No. 21-5517

In the United States Court of Appeals
FOR THE SIXTH CIRCUIT

JAKE'S BAR AND GRILL, LLC, AND ANTONIO VITOLO
PLAINTIFFS-APPELLANTS,

v.

ISABELLA CASILLAS GUZMAN,
DEFENDANT-APPELLEE.

On Appeal From The United States District Court
For The Eastern District of Tennessee
Case No. 3:21-CV-176
The Honorable Travis R. McDonough, Chief Judge

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Plaintiffs–Appellants state that neither is a subsidiary or affiliate of a publicly owned corporation, and that no publicly owned corporation, not a party to the appeal, has a financial interest in its outcome.

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INTRODUCTION

The American Rescue Plan Act of 2021 creates a $28.6 billion fund to provide relief for restaurants impacted by the COVID pandemic, but then directs the Small Business Administration (SBA) to process certain applications ahead of others based on the race and gender of the applicant. SBA is currently disbursing funds on a first-come, first-serve basis, but only to "priority" applicants, having pushed all disfavored applicants—mostly white males—to the back of the line, regardless of when they applied. Grant requests from "priority" applicants alone have already exceeded the size of the fund, so this structure effectively operates as a *de facto* bar to relief for most white males.

As of two days ago, SBA had already disbursed 20% of the fund. Unless this Court issues an injunction in short order, the limited fund will be fully depleted before Plaintiffs and thousands of other white male applicants ever have a shot at these much needed funds, even if they applied as soon as they could, like Plaintiffs did. This Court can fully remedy the flagrant equal protection violation by ordering SBA to immediately cease disbursing funds on the basis of race and gender, and

instead to process all applications equally in the order that they were received, without regard to race or gender.

The District Court concluded that generalized assertions of societal discrimination and a few statistical disparities support the explicit race and gender discrimination in the program. But the Supreme Court has made very clear, time and again, that this is not enough: Congress must have a "strong basis in evidence" of "identified discrimination" before it may use discrimination to remedy past discrimination. *E.g.*, *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

In enacting this program, Congress did something it has never done in the modern era. It created a huge government program in which the great majority of the funds will be made available on the basis of race and gender. All (or almost all) racial minorities who are not veterans are preferred to all (or almost all) white males who are not veterans. The priority is dispositive: no one who does not enjoy a priority will get a dime. Plaintiffs are unaware that any racial preference program of this nature has ever been upheld. Plaintiffs are unaware that any racial preference program based on such generalized allegations of discrimination has ever

survived scrutiny. Neither Defendant nor the District Court could identify one.

RELIEF REQUESTED

Plaintiffs-Appellants respectfully request, pursuant to F.R.A.P. 8 and 6th Cir. R. 27(f), that this Court expedite this appeal and issue an injunction, as soon as possible, ordering Defendants to cease disbursing funds from the Restaurant Revitalization Fund until this Court or the District Court can rule on a preliminary injunction. Plaintiffs ultimately seek an injunction requiring Defendants to process applications in the order that they were received, without regard to the race or gender of the applicant. Given how blatant the equal-protection violation is, this Court could issue such an injunction now. However, the District Court has not yet ruled on Plaintiffs' motion for a preliminary injunction,[1] so this Court

[1] The Court's memorandum opinion orders Plaintiffs to "inform the Court … whether they wish to persist in their motion for a preliminary injunction," and indicates that, "if so, the Court will *likely* order expedited briefing and another hearing." R.24:29. Given that the fund is rapidly being depleted, Plaintiffs cannot wait to appeal until another round of briefing and hearing, which may or may not be expedited. Such a hearing would be fruitless in any event, since the District Court has already concluded that mere statistical disparities are sufficient to support blatant race and gender discrimination, contrary to Supreme Court precedent. *See infra* Part II.A. Out of an abundance of caution, Plaintiffs are simultaneously asking the District Court to proceed with their preliminary injunction motion, but this Court should nevertheless expedite this appeal and grant an injunction now, given the time-sensitive nature of this case.

should, at the very least, order Defendants to cease disbursing funds until the District Court rules on the preliminary injunction. If this Court takes the latter approach, then it should make clear that its injunction lasts through any appeal if the District Court denies a preliminary injunction, to avoid another emergency application to this Court.

