No. 21-5517

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTONIO VITOLO, *et al.*,

Plaintiffs-Appellants,

v.

ISABELLA GUZMAN,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Tennessee

OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION AND SUMMARY

In March 2021, Congress enacted the American Rescue Plan Act (ARPA) as a continuation of the federal government's efforts to provide relief to American individuals and businesses from the effects of the COVID-19 pandemic. In enacting this latest installment of COVID-19 relief, Congress aimed to provide much-needed support to America's restaurant industry. Aware that the pandemic has not affected every American equally, Congress sought to ensure this crucial aid would reach small businesses owned by entrepreneurs who have experienced discrimination, who it found were not adequately served by earlier pandemic relief efforts. In particular, Section 5003 created and appropriated funds for a Restaurant Revitalization Fund (RRF) to provide grants to small businesses in the restaurant industry. Section 5003 also provided that for the first twenty-one days SBA provided grants under this program, it should prioritize applications from small businesses that are at least 51% owned and controlled by women, veterans, or socially and economically disadvantaged individuals. The Small Business Administration (SBA) is responsible for administering this program, and has begun to accept applications and distribute funds consistent with this statutory mandate. While SBA regulations and the application for the RRF presume that members of certain racial and ethnic groups are among those designated as socially disadvantaged, that category is not limited exclusively to members of those groups—and members of those groups do not qualify for prioritization unless they are also economically disadvantaged.

Plaintiffs sought both a temporary restraining order and a preliminary injunction prohibiting SBA's implementation of Section 5003, arguing that the law discriminates on the basis of race and gender. The district court denied plaintiffs' motion for a TRO, but litigation over plaintiffs' motion for a preliminary injunction continues expeditiously in the district court. Plaintiffs come to this Court invoking its jurisdiction to review appeals of "[i]nterlocutory orders of the district courts … refusing … injunctions." 28 U.S.C. §1292(a)(1). But it is well established that courts of appeals generally lack jurisdiction to review denials of TROs. This appeal should be dismissed on that basis.

Even if this Court had jurisdiction, plaintiffs would not be entitled to an injunction pending appeal. Plaintiffs are unlikely to succeed on the merits of their claims. As this district court found in denying the TRO, SBA's consideration of race and gender is constitutional because the race-based presumption is narrowly tailored to serve a compelling government interest, and the gender-based preference serves important governmental objectives and is substantially related to the achievement of those objectives.

STATEMENT

I. STATUTORY BACKGROUND

A. The Federal Government's Early COVID-19 Relief Programs.

On March 6, 2020, in response to the burgeoning COVID-19 pandemic, Congress passed the Coronavirus Preparedness and Response Supplemental

Appropriations Act of 2020, which deemed the coronavirus a disaster for purposes of allowing the SBA to make Economic Injury Disaster Loans (EIDL) available to eligible small businesses. H.R. 6074, 134 Stat. 146 (2020). On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which established the Paycheck Protection Program (PPP), provided $349 billion to fund the program, and provided funding for a new EIDL advance grant program. H.R. 748, 134 Stat. 281 (2020). The PPP provides small businesses with SBA-backed loans that can be used to cover payroll (and certain other expenses) during the COVID-19 crisis. The $349 billion in PPP funds were soon exhausted, and Congress enacted another law appropriating additional funding for the PPP, EIDL loans, and EIDL advance grants. H.R. 266, 134 Stat. 620 (2020). Congress has since continued to modify and extend the PPP program.

B. Congress Enacts Assistance to the Restaurant Industry, With an Emphasis on Veteran-, Minority- and Women-Owned Small Businesses.

