No. 23-13138

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN ALLIANCE FOR EQUAL RIGHTS
Plaintiff-Appellant,

v.

FEARLESS FUND MANAGEMENT, LLC, et al.
Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of Georgia, No. 1:23-cv-3424-TWT

REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL (RELIEF NEEDED BY SEPTEMBER 30, 2023)

William Fawcett, Sr.
Chambliss & Fawcett, LLP
2900 Paces Ferry Road, Ste. B-101
Atlanta, GA 30339

Thomas R. McCarthy
Cameron T. Norris
Gilbert C. Dickey
R. Gabriel Anderson
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
tom@consovoymccarthy.com
cam@consovoymccarthy.com
gilbert@consovoymccarthy.com
gabe@consovoymccarthy.com

INTRODUCTION

The district court's now-released opinion clarifies the stakes. The Alliance is likely to succeed on every merits question, the district court ruled, except one: Fearless' defense under the First Amendment. So under the district court's decision, companies can create programs that are contracts, that are not valid affirmative-action plans, and that exclude all races but one—yet evade liability by saying their discrimination is "expressive conduct." D.E.115 at 15. That a federal court would say the Civil Rights Act of 1866 *likely violates the First Amendment* is alarming. And it's indefensible given the many Supreme Court precedents saying the opposite. *E.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) ("[§]1981" is "a permissible content-neutral regulation of conduct"). This case does not involve some unusual application of §1981, where a court is using the statute to compel or alter pure speech. The district court said *discriminatory contracting itself* is protected speech. That line is one the Supreme Court has always been careful not to cross, as it would destroy the whole enterprise of antidiscrimination law. *See 303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023). But the district court crossed it.

This Court cannot let the district court's evisceration of §1981 stand; but it might have to if the Alliance can't get an injunction pending appeal before September 30. Fearless doesn't dispute that it will close the application process in two days. And Fearless doesn't deny that, once it selects a winner, it will argue this entire case is moot. This Court should not tolerate that threat to its jurisdiction. And preserving the

status quo is especially appropriate here, since it would prevent invidious racial discrimination against the side most likely to win.

ARGUMENT

Though an injunction pending appeal is extraordinary, so is flagrant racial discrimination, a rapidly closing deadline, and the giant hole the district court blasted through §1981. Courts grant injunctions pending appeal when the four factors are met. *See Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021). They're met.[1]

I. The Alliance will likely win this appeal.

Fearless tries, but fails, to defend the district court's remarkable First Amendment ruling. And despite insisting that this Court will likely *affirm*, Fearless spends much of its brief arguing issues that it thinks the district court *got wrong*. Those rejected arguments won't fare better on appeal.

A. Racially discriminatory contracting isn't speech.

The district court's opinion would render §1981 a dead letter. Since Fearless "intends to convey" a message, the court reasoned, its discrimination is "expressive and subject to the First Amendment." D.E.115 at 15-16. No matter that Fearless sends its message only by discriminating when deciding who may "enter a contract." D.E.115 at 15. Under this view, Fearless can discriminate against all races but one to send the message that "Black Women owned businesses are vital to our economy." D.E.115 at 15.

[1] Fearless doesn't dispute that, regardless whether the traditional factors are met, this Court can enter an administrative injunction that gives it time to resolve *this* motion. Mot.11.

A white-supremacist organization, presumably too, can contract only with white men to convey its message that they are vital to the economy.

The Supreme Court disagrees. It has twice explained that "[§]1981" is "a permissible content-neutral regulation of conduct." *Mitchell*, 508 U.S. at 487; *accord R.A.V. v. St. Paul*, 505 U.S. 377, 389-90 (1992). Discriminatory "acts" that violate §1981 "are not shielded from regulation merely because they express a discriminatory idea." *R.A.V.*, 505 U.S. at 390. The district court ignored these controlling decisions.

The district court also wrongly rejected *Runyon*, where the Court held that §1981 and the First Amendment don't conflict because "invidious private discrimination ... has never been accorded affirmative constitutional protections." *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (cleaned up). The district court acknowledged this holding but refused to apply it, dismissing it as a case about the right of "association" that was "difficult to square" with more recent cases. D.E.115 at 16. Not so.

