

GUEST COLUMN

Appellate court blocks venture firm's grant program for Black women

By K. Chike Odiwe

The 11th U.S. Circuit Court of Appeals (Court of Appeals), in a 2-1 ruling, sided with a challenge to the grant program that awards to businesses owned by Black women. The challenge was backed by prominent affirmative-action opponent, Edward Blum, who argued it violated a Reconstruction-era civil-rights law, known as Section 1981, that prohibits discrimination in contracts. It is Blum's position that race cannot be considered in contractual relationships.

The Court of Appeals ruling is another strike against diversity and inclusion programs that have come under increased legal attacks.

The ruling against Fearless Fund is another victory for conservative groups focused on legal battles against corporate diversity programs that have targeted several companies and government institutions.

Affirmative action programs are routinely used to even the playing field for minority- and women-owned business in public procurement markets, and therefore may be a positive factor in business entry and survival.

Affirmative action programs are broadly used in federal public procurement markets and by many states and local governments, and contracts awarded through these programs are a significant source of revenue for some businesses owned by minorities and women. Many of the existing federal, state, and local government programs were created in the late 1970s and



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1980s to develop minority and women enterprises, counter the effects of past discrimination, and reduce unemployment among minorities in urban communities. Boston, T. D. (1999). Affirmative action and black entrepreneurship. For the past two decades, however, state and local programs have been both judicially and legislatively challenged and, in many cases, dismantled.

The case against the Fearless Fund (Fearless) was brought last year by the American Alliance for Equal Rights, a group led by Blum, the conservative activist behind the Supreme Court case that ended affirmative action in college admissions.

Blum commended the ruling, saying "programs that exclude certain individuals because of their race such as the ones the Fearless Fund has designed and implemented are unjust and polarizing."

Fearless CEO Arian Simone said the ruling was "devastating" for the organizations and the women it has invested in. "The message these judges sent today is that diversity in Corporate America, education, or anywhere else should not exist," she said in statement.

The case against Fearless has been closely monitored by civil rights advocates, philanthropic organizations, employment lawyers

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and the venture capital industry as a gauge for how the courts are viewing programs intended to level the playing field for racial minorities and other groups that have historically faced discrimination in businesses and workplaces.

In a 2-1 ruling, the Court of Appeals found that Blum was likely to prevail in his lawsuit claiming the grant program violates section 1981 of the 1866 Civil Rights Act, which prohibits discrimination based on race when enforcing contracts. The Reconstruction-era law was originally intended to protect formally enslaved people from economic exclusion, but anti-affirmative action activists have been utilizing it to challenge programs intended to benefit minority-owned businesses.

The court ordered Fearless to suspend its Strivers Grant Contest,

which provides \$20,000 to businesses that are majority-owned by Black women, for the remainder of the lawsuit that is being litigated in a federal court in Atlanta. The ruling reversed a federal judge's ruling last year that the contest should be allowed to continue because Blum's lawsuit was likely to fail. However, the grant contest has been suspended since October after a separate panel of the federal appeals court granted Blum's request for an emergency injunction while he challenged the federal judge's original order.

The Court of Appeals, consisting of two judges appointed by former President Donald Trump and one appointed by former President Barack Obama, rejected Fearless' arguments that the grants are not contracts but charitable donations

protected by the First Amendment right to free speech.

The court's majority opinion stated that "The fact remains, though, that Fearless simply and flatly refuses to entertain applications from business owners who are not "black females." The court's majority opinion articulated that "every act of race discrimination" would be deemed expressive conduct under Fearless' argument.

The Court of Appeals also rejected Fearless' contention that Blum had no standing because the lawsuit was filed on behalf of three anonymous women who failed to demonstrate that they were "ready and able" to apply for the grant or that they had been injured by not being able to do so.

Judge Robin Rosenbaum, an Obama appointee, disagreed in a strong

dissent, likening the plaintiffs' claims of harm to soccer players trying to win by "flopping on the field, faking an injury." Rosenbaum said none of the plaintiffs demonstrated that they had any real intention to apply for the grants in what she called "cookie-cutter declarations" that were "threadbare and devoid of substance."

The court's ruling was not surprising because of its conservative-leaning and previous skepticism towards the argument presented by Fearless, said David Glasgow, executive director of the Meltzer Center for Diversity, Inclusion, and Belonging at New York University's School of Law.

The ruling is additional evidence that we are going to see some pro-DEI outcomes in liberal circuits and anti-DEI outcomes in conservative circuits.