless.fund/about (last visited Sep. 12, 2024).

[19] Arian Simone (@ariansimone), https://www.instagram.com/ariansimone/ (last visited Sep.12, 2024).

[20] Id.

[21] See supra note 16.