QUESTION PRESENTED

Can the federal government allocate limited COVID relief funds based on the race and gender of the applicant, effectively denying relief to most white males?

BACKGROUND

A. The Restaurant Revitalization Fund

In Section 5003 of ARPA, Congress created the Restaurant Revitalization Fund (the "Fund"), a $28.6 billion fund for grants to restaurants impacted by "the uncertainty of current economic conditions." ARPA, § 5003(b)(2), (c)(2)(A)(i).[2]

ARPA requires Defendant to impose race– and gender–based priorities while administering the fund. During the "initial 21-day period

[2] Not yet codified, ARPA is available on Congress's website at https://www.congress.gov/bill/117th-congress/house-bill/1319.

in which the Administrator awards grants," Defendant is required to "prioritize grants to … small business concerns owned and controlled by women," veterans, or "socially and economically disadvantaged small business concerns." ARPA, § 5003(c)(3)(A).

ARPA incorporates the Small Business Act's definitions of the terms "socially disadvantaged" and "economically disadvantaged." ARPA, § 5003(c)(3)(A). "Socially disadvantaged individuals are 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). "Economically disadvantaged individuals are those 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." 15 U.S.C. § 637(a)(6)(A).

In interpreting these definitions, SBA regulations further define "socially disadvantaged individuals" and "economically disadvantaged individuals" as those individuals who belong to certain racial and ethnic groups. 13 C.F.R. § 124.103. Under these regulations, members of the

following groups are presumed to be socially disadvantaged[3]: "Black Americans; Hispanic Americans; Native Americans (including Alaska Natives and Native Hawaiians); Asian Pacific Americans; or Subcontinent Asian Americans." *Id*. Economically disadvantaged individuals are those individuals who are socially disadvantaged, but who also meet certain income and asset limitations. 13 C.F.R. § 124.104.

White men do not presumptively qualify for the 21-day priority period. Other minorities also do not qualify for SBA's race-based "presumption" of priority status. *See* 13 C.F.R. § 124.103.[4] While Defendant now claims that white males could propose another group (in which they are a member) to be recognized as socially disadvantaged, and that group, in theory, might not be based on race or ethnicity, Plaintiffs

[3] While this presumption is "rebuttable," Defendant does not explain what would cause a member of the designated racial groups *not* to be considered "socially disadvantaged." Additionally, Defendant does not collect any information or provide any process that would enable a person not in such a designated group to be recognized as "socially disadvantaged" under ARPA. The presumption is effectively conclusive.

[4] Individuals from (or whose ancestors are from) the following countries do not qualify: Afghanistan, Iran, Iraq, Turkey, Syria, Saudi Arabia, Jordan, Palestine, Yemen, Kuwait, U.A.E., Qatar, Lebanon, Mongolia, Kazakhstan, Turkmenistan, Tajikistan, Kyrgyzstan, or Uzbekistan. *See* 13 C.F.R. § 124.103. Similarly, individuals from north Africa—Egypt, Libya, Algeria, Tunisia, and Morocco—are also excluded. *Id.*

would have to prove it. No presumption is available. And Defendants have not explained *how* Plaintiffs could prove it. No process exists under ARPA.

On April 27, 2021, Defendant announced the opening of the application period for the Fund. R.12-3:6.[5] According to this press release, "[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals." R.12-3:7. The press release emphasizes that "[a]ll eligible applicants are encouraged to submit applications as soon as the portal opens," because "applications will be funded on a first-come, first-served basis." R.12-3:7.[6]

B. Jake's Bar and Grill and Antonio Vitolo

Antonio ("Tony") Vitolo is a white male who owns and operates Jake's Bar and Grill, LLC, in Harriman, Roane County, Tennessee. R.12-3:1. Through the restaurant, he supports his wife and children. R.12-3:1.

