No. 23-13138

In the United States Court of Appeals for the Eleventh Circuit

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AMERICAN ALLIANCE FOR EQUAL RIGHTS,

Plaintiff-Appellant,

v.

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

Defendant-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-03424-TWT

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT, MANHATTAN INSTITUTE, AND THE BUCKEYE INSTITUTE AS AMICI CURIAE IN SUPPORT OF THE APPELLANT AND REVERSAL

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RULE 29(A)(4)(A) CORPORATE DISCLOSURE STATEMENT

The ACR Project is a nonprofit corporation organized under the laws of Texas. The Manhattan Institute is a nonprofit corporation organized under the laws of New York. The Buckeye Institute in a nonprofit corporation organized under the laws of Ohio. None of these *amici* issues stock, nor is any owned by or the owner of any corporate entity in whole or in part.

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INTEREST OF AMICI CURIAE[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law. The ACR Project believes its expertise will benefit the Court in its consideration of this case.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting educational excellence and racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, Seymour Fliegel, John McWhorter, Abigail and Stephan Thernstrom, Jay Greene, and Marcus Winters. Current MI scholars, including Jason Riley and Wai Wah Chin, continue this research.

The Buckeye Institute ("Buckeye") was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. Buckeye accomplishes its mission by performing timely, reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions. Buckeye's Legal Center files *amicus* briefs consistent with its mission and goals.

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[1] Rule 29 Statement: All parties have consented to the filing of amicus briefs in this case. No counsel for a party authored any part of this brief. And no one other than the *amici curiae*, their members, or their counsel financed the preparation or submission or this brief.

This case interests *amici* because it involves the appropriate application of constitutional principles central to the rule of law and *amici* have invested substantial time and resources investigating the meaning of American non-discrimination laws and related constitutional provisions.

SUMMARY OF THE ARGUMENT

The Fearless Fund appellees (the "Appellees") unapologetically choose with whom they are willing to contract and with whom they categorically refuse to do business based on race. Specifically, they decide what third-party, non-employee businesses they will invest in through business contracts using sex and race of the ownership and management of potential counterparties as a litmus test for eligibility.

Such plainly racial policies of exclusion violate one of the main surviving provisions of the Civil Rights Act of 1866, America's very first civil rights law. Congress embedded these rights into the Fourteenth Amendment, thus assuring that they would be beyond constitutional challenge. It's plain from the text of the remaining statute that appellees' conduct is illegal. The illegality is also made plain by the original public meaning of the current version of the statute, as confirmed by decades of applicable caselaw.

Nonetheless, the lower court classified the Appellees' policy of contracting to invest solely with one race as "expressive activity" "intend[ed] to convey a particular message," and so protected by the First Amendment.[2] On that basis and the resulting conclusion that "[a]pplying § 1981 as the Plaintiff proposes would impermissibly 'modify the content of [the Appellees'] expression—and thus modify [its] 'speech itself[,]' ' "[3] the lower court refused to

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[2] *Am. All. For Equal Rights v. Fearless Fund Mgt., LLC*, 2023 U.S. Dist. LEXIS 172392, *17-*21 (N.D. Ga. 2023).

[3] *Id.*, at *20-*21.

enjoin the Appellees' racial-contracting policy. The history of Section 1981 and of the Fourteenth Amendment's ratification establish the contrary.

The lower court also held that a judicially conjured defense to employment-discrimination claims under Title VII of the Civil Rights Act of 1964 protects the appellees' policy from violating the same surviving provision of the Civil Rights Act of 1866. Whatever the propriety of judicially conjured defenses or of the extension of judicially conjured defenses to silently amend unmentioned statutes where their coverage overlaps, the lower court's contention is indefensible in contexts *where they don't*.

The lower court grasped at straws to deny a plainly justified injunction against an illegal corporate policy. It was wrong to do so. The Court should reverse the lower court's incorrect decision and remand with instruction to enjoin the appellees from continuing to pursue their discriminatory policy.

ARGUMENT

I. 42 U.S.C. 1981 CONSTITUTIONALLY BARS APPELLANTS' RACIALLY DISCRIMINATORY CONTRACTING PRACTICES

No matter the context, *all* racial discrimination is invidious.[4] It "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[5] The Appellees engage in

[4] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 214 (2023).

