No. 23-13138

United States Court of Appeals

for the

Eleventh Circuit

AMERICAN ALLIANCE FOR EQUAL RIGHTS,

Plaintiff-Appellant,

– v. –

FEARLESS FUND MANAGEMENT, LLC, FEARLESS FUND II, GP,LLC, FEARLESS FUND II, LP, FEARLESS FOUNDATION, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA, IN NO. 1:23-CV-03424-TWT
(HONORABLE THOMAS W. THRASH, SENIOR U.S. DISTRICT COURT JUDGE)

BRIEF OF *AMICUS CURIAE* THE EQUAL PROTECTION PROJECT SUPPORTING APPELLANT AND SUPPORTING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 and Circuit Rule 26.1, *Amicus Curiae* the Equal Protection Project certifies that the following have an interest in the outcome of this appeal, in addition to any persons or entities listed by Appellant, Appellees, and any other *Amicus Curiae*:

1. The Equal Protection Project of The Legal Insurrection Foundation, *Amicus Curiae*

2. William A. Jacobson, *Attorney for Amicus Curiae the Equal Protection Project*

3. James R. Nault, *Attorney for Amicus Curiae the Equal Protection Project*

The Legal Insurrection Foundation, of which the Equal Protection Project is a project, is a Rhode Island tax-exempt not-for-profit corporation. It has no parent corporation, shareholders, subsidiaries, or affiliates. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

Per Circuit Rule 26.1-2(c), *Amicus Curiae* the Equal Protection Project certifies that this CIP is complete.

Dated: November 13, 2023

/s/ William A. Jacobson
Counsel for the Equal
Protection Project

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTEREST OF *AMICUS CURIAE*[1]

The Equal Protection Project (EPP) is a project of the Legal Insurrection Foundation (LIF),[2] a Rhode Island tax-exempt 501(c)(3), devoted to the fair treatment of all persons without regard to race or ethnicity. Our guiding principle is that there is no "good" form of racism. The remedy for racism never is more racism.

Since its creation in February 2023, EPP has filed more than a dozen civil rights complaints, in various fora, against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms, and its work is ongoing. EPP updates the public on its activities at EPP's website.[3]

The district court's order, if not reversed, will have a profoundly negative impact on EPP's attempt to vindicate constitutional and statutory protections against racial discrimination, by carving out a massive loophole to characterize discriminatory conduct as protected speech. *See Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 1:23-cv-3424-TWT, 2023 WL 6295121, at *2-8 (N.D. Ga. Sept. 27, 2023). The district court held that the racially discriminatory conduct in this case was the equivalent of expressive speech and therefore was

[1] All parties have consented to the filing of this amicus brief. Fed. R. App. P. 29(a)(2).
[2] https://legalinsurrectionfoundation.org/.
[3] https://equalprotect.org/.

protected by the First Amendment. *Id.* The district court also found no irreparable harm. *Id.* at *8. If the judgment of the court below stands, it will eviscerate not only 42 U.S.C. § 1981, but also other civil rights laws, as racially discriminatory conduct could be excusable as protected expressive speech.

The district court's decision on irreparable harm is equally damaging, as a finding of no irreparable harm in cases of proven racially discriminatory conduct will help normalize racial discrimination and render the very real, irreparable harm that flows from racial discrimination irremediable.

Finally, EPP is interested in addressing this court's order staying Appellees' contest pending this appeal, because the dissent in that order erroneously opined that 42 U.S.C. § 1981 does not protect the interests of white citizens. That is not the law.

In short, the stakes for the nation, and EPP, could not be higher. Hence our interest in this case.

While EPP supports Appellant's merits arguments in favor of reversal, EPP submits this brief to address three areas squarely in EPP's experience: (i) the societal trend toward increased racial discrimination in the name of anti-racism, which the district court's order, if left unchecked, will facilitate, (ii) the destructive effects and irreparable harm resulting from racially discriminatory conduct, and

(iii) the broad protections afforded by civil rights statutes, including 42 U.S.C. § 1981, which protect citizens of all races from racially discriminatory contract.

STATEMENT OF THE CASE

We rely on the Statement of the Case and procedural history set forth in Appellant's Brief.

STATEMENT OF THE ISSUES

The issues in this case are (i) whether racially discriminatory conduct is legally excusable as expressive speech, and whether Appellees' alleged free speech rights outweigh Appellant's members' right to contract in a non-racially discriminatory manner, (ii) whether racially discriminatory conduct inflicts irreparable harm on victims of racial discrimination, and (iii) whether 42 U.S.C. § 1981 protects citizens of all races from racially discriminatory contract.

SUMMARY OF ARGUMENT

In *Richmond v. J. A. Croson Co*., Justice Scalia aptly noted that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of a democratic society." 488 U.S. 469, 505 (1989)(citing A. Bickel, The Morality of Consent 133 (1975)(Scalia, J., concurring)).