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[5] Citations to the record in the CM/ECF Docket will be R.__-[exhibit number]:[ECF page number].

[6] SBA's website suggests that even after the 21-day priority period is over, SBA will finish processing all "priority" applications received during 21-day priority period ahead of any non-priority applications. *See* R.12-3:21–22 (stating that SBA will "process applications in the order in which they are approved by SBA").

Vitolo's wife is Hispanic and she owns 50% of the restaurant. R.12-3:1. Like most restaurants, Jake's was hit hard by the COVID-19 pandemic: Vitolo closed the restaurant during weekdays and offered to-go orders on the weekends. R.12-3:1. Vitolo estimates that he lost $35,000 in sales during the month of April 2020 alone. R.12-3:2. He has also lost workers due to the economic uncertainty. R.12-3:2.

On Monday, May 3—the first day that SBA allowed applications—Vitolo applied for a grant from the Fund at SBA's web portal, restaurants.sba.gov. R.12-3:2. When he filled out his application, Vitolo learned that SBA was prioritizing applications from "small business concerns at least 51 percent owned and controlled by individuals who are women, veterans, and/or socially and economically disadvantaged individuals." R.12-3:2, 10.

SBA's grant application included a section describing who would qualify for these categories. R.12-3:11. This section explains that owners are presumed to be "socially and economically disadvantaged" if they belong to the certain racial groups. R.12-3:11. Vitolo does not fit into any of these categories because he is not a woman, veteran, or socially

disadvantaged because of his race. R.12-3:1–2. He would, however, qualify as "economically disadvantaged," but for his race. R.12-3:3–4.

Vitolo truthfully filled out the application describing his race and gender. R.12-3:12. Upon completing his application, SBA notified Vitolo that his application was "under review" and that his "calculated award amount" was $104,590.20. R.12-3:13.

The next day, May 4, SBA emailed Vitolo confirming receipt of his application. R.12-3:14. The email also confirmed that SBA would not process his application: "the SBA will focus their reviews on the priority applications that have been submitted. Applicants who have submitted a non-priority application will find their applications remain in a Review status while the priority applications are processed during the first 21 days." R.12-3:14.

As of May 12, SBA reported that it had received over 147,000 applications from "priority" applicants, requesting a total of $29 billion—more than is available in the entire Fund. R.15:1. And just two days ago,

SBA announced that it has already disbursed over $6 billion (20%) of the Fund. R.23.[7]

C. The Litigation

Plaintiffs filed this lawsuit on May 12, R.1, and immediately filed motions for a temporary restraining order, R.12, and preliminary injunction, R.11. On May 17, the Chief Judge of the Eastern District of Tennessee heard arguments and issued an order denying Plaintiffs' motion for a temporary restraining order. R.20 (attached). Yesterday, May 19, the Court issued a memorandum opinion explaining its reasons for the decision. R.24 (attached). Also on May 19, Plaintiffs filed a notice of appeal, R. 25 (attached), as well as a motion for an injunction pending appeal, R.23, which the District Court denied, R.27.

ARGUMENT

I. This Court Has Jurisdiction Over This Appeal

This Court has jurisdiction to hear appeals from "[i]nterlocutory orders of the district courts … refusing … injunctions." 28 U.S.C. § 1292(a)(1). Due to their short duration, an order denying a TRO is

[7] https://www.sba.gov/article/2021/may/18/last-call-administrator-guzman-announces-final-push-restaurant-revitalization-fund-applications

generally not appealable, however this Court will review a TRO denial if necessary to prevent "serious, perhaps irreparable, consequence[s]," *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 612 (6th Cir. 2020) (citation omitted); *Beacon J. Publ'g Co., Inc. v. Blackwell*, 389 F.3d 683, 684 (6th Cir. 2004).

