IN THE

United States Court of Appeals
For the Eleventh Circuit

No. 23–13138

AMERICAN ALLIANCE FOR
EQUAL RIGHTS, PETITIONER
v.
FEARLESS FUND MANAGEMENT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[JULY 23, 2024]

PER CURIAM.

"Eliminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ___, ___ (2023) (slip op., at 15). That's crucial, because discrimination "is among the most distressing feelings that can be felt by our social species." *303 Creative LLC v. Elenis*, 600 U.S. ___, ___ (2023) (Sotomayor, J., dissenting) (quoting K. Williams, Ostracism, 58 Ann. Rev. Psychology 425, 432–435 (2007)) (slip op., at 5).

It is with this idea in mind that we address today's case, which concerns a competitive grant program that awards funding to small businesses owned exclusively by Black women. We consider whether such a program is protected as expressive activity under the First Amendment's free speech clause, or if it runs afoul of the 1866 Civil Rights Act.

I

If anything in the record before us today stands without objection, it is that Black women in the United States fight

an uphill battle in starting and operating their own businesses. They represent 6% of the U.S. population but own only 2% of the nation's businesses with more than employee. Brief for Respondent, p. 4. A prominent source of this discrepancy is lack of access to funding. One survey found that 66% of Black women entrepreneurs identified funding as among their greatest challenges, whereas only 39% of non-Black counterparts reported the same. *Id.*, at 5. Black women are rejected for lines of credit at a rate three times higher than non-Black peers. *Id.*, at 6. To put the disparity in sobering perspective, $288 billion in venture-capital funding went to U.S. startups in 2022. How much of that went to startups with at least one Black woman founder? 0.13%. *Id.*

Respondent Fearless Foundation has devoted itself to rectifying the "historical obstacles faced by women of color entrepreneurs" we just summarized by providing "access to capital for small businesses owned by women of color." *Id.*, at 1. Among Fearless Foundation's many initiatives is a quarterly grant program, the Fearless Strivers Grant Contest. Four times a year, the Foundation awards one small business winner a $20,000 grant, in addition to "formal one-on-one mentorship and tools to help to help grow their businesses." *Id.*, at 7. The winner is chosen by Fearless Foundation based on several criteria, including "the viability and strength of their business, their intended uses of the grant, and the potential growth of the businesses." *Id.* To apply for the grant, applicants must relinquish certain legal rights, such as the right to "discuss or otherwise disclose the ideas" in the application "or otherwise use the ideas without any additional compensation." Brief for Petitioner, p. 5. One major caveat, though: In order to be eligible to apply for the grant, an applicant must be a Black woman. The contest rules state that the contest is "open only to Black females" and that businesses eligible to receive the grant funding "must be at least 51% black woman owned." *Id.*, at 4.

These race-based eligibility criteria for Respondent's grant program quickly irked some, including Petitioner American Alliance for Equal Rights, whose mission is to "[challenge] distinctions and preferences made on the basis of race and ethnicity." DC Opinion, p. 2. The Alliance claims that three of its members would like to apply for Respondent's grant program to compete for the $20,000 in funding and business support resources. But those three members (who are women) are not Black, and thus are ineligible to apply.

A

To secure its members access to the Fearless Strivers Grant, Petitioner filed a lawsuit in federal district court. In that suit, Petitioner sought declaratory judgement that Respondent's grant program violates Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. §1981), which bars racial discrimination in contracting. It also sought a preliminary injunction to enjoin Respondent from closing the application window for its grant program and selecting a winner.

To secure a preliminary injunction, Petitioner had to satisfy an onerous burden: "The moving party must show: (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing part; and (4) that the injunction would not disserve the public interest." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Circuit 2015).

For its part, Respondent challenged various elements of Petitioner's suit. To begin with, Respondent alleged that Petitioner lacked standing to sue. On the merits, Respondent claimed that its grant program was expressive activity shielded by the First Amendment, thus overriding any §1981 claim. After all, when a federal law "and the Constitution collide, there can be no question which must prevail." *303 Creative*, 600 U.S. at ___ (slip op., at 14). Respondent also

claimed that its grant program is a valid affirmative action plan.

