

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Greer's Ranch Café, et al.,

Plaintiffs,

v.

Isabella Casillas Guzman, et al.,

Defendants.

Case No. 4:21-cv-00651-O

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER**

Section 5003 of the American Rescue Plan Act of 2021 appropriates \$28.6 billion to create the Restaurant Revitalization Fund, and it authorizes the Small Business Administration to distribute this money to restaurants that have been harmed by the COVID-19 pandemic. But the statute requires the Small Business Administration to “prioritize awarding grants” to businesses owned by women and racial minorities during the first 21 days of the program, which began on May 3, 2021, and the SBA’s website says that it will “only process and fund priority group applicants” during this 21-day window. *See* Exhibit 1.

On May 12, 2021, the SBA announced that it has already received “more than 147,000 applications from women, veterans, and socially and economically disadvantaged business owners,” which are “requesting a total of \$29 billion in relief funds.” Exhibit 2. This raises the prospect that the entire \$28.6 billion that Congress appropriated will be depleted before restaurants owned by white men can even be considered for relief under the program. The Court should issue immediate injunctive relief to prevent this from happening.

FACTS

Section 5003 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, provides aid to restaurants and restaurant owners that have been harmed by the COVID-19 pandemic. It appropriates \$28.6 billion to create the Restaurant Revitalization Fund, which is to be administered by the Small Business Administration. The statute provides that:

During the initial 21-day period in which the Administrator awards grants under this subsection, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women (as defined in section 3(n) of the Small Business Act (15 U.S.C. 632(n))), small business concerns owned and controlled by veterans (as defined in section 3(q) of such Act (15 U.S.C. 632(q))), or socially and economically disadvantaged small business concerns (as defined in section 8(a)(4)(A) of the Small Business Act (15 U.S.C. 637(a)(4)(A))). The Administrator may take such steps as necessary to ensure that eligible entities described in this subparagraph have access to grant funding under this section after the end of such 21-day period.

American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003(c)(3)(A). This compels the SBA Administrator to confer priority upon businesses owned and controlled by “women,” “veterans,” and “socially and economically disadvantaged small business concerns.” A “socially disadvantaged individual” is defined by statute to include:

those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). And the SBA’s regulations presume, without any analysis bearing on its use in the context of the Restaurant Revitalization Fund, that the following individuals are “socially disadvantaged”:

Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated

States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

13 C.F.R. § 124.103. An “economically disadvantaged individual,” by contrast, is defined by statute to include:

socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe’s access to capital markets.

15 U.S.C. § 637(a)(5)(B). The SBA’s website says that it will “*only* process and fund priority group applications” during the first 21 days of the program, which began on May 3, 2021, and it will only process and fund those applications if the applicant “has self-certified that it meets the eligibility requirements for a small business owned by women, veterans, or socially and economically disadvantaged individuals.” *See* Exhibit 1; *see also* <https://bit.ly/3tJ4FrT> (last visited on May 16, 2021).

Plaintiff Philip Greer is a white male and a non-veteran, and he does not fall within any of the preferred categories described in section 5003. *See* Declaration of Philip Greer ¶¶ 4–5. Mr. Greer is the owner of Greer’s Ranch Café, which was hit hard by the pandemic and lost nearly \$100,000 of gross revenue. *See id.* at ¶ 7. Mr. Greer and his restaurant are otherwise eligible for relief from the Restaurant Revitalization Fund, and Mr. Greer has prepared an application and will submit it to the SBA as soon it becomes eligible for consideration. *See id.* at ¶¶ 9–10.

On May 12, 2021, the SBA announced that it has *already* received “more than 147,000 applications from women, veterans, and socially and economically disadvantaged business owners,” and these prioritized applications are “requesting a total of \$29 billion in relief funds.” *See* Exhibit 2; *see also* <https://bit.ly/3eMWAOT> (last visited May 14, 2021). The SBA also announced that “a total of \$2.7 billion of relief funds have been distributed to 21,000 restaurants since the Restaurant Vitalization Fund opened on May 3, 2021.” *Id.* The SBA’s announcement of May 12, 2021, raises the prospect that the entire \$28.6 billion that Congress appropriated will be depleted before applications submitted by white male non-veterans such as Mr. Greer are even eligible to be considered. Indeed, it makes it more than likely that the appropriated funds will be depleted. Mr. Greer and his restaurant respectfully seek a temporary restraining order to bring an immediate halt to these unconstitutional race and sex preferences.

THE PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER

To obtain a temporary restraining order, the plaintiffs must show: “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). All four factors support a TRO.

I. The Plaintiffs Are Likely To Succeed On The Merits Because The Race And Sex Preferences in Section 5003 Are Patently Unconstitutional

Racial classifications are antithetical to the Constitution, as the Supreme Court has recognized time and time again. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”);

Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (footnote omitted) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”); *see also Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (requiring the federal government to comply with the constitutional prohibition on racial on the same terms as the states). All government-imposed racial classifications are “presumptively invalid”¹ and “inherently suspect,”² and they will not be tolerated unless the government proves that a racial classification is “narrowly tailored” and “furthers compelling governmental interests.” *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation and internal quotation marks omitted).

Government-imposed sex classifications are also presumptively invalid, and they will not be sustained unless the government demonstrates an “exceedingly persuasive justification” for its discriminatory regime. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” (citation omitted)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment) (“[O]ur case law does reveal a strong presumption that gender classifications are invalid.”).