Yet despite the court below finding that Appellant had standing and had "clearly shown the existence of a contractual regime that brings this case within the realm of [42 U.S.C.] § 1981," the civil rights statute prohibiting racially

discriminatory contract, the district court held that Appellees "clearly intend[] to convey a particular message in promoting and operating [their] grant program," and so Appellees' racially discriminatory conduct was excused on First Amendment free speech grounds. *Fearless Fund Mgmt.*, 2023 WL 6295121, at *5-6, 8.

That is contrary to law. As this court held in granting Appellant's motion for injunction pending appeal, "[t]he [Appellees] do not provide 'expressive services' or otherwise engage in 'pure speech,'" *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023)(quoting *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2318 (2023)), and "although the First Amendment protects the [Appellees]' right to promote beliefs about race, it does not give the [Appellees] the right to exclude persons from a contractual regime based on their race." *Id.* (citing *Runyon v. McCrary*, 427 U.S. 160, 176 (1976)).

This Court's ruling on the injunction motion undoubtedly was the correct result, and while EPP supports Appellant's merits arguments in favor of reversal, EPP argues below that a contrary decision would have unfathomably disastrous consequences for the nation because the district court's order denying injunctive relief, if affirmed, will eviscerate not only § 1981, but also other civil rights laws.

The district court also held that discriminatory conduct did not constitute irreparable harm because (i) [Appellant]'s likelihood of success was lacking, and (ii) § 1981 does not provide for injunctive relief. *Fearless Fund Mgmt.*, 2023 WL 6295121, at *8. This is incorrect as a matter of law, as this court recognized in its stay pending appeal. *Fearless Fund Mgmt.*, 2023 WL 6520763, at *1 ("In light of the plaintiffs' likelihood of success on the merits, the plaintiffs have established an irreparable injury.")(citing *Gresham v. Windrush Partners*, 730 F.2d 1417, 1424 (11th Cir. 1984)).

Finally, this court held, *contra* the dissent, that "[t]he Supreme Court has held that Section 1981 'was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.' We find no support in the caselaw to limit the standing of a membership organization to file a Section 1981 claim because it has members of many different races." *Fearless Fund Mgmt.*, 2023 WL 6520763, at *1 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976)).

In short, this Court should reverse the district court's order, and enjoin Appellees from implementing their racially discriminatory contest.

ARGUMENT

I. The district court's decision would gut existing antidiscrimination civil rights laws.

As a preliminary matter, it is important to note that this case is fundamentally different than *303 Creative*, which the district court and Appellees rely on. There, the Supreme Court held that antidiscrimination statutes could not be used to *compel the creation* of speech with which the speaker disagrees. Here, the issue is whether the First Amendment protects racially discriminatory conduct. The U.S. Supreme Court already addressed this issue in *Runyon*, and clearly stated that it does not.

Moreover, the Supreme Court has also ruled that not only is discriminatory conduct not protected by the First Amendment, but even some ***speech*** is afforded no First Amendment protection, in cases ranging from fighting words to defamation to true threats and in other cases. The district court is simply wrong here.

As to the impact if this court affirms the district court, Appellant has argued that "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. But the district court crossed it." Reply Brief in Support of Injunction Pending Appeal of Plaintiff-Appellant at 2, *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No.

23-13138, Document 7 (11th Cir. Sept. 28, 2023)(citations to the record omitted)(emphasis in original).

Appellant also argued that "[t]he district court's opinion would render §1981 a dead letter" because it allows Appellees to "discriminate against all races but one to send the message that 'Black Women owned businesses are vital to our economy,'" and would also allow "[a] white-supremacist organization [to] contract only with white men to convey its message that they [too] are vital to the economy." *Id.* at 3-4 (citations to the record omitted).

EPP agrees with Appellant's arguments as to the disastrous consequences that lie ahead, should the district court's order be affirmed, based on EPP's experience opposing racially discriminatory conduct.

For example, in July of this year, EPP filed a civil rights Complaint with the U.S. Department of Education's Office of Civil Rights ("OCR") charging New York University ("NYU") with civil rights violations for a racially discriminatory program.[4] Specifically, EPP challenged NYU's racially discriminatory school parents' workshop, which was open only to white parents.[5] The basis for the

[4] *NYU Whites-Only "Anti-Racist" Workshop Challenged By Equal Protection Project*¸ available at https://legalinsurrection.com/2023/07/nyu-whites-only-anti-racist-workshop-challenged-by-equal-protection-project/.
[5] Office of Civil Rights Administrative Complaint (hereinafter "OCR Complaint"), July 14, 2022, available at https://legalinsurrection.com/wp-content/uploads/2023/07/OCR-Complaint-New-York-University.pdf.