[5] *Id.* at 220 (cleaned up).

such invidious discrimination. Thankfully, that's illegal and that legal prohibition is constitutional.

A. 42 U.S.C. § 1981 BARS RACIALLY DISCRIMINATORY CONTRACTING

Congress first sought to combat racial discrimination in private contracting through America's very first civil rights statute: the Civil Rights Act of 1866. The resulting protection, as amended, now resides in the U.S. Code at 42 U.S.C. § 1981. Congress subsequently promulgated the Fourteenth Amendment primarily to shore up any concerns with the Constitutionality of the Civil Rights Act of 1866.[6]

The original version of the statute was enacted as § 1 of the Civil Rights Act of 1866.[7] It was amended in minor respects in 1870 and recodified in 1874.[8] Its basic structure remained unchanged until 1991.[9]

For decades leading up to that 1991 revision, the Supreme Court maintained with uniformity that Section 1981 barred discrimination on the basis of *any* race in *any* contracting, whether by actors private or public.[10] Over the

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6 *E.g.*, *Gen'l Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 389 (1982) ("The 1866 Act represented Congress's first attempt to ensure equal rights…. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of '[incorporating] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.') (citing *Hurd v. Hodge*, 334 U.S. 24, 32 (1948).

7 14 Stat 27.

8 *Runyon v. McCrary*, 427 US 160, 168-169, n. 8 (1976).

9 *Jones v. R.R. Donnelly and Sons Co.*, 541 U.S. 369, 372-73 (2004).

10 *E.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 298 (1976) (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.").

same decades, the Court maintained with the same uniformity that Section 1981's prohibitions are "violated if a private offeror refuses to extend to [an American], solely because [of his race], the same opportunity to enter into contracts as he extends to [other] offerees."[11]

Then Congress acted in 1991 to once more shore up any confusion about the extent of Section 1981's ambit. In the Civil Rights Act of 1991, Congress added two sections. First it added subsection 1981(b), which states:

> or purposes of this section, the term "make and enforce contracts" includes the *making*, performance, modification, and termination of contacts, and the enjoyment of all benefits, privileges, terms, and condition of the contractual relationship.[12]

Congress added subsection (b) in part in response to the Supreme Court's 1989 ruling in *Patterson v. McLean Credit Union*.[13] In *Patterson*, an employee sought damages for racial harassment and for discrimination under 42 U.S.C. § 1981. The Supreme Court held that racial harassment relating to conditions of employment was not actionable under § 1981, because it did not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations. Congress responded with subsection (b), clarifying that § 1981 covered both the *entry* into contracts and post-contract-formation/modification conduct, including discriminatory termination.

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[11] *Runyon*, 427 US at 170-171.

[12] Emphasis added.

[13] 491 U.S. 164 (1989).

The 1991 Act also added subsection (c), which made explicit Section 1981's applicability to public and private discrimination alike:

> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

This addition, too, clarified the extent of Section 1981's scope, by rectifying any concerns that—like the Equal Protection Clause—it might apply only to acts undertaken as state actions.

The original public meaning of Section 1981, as amended in 1991, is thus clear. The modern version of Section 1981 "protects the equal right of all persons . . . to *make* and enforce contracts without respect to race."[14] As this court recently reiterated, "Section 1981 prohibits intentional race discrimination in the *making* and enforcement of public and private contracts."[15]

B. 42 U.S.C. § 1981 IS CONSTITUTIONAL

That clear understanding of Section 1981's proper application is firmly grounded in Congress's constitutional powers. The district court's odd misgivings aside, the context of the Fourteenth Amendment's ratification makes this a truism and prevents any legitimate contention that applying its dictates could violate the First Amendment. Congress wrote the Fourteenth Amendment to cut off arguments precisely like that advanced by the court below that the Civil Rights Act of 1866 might overreach Congress's pre-existing

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[14] *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (cleaned up) (emphasis added).

[15] *Jenkins v. Nell*, 26 F. 4th 1243, 1249 (11th Cir. 2022) (emphasis added).

legislative powers.[16] Congress then re-passed Section 1981's antecedent in 1870, to head-off any contention that it had lacked the authority to pass Section 1981 in 1866.[17]

It is difficult to imagine stronger originalist evidence. The relevant constitutional provision was expressly written to assure that the relevant statutory provision would be constitutional.