B

Ultimately, the district court ruled against Petitioner and denied its motion for a preliminary injunction. While the court rejected Respondent's affirmative action argument and held that Petitioner did have standing to sue, it ruled that the grant program did qualify as expressive conduct under the First Amendment's free speech clause. DC Opinion, p. 14. By consequence, the court did not find it substantially likely that Petitioner would succeed on the merits, a necessary showing for a preliminary injunction. *Id.*, at 21.

We granted certiorari to consider the following question: "Does enforcement of §1981 against competitive grant programs with race-based eligibility requirements violate the First Amendment's free speech clause?" 603 U.S. ___ (2024).

We hold that it does not. Because operating a competitive grant is not an inherently expressive activity, and because discriminatory philosophy may not be used as an action's only nexus to expression, Respondent's grant program is not protected speech under the First Amendment. Thus, §1981 enforcement against Respondent does not run into a constitutional blockade.

In this case, the district court's denial of Petitioner's motion for preliminary injunction rested on its errant ruling that the First Amendment was likely to suffocate Petitioner's §1981 claim against Respondent. We therefore vacate the judgement of the district court and remand the case for further proceedings consistent with this opinion.

II

A

The Civil Rights Act of 1866 was this nation's first civil rights law. Passed during a divisive post-war period over the

veto of President Andrew Johnson, the Act sought to rectify a gaping hole in Johnson's reconstruction plan: While southern states adopted a series of laws that recognized certain liberties for Black Americans, these laws unilaterally stopped short of guaranteeing them equal protection under law. Supp. Brief in Supp. of Pet., p. 4.[1] Lawmakers who pushed for the passage of the 1866 Civil Rights Act argued that the federal government "had a role in shaping a multiracial society in the postwar South…" *Id.* As Representative William Lawrence, a member of the House Judiciary Committee, observed in an 1866 speech, "There are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him." *Id.* "As necessary incidents of these rights," Lawrence continued, "there [is] the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property." *Id.*

The relevant portion of Section 1981 of the Civil Rights Act of 1866 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens." 42 U.S.C. §1981. The clause's prohibition on unequal contract-making has long been held to apply to all contracts, regardless of what race is helped or harmed. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that §1981 prohibits racial discrimination against white people); *Gratz v. Bollinger*, 539 U.S. 244, 250 (2003) (allowing a white woman to sue under §1981); see also *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983) (holding that a textual analysis of §1981 suggests that Congress intended for it to bar all discrimination, regardless of race).

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[1] This citation is not real, but the historical facts are. I imagine that if I were actually a judge hearing this case, there would be a complete record with a supplemental brief that contains historical facts like this one.

At the district court level, one point of contention was whether Respondent's grant program qualifies as a contract under §1981 purview. The court held that it does. "[Petitioner] has clearly shown the existence of a contractual regime that brings this case within the realm of §1981." DC Opinion at 12. We issue no judgement today on that issue, but because we consider whether enforcement of §1981 against Respondent would amount to an unconstitutional encroachment on its First Amendment rights, we operate under the assumption that §1981 otherwise applies to Respondent's grant program.

B

On the opposite side of this constitutional conundrum, the free speech clause of the First Amendment demands "Congress shall make no law … abridging the freedom of speech." U.S. Const., Amdt. 1. First Amendment jurisprudence has long held that free speech protections do not apply solely to pure speech: "Constitutional protection for freedom of speech does not end at the spoken or written word." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (quoting *Texas v. Johnson*, 491 U.S. 397, 404) (internal quotation marks omitted). The court in that case continued to explain that "acts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution." *Id.* (quoting Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993)). The question we must answer today, then, is whether Respondent's operation of its grant program qualifies as expressive conduct, and by consequence, an activity protected by the First Amendment.