Following the initial rush to implement COVID relief, Congress' attention turned to the impact of the pandemic on the restaurant industry and on minority- and women-owned businesses in particular. The United States House of Representatives Committee on Small Business "held many hearings and forums ... on a wide variety of subjects relevant to pandemic aid programs," including hearings addressing lessons learned from prior COVID relief programs and the needs of small businesses,

including restaurants. H.R. Rep. No. 117-7, at 457 (2021). Two relevant themes emerged during these hearings—first, that special support was needed for the restaurant industry, and second, that targeted relief was needed for minority- and women-owned businesses, many of whom had not benefited from prior relief programs.

On June 17, 2020, the Committee on Small Business held a remote hearing addressing, among other topics, "the impact the PPP has had on traditionally underserved businesses communities," including reports that "more needs to be done to ensure minority-owned businesses are fully able to access the program." *See* Memo. from N. Velázquez to Members, Comm. on Small Bus. 3 (June 17, 2020), https://smallbusiness.house.gov/uploadedfiles/06-17-20_hearing_memo.pdf.

On July 15, 2020, the Committee on Small Business held a full committee hearing addressing "recovery efforts to stimulate small business growth following the Great Recession, barriers to recovery, and some of the industries that have been disproportionately impacted by COVID-19," particularly the restaurant and hospitality industries. *See* Memo. from N. Velázquez, Chairwoman to Members, Comm. on Small Bus. (July 15, 2020), https://smallbusiness.house.gov/uploadedfiles/07-15-20_memo.pdf ("July 15, 2020 Memo."). At that hearing, the committee discussed efforts to shore up small businesses during the pandemic, with a particular focus on minority- and women-owned businesses.

On February 4, 2021, the House Subcommittee on National Security, International Development, and Monetary Policy held a hearing entitled "Supporting Small and Minority-Owned Businesses Through the Pandemic," which focused on "understand[ing] why aid to minority-owned businesses was delayed" and "helping to lay the groundwork for how [Congress] can do better going forward." 117th Cong. 2-3 (2021). That hearing examined the need for additional COVID-related assistance to small and minority-owned businesses. *See id.*

D. The American Rescue Plan Act and the Restaurant Revitalization Fund

On March 11, 2021, Congress enacted the American Rescue Plan Act (ARPA), which provides widespread COVID-related relief to the American people and businesses, including restaurants. Pub. L. No. 117-2 (2021). The House Report accompanying the bill highlighted the ways in which the nation's "most vulnerable communities are forced to bear the brunt of" both the coronavirus pandemic and the resultant economic crisis as "economic inequities grow worse." H.R. Rep. No. 117-7 at 2 (2021). It also explained that "underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic," women are exiting the workforce at alarming rates, and "eight out of ten minority-owned businesses are on the brink of closure." *Id.* at 2. ARPA is intended to "provide crucial support for the hardest-hit small businesses, especially those owned by entrepreneurs who have experienced systemic discrimination." *Id.* at 3.

As relevant here, Section 5003 of ARPA established the Restaurant Revitalization Fund (RRF) and appropriated $28.6 billion to the fund for fiscal year 2021. ARPA §5003(b)(1)-(2). Section 5003 includes a priority period for certain businesses. Specifically, Section 5003 instructs that in the first 21 days, the SBA "shall prioritize awarding grants" to eligible small businesses that are "owned and controlled by women (as defined in [the Small Business Act] (15 U.S.C. §632(n)), … veterans …, 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)))." ARPA §5003(c)(3)(A).

Under the relevant statute, a small business is "owned and controlled by women" if at least 51 percent of the business is owned by women, and its daily business operations are controlled women. 15 U.S.C. §632(n). Similarly, a small business is "owned and controlled by veterans" if at least 51 percent of the business is owned by veterans and its daily operations are controlled by veterans. *Id.* §632(q)(3). Under Section 8(a) of the Small Business Act, which permits the federal government to limit the issuance of government contracts to certain small businesses owned and controlled by socially and economically disadvantaged individuals, a "socially and economically disadvantaged small business" is at least 51 percent owned by "one or more socially and economically disadvantaged individuals," "an economically disadvantaged Indian tribe," or "an economically disadvantaged Native Hawaiian

organization," where daily business operations are controlled by the same. *Id.* §637(a)(4)(A)).