Amici are aware of no compelling arguments to the contrary. The lower court's invocation of *303 Creative LLC v. Elenis*,[18] and of *Claybrooks v. Am. Broad. Cos., Inc.*,[19] certainly do not qualify. The artistic rendering of tasteful websites and the casting of reality-tv performers necessarily entail artistic decisions in a way that venture capital investing does not. The lower court's contrary conclusion seemingly declares all of life to be Constitutionally protected performance art, a step that would expand the First Amendment's freedom of speech into an exemption of all conduct from all substantive law.

Some would attempt to cast appellees' racial discrimination as expressive. But their discrimination is only "expressive" to the extent that refusal to deal with or serve a class of people is.[20] It's as expressive as a motel owner's refusal to allow black people to stay at his establishment.[21] It's as expressive as

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16 *E.g., supra*, n. 6.

17 *Supra*, n. 8.

18 143 S.Ct. 2298 (2023).

19 898 F. Supp. 2d (M.D. Tenn. 2012).

20 *303 Creative*, 143 S. Ct. at 2331 (Sotomayor, J., dissenting).

21 *See id.*, quoting *Heart of Atlanta Motel*, 379 U.S. 241, 260 (1964).

Ollie's Barbecue's insistence on serving black people at a separate counter.[22] And it's as expressive as a school's refusal to admit black students[23]—or to give black students preferences, to the detriment of Asian-American students.[24] None of those discriminatory practices were rescued by their incidental effect on speech.

The District Court's reliance on *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*,[25] for the proposition that "donating money qualifies as expressive conduct" is also misplaced.[26] In that case *"[t]he parties d[id] not dispute that* donating money qualifies as expressive conduct" where the donations at issue were to nonprofit groups *to subsidize their speech*; the court relied on the "principle that . . . no person . . may be compelled *to subsidize speech by a third party* that he or she does not wish to support."[27] But the Appellees are investors, not charitable benefactors; they invest through contracts, rather than dispensing charity. They do not refuse to contract with applicants on the basis of their ideas or expression. They refuse to contract with applicants *whose skin is the wrong color*, no matter what their ideas are or how they express them. That is legitimately barred conduct, not speech, which the law does not allow and the First Amendment does not protect.

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22 *See id.*, discussing *In Katzenbach v. McClung*, 379 U. S. 294 (1964).

23 *See id.*, discussing *Runyon v. McCrary*, 427 U. S. 160 (1976).

24 *Students for Fair Admissions, Inc.*, 600 U.S. 181, 214 (2023).

25 6 F.4th 1247 (11th Cir. 2021).

26 *See* District Court Dkt. 115 at 14.

27 *Coral Ridge Ministries Media, Inc.*, 6 F.4th at 1254 (emphasis added).

II. THERE IS NO NON-EMPLOYMENT "AFFIRMATIVE ACTION" DEFENSE TO § 1981

Despite the plain and unambiguous language of 42 U.S.C. § 1981, courts have created one—and only one—significant exception, retroactively imported from another statute. Courts have read into Title VII of the Civil Rights Act of 1964, as amended, an "affirmative action" defense to employment discrimination claims. Recognizing that the Congress had intended Title VII to be a comprehensive regulatory regime for employment discrimination, to resolve any conflicts between Title VII and Section 1981, courts have imported that defense into employment cases brought under § 1981.[28, 29] Such protected "affirmative-action plans" ("AAP(s)") are formally created with specific goals: They change an employer's selection procedures to give preferences to certain races until those races are represented at particular levels of a company's corporate structure at rates comparable to their share of the qualified workforce.[30]

The Appellees argue that their racial discrimination is lawful because it falls within this judicially created exception to Title VII, and within that exception's judicially created extension to employment-discrimination cases litigated under Section 1981. That's not true for a host of reasons.

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[28] Recognizing that silent amendments to statutes are problematic, appellants have preserved the argument that this atextual defense to § 1981 claims should be eliminated in its entirety, even in the employment context to which Title VII (unlike § 1981) solely applies. District Ct. Dkt. 91 at 16 n.6. *See*, *e.g.*, *E.g., Johnson v. Transportation Agency*, 480 U.S. 616, 628-31 (1987).

[29] *E.g., Johnson v. Transportation Agency*, 480 U.S. at 628-31.

[30] 29 C.F.R. §1608.4(a)-(c); *Johnson*, 480 U.S. at 628-31.