III

"Determining what qualifies as expressive activity protected by the First Amendment," the Supreme Court has noted, "Can … raise difficult questions." *303 Creative*, 600

U.S. at ___ (slip op., at 21). Here's one: What criteria must the conduct in question meet in order to qualify as expressive? In *Spence v. Washington*, the Supreme Court established a two-part test to determine whether conduct is expressive. First, there must be "intent to convey a particularized message." *Spence v. Washington*, 418 U.S. 405, 410–411 (1974). Second, "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* Since *Spence*, the Supreme Court has clarified that "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message." *Fort Lauderdale Food*, 901 F.3d at 1240 (quoting *Holloman ex Rel. Holloman v. Harland,* 370 F.3d 1252, 1270 (11th Cir. 2004)). This is not a high bar to meet, but as careful analysis of precedent resoundingly demonstrates, Respondent falls short.

We can first quickly push the first prong of the *Spence* test out the way. No party in today's case contests that Respondent *intends* to convey a particularized message with its grant program. Additionally, to our knowledge, no case subjected to the *Spence* test has ever failed the intent requirement, suggesting that its existence serves to cast out frivolous and unserious claims rather than to precisely identify legitimate expressive conduct.

A

Next, then, we turn our attention to the second prong of the test. But first, some ground rules — three to be exact.

First, in evaluating whether a reasonable person would interpret conduct as some sort of message, we may not consider contextual expressive speech explaining the conduct. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, the Supreme Court rejected a law school's contention that its disparate treatment of military recruiters sufficiently expressed a message. Among

other things, the law school barred military recruiters from on-campus interviews when it allowed the practice for all other recruiters. This conduct, the Supreme Court held, were not inherently expressive, but only appeared so because of explanatory speech: "These actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Naturally, the converse is true: In cases where the courts have recognized conduct as expressive, the conduct has been *inherently* expressive. See *Hurley v. Irish-American Gay, Lesbian Bisexual Group*, 515 U.S. 557, 568 (1995) ("the *inherent expressiveness* of marching to make a point explains our cases involving protest marches") (emphasis added).

Second, our precedent permits us to consider *appropriate* contextual factors in determining whether conduct is expressive.[2] In *Fort Lauderdale Food,* we wittingly noted that, "History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation." *Fort Lauderdale Food*, 901 F.3d at 1241. In that case, we held that an organization's open-to-all food sharing events in a public park constituted expressive conduct, even though "most social-service food sharing events will not be expressive." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021). We even emphasized that the gratuitous provision of clothing, shelter, and medical care "usually [does] not involve expressive conduct." *Id.* That's why context matters. Unfortunately, in this case, the district court did not grant ample weight to the contextual differences

[2] Importantly, speech surrounding the conduct in question is not one of the contextual factors that we may consider (see, *supra*, p. 5). In *Fort Lauderdale Food*, the court considered the distribution of signage and literature at the food sharing events as a contextual factor but did not consider the content of these handouts. *Fort Lauderdale Food*, 901 F.3d at 1242.

between a charitable gift (*Coral Ridge*) and the grant program in this case. Just as context can transform what is normally not an expressive activity (provision of food) into an expressive one, context can also transform what is normally an expressive activity (donation of money) into a non-expressive one.

Third, if conduct is not inherently expressive, we may not grant it expressive status merely because it is backed by discriminatory philosophy or creates discriminatory consequences. There are two reasons for this. First, as we have previously held, the Constitution "places no value on discrimination." *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)). To put it another way, "[i]nvidious private discrimination … has never been accorded affirmative constitutional protections." *Id.*, at 177 (quoting *Norwood*, 403 U.S. at 470). Second, allowing discriminatory philosophy to transform otherwise non-expressive conduct into expressive conduct would create a problem analogous to the one in *Rumsfeld*: Absolutely anything could be considered expression. A hotel that refuses Black patrons? Expressive. A landlord that refuses to lease to Black tenants? Expressive. Respondent's attempt to masquerade its conduct under the guises of a protected activity is not just an affront to our First Amendment jurisprudence — it is a threat to our nation's commitments to equality for all, one that would render our landmark rulings in *Heart of Atlanta Motel* and *Jones v. Alfred H. Mayer Co.* mere lip service.