Section 8(a) defines "socially disadvantaged individuals" 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." *Id.* §637(5). The RRF application adopts this statutory definition, and its instructions provide that individuals who are members of the following groups are "presumed to be socially disadvantaged: Black Americans, Hispanic Americans, Native Americans (including Alaska Natives and Native Hawaiians), Asian Pacific Americans, and Subcontinent Asian Americans." R.12-3, Ex 3. Those designated groups track the groups identified in SBA regulations related to Section 8(a). *See* 13 C.F.R. §124.103(b)(1). Under those regulations, the presumption that an individual is social disadvantaged may be rebutted, and individuals who are not members of one of these groups may demonstrate social disadvantage by submitting evidence that shows that a distinguishing characteristic has contributed to substantial social disadvantage, which has limited their entry or advancement in the business world. *Id.* §124.103(c)(1)-(2). Thus, an individual's race may create a presumption that he or she is socially disadvantaged, but individuals who are not members of the enumerated groups also may be considered socially disadvantaged.

Section 8(a) defines "economically disadvantaged individuals" as those "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." *Id.* §637(6)(A). On the RRF application, the SBA states that in assessing economic disadvantage, it will look at an individual's net worth, average income over the past three years, and the fair market value of the individual's assets. If an individual exceeds certain thresholds on any of those three metrics, he or she will generally be deemed not to be economically disadvantaged. *See* 13 C.F.R. §124.104(c). Because the priority period is open to "socially ***and*** economically disadvantaged" individuals, a restaurant owner who is socially disadvantaged must also be economically disadvantaged in order to participate in the priority period.

On May 3, 2021, SBA began accepting applications for the RRF. The RRF application explains that SBA will prioritize awarding funds to small businesses that are at least 51 percent owned and controlled by individuals who are women, veterans, and/or socially and economically disadvantaged individuals. *See* R.18-1, PageID#133. Applicants are then asked to check a box if "[a]s of the date of this application, Applicant is a small business concern at least 51 percent owned and controlled by: [o]ne or more women; [v]eteran(s); [and/or] [s]ocially and economically disadvantaged individual(s)." R.18-1, PageID#134. The application does not require that an individual be predetermined by SBA to qualify as socially and economically disadvantaged and does not ask whether an applicant is a member of a particular racial or ethnic group that is presumed to be socially disadvantaged. *Id.*

D. This Litigation

On May 12, 2021, plaintiffs filed this action, alleging that the priority period set out in Section 5003 unconstitutionally discriminates on the basis of race and sex, in violation of the Equal Protection and Due Process guarantees of the United States Constitution. That same day, plaintiffs filed a motion for a temporary restraining order, a motion for a preliminary injunction, and a single brief in support of both motions. The district court ordered a hearing on the TRO motion for May 17, 2021. After that hearing, the district court denied plaintiffs' motion, and issued a memorandum opinion memorializing that decision on May 19, 2021. Later that day, plaintiffs filed a notice of appeal and moved the district court for a preliminary injunction pending appeal. The district court denied that motion on May 20, 2021. Shortly thereafter, plaintiffs notified the district court that they wished to proceed with their preliminary injunction motion and requested a briefing schedule on that motion. The district court ordered defendant to file a response by today.

ARGUMENT

I. THIS COURT LACKS JURISDICTION.

This Court has jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States … granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. §1292(a)(1). But a TRO is not an "injunction," and therefore this Court generally lacks jurisdiction to hear an appeal of an order denying

a TRO. *See Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees,* 473 U.S. 1301, 1303-04 (1985).

While there are certain narrow exceptions to that rule, none applies here. This is not a case where the district court granted a TRO that does "not preserve the status quo" but rather requires immediate affirmative action. *Northeast Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1006 (6th Cir. 2006). Nor is this a case where the parties "have treated the motion and the district court's ruling thereon, as a motion for a preliminary injunction." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). Indeed, expedited briefing on plaintiffs' motion for a preliminary injunction is ongoing.