For the reasons explained in more detail in the harm section below, *infra* Part II.B, an immediate appeal and injunction is necessary to prevent serious, irreparable consequences to Plaintiffs and thousands of other similarly situated restaurant owners. In short, the United States has adopted a one-time, limited COVID-relief fund that is being distributed on a first-come, first-serve basis through a queue ordered based almost entirely on the race and gender of the applicants, putting white male applicants at the back of the line. And the government is disbursing these funds every day, rapidly diminishing the limited fund. Unless this Court reviews this appeal and issues an injunction, the fund will soon be depleted, at which point remedying the clear equal protection violation will be difficult, if not impossible.

II. This Court Should Grant an Injunction Pending Appeal

In considering a request for an injunction pending appeal, this Court considers the likelihood of success on the merits, irreparable injury absent an injunction, harm to others from an injunction, if any, and the public interest. *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020). These "are not prerequisites," but "interrelated considerations that must be balanced together." *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (citation omitted). In constitutional cases, however, injunctions "often turn on likelihood of success on the merits." *Roberts*, 958 F.3d at 416.

A. Plaintiffs Are Likely to Succeed Because the Race and Gender Preferences Clearly Violate the Equal Protection Guarantee in the United States Constitution

1. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). This is because the Constitution forbids "discrimination by the general government … against any citizen because of his race." *Gibson v. State of Mississippi*, 162 U.S. 565, 591 (1896). When confronted with such a racial classification, "[a]ny person, of whatever race, has the right to

demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). "Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation omitted).

Likewise, classifications based on gender "are in many settings unconstitutional." *Feeney,* 442 U.S. at 273 (collecting cases). When a plaintiff raises a claim of gender discrimination, government officials "must demonstrate an exceedingly persuasive justification for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996). "The burden of justification rests entirely" on the government to prove that "the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 532–33 (citations omitted).

2. As described in more detail above, Defendant has prioritized grant applications from certain restaurant owners based on race and gender. *Supra* pp. 4–10. Because this prioritization constitutes explicit

race and gender discrimination, the burden shifts to Defendant to justify this discrimination by meeting strict scrutiny in the case of the racial qualifications, *see Johnson*, 543 U.S. at 505, and intermediate scrutiny in the case of the gender qualification, *Virginia,* 518 U.S. at 531. Defendant has conceded that strict scrutiny applies. R.18:10.

Defendant has asserted a "compelling interest in remedying the effects of past and present discrimination that led to socially and economically disadvantaged business owners having less access to capital and credit, including capital and credit provided through prior COVID relief efforts." R.18:11. The District Court agreed, slightly reframing the government's interest as remedying "past and present racial discrimination" that has led to current problems with "the formation and stability of minority-owned businesses." R.24:14.[8]

However such claims are articulated, they do not satisfy the rigorous requirements of *Shaw v. Hunt*, 517 U.S. 899 (1996). The

[8] The District Court correctly ignored Defendant's citations to reports from the 1970s and 1980s. This Court requires *recent* evidence of discrimination. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993) (discrimination that occurred 14 years ago was too remote to support a gender-based affirmative action program), *citing Hammon v. Barry*, 826 F.3d 73, 76–77 (D.C. Cir. 1987) (discrimination that occurred 18 years earlier was too remote to support a race-based affirmative action program).

Supreme Court explained that the government must point to "identified discrimination" "with some specificity" and "with a strong basis in evidence." *Id.* at 909–10 (citation omitted). In other words, a "generalized assertion of past discrimination in a particular industry or region is not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 910. In short, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* (citing *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 274–75, 276, 288 (1986)).