There is no conceivable justification for the race and sex preferences in section 5003 that could satisfy the “strict scrutiny” standard or the “exceedingly persuasive justification” requirement. The COVID-19 pandemic has harmed restaurants owned by members of all races and sexes. It has infected nearly 33 million Americans without regard to their race or sex. And even if there were some unique vulnerabilities to infection among women or certain racial groups, that would have no effect on the

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1. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).
 2. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (citation and internal quotation marks omitted).

economic misfortunes that befall a person's restaurant. Restaurants lost business during the pandemic because dine-in options were unavailable or strictly limited, and the amount of revenue lost had nothing to do with the race or sex of the restaurant owner. It is not as though white men were getting special dispensations from regulatory authorities to keep their restaurants' dining area open.

If the government thinks it can "prioritize" women and racial minorities in an effort to compensate for past discriminatory actions that have occurred in society generally, those efforts will be foreclosed by *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Croson* emphatically rejected the idea that amorphous claims of past discrimination can justify a present-day racial preference in the distribution of government largesse. *See id.* at 499–506; *see also Adarand*, 515 U.S. 200 (extending *Croson's* holding to the federal government). The statute contains no findings of past discrimination that are specific enough to warrant remedial preferences in the Restaurant Revitalization Fund. This is nothing more than a naked discriminatory preference that turns a disaster-relief program into a politicized spoils system. And in all events, there is no basis in reason or evidence to think that precluding white men from obtaining funds from the Restaurant Revitalization Program will do anything to "remedy" past societal discrimination.

II. The Plaintiffs Will Suffer Irreparable Harm Absent A Temporary Restraining Order

The plaintiffs will suffer irreparable harm absent a TRO because the entire \$28.6 billion that Congress appropriated is likely to be depleted before Mr. Greer's application is eligible for consideration. The SBA has already received more than 147,000 applications from members of the "prioritized" groups—and these prioritized applications are "requesting a total of \$29 billion in relief funds." Exhibit 2. The SBA is therefore on track to spend the entire \$28.6 billion on these "prioritized" groups before applications submitted by white men can even be considered. And even if the

SBA does not spend the entire \$28.6 billion on these “prioritized” applications, the remaining pot of money is certain to be greatly reduced when Mr. Greer’s application can finally be considered on May 24, 2021. There is no mechanism to “claw back” this money once it is dispensed, and the defendants’ sovereign immunity makes it impossible for the plaintiffs to recover damages if these unconstitutional race and sex preferences wind up excluding Mr. Greer from the Restaurant Revitalization Fund.

The plaintiffs are suffering additional irreparable harm because they are encountering race and sex discrimination at the hands of government officials, which inflicts irreparable harm *per se*. See *Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff’d sub nom., McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (“[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.”). This injury cannot be remedied absent a TRO because the defendants’ sovereign immunity prevents retrospective relief.

III. The Harm To The Plaintiffs Outweighs Harms That Will Arise If A TRO Is Granted

The harm to the plaintiffs (and others who are being excluded from the Restaurant Revitalization Fund on account of their race and sex) outweighs any “harms” that might arise from the proposed TRO. At first glance, a fight over the distribution of government funds may seem like a zero-sum game. A remedy that prevents harm to the plaintiffs by increasing their chances of obtaining these funds will inflict an equal and opposite harm on the “prioritized” individuals whose chances of obtaining those funds is now reduced. But that analysis ignores the additional harms inflicted by the defendants’ unconstitutional race and sex discrimination.

A TRO will not only alleviate the financial harms that are being inflicted the plaintiffs, it will also eliminate the injury to their constitutional right to be free from race and sex discrimination at the hands of the government. The “prioritized” individuals,

by contrast, will be “harmed” if they receive less money from the Restaurant Revitalization Fund, but they will not encounter or experience any discriminatory treatment if the TRO is granted. The tips the scales decisively in favor of the plaintiffs.

IV. A Temporary Restraining Order Is In The Public Interest

The protection of constitutional rights is by definition in the public interest. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997) (“[T]he public interest clearly favors the protection of constitutional rights.”); *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (“[U]pholding constitutional rights surely serves the public interest.”); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (“[I]t is always in the public interest to prevent violation of a party’s constitutional rights.”). If the Court agrees that the plaintiffs are likely to succeed on their claim that the race and sex preferences in section 5003 are unconstitutional, then a TRO will be in the public interest as well.

V. The Plaintiffs’ Motion For a TRO Complies With Rule 65(b) and Rule 65(c)

The attached declaration of Philip Greer describes the “specific facts” that “clearly show” how immediate and irreparable injury, loss, or damage will result in the absence of a TRO. *See* Declaration of Philip Greer ¶¶ 4–5, ¶¶ 8–13; *see also* Fed. R. Civ. P. 65(b)(1)(A). The attached declaration of Jonathan F. Mitchell describes our efforts to give notice to the defendants. *See* Fed. R. Civ. P. 65(b)(1)(B). Mr. Mitchell has already e-mailed attorneys at the U.S. Department of Justice to inform them of this lawsuit and our intent to seek a temporary restraining order, and invited them to appear in the case. We will also e-mail them the TRO filings today. DOJ lawyers have already appeared in a similar case that seeks a TRO against the race and sex preferences in section 5003,³ and they have every opportunity³ to do so here if they wish to be heard in this matter.

3. *See Vitolo v. Guzman*, No. 3:21-cv-00176-TRM-DCP (E.D. Tenn.).

Finally, it is not necessary to require a bond because the federal government will not suffer costs or damages from the proposed TRO. *See* Fed. R. Civ. P. 65(c).

CONCLUSION

The motion for temporary restraining order should be granted.

Respectfully submitted.

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* application for admission to
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