The conduct in *Runyon* was the same as the conduct here. There a private school sought to "exclud[e] racial minorities" to "promote the belief that racial segregation is desirable." 427 U.S. at 176. Here Fearless seeks to exclude all races but one to promote the belief that "Black women owned businesses are vital to the economy." D.E.59 at 23. Fearless, like the private schools in *Runyon*, is free to promote its belief, but it cannot do so through racially-discriminatory contracting. And in any event, the district court's distinction between expressive conduct and association is no answer to *Runyon*'s broad holding that discrimination lacks "constitutional protections." 427 U.S. at 176.

Drawing from cases where nondiscrimination laws would compel "pure speech," *303 Creative*, 143 S.Ct. at 2318 (designing a website); *Claybrooks v. ABC*, 898 F. Supp. 2d 986, 999-1000 (2012) (casting a reality show), the district court held that organizations can refuse to contract with all races but one so long as they tie that discrimination to some message. D.E.115 at 16-17. But those same cases stress that they are *not* recognizing a "right to refuse to serve" (*i.e.*, contract with) "members of a protected class." *303 Creative*, 143 S.Ct. at 2318. Instead, they involved "peculiar" applications of nondiscrimination laws where members of a protected class were not categorically excluded, but merely not allowed to participate in ways that changed a speaker's message. *Hurley v. Irish-American GLBG*, 515 U.S. 557, 572 (1995). In those circumstances, any discrimination was incidental to speech. But per Fearless, its discrimination *is* the speech: Fearless seeks to exclude nonblack women to express a message of support for black women.

This crucial distinction was not undone by *Coral Ridge*'s statement that "donating money qualifies as expressive conduct." *Coral Ridge v. Amazon.com*, 6 F.4th 1247, 1254 (11th Cir. 2021). Fearless can support and donate money to anyone it chooses. But when it enters *contracts*, §1981 applies to its conduct, whether its motive is charitable or not. Fearless can no more object than the employer who must remove a "sign reading 'White Applicants Only.'" *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). In both cases, any impact on speech is "plainly incidental" to the law's valid regulation of conduct. *Id.*

Even if Fearless were right that its contest is expressive, the district court's analysis was incomplete. A "content neutral regulation of expressive conduc[t] is subject only to intermediate scrutiny." *Ft. Lauderdale Food Not Bombs v. Ft. Lauderdale*, 11 F.4th 1266, 1295 (11th Cir. 2021). But the district court never explained why Congress failed intermediate scrutiny. It didn't, since §1981 leaves Fearless open to say whatever it wants and limit its donations (but not its contracts) to one race. This ban is narrowly tailored to racial discrimination, invidious conduct that "has never been accorded affirmative constitutional protections." *Runyon*, 427 U.S. at 174. Because this Court will likely vacate or reverse the district court on the First Amendment—the *only* basis for its denial of the preliminary injunction—it should enter an injunction pending appeal.

B. The contest is a contract.

Fearless offers no basis to disturb the district court's finding, protected by clear-error review, that the contest is "a contrac[t]." D.E.115 at 12; *see S. Coal Corp. v. Drummond Coal Sales,*, 28 F.4th 1334, 1343 (11th Cir. 2022). Calling the contest "charity" doesn't make it noncontractual. As the district court pointed out, "labels" are "not determinative." D.E.115 at 12. (Though here, Fearless labeled the rules "A CONTRACT." D.E.2-3 at 3.) Even if Fearless could rebrand its contest as charity, charity is still a contract when it comes with strings attached. *Atlanta Dev. Auth. v. Clark Atlanta Univ.*, 298 Ga. 575, 578-79 (2016). And Fearless attaches many strings, as the district court found. D.E.115 at 12. Regardless of the official rules, moreover, Fearless never

disputes that the contest itself is "an option or unilateral contract." *Hampton v. Dillard Dep't Stores*, 247 F.3d 1091, 1104 (10th Cir. 2001).