Over several decades, the Supreme Court has repeatedly and frequently reaffirmed this basic principle that remedying past societal discrimination does not justify race-conscious government action. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 310 (1978). And so has this Court. *See, e.g., Michigan Rd. Builders Ass'n, Inc.*, 834 F.2d 583, 590 (6th Cir. 1987) (collecting cases).

The Court has similarly repeated that compensating for racial disparities in income, wealth, or participation in government programs likewise is not a compelling interest supporting explicit racial

preferences. "Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Parents Involved*, 551 U.S. at 730.

Here, Defendant's "evidence" is neither strong nor specific. Defendant cites reports recounting that business owners, in the past, experienced racial and ethnic prejudice, and "to some degree" this prejudice has "adversely affected our present system." R.18:12. Defendant further cites generalized problems with "access to capital and credit" and problems "competing for government contracts," "historic and present-day discrimination," "long-standing structural racial disparities," "structural limitations," "structural inequities," "pre-existing disparities in access to capital," and "structural racism." R.18:13–16. They allegations are neither specific to the restaurant industry nor sufficiently particular to allow a court to assess what sort of preference might be permitted, save the almost absolute preference present here.

The District Court pointed to these same historical problems as a compelling government interest and citing "historical lending discrimination" and "historical patterns of discrimination [ ] reflected in the present lack of relationships between minority-owned businesses and banks." R.24:20. Yet none of these claims provide "strong evidence" of recent intentional discrimination "with specificity" within the U.S. restaurant industry. *Shaw,* 517 U.S. at 909. They are no different than the type of evidence that was found wanting in cases like *Wygant*, *Croson*, *Adarand*, *Shaw* and *Parents Involved*.

Apart from generalized claims of historical discrimination, the District Court relied on statistical disparities—either in participation in certain government programs or in matters such as revenue or assets that might make a business more vulnerable to COVID restrictions or declines in business. According to the District Court, Congress gathered evidence "suggesting" that businesses owned by minorities "have suffered more severely than other kinds of businesses during the COVID-19 pandemic." R.24:14–15. The court further stated that "the Government's early attempts at general economic stimulus—*i.e.*, the Paycheck Protection Program ("PPP")—disproportionately failed to help those

businesses directly because of historical discrimination patterns." R.24:15. The District Court pointed to racial disparities in business ownership, access to credit, and the impact of COVID-19 on businesses. R.24:15.[9]

Evidence of statistical disparities is not the type of specific and concrete evidence that can support a compelling government interest. As explained by this Court in *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000), "statistical disparity in the proportion of contracts awarded to a particular group, standing alone," is not a compelling government interest. *Id.* at 735. The government "cannot rely on mere speculation, or legislative pronouncements, of past discrimination." *Id.* Specifically, this Court criticized reliance on reports that "focused on a mere underrepresentation"; "such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court." *Id* at 736; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) ("The mere fact that black membership in these

[9] Defendant similarly argued that Congress has found that the pandemic "has had a particularly devastating impact on small businesses owned by minorities and women." R.18:13–14.

trade organizations is low, standing alone, cannot establish a prima facie case of discrimination.").

Acknowledging this flaw in its own analysis, the District Court conceded as follows: "To the extent that Plaintiffs argue that evidence of racial disparity or disparate impact alone is not enough to support a compelling government interest, Congress also heard evidence that racial bias plays a direct role in these disparities." R.25:18–19. True, "evidence of racial disparity or disparity alone is not enough." *Drabik*, 214 F.3d at 735; *Croson*, 488 U.S. at 501. But neither are abstract claims of "racial bias." *Id.* ("A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists.").

The District Court's *only* assertion of a compelling government interest *not* based on generalized societal discrimination or disparities is a citation to a 2020 study. R.24:19. In this study, mystery shoppers went into "several Washington, D.C. banks" and found disparities in "levels of encouragement," "products offered," and "information provided by the bank." One study about banks in Washington, D.C. cannot seriously support a nationwide, race and gender based $28.6 billion program supporting certain parts of the American restaurant industry.

