

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

ANTONIO VITOLO, JAKE'S BAR AND GRILL, LLC,
BYRON SACKETT, HOMESTEADS MANAGEMENT, LLC,
KEVIN L. PEARSON, S & K SOUP CO.,
ALFRED CASTIGLIONI, THE 579 LLC,
CHARDONNAYS INC., ZINFANDEL LLC,
DENIS FLANAGAN, 3KAD LLC,

No. Case 3:21cv176-TRM-DCP

Plaintiffs,

v.

ISABELLA CASILLAS GUZMAN,

Defendant.

AMENDED COMPLAINT

Plaintiffs allege their complaint against Defendant as follows:

INTRODUCTION

1. “The Constitution created a government dedicated to equal justice under law.” *Cooper v. Aaron*, 358 U.S. 1, 19 (1958). The government may not frustrate this principle of equality by making “distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.” *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). Whether it be discrimination based on race or gender, “unreasonable discrimination” by the government is never permitted. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

2. In March 2021, the United States pushed aside equality under the law by enacting a grant program that gives special treatment based on race and gender.

Under Section 5003 of the American Rescue Plan (ARPA), Congress appropriated \$28.6 billion to create the Restaurant Revitalization Fund to be administered by Defendant, who runs the Small Business Administration (SBA). This fund provides relief for restaurants impacted by the COVID-19 pandemic. Under the terms of the law, however, Defendant must administer the fund in a discriminatory manner. For the first 21 days, which started May 3, 2021, Defendant is obligated to “prioritize awarding grants” to restaurants owned by certain minorities and women.

3. To implement this discriminatory mandate, Defendant adopted a first-come, first-serve queue to process grant requests until the money runs out, but has then re-sorted applicants within the queue based on their race and gender, putting white male restaurant owners behind certain minority and female applicants, regardless of when they filed an application. Given the limited pot of funds, this puts white male applicants at significant risk that, by the time their applications are processed, and grants awarded, the money will be gone.

4. Defendant has no justification for granting these priorities based on race and gender. Therefore, the priority program should be declared unconstitutional and enjoined.

THE PARTIES

5. Antonio Vitolo is a white male who owns a Jake’s Bar and Grill, LLC, a Tennessee limited liability company, with its principal place of business in Harriman, Roane County, Tennessee. His wife is Hispanic and, by operation of state law, she owns 50% of the business. Vitolo applied for a grant from the Restaurant

Revitalization Fund on May 3, 2021, but he was denied a priority preference based on his race and gender.

6. Byron Sackett is a white male who owns a catering/concessions company called Homesteads Management, LLC, in Charlotte, North Carolina. Sackett applied for a grant from the Restaurant Revitalization Fund on May 3, 2021, but he was denied a priority preference based on his race and gender.

7. Kevin Pearson is a white male who owns S & K Soup Co., doing business as Zoup! in Mishawaka, Indiana. Pearson applied for a grant from the Restaurant Revitalization Fund on May 3, 2021, but he was denied a priority preference based on his race and gender.

8. Alfred Castiglioni owns The 579 LLC, Chardonnays Inc., and Zinfandel LLC, doing business as 579 Benefit Street Restaurant in Pawtucket, Rhode Island, Chardonnay's Restaurant in Seekonk, Massachusetts, and Meritage Restaurant in East Greenwich, Rhode Island. Castiglioni applied for a grant from the Restaurant Revitalization Fund on May 3, 2021, but he was denied a priority preference based on his race and gender.

9. Denis Flanagan is a member of 3kad LLC, which does business as Draught 55 in New York City, New York. Mr. Flanagan and the other members of 3kad LLC are white males, with the sole exception of his wife, who is female. 3kad LLC, through its members, applied for a grant from the Restaurant Revitalization Fund on May 3, 2021, but the company was denied priority consideration because its members were white males.

10. Defendant Isabella Casillas Guzman is the Administrator of SBA. Under Section 5003 of ARPA, Defendant Guzman is responsible for administering the Restaurant Revitalization Fund. She is sued in her official capacity for declaratory and injunctive relief.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this complaint under 28 U.S.C. § 1331, § 2201, and 5 U.S.C. § 702, because this case presents a substantial question of federal law, specifically whether Section 5003 of ARPA—and Defendant’s implementation of that section—violates the United States Constitution’s guarantee of equal protection of the laws.

12. This Court has authority to issue a declaratory judgment and to order injunctive relief and other relief that is necessary and proper pursuant to 28 U.S.C. § 2201 and 2202.

13. Venue is appropriate in this district under 28 U.S.C. § 1391(e)(1). A substantial part of the events giving rise to this claim occurred in this district, a substantial part of the property subject to this action is situated in this district, and a plaintiff resides in this district.

STATEMENT OF CLAIM

14. On March 11, 2021, the President of the United States signed ARPA into law.

15. Through Section 5003 of ARPA, Congress appropriated \$28.6 billion for the Restaurant Revitalization Fund, to be administered by Defendant, who is the

Administrator of SBA. ARPA provides that the “Administer shall use amounts in the Fund to make grants” to restaurants that require grant support due to “the uncertainty of current economic conditions.”

16. Section 5003(c)(3) of ARPA provides a priority to certain applicants: “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, [veterans], or socially and economically disadvantaged small business concerns.”