C. The contest isn't affirmative action.

Fearless' contest falls outside any "affirmative action" defense. As the district court noted, this racially discriminatory contest isn't a "traditional affirmative action plan." D.E.115 at 20. Affirmative-action plans are formally created with specific goals: They change an employer's selection procedures to give preferences to certain minorities until those minorities are represented in the company at a normal level. *See* 29 C.F.R. §1608.4(a)-(c); *Johnson v. Transportation Agency*, 480 U.S. 616, 628-31 (1987). Fearless' contest does none of that.

Regardless, affirmative-action plans must be narrowly tailored, and Fearless' isn't. "[A]n affirmative action plan" cannot "unnecessarily trammel the rights of non-black employees or create an absolute bar." *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1114 (11th Cir. 2001). But Fearless' program is "open only to black women," D.E.115 at 2, meaning every other race is absolutely barred, including those who historically receive *less* funding than black women. This "hard-core, cold-on-the-docks quota" isn't remotely legal. *Hammon v. Barry*, 826 F.2d 73, 79 (D.C. Cir. 1987). In fact, it's precisely the type of affirmative-action plan that *Weber* and *Johnson* said would be invalid. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Johnson*, 480 U.S. at 638.

D. Fearless' standing arguments are meritless.

The district court was right that the Alliance has associational standing. Fearless now contests only whether Owners A-C have standing on their own. They do, since Fearless' racial bar prevents them from "'compet[ing] on equal footing'" for a contest they're "able and ready" to apply for. D.E.115 at 9-11. Contra Fearless, their ability and readiness to apply, plus their inability to compete due to race, is itself an injury. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003).

The Alliance's members can use pseudonyms at this stage. D.E.115 at 6-8. Circuit precedent is clear that, at least before discovery, "organizational plaintiffs need not name names." *Am. Coll. of Emergency Physicians v. BCBS of Ga.*, 833 F. App'x 235, 241 n.8 (11th Cir. 2020). Fearless cites no precedents involving pseudonyms; its precedents all involve associations who failed to identify any *specific* member who *has* standing. *See Chamber of Com. v. CFPB*, 2023 WL 5835951, at *6 (E.D. Tex.). The Alliance didn't commit that error: As the district court found, it "clearly avers that three members of its organization are injured by the Contest." D.E.115 at 7. Hence why, just last year, this Court held that an association had standing based on pseudonymous members, at the same preliminary-injunction stage, on the same record. *Speech First v. Cartwright*, 32 F.4th 1110, 1113-14 (2022).

Fearless now argues that the anonymous declarations are inadmissible, but that objection—which, at the preliminary-injunction stage, goes only to the declarations' *weight*—is forfeited because Fearless didn't brief it below. The district court thus didn't

accept it. And it's meritless. "28 U.S.C. §1746 … does not prohibit the use of … pseudonyms" if "the actual person can be identified." *Springer v. IRS*, 1997 WL 732526, at *5 (E.D. Cal.). Owners A-C can be identified by their declarations' identifying details and the Alliance's president. *McGehee v. Neb. DOC*, 2019 WL 1227928, at *2 (D. Neb.), *vacated on other grounds*, 987 F.3d 785 (8th Cir. 2021). And the same representations about their standing appear in the president's signed, nonanonymous declaration based on his personal knowledge. D.E.1-11; *see Marszalek v. Kelly*, 2021 WL 2350913, at *4 (N.D. Ill.).

II. The Alliance faces irreparable harm.

A "discriminatory classification" bars the Alliance's members "from competing on equal footing." *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995) (cleaned up). And this Court—like many others—has observed that "racial discrimination … is sufficient to permit a court to presume irreparable injury." *Gresham v. Windrush Partners*, 730 F.2d 1417, 1424 (11th Cir. 1984); *accord Rogers v. Windmill Pointe*, 967 F.2d 525, 528 (11th Cir. 1992) ("irreparable injury may be presumed from the fact of discrimination").