3. Even if SBA could come up with a compelling or substantial government interest, there is no evidence that Defendant's use of a "priority period" is narrowly tailored or substantially related to achieving any justifiable goal. Narrow tailoring requires evaluating the "efficacy of alternative [race-neutral] measures." *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion). But Congress did not considered any race-neutral alternatives. For example, Defendant argues that minorities (R.18:14) and women (R.18:22) received less from the Paycheck Protection Program (PPP) than others (a disparity that could have any number of explanations). The District Court similarly relied on this. R.24:15–19. If this is true, then Congress could enact a simple race-neutral alternative: provide funds first to those restaurants that did not get a PPP loan (or whatever other program Congress believes inadequately served minorities). This race-neutral alternative would fully address Defendant's concern that Congress has underserved minorities and women with its past programs.

Next, a remedy is not narrowly tailored if it is overinclusive. *Croson*, 488 U.S. at 506. In this case, SBA cannot explain how its "priority period" is necessary to rectify a compelling governmental interest with

regard to all of the groups designated as "socially and economically disadvantaged," and whether some groups, such as Black Americans, must share this allegedly targeted benefit with other groups, such as Alaskan and Hawaiian natives. *O'Donnell Const. Co. v. D.C.,* 963 F.2d 420, 427 (D.C. Cir. 1992) ("'random inclusion of racial groups' for which there is no evidence of past discrimination in the construction industry raises doubts about the remedial nature of the Act's program"). The District Court did not address the claim of overinclusiveness. R.24:22.

On the other hand, a program is also not narrowly tailored if it is underinclusive. *Drabik*, 214 F.3d at 737. SBA's regulations pick and choose among Asian-Americans, offering a priority period to certain Asians from the Pacific region and the "subcontinent," but not others from northern and western Asia. *See* 13 C.F.R. § 124.103. SBA cannot explain why it believes that Malaysian-Americans, for example, are socially disadvantaged while Syrian-Americans are not. *Id.*

The District Court wrote that anyone who "felt they met" the definition of socially disadvantaged could simply "check that box." R.24:22. But the pertinent part of Defendant's regulations say otherwise and Defendant's counsel warned at oral argument that an applicant

cannot lie on a government form. Even if the SBA would recognize some form of social disadvantage based on something other than race (a matter of pure speculation), this does not alter the fact that ARPA's "socially disadvantaged" priority *is a preference based on a race-based presumption*. ARPA, § 5003(c)(3)(A); 15 U.S.C. § 637(a)(5); 13 C.F.R. § 124.103. Businesses in Plaintiffs' position have still been disadvantaged due to their race, given that other minorities receive a presumption of disadvantage and do not have to prove anything. *See Fisher v. Univ. of Texas at Austin,* 570 U.S. 297, 307 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

4. Given Defendant's inability to identify a government interest or precise tailoring needed to satisfy either strict or intermediate scrutiny in the face of race and gender discrimination, Plaintiffs have therefore made a strong showing that they are likely succeed on their equal-protection claim. Success on this prong of the test weighs strongly in favor of granting an injunction. "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

B. Plaintiffs and Other Disfavored Applicants Are Irreparably Harmed By Being Pushed to the Back of the Line, Based Their Race and Gender, for Grants From a Limited Pot of Relief Funds.

If this Court does not promptly halt all payments from the Fund, the limited available funds will be fully depleted before the disfavored groups (largely white males) ever have a shot at this much-needed relief. On May 12—halfway through the priority period—SBA announced it had already received over 147,000 applications from "priority" applicants, requesting a total of $29 billion in funds—more than is available in the fund. R.15:1.*Supra* p. 9. On May 18, SBA noted in a press release that it had already processed 38,000 applications and disbursed over $6 billion of the funds. *Supra* n.7

Plaintiffs applied on the very first day the application was open, R.12-3, ¶9, yet were told by SBA that their application would not be considered until after any priority applicants who apply in the first 21 days. R.12-3. ¶14, Ex. 6.