Plaintiffs instead assert that they must be allowed to appeal the district court's denial of their TRO in order to avert "serious, perhaps irreparable consequences," that would occur if they were required to wait until the district court rules on their pending motion for preliminary injunction. Mot. 11. But as plaintiffs acknowledge, SBA has been processing applications for nearly three weeks and has only depleted about 20% of the available funds. Mot. 9-10. Plaintiffs provide no basis to think that SBA's rate of disbursement will materially increase, such that the funds will be depleted in the coming few weeks. This is therefore not a case where exigencies are likely to render this dispute moot if the Court does not entertain appeal of an order denying a TRO. *Cf. Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 612 (6th Cir. 2020) (allowing appeal of TRO denial where clear that "case will become moot just

over three Sundays from now"). Nor is there any reason to think plaintiffs will have to wait long for a final decision from the district court on their pending motion for preliminary injunction: plaintiffs acknowledge that they are simultaneously litigating this appeal and their motion for a preliminary injunction in the district court, and that the district court has been proceeding expeditiously. Mot. 3 n.1, 10. This Court should therefore dismiss this appeal for lack of appellate jurisdiction.[1]

II. PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION PENDING APPEAL.

A mandatory injunction pending appeal is an extraordinary remedy that requires an extraordinary showing. In reviewing such a motion, this Court considers four factors: (1) whether the applicant is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably harmed absent the injunction; (3) whether the injunction will injure the other parties; and (4) whether the public interest favors an injunction. *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020).

A. The Government is Likely to Succeed on the Merits.

Although the statutory definition of "socially disadvantaged individual" cited in Section 5003 is race-neutral, SBA regulations and the RRF application include a rebuttable presumption of social disadvantage that is race-conscious and subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Under

[1] Should this Court conclude that it has jurisdiction over this appeal, the government does not oppose plaintiffs' motion to expedite.

strict scrutiny, "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Although the test for strict scrutiny is rigorous, the Supreme Court has cautioned that it should not be interpreted as "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237. And it is well established that "the government is not disqualified from acting in response to" the reality of "the lingering effects of racial discrimination against minority groups." *Id.*

1. The Priority Application Period Serves a Compelling Government Interest.

To survive strict scrutiny, the government must advance a compelling government interest and show a "strong basis in evidence supporting its conclusion that remedial action was necessary." *Associated Gen. Contractors of Ohio, Inc. v. Drabnik*, 214 F.3d 730, 735 (6th Cir. 2000). Congress is not entitled to deference in its ultimate conclusion that race-based relief is necessary, but that "does not mean that Congress is entitled to no deference in its factfinding." *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1321 n.14 (Fed. Cir. 2001). After the government makes its initial showing, the burden shifts to the plaintiff to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *Concrete Works of Colo. v. City and Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003)).

As the district court correctly concluded, Congress "has a compelling interest in remediating past racial discrimination against minority-owned restaurants" and "in

ensuring public relief funds are not perpetuating the legacy of that discrimination." R.24, PageID#204 (citing *Croson*, 488 U.S. at 492; *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000)). The record before the district court demonstrated that Congress had a "strong basis in evidence supporting its conclusion that remedial action was necessary." *Associated Contractors*, 214 F.3d at 735. Far from a mere "generalized assertion of past discrimination," Mot. 15, the evidence before Congress established that the COVID-19 pandemic had crystalized long-existing discriminatory trends into immediate and concrete harms for minority-owned businesses. In particular, Congress reviewed substantial evidence demonstrating both that (1) COVID-19 has had a particularly devastating impact on small businesses owned by minorities and women, and (2) prior, race-neutral COVID relief efforts failed to successfully reach these businesses due to financial disparities rooted in racial discrimination, particularly in the lending industry.