The district found no irreparable harm on only two grounds: the Alliance is unlikely to succeed on the merits, and §1981 doesn't explicitly authorize injunctive relief. D.E.115 at 21-22. Both reasons are purely legal, plainly wrong, and thus an abuse of discretion. As explained, the district court was plainly wrong on the First Amendment, and it found that *the Alliance* was likely to succeed on every other question. The district court was wrong to focus on whether §1981 specifically authorizes injunctive relief. True, *Gresham* explains that statutory authorization can support an injunction. *Id.* at

1423. But that same opinion says irreparable harm can also be *presumed* from racial discrimination itself. *Id.* at 1424. That conclusion turned not on statutory-enforcement mechanisms, but on the "essentially irremediable nature of racial discrimination." *Id.* at 1424.

Nor is racial discrimination irreparable under the Constitution, but somehow not irreparable under §1981, as one court bizarrely held. *Moses v. Comcast*, 2022 WL 2046345, at *3 (S.D. Ind.). It would be extraordinary for a harm to be irreparable under the Constitution but not under a statute meant to "translate" that constitutional right. *Runyon*, 427 U.S. at 170. In both instances, the individual has been subjected to a racial classification that "demeans [her] dignity and worth." *SFFA*, 143 S.Ct. at 2170. That out-of-circuit decision thus cited no authority, pointing instead to cases where harm is presumed because a statute provides an injunction. *See Moses*, 2022 WL 20463445, at *3. But that's a non sequitur: A statute can remove the need to prove irreparable harm, but the absence of such a statute does not somehow make an irreparable harm reparable.

Finally, the harms here cannot be remedied by monetary damages. The Alliance's members are harmed by being excluded based on their skin color. *SFFA*, 143 S.Ct. at 2170. And Fearless' contest provides other intangible benefits like "mentorship." D.E. 59 at 14; *see* D.E.59-3 at 7 ("informal support," "network[ing]," and "training programs"). So even if irreparable harm couldn't be *presumed* from racial discrimination, no presumption is needed. As the Alliance argued below, this discrimination denies the Alliance's members valuable, nonquantifiable benefits. D.E.2-1 at 8-9. And refusing to

enjoin the contest threatens the Alliance's right to judicial review, as Fearless will argue that its selection of a winner moots this case. That threatened harm is itself irreparable. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers).

Further, there was no delay. The Alliance filed this motion immediately, and it filed its preliminary-injunction motion one day after this contest round opened. Fearless raised this same argument below. It was wrong then, *see* D.E.91 at 23, and it won't prove on appeal that the district court abused its discretion by ignoring it.

III. The remaining factors also favor an injunction.

The district court did not address the balance of the harms or public interest, but both favor an injunction. The Alliance's members face the prospect of forever losing the chance to compete. *SFFA*, 143 S.Ct. at 2159. While Fearless would simply suffer a slight delay of its own arbitrary deadline on its illegal program. *GOS Op. v. Sebellius*, 2012 WL 175056, at *5 (S.D. Ala.). The public interest favors enforcing civil-rights laws. *Villano v. Boynton Beach*, 254 F.3d 1302, 1306 (11th Cir. 2001).

CONCLUSION

By September 30, this Court should enjoin Fearless from closing the application window or selecting a winner for the challenged contest.

Respectfully submitted,

Dated: September 28, 2023

/s/ Cameron T. Norris

Thomas R. McCarthy
Cameron T. Norris
Gilbert C. Dickey
R. Gabriel Anderson
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
tom@consovoymccarthy.com
cam@consovoymccarthy.com
gilbert@consovoymccarthy.com
gabe@consovoymccarthy.com

William Fawcett, Sr.
Chambliss & Fawcett, LLP
2900 Paces Ferry Road, Ste. B-101
Atlanta, GA 30339

CERTIFICATE OF COMPLIANCE

This reply complies with Rule 27(d)(2) because it contains 2,599 words, excluding the parts that can be excluded. This reply also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 28, 2023 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed this reply with the Court via ECF, which emailed all counsel of record.

Dated: September 28, 2023 */s/ Cameron T. Norris*