An injunction would allow a complete remedy and ensure that all applicants receive an equal and fair shot at these critical relief funds. Indeed, there is a relatively simple fix (for now). SBA can pause processing "priority" applications until it catches up on any earlier-filed

applications from disfavored applicants who were moved to the back of the line based on their race and gender. Once caught up, the SBA can then continue processing all applications, without regard to race or gender, until the money runs out.

Without an injunction, however, the harm will most likely become irreparable. Every day that goes by, the fund grows smaller and smaller. At some point, knowable only to Defendant, the remaining funds will be insufficient to catch up on earlier-filed applications from disfavored applicants that were pushed to the back of the line. And damages—if they are even available[10]—are an unworkable remedy, since it may be impossible to sort out who would have received a grant before the funds ran out, had the government not discriminated based on race and gender. Moreover, once the funds are depleted, any monetary remedy would

[10] "Federal constitutional claims for damages are cognizable only under *Bivens*." *Loumiet v. United States*, 828 F.3d 935, 945 (D.C. Cir. 2016). And while the Supreme Court has recognized a *Bivens* claim for a certain type of equal protection claim, *Davis v. Passman*, 442 U.S. 228 (1979) (gender discrimination in federal employment), the Supreme Court has more recently explained that courts must be very reluctant to extend *Bivens* to any new "context"—where "context" does not mean a different constitutional provision, but simply a different type of case with any "meaningful" differences to the only three contexts where the Court has recognized a *Bivens* damages remedy. *Hernandez v. Mesa*, 140 S. Ct. 735, 741–50 (2020); *see also id.* at 750–53 (Thomas, J., and Gorsuch, J., concurring) (calling for *Bivens* and *Davis* to be overruled).

vastly increase the size of the appropriation. Thus, an injunction is the only workable remedy.

Even putting aside the irreparable harm from losing a fair shot at much-needed relief funds, the flagrant constitutional violation is itself an irreparable harm. Indeed, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am.*, 697 F.3d at 436; *Am. C.L. Union of Kentucky v. McCreary Cty., Kentucky*, 354 F.3d 438, 445 (6th Cir. 2003); Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1 (3d. ed.) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary.").

The Supreme Court has recognized that "a racial classification causes 'fundamental injury' to the 'individual rights of a person.'" *Shaw*, 517 U.S. at 908. Indeed, the *primary* injury "in an equal protection case of this variety is the denial of equal treatment" itself. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Plaintiffs, and tens of thousands of other applicants, are being treated differently by the government, based solely on their race

and gender. Such unequal treatment "demeans us all," *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

C. The Public Interest and Balance of Harms Weigh Heavily in Favor of an Injunction

An injunction is in the public interest, because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994). Indeed, issuing an injunction "would serve the public's interest in maintaining a system of laws free of unconstitutional racial classifications." *O'Donnell Const. Co.*, 963 F.2d at 429 (issuing a preliminary injunction against a D.C. law that required a certain percentage of contracts to be awarded to minority-owned businesses).

Finally, an injunction will not cause any harm. As to Defendants, "no substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001). And those currently given "priority period" status would only lose a status unconstitutionally granted to them by Defendant. Moreover, those currently in the "priority" queue will still be

treated equally under Plaintiffs' proposed injunction. Plaintiffs only seek equal treatment under the law, not special treatment. If an injunction is granted, all applicants, regardless of race and gender, will be treated equally, as the Constitution requires.

CONCLUSION

This Court should expedite this appeal and enter an injunction as set forth above.

Dated: May 20, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this emergency motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,188 words, excluding the parts exempted.

This emergency motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(E), because this document has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: May 20, 2021

/s/ Daniel P. Lennington
DANIEL P. LENNINGTON

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

Dated: May 20, 2021

/s/ Daniel P. Lennington
DANIEL P. LENNINGTON