First, Congress had a strong basis in evidence to conclude that underlying racial and social inequities have been exacerbated by the pandemic, and that, as a result, minority-owned businesses have experienced disproportionately severe effects. As Congress noted in enacting the program, "eight out of ten minority-owned businesses are on the brink of closure." H.R. Rep. 117-7, at 2 (2021). During a July 15, 2020 hearing, the Committee on Small Business heard about the particular impact of the COVID-19 pandemic on minority- and women-owned businesses. Witnesses at the hearing also testified about the outsized impact of the pandemic on minority-owned

businesses. One witness discussed the "catastrophic failure of minority-owned small businesses," including estimates that "while 22 percent of small businesses" overall are out of business, "32 percent of Hispanic-owned small businesses and up to 41-percent of Black-owned businesses" are now out of business. *See* 116 Cong. 6 (2020). Witnesses also explained that this discrepancy was due in part to minority business owners' difficulties in accessing capital. One witness emphasized the "[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital," noting that "[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th." *Id.* at 6, 16.

Other testimony supported the conclusion that racial minorities' struggles to access capital and credit are rooted in historic and present-day discrimination. In connection with the February 4, 2021 subcommittee hearing on pandemic relief for small and minority-owned businesses, researchers from the Brookings Institute submitted written testimony addressing "long-standing structural racial disparities in small business ownership and performance." 117th Cong. 60 (Feb. 4, 2021). For example, the Federal Reserve's 2020 Small Business Credit Survey shows that large banks "approve around 67% of loans sought by white small-business owners, 43% of those sought by Latino or Hispanic small-business owners, and just 29% of those sought by Black small-business owners." *Id.* (citing 2020 Small Business Credit Survey, https://www.fedsmallbusiness.org/survey/2020/report-on-employer-firms). The testimony further explained that "[b]ecause the enduring impact of structural

racism compounds over generations, minority entrepreneurs also have less exposure to business ownership within their families, and lower levels of family wealth to draw from as startup capital or collateral." *Id.*

Second, Congress had a strong basis in evidence to conclude that earlier, race-neutral efforts to provide financial support to small businesses during the pandemic "disproportionately failed to reach minority-owned businesses" due at least in part to symptoms "of historical lending discrimination." R.24, PageID#203 19. During the June 17, 2020, Committee on Small Business hearing on PPP loans, the committee heard testimony regarding a number of ways in which structural limitations of the PPP program harmed minority-owned businesses. *See* 116 Cong. 10 (June 17, 2020). One witness explained that certain features of the PPP program ensured that "businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently," and that racial minorities are less likely to have such relationships with lenders due to "pre-existing disparities in access to capital." *Id.* at 59-60. That witness also relied on a study showing that Black and Hispanic individuals "were required to produce more documentation to support their loan application and received less information about fees, and less friendly service when visiting a small business lender," when they applied for loans. *Id.* at 60. That witness implored the Committee to not "allow federal policies and investments to continue the centuries' old practice of excluding people of color." *Id.* at 72.

Furthermore, during a July 2020 hearing, a witness noted that, in many cases, minority-owned businesses struggled to access earlier COVID-19 relief funding, such as PPP loans, "due to the heavy reliance on large banks, with whom they have had historically poor relationships." *See* 116 Cong. 10. Finally, during a February 2021 subcommittee hearing, the Center for Responsible Lending submitted a written statement addressing "overtly discriminatory practices by lenders" and "facially neutral practices with disparate effects" that make it more difficult for minority-owned businesses to access capital than white-owned businesses. 117th Cong. 70.

2. The Priority Period Is Narrowly Tailored to Achieve the Government's Compelling Interest.

Once the government has identified a compelling interest, the court's attention turns to whether "the means chosen to accomplish the [government's] asserted purpose [are] specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 333. But "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," though it does "require serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339.