For one, the "threshold step in the analysis [is] whether the race[-]conscious action constitutes an affirmative action plan at all."[31] As the Supreme Court's analysis in *Ricci* makes clear, an employer action isn't necessarily an AAP simply by virtue of being intended to help minorities.[32] The Appellees fall much further short of passing the smell test in attempting to cast *their entire operation* as an "AAP."

Second, as appellants explained below, such a plan must satisfy strict scrutiny, a standard the Appellees don't even attempt to meet.[33] Also, and significantly, a valid AAP *temporarily* changes an employer's *selection procedures* to achieve *racial balance*. The Appellees' discrimination is their avowed reason for existing, so the discrimination isn't a "change" to the Appellees' otherwise applicable, nondiscriminatory procedures, but rather *is* the Appellees' standard criterion for selection. It also isn't temporary, as a valid AAP must be; it's indefinite. And the Appellees use this race-based screen to seek the *opposite* of a demographically representative balance among contest their counterparties; they avowedly *preclude absolutely* any such balance.

Moreover, any valid AAP must be narrowly tailored, as the Appellees' racial discrimination emphatically isn't. A plan can't "unnecessarily trammel the rights of non-[favored] employees or create an absolute bar."[34] But the

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31 *United States v. Brennan*, 650 F.3d 65, 97-98 (2d Cir. 2011).

32 *See Ricci v. DeStefano*, 557 U.S. 557, 626 (2009) (Ginsburg, J., dissenting) ("This litigation does not involve affirmative action.").

33 *See* District Ct. Dkt. 91 at 15-16.

34 *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1114 (11th Cir. 2001).

Appellees' contract *only* with black women, meaning *every other race* is absolutely barred, including those who historically receive *less* venture capital funding than do black women. This "hard-core, cold-on-the-docks quota" isn't just illegal,[35] to the extent that AAPs are *ever* relevant to non-employment § 1981 actions, it's *exactly* the type of AAP that the Supreme Court has repeatedly offered as an example of obvious *in*validity.[36]

Exactly, that is, except for the Appellees' race-based policy's most important respect: *it does not involve any employment policy or deal with the Appellees as employers or potential employers*. This case involves the Appellees' race-based, non-employment contracting policies. But the Supreme Court cases adjudicating the boundaries of the affirmative-action defense to Section 1981 actions uniformly contemplate that defense *only* in the context of *employment* contracts otherwise addressed by Title VII.

Title VII—the *only* source of this defense (via atextual judicial interpolation)—deals exclusively with employment discrimination. By contrast, Section 1981 "is not limited to employment; because it covers *all* contracts, a substantial part of [its] sweep does not overlap Title VII."[37]

It's one thing to read a comprehensive statute like Title VII to silently amend a broader statute within their overlapping ambit (as the courts have done, perhaps problematically). But even on its own terms, that judicial

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[35] *Hammon v. Barry*, 826 F.2d 73, 79 (D.C. Cir. 1987).

[36] *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Johnson*, 480 U.S. at 638.

[37] *Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994).

interpolation can't coherently be extended to non-employment cases. Such a reading of Title VII would have no conceivable limiting principle and would effectively read this issue-specific congressional regulation to silently rewrite *every non-overlapping* statute based on nothing but ether.

The Appellees point to exactly *two* cases in which, they say, courts have applied this narrow affirmative-action defense outside of the employment context.

The first is of no help to them: it's an unpublished district court case, in which the parties (erroneously) stipulated to the only relevant question: that the (non-employee) training program at issue was a "voluntary affirmative action program"—and disputed only whether it was "properly constituted[.]"[38] The court held that plaintiff's Title VII claim—not asserted here—was insufficient because the plaintiffs were not employees and also that the plaintiff's Section 1981 claim failed because there was insufficient evidence of harm to the plaintiff.[39, 40]

The Appellees' other example is more significant but equally unpersuasive: the Ninth Circuit's *en banc* decision in *Doe v. Kamehameha Schools* .[41] *Doe I* held (among a host of other errors) that the affirmative action defense to Title VII and 1981 employment actions could be deployed by a school as a

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38 *Rabbani v. Gen. Motors Corp.*, 2000 U.S. Dist. LEXIS 24945 at *5 (N.D. Fla. July 26, 2000).

39 *Id.* at *4.

40 *Id.* at *9.

