Simpson Thacher

Memorandum

DEI Developments: 11th Circuit Blocks the Fearless Fund's Grant Program for Black Female-Owned Businesses

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On June 3, the Appeals Court for the Eleventh Circuit authorized a preliminary injunction enjoining a program run by the Fearless Fund to provide grants to women of color building new companies. It appears to be the first appellate court ruling to limit private charitable support to members of a particular racial or ethnic group. More broadly, the decision is the latest major development in diversity, equity and inclusion (DEI)-related litigation, and may be used to challenge other similar programs targeted at providing opportunities to certain classes of individuals.

Background

The Fearless Fund is an Atlanta-based firm with a stated mission of providing venture capital funding for women of color building new companies. Grants to these business owners are made under a competitive application process that is open only to Black females and to businesses that are majority-owned by Black women.

The challenge to Fearless Fund's program came just over a month after the Supreme Court's decision last June in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina* ("*SFFA*"), wherein the Court struck down race-based college admissions practices. Following that decision, the American Alliance for Equal Rights ("AAER") (an organization founded by Edward Blum, who also founded Students for Fair Admissions) brought suit against Fearless Fund, looking to extend the logic underlying the Supreme Court's holding beyond the educational context and enjoin the Fund's program. AAER claimed that the Fund's grant program violates 42 U.S.C. § 1981—a statute not at issue in *SFFA*, prohibiting race discrimination in the making and enforcement of contracts.

The District Court for the Northern District of Georgia denied a motion for a preliminary injunction of Fearless Fund's program, concluding that the case was not substantially likely to succeed on its merits. In September 2023, the 11th Circuit temporarily enjoined the program pending appeal, and has now remanded the case to the district court with instructions to enter a preliminary injunction.

Eleventh Circuit Decision

Fearless Fund had opposed AAER's motion for a preliminary injunction on the basis that (i) the plaintiffs lacked standing, (ii) § 1981 does not apply to the program, and (iii) the program was protected by the First Amendment. Rejecting each of these arguments, the Eleventh Circuit held that the challenge has a substantial likelihood of

succeeding on its merits, and that since the plaintiff's members would suffer irreparable injury in the absence of the injunction, that the injunction was appropriate.

Notable findings from the decision include:

- While an organization may sue on behalf of its members if those members would otherwise have standing to sue in their own right, there is no requirement that these members be identified specifically by name. Here, the members were given pseudonyms and described in very general terms. The Eleventh Circuit joined the Fourth and Tenth Circuits in allowing for anonymity in this practice; by contrast, the Second Circuit required at least one member be identified by name in its decision concerning a diversity fellowship program at Pfizer in early March.
- The court decided that the grant at issue was a "contract" for purposes of § 1981 because (i) Fearless Fund described it as a contract in the initial version of the application (which was subsequently changed, after the suit was filed) and (ii) in exchange for the grant money, Fearless Fund would receive rights including as to use of the grant recipient's name, image and likeness.
- Courts have recognized an exception to § 1981 for "remedial programs" that address racial imbalances and do not unnecessarily trammel the rights of others or create an absolute bar to advancement. Without deciding the issue, the court assumed that the exception would also apply to cases outside of the employment context, but held that the program does not meet the test because it creates an absolute bar to entry, in that only Black women may apply for grants under the program.
- While First Amendment protections may cover certain speech that entails discriminatory statements, the act of discrimination is not so covered. The Eleventh Circuit, unlike the district court, narrowly applied *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), which held that a website designer could not be compelled to create material celebrating a same-sex wedding. Here, the Eleventh Circuit drew a distinction between such programs, which it saw as advocating discrimination, from the closed program in this case, which it saw as *engaging* in discrimination.

The dissent, written by Judge Robin Rosenbaum, focused on the question of standing, comparing the suit to "flopping" in soccer to manufacture a foul. She argued that the plaintiffs suffered no injury because they had no concrete plans to seek grants under the program and no actual desire to do so.

Implications of the Ruling

This decision marks a significant extension of the concepts established in *SFFA*, shifting legal skepticism of DEI and affirmative action programs beyond the college admissions process and onto the activity of private firms and private transactions. While many similar lawsuits challenging corporate programs at companies like Amazon, Pfizer, Progressive Insurance and Starbucks have been dismissed, AAER and other groups continue to file suit against corporate programs—and now may have greater leeway to do so given the anonymity under which one can file and maintain standing (at least in the Eleventh Circuit). With respect to charitable programs specifically, the

ruling suggests that programs adhering more closely to "grants," which are not explicitly covered by § 1981, may be more likely to escape similar scrutiny.

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