As an initial matter, Section 5003 does not exist in a vacuum; rather, it was developed in the shadow of a year-long effort to provide relief to small businesses suffering amidst the COVID-19 pandemic. The government had actually attempted to provide aid to restaurants through earlier, race-neutral COVID relief programs, but those programs did not reach minority-owned businesses, due in significant part to

the lingering effects of historical patterns of discrimination. *Supra* 15-16. Thus, Section 5003's priority period is a direct response to the inability of race-neutral alternatives to remedy the problem identified.

The RRF priority period also includes a number of provisions designed to minimize the burden on non-minority restaurant owners. Most importantly, the SBA (and thus Section 5003 of ARPA, which adopts this definition) does not define "socially disadvantaged individuals" in a way that excludes any particular race. Instead, the statute defines that term to include all "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(5). SBA's regulations similarly state that "socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities" where "[t]he social disadvantage ... stem[s] from circumstances beyond their control." 13 C.F.R. §124.103(a).

Those definitions do not categorically exclude any race. And while the SBA regulations (and the RRF application) do include a race-conscious rebuttable *presumption* that certain individuals are socially disadvantaged, 13 C.F.R. §124.103(b)(1), the regulations also expressly contemplate that an individual who is not a member of one of those groups can still be "socially disadvantaged" if he can point to "[a]t least one objective distinguishing feature that has contributed to social disadvantage, such

as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged." *Id.* §124.103(c)(2)(i). Thus, a white male restaurant owner can qualify for the priority period so long as he indicates that he is socially and economically disadvantaged.

The RRF priority period also includes net worth, income, and asset limitations that "ensure that wealthy minorities who have not encountered discriminatory impediments do not receive an unwarranted windfall" through the RRF priority period. *See W. States Paving v. Wash. State DOT*, 407 F.3d 983, 995 (9th Cir. 2005). And the priority period is "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Adarand*, 515 U.S. at 238. The priority period runs for the first twenty-one days of the program, ensuring that women and socially and economically disadvantaged business owners have an opportunity to access available funding; however, after twenty-one days, any business is eligible to receive funding. Thus, this is a short duration program that will not outlast the discriminatory effects it is designed to eliminate.

Plaintiffs nevertheless claim that the priority period is both overinclusive (because it utilizes a rebuttable presumption that several minority groups are socially disadvantaged, Mot. 20-21) and is underinclusive (because it fails to include other minority groups, namely certain Asian-Americans, Mot. 21). As to overinclusivity, the presumption of social disadvantage set forth in SBA regulations is rebuttable, so a

member of one of the specified minority groups who is not actually socially disadvantaged would not qualify for the priority period. 13 C.F.R. §124.103(b)(3). And the priority period is not available to all "socially disadvantaged" business owners, but only those business owners who are also "economically disadvantaged." Nor is the category of "socially and economically disadvantaged" individuals underinclusive. Plaintiffs' sole argument on this point is that the regulations "pick and choose among Asian-Americans," Mot. 21, but that argument misunderstands the definition of "socially disadvantaged," which is not so limited. The regulations also provide that an individual who is not a member of one of the presumptively disadvantaged groups can still be "socially disadvantaged." *Supra* 17-18. And to be considered for the priority group in the RRF application process, an applicant need only self-certify that he is "eligible for priority in awarding grants" by virtue of being "a small business concern at least 51 percent owned and controlled by" one or more women; veteran(s); and/or socially and economically disadvantaged individuals.

3. The Government's Prioritization of Women-Owned Businesses is Constitutional

Section 5003's prioritization of women-owned businesses is likewise constitutional. Classifications based on gender are subject to intermediate scrutiny, meaning that the challenged classification must "serve[] important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 33 (1996) (internal quotation marks omitted).