17. ARPA incorporates another federal law called the Small Business Act, which provides that “[s]ocially 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)(4)(A).

18. SBA regulations further define “socially disadvantaged individuals” and “economically disadvantaged individuals” as those individuals who belong to certain racial groups. 13 C.F.R. §§ 124.103, .104. Individuals in the following groups are automatically granted priority status: “Black Americans; Hispanic Americans; Native Americans (including Alaska Natives and Native Hawaiians); Asian Pacific Americans; or Subcontinent Asian Americans.”

19. Plaintiffs are not a member of any of the racial or ethnic groups identified in 13 C.F.R. § 124.103 or any other group identified by Defendant as “socially disadvantaged” or “economically disadvantaged.”

20. Plaintiffs are eligible for a grant under the Restaurant Revitalization Fund, except they are not eligible for priority consideration because their owners are white males.

21. On April 30, 2021, SBA sent out an email to restaurants detailing to process for the Restaurant Revitalization Fund. The email included the following information: “All businesses can and should apply on Monday. Due to limited funds and the first-come, first-served basis, the earliest possible submission of your application is the best way to maximize your chance of receiving the grant. The law mandates a 21-day priority window for businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals. The SBA has indicated it will fund those applications first, as required.”

22. On May 3, 2021, Plaintiffs applied for a grant under the Restaurant Revitalization Fund at restaurant.sba.gov. During the application process, SBA notified Plaintiffs that “SBA will accept applications from all eligible applicants, but only process and fund priority group applications.” The website continued that priority applicants include businesses owned by “women, veterans, or socially and economically disadvantaged individuals.” SBA’s website further explains that “socially disadvantaged individuals” and “economically disadvantaged individuals” must be “a member of a group” that has “been subjected to racial or ethnic prejudice or cultural bias.”

23. On May 4, 2021, SBA sent email to applicants explaining as follows: “As outlined by Congress, 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. Applicants in this status should not anticipate any outreach from the SBA during this period.”

24. Plaintiffs are harmed in multiple ways. First, they have been pushed to the back of the line behind priority applicants, regardless of when they applied, for a limited fund that may run out before their application is processed. Second, even if the fund does not run out, Plaintiffs are harmed by being treated differently because of their race and gender during the application and award process for a grant under the Restaurant Revitalization Fund program.

25. Unless Defendant is immediately enjoined, Plaintiffs may never be able to recover from the Restaurant Revitalization Fund program if the funds run out before their applications are processed and awarded.

CAUSE OF ACTION EQUAL PROTECTION VIOLATION

26. Plaintiffs reallege and incorporate by reference the allegations set forth above as if fully set forth herein.

27. 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).

28. Gender discrimination is also unconstitutional. Courts “carefully inspect[] official action that closes a door or denies opportunity to women (or to men).” *United States v. Virginia*, 518 U.S. 515, 532 (1996).

29. “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” *United States v. Windsor*, 570 U.S. 744, 774 (2013).

30. “[A]ll racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.” *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation omitted). “Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.” *Id.* (citation omitted).

31. When gender discrimination is employed, the burden “rests entirely” on the government to offer an “exceedingly persuasive” justification, and to prove that the “the discriminatory means employed are substantially related to the achievement of those objectives.” *Virginia*, 518 U.S. at 532 (citations omitted).

32. Section 5003 of ARPA imposes racial classifications and grants a benefit—priority consideration—based on those racial classifications.

33. Section 5003 of ARPA likewise uses gender discrimination as a method of distributing funds through a gender-based priority consideration.

34. Defendant is responsible for interpreting and implementing Section 5003 of ARPA.

35. Although Plaintiffs suffered from the COVID-19 pandemic and are otherwise eligible for a grant under the Restaurant Revitalization Fund, Plaintiffs are ineligible for priority consideration, and instead are pushed to the back of the line

for processing and awarding, because they are white males (or in the case of plaintiff-entities, controlled by white males).

36. Plaintiffs applied for a grant under Section 5003 of ARPA and were denied priority consideration because they are white males (or in the case of plaintiff-entities, controlled by white males).

37. The racial classifications under Section 5003 of ARPA are unconstitutional because they violate the Equal Protection and Due Process guarantees in the United States Constitution. These racial classifications under Section 5003 of ARPA are not narrowly tailored to serve a compelling government interest.

38. The gender-based classification under Section 5003 of ARPA is unconstitutional because it violates the Equal Protection and Due Process guarantees in the United States Constitution. This gender-based classification is not supported by an exceedingly persuasive objective, and the discriminatory means employed are not substantially related to the achievement of that objective

RELIEF REQUESTED

Plaintiffs respectfully request that this Court:

A. Immediately enter a temporary restraining order ordering Defendant to pay Plaintiffs' grant applications, if approved, before all other later-filed applications, without regard to processing time or the applicants' race or sex.

B. Enter a preliminary injunction requiring Defendant to pay Plaintiffs' grant applications if approved, before all other later-filed applications, without regard to processing time or the applicants' race or sex.

C. Enter a declaratory judgment that the race- and gender-based classifications under Section 5003 of ARPA are unconstitutional.

D. Enter an order permanently enjoining Defendant from applying race- and gender-based classifications when determining eligibility or priority consideration for grants under Section 5003 of ARPA.

E. Grant Plaintiffs such other and further relief as the court deems appropriate.

Dated: June 1, 2021

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