Complaint was that the program, as here, violated 42 U.S.C. § 1981, and also Title II of the Civil Rights Act of 1964 ("Title II"), Title VI of the Civil Rights Act of 1964 ("Title VI"), and New York State and New York City Human Rights Laws. *See* OCR Complaint at 1-2.

In explaining the reasoning for the racially discriminatory parents' workshop, NYU and its representatives stressed the importance of "gathering as a white anti-racist community" in order to "unlearn racism …. without having to … subject people of color to … undue trauma or pain." OCR Complaint at 2. They also asserted that it was important to have "a space for white people to figure out what it means to be an anti-racist white person" and to "learn the skills needed to transform the larger white community." *Id.*

When questioned during the workshop about the reasons for having a white-only workshop, NYU's instructor stated:

> The purpose [of the workshop] is to create space where we can talk about our racism with each other and support each other through that and hold each other accountable to show up differently and **without burdening the people of color in our lives** …. So we have to figure it out **amongst ourselves**, we have to talk about the hard things, we have to be able to say them out loud, we have to have the safety to do that without having to worry about harming people of color and … to practice anti-racist ways of being and come back to each other for support and accountability…. And it's actually so that we can **show up better in multiracial spaces**.

OCR Complaint at 1-2 (emphasis in original).

While this case and the NYU case are not identical, the legal principle that needs to be vindicated is the same. It is not a legal defense that NYU might have "clearly intend[ed] to convey a particular message in promoting and operating its [parents' workshop] program: "[Having a whites only space is] vital to [not burdening Black parents with potentially racist speech by whites]." *Fearless Fund Mgmt.*, 2023 WL 6295121, at *6. Whatever NYU's First Amendment free speech rights might or might not be, they cannot override § 1981, Title II, and Title VI's antidiscrimination protections, as the district court did here regarding 42 U.S.C. § 1981 alone.

Other similar cases EPP has brought[6] demonstrate as well that discriminatory conduct, even if there is some part that is expressive, cannot evade the civil rights laws. Otherwise, those civil rights laws would be rendered meaningless. This court must not let that happen.

One aspect of this case that Appellees appear not to have considered in their injunction pending appeal opposition papers is the impact affirmance of the district court's order will have on the very minority individuals Appellees purport to be assisting. If Appellees prevail in this case, there would be nothing stopping another entity similar to Appellees from running an identical contest open only to entrepreneurs who are white. As Appellant states, if the district court's opinion is

[6] https://equalprotect.org/case/.

affirmed, "[a] white-supremacist organization [could] contract only with white men to convey its message that they [too] are vital to the economy." Reply Brief in Support of Injunction Pending Appeal of Plaintiff-Appellant at 2, *Fearless Fund Mgmt.*, No. 23-13138, Document 7 (11th Cir. Sept. 28, 2023).

Importantly, affirmance of the district court's order would embrace the growth of an entire discriminatory, Jim Crow-like nationwide regime, where discrimination against any and all individuals based on any skin color would not only be legal, but it would also likely become the norm. All a business would have to do to evade liability is hold itself out as expressing a discriminatory opinion regarding the benefits its business solution provides to members of its preferred race.

In sum, this court must reverse the district court's erroneous order that Appellees' First Amendment speech rights trump conduct covered by 42 U.S.C. § 1981.

II. The district court erroneously held that Appellant had not shown irreparable harm from Appellees' racially discriminatory conduct.

The court below concluded that Appellees' racially discriminatory exclusion of Appellant's members from Appellees' contest had not caused irreparable harm because (i) Appellant had not shown a likelihood of success on the merits, and (ii) 42 U.S.C. § 1981 does not provide for injunctive relief. *Fearless Fund Mgmt.*, 2023 WL 6295121, at *8.

In granting Appellant's request for a stay pending appeal, this court disagreed. *See Fearless Fund Mgmt.*, 2023 WL 6520763, at *1 ("In light of the plaintiffs' likelihood of success on the merits, the plaintiffs have established an irreparable injury.")(citing *Gresham*, 730 F.2d at 1424).

In their opposition papers on the injunction pending appeal, Appellees attempted to distinguish this court's *Gresham* case as one involving a housing statute that specifically provided for injunctive relief, arguing that such a provision supports irreparable harm. Response to Appellant's Emergency Motion for Injunction Pending Appeal at 15-18, *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 23-13138, Document 6 (11th Cir. Sept. 28, 2023). But as Appellant has argued:

> The district court was also wrong to limit irreparable harm to statutes that specifically authorize injunctive relief. This reasoning ignores *Gresham's* holding that irreparable injury can be presumed from racial discrimination. 730 F.2d at 1424. Though *Gresham* also discusses statutes that authorize injunctions, that reasoning does nothing to undermine this independent holding. The district court did not explain its refusal to apply binding circuit precedent.