B

With those ground rules established, we now turn to evaluate Respondent's grant program itself. As previously established, in order to qualify for First Amendment consideration, the grant program must be (1) inherently expressive and (2) a reasonable person must interpret the program as expressing some sort of message.

The Fearless Strivers Grant Contest, to begin with, is not inherently expressive. Respondent devotes a great deal of ink to the idea that donating money is expressive conduct: "Soliciting and donating money to charitable causes serves several communicative ends." Brief for Respondent, p. 17. "First Amendment expressive conduct unquestionably includes donating money in support of a cause." *Id.* Concerningly, the district court bit the bait on this issue: "This case presents no complication … the Eleventh Circuit has made clear that donating money qualifies as expressive conduct." DC Opinion, p. 14 (internal quotation marks omitted). But to argue that gifts are inherently expressive misses the point entirely. Respondent's grant contest is by no means a charitable gift: It is a skill-based contest that awards funds to for-profit businesses based on Respondent's assessment, *inter alia*, of the applicant's "[v]iability and strength of business," "[h]ow the business intends to use the grant," and "[p]otential business growth." 23-CV03424 Complaint, p. 4. The selections process for the grant pushes it more into the territory of school admissions and job hiring than charity. While Respondent may claim it is acting in a charitable manner by giving sizable funds to these businesses, the facts are simple: Respondent is operating a contest where the grant money goes to the winners of that contest. We would hardly consider the organizers of the popular game show *Jeopardy!* to be making a charitable donation when it awards prize money to the show's winners. There is something inherently expressive about a true charitable gift that is spoiled by eligibility requirements, lengthy applications, and black-box selections processes. So yes, *Coral Ridge* did find that donations are expressive conduct. But that's not the conduct in *this* case, so *Coral Ridge* does not control. Perhaps that is why we find support for the distinction between gifts and grants even in official contexts: Grants are generally considered taxable income by

the IRS, whereas gifts are not. IRS Publication 525: Taxable and Nontaxable Income.

Respondent accuses Petitioner of "stripping out all context and focusing myopically on the moment of cash handoff — exactly what this Court has said *not* to do." Brief for Respondent, p. 19. Never mind that it is Respondent who likens its grant to a charitable gift by divorcing it from all appropriate context, and instead calls on this Court to do something truly novel in considering discriminatory intent as relevant context for an otherwise non-expressive activity.

The discussion thus far should make clear that the survival of Respondent's expressive conduct argument relies on our evaluation of the grant program *with* the race eligibility criterion. As we just analyzed, without this criterion, a skill-based contest like the Fearless Strivers Grant Contest expresses no message to a reasonable viewer. Though we have already established that we may not evaluate the grant program with the race eligibility criterion (see, *supra*, p. 7), imagine for a moment that we may do so. Respondent's grant program would *still* fail to express a message to a reasonable viewer. Recall the evaluation conducted in *Rumsfeld*, where the Supreme Court held that law schools did not express any message perceivable to a reasonable person even when they barred only military recruiters from conducting on-campus interviews and posting informative signage, privileges granted to all other recruiters. See *Rumsfeld*, 547 U.S. at 66 ("… An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else."). Similarly, we struggle to think of any meaningful expression a reasonable person would perceive upon observing that the quarterly winner of a skill-based, competitive small business grant always happens to be a

Black woman. Is this reasonable person to assume that, because the winners are Black women, the granting organization only allows Black women to apply and is thus sending a message about the importance of Black women in the economy? We said reasonable, not racist.

Respondent might counter by arguing that a reasonable person would undoubtedly encounter the grant website and learn about the Fearless Foundation's intentions: "Surrounding speech … leaves no doubt about the Foundation's message. To apply for [the grant], an applicant must visit the Foundation's website, which informs her that the Foundation believes 'women of color are the unrecognized economic powerhouses of the world.'" Brief for Respondent, p. 21. It is truly striking how passionately Respondent asks this Court to consider the pure speech explaining the conduct in our determination of expressiveness when our precedent expressly prohibits us from doing so. In *Rumsfeld*, the Supreme Court noted that the necessity of explanatory speech itself was evidence that the conduct lacked expressiveness. *Rumsfeld*, 547 U.S. at 66 ("The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not … inherently expressive").