Section 5003's prioritization of women-owned businesses serves the important governmental objective of assisting with the economic recovery of women-owned businesses, which were "disproportionately affected" by the COVID-19 pandemic for many of the same reasons as minority-owned businesses—namely, "their concentration in personal services firms, lower cash reserves, and less access to credit." July 15, 2020 Memo at 4-5. In enacting this gender preference, Congress did not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Instead, it relied on actual data regarding the impact of the COVID-19 pandemic on women-owned businesses, including evidence that women-owned businesses have "struggled to receive pandemic relief from the Federal government." July 15, 2020 Memo. at 5.

Moreover, plaintiffs offer no meaningful argument that a priority period for women-owned businesses is not "substantially related to the achievement of [that] objective[]." *Virginia*, 518 U.S. at 533. Nor can they because prioritizing women-owned businesses is indisputably related to the goal of remedying the funding gap that has caused women-owned businesses to suffer at disproportionately higher rates during the pandemic.

B. The Remaining Factors Also Preclude an Injunction

Because plaintiffs are not likely to succeed on the merits of their constitutional claim, an injunction will not prevent a violation of their constitutional rights. Moreover, the public interest would be harmed by the requested injunction, which

would delay the disbursement of much-needed funds to struggling restaurants at a critical moment in the COVID-19 recovery. The House Report on ARPA, issued nearly three months ago, explained that "[a]lmost eleven months after shutdown orders and social distancing guidelines were implemented across our country, small businesses are still struggling to stay open … and remain viable." H.R. Rep. No. 117-7, at 457 (2021). Critically, the report stated that "many restaurants may not survive" the COVID-19 pandemic. *Id.* at 457. Delaying this much-needed aid could further threaten the viability of restaurants who are desperately counting on the RRF to stay afloat.

III. ANY INJUNCTIVE RELIEF SHOULD BE TAILORED TO THE INJURY PLAINTIFFS HAVE ALLEGED.

Even if the Court were inclined to grant an injunction pending appeal, Article III requires that injunctive relief "be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Equitable principles likewise require that an injunction be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Whole Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). The injunctive relief that plaintiffs seek flouts these principles. Plaintiffs ask for an injunction "ordering Defendants to cease disbursing funds from [RRF] until this Court or the District Court can rule on a preliminary injunction," Mot. 3, but that remedy bears no relation to the injuries plaintiffs claim. Plaintiffs allege harm from the possibility that they will not be able to obtain the RRF

grant money they requested because the funds might run out before the SBA processes their application. That harm could be fully addressed without depriving other restauranteurs of critically needed funds by requiring SBA to set aside the amount that plaintiffs requested ($104,590.20), and to hold those funds until the termination of this litigation. Indeed, courts have ordered similar relief in other litigation challenging SBA programs with limited funds. *See, e.g.*, *Camelot Banquet Rooms, Inc. v. United States Small Bus. Admin.*, 458 F. Supp. 3d 1044, 1049 (E.D. Wis. 2020) (SBA ordered to "set aside" authority to cover plaintiffs' requested PPP loan).

Plaintiffs give no indication why broader relief is necessary. While plaintiffs refer in passing to "thousands of other similarly situated restaurant owners," Mot. 11, those thousands of individuals are not parties to this case, and plaintiffs have not sought to raise class claims on their behalf. Plaintiffs, thus, fail to "present facts sufficient to show" that they need "the remedy for which [they] ask[]." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974). Plaintiffs' request for overbroad injunctive relief should therefore be denied.

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' appeal for lack of jurisdiction or, in the alternative, deny plaintiffs' motion for injunction pending appeal.

Respectfully submitted,

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MAY 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion uses a proportionately spaced, 14-point font and contains 5,196 words according to the count of this office's word processing system and thus complies with Federal Rules of Appellate Procedure 27(d)(1)(E) and (2)(A) and with Circuit Rule 32(b).

s/ Jack Starcher
JACK STARCHER

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2021, a true and correct copy of the foregoing was filed via the Court's ECF system which will effect service upon all counsel or parties of record

s/ Jack Starcher
JACK STARCHER