Brief of Appellant at 32, *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 23-13138, Document 34 (11th Cir. Nov. 6, 2023).

Appellees' position in this regard is especially suspect in that Fearless Fund's very reason for this contest is that past discrimination against Black

businesswomen, which it claims continues to this day, causes very real harms to those businesswomen:

> Defendant Fearless Foundation is a nonprofit organization that seeks to increase access to capital for small businesses owned by women of color. The Foundation's Fearless Strivers Grant program furthers this aim by awarding $20,000 grants and mentorship to Black women-owned small businesses, *which historically have been disadvantaged* in their ability to obtain funding. The remedial purpose of this program is wholly aligned with that of Section 1981—to ensure that Black women enjoy the same right to make and enforce contracts "as is enjoyed by white citizens. . . . [This] charitable grant program [is] aimed at *leveling the playing field* for Black women businessowners. . . . [and] *addressing manifest racial imbalances*.

Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 1, 3, *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 1:23-cv-3424-TWT, Document 59 (N.D. Ga. Aug. 31, 2023)(emphasis added).

Appellees' argument is, in essence, that its contest is required to "level the playing field" because past and present discrimination against Black businesswomen caused them to be "disadvantaged," but they simultaneously argue that the very same type of discrimination that black businesswomen suffered would not cause harm to those discriminated against by their contest. Appellees cannot have it both ways.

Other cases in and out of this Circuit agree that racially discriminatory conduct causes *per se* irreparable harm. *See Rogers v. Windmill Pointe Vill. Club Ass'n, Inc.*, 967 F.2d 525, 528 (11th Cir. 1992)("[I]rreparable injury may be

presumed from the fact of discrimination"); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020)("[A] presumption of irreparable injury flows from a violation of constitutional rights.")(quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)); *Ass'n for Fairness in Bus. Inc. v. N.J.*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) (finding irreparable injury and entering a preliminary injunction where the Plaintiffs were forced to "compete on an unfair playing field" as a result of a racial set-aside program); *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021)(finding irreparable harm where the government was "allocat[ing] limited coronavirus relief funds based on the race and sex of the applicants.").

III. 42 U.S.C. § 1981 proscribes racial discrimination in the making or enforcement of contracts against, or in favor of, any race.

In his dissent on the injunction pending appeal motion, Judge Wilson argued, *inter alia*, that "Plaintiffs bringing a cause of action under § 1981 must show that . . . they are a member of a racial minority . . . ." *Fearless Fund Mgmt.*, 2023 WL 6520763, at *2 (citing *Lopez v. Target Corp*., 676 F.3d 1230, 1233 (11th Cir. 2012), *Kinnon v. Arcoub, Gopman & Assocs., Inc*., 490 F.3d 886, 891 (11th Cir. 2007), and *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1270 (11th Cir. 2004)). Judge Wilson thus concluded that "AAER fails as an organization bringing a § 1981 claim on behalf of white members." *Id.* This conclusion is erroneous as a matter of law.

First, the dissent ignored the lineage of *Lopez*, *Kinnon,* and *Jackson*, which cite a number of Eleventh Circuit cases back to the earliest such case, *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000). That case cited three out-of-Circuit cases[7] stating that a § 1981 Plaintiff must be a racial minority, each of which cites back to *Baker v. McDonald's Corp.*, 686 F. Supp. 1474 (S.D. Fla. 1987), *aff'd without opinion*, 865 F.2d 1272 (11th Cir. 1988)(table)). *Baker* cited nothing, save for the text of § 1981 itself, for the idea that a § 1981 plaintiff must be a racial minority. Section 1981, of course, states no such requirement.

More importantly, Justice Thurgood Marshall, the author of *McDonald*, 427 U.S. 273, cited by the majority granting the injunction pending appeal and ignored by the dissent, thoroughly dismantled the idea that a § 1981 plaintiff must be a racial minority:

> The question here is whether [§] 1981 prohibits racial discrimination in private employment against whites as well as nonwhites. . . .
> [O]ur examination of the language and history of [§] 1981 convinces us that [§] 1981 is applicable to racial discrimination in private employment against white persons. . . .
> While it is, of course, true that the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves, the general discussion of the scope of the bill did not circumscribe its broad language to that limited goal. On the contrary, the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites. . . .

[7] *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993).

Id. at 285-87, 289 (citing the extensive legislative history of 42 U.S.C. § 1981).

Justice Marshall concluded, 42 U.S.C. § 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Id.* at 295. This Court should reiterate that legal principle.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the district court and remand with instructions to enter a preliminary injunction barring Appellees from operating the racially discriminatory contest.

Respectfully submitted,

/s/ William A. Jacobson

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as the brief contains 3315 words, excluding those parts exempted by 11th Cir. Local R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ William A. Jacobson

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2023, 4 copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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