41 470 F.3d 827 (9th Cir. 2006) ("*Doe I*").

defense to a challenge to its racial preferences in admissions-contracting decisions. The missteps of that decision would require multiple briefs even to recount in full,[42] but the most fundamental is the idea, pushed by the Appellees here, "that Title VII provides the standard of review in [such a] case."[43] As succinctly debunked by Judge Kleinfeld in his dissent, this position makes no sense, because "Title VII prohibits discrimination in employment. This case does not involve employment. Title VII has nothing to do with exclusion of students from schools because of race."[44] He was right: *employers alone* have access to Title VII's narrow affirmative action defense.[45]

Nor can the Appellees seriously advance *Doe I* as a precedent, when that decision's subsequent history so clearly calls into question its legitimacy. Although the Ninth Circuit ruled against the *Doe I* plaintiffs, they sought *and obtained* the Supreme Court's agreement to take certiorari to consider reversal. The parties in *Doe I* settled *one* day later (reportedly for 7 *million* dollars)—thus evading review and preserving the Ninth Circuit's decision (reached "by the narrowest of margins").[46]

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42 *See id.* at 857-89 (dissents).

43 *Doe I*, 470 F.3d at 887 (Kleinfeld, dissenting).

44 *Id*.

45 *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litig.)*, 20 F.3d 1525 (11th Cir. 1994) (outlining considerations).

46 *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 625 F.3d 1182, 1184 (9th Circuit 2010) ("*Doe II*") (Kozinski, J., dissenting); *id.* at 1185-86 (Reinhardt, J., dissenting). *See also* Grant, *Doe v. Kamehameha Schools: The Undiscovered Opinion*, 30 U. HAW. L. REV. 355, 355 (2007-2008).

In any case, since that settlement, the Supreme Court has largely abrogated the reasoning of *Doe I* even in the non-employment educational-contracting context in which it saw the Ninth Circuit "apply" Title VII's affirmative action defense to a non-employment discrimination § 1981 claim. *Doe I* based its expansion of Title VII's defenses into this virgin territory on "defer[ence] to education officials in admission decisions," which the *Doe I* court believed the Supreme Court's precedents to have required by "underscore[ing] that complex educational judgments should be left largely to schools."[47] But in 2007, the Supreme Court clarified that such deference didn't apply to elementary and secondary schools like the one at issue in *Doe I*.[48] More recently, the Supreme Court explicitly went further, clarifying that schools enjoy deference only in the definition of their mission, *not* in any decisions to racially discriminate in their admissions-contracting decisions: "Universities may define their missions as they see fit. The Constitution defines ours."[49] It also noted that no Supreme Court decision had *ever* approved of racially discriminatory admissions policies as a remedial justification for generalized social discrimination.[50] Who *had* approved precisely this

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47 *Doe I*, 470 F.3d at 841 (cleaned up, but relying on *Grutter v. Bolinger*, 539 U.S. 306 (2003)).

48 *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 724–725 (2007).

49 *See Students for Fair Admissions*, 600 U.S. at 217. *See also id.* at 252 (Thomas, J., concurring) (noting majority opinion holding that "those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating").

50 *See id.* at 227 n.8.

justification for such discrimination? The Ninth Circuit, in *Doe I*, in part out of since-prohibited deference to educators.

It is also worth noting that, even if *Doe I* established a viable outermost limit of a defensible, non-employment AAP (which it does not), the Appellees' challenged policy of racial exclusion would *still* not qualify. Even in *Doe I*,[51] the school at least permitted people of all races *to apply* for admission to the challenged program; the Appellees refuse to even do that.

The Court must decline the Appellees' invitation to gut Section 1981's bar on racially discriminatory contracting by endorsing such a radical departure from the Supreme Court's approach to non-employment discrimination cases. The district court's extension of the already-questionable AAP exception to American non-discrimination law, wholly untethered to the text, history, or caselaw of Section 1981 and equally unmoored in Title VII's employment context, groundlessly legislates. And it does so in a way that's directly at odds with the choices made by Congress. It is indefensible and cries out for reversal.

CONCLUSION

The Court should reverse the district court's order and remand with instruction to issue the requested preliminary injunction. Our law demands no less.

[51] *See Doe I*, 470 F.3d at 844.

Respectfully submitted.

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Dated: November 13, 2023

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Dated: November 13, 2023