Respondent still goes on to argues that we create a "false dichotomy" in distinguishing conduct and speech. Brief for Respondent, p. 17. But we struggle, however, to find anything false about that differentiation. We have long held that each key to the door of First Amendment protections — be it pure speech, expressive conduct, or association — carries with it distinct criteria and treatment under the Constitution. Speaking out against taxation is miles apart from refusing to send a tax check to the IRS — and we don't evaluate the expressiveness of these two acts using the same test. *Rumsfeld*, 547 U.S. at 66. If anything is false in this case, it is the use of First Amendment jurisprudence specifically related to pure speech or free association to

suggest a line of precedent that governs conduct cases. Take *303 Creative* for example, which both the district court and Respondent rely on heavily in their respective arguments. Ironic, given that the majority opinion expressly clarifies that the Court's holding does *not* apply to conduct, only pure speech: "The state seeks to compel pure speech … Colorado itself has stipulated Ms. Smith will (as CADA requires) work with all people regardless of … sexual orientation." *303 Creative*, 600 U.S. at ___ (slip op., at 20) (internal quotation marks omitted).

To end our analysis of the clash between §1981 and the First Amendment, we must be sure that enforcement of §1981 would not "impermissibly modify the content of expression—and thus modify 'speech itself.'" *Coral Ridge Ministries Media, Inc. v. Amazon.Com, Inc.*, 6 F.4th 1247, 1256 (11th Cir. 2021) (quoting *Hurley*, 515 U.S. at 557). In our view, Respondent's grant program does not contain any expression at all, so enforcement of §1981 by enjoining Respondent to open its grant to women of all races would not modify the content of expression. (Without getting excessively metaphysical, something that does not exist cannot be modified.) But the district court ruled otherwise, and we see it as valuable to emphasize just how problematic that ruling is. In holding that the grant program is expressive conduct, the district court identified the message conveyed as, "Black women-owned businesses are vital to our economy." DC Opinion, p. 15. But if that's the message, we fail to see how requiring Respondent's grant program to be open to all races would "impermissibly modify" that message. Can one not operate an open-to-all grant program whilst not abandoning one's conviction that Black women-owned businesses are vital to our economy? In our estimation, Respondent is caught in a gnarly double bind: Either they concede that making their grants available to small business owners of all races would not modify the content of its expression, or they acknowledge the only

reason their grant program can be interpreted as expressive is because it is available exclusively to Black women. If they take the former path, their First Amendment claim is dead at the outset — after all, if compliance with §1981 wouldn't alter their message, what are we even debating about? If they opt for the latter path, then their claim of expressive conduct is nullified, as we have long held that conduct cannot be interpreted as expressive merely by virtue of its discriminatory nature. See, *supra*, p. 9.

* * *

We conclude that Respondent's grant program does not qualify as expressive because we refuse to take the unprecedented — and frankly, troubling — step of granting constitutional protection to behavior that can only be interpreted as expressive by virtue of its discriminatory nature. The conduct that Respondent attempts to shove into the auspices of the First Amendment is not inherently expressive, regardless of what expressive speech surrounds it. In ruling to the contrary, the district court misapplied our precedent in two ways. To begin with, it employed an overly expansive definition of donations to include grants, even when the application-based, competitive grant that Respondent operates functions nothing like a traditional donation. Then, in applying the two-part test established in *Spence* to determine if conduct qualifies as expressive, the district court made two errors. First, the court allowed expressive speech Respondent made *about* its conduct to infect the inquiry into the expressiveness of Respondent's conduct, a practice expressly prohibited by prior rulings in *Fort Lauderdale Food* and *Rumsfeld*. Second, the Court failed to follow our guidance in *Rumsfeld* in ruling that a reasonable person would interpret the grant program as conveying some message.

The district court's ruling that Respondent's grant program qualifies as protected expressive conduct opens the door to a Pandora's box of threats to equality in our nation. Accordingly, we reverse its judgement and remand the case for further proceedings consistent with this opinion.

It is so ordered.