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Via CM/ECF

Deborah S. Hunt
Clerk of Court
U.S. Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

Re: Antonio Vitolo, et al. v. Isabella Casillas Guzman, Case No. 21-5517

Dear Ms. Hunt:

Today, the Court requested a response to Document No. 16, in which Defendant-Appellee argues that this case is moot. With respect, not only is this case not moot, Defendant's declaration confirms the urgent need for an injunction. Therefore, the Court should enter an emergency injunction to prevent the continued use of unconstitutional preferences in the disbursement of the Restaurant Revitalization Fund (RRF).

The Small Business Administration (SBA) is still awarding RRF grants with a preference based on race and gender. In his declaration, Mr. Miller makes a critical distinction between "processing" and "awarding" grants. Miller Decl. ¶ 12. According to his declaration, "processing" individual applications takes about 14 days on average. Miller Decl. ¶ 14. Grants are "approved and paid out" *after* processing is complete. Miller Decl. ¶ 15. Once processing starts, applications are paid out after they are processed, based on the individual circumstances of the application (some are simple, some are complicated). Miller Decl. ¶ 15.

SBA admits that during the first 21 days, they "initiated the processing of applications" of priority applicants. Miller Decl. ¶16. So even before the first non-priority application was reviewed on Monday, *all of the priority applications were already in process and moving forward towards payout*.

In effect, Mr. Miller's declaration explains that priority applicants have received a head start, which they continue to enjoy. On the other hand, non-priority applicants lag behind. Mr. Miller says that on Monday, SBA "[began] *processing* all

claims based on the order in which they were received regardless of priority status." Miller Decl. ¶ 18 (emphasis added). Mr. Miller admits that SBA will "no longer consider" race or gender *only* "when *beginning to process* an otherwise eligible claim." Miller Decl. ¶ 18 (emphasis added). But SBA will continue to process and payout priority applications that have already received a race or gender preference. In other words, SBA will continue to allow race and gender to impact the awarding and payment of grants for the foreseeable future.

Importantly, this processing head start will continue to advantage applicants based on race: for example, Mr. Miller explains that about $4 billion has been approved but not yet awarded. Miller Decl. ¶11. Moreover, this unconstitutional head start for priority applicants is likely to swamp the entire fund, as Plaintiffs-Appellants notified the District Court on May 12 that priority applicants had already requested more than $29 billion (which exceeds the size of the RRF). *See* District Court Doc. 15. Defendant-Appellee's new claim of a neutral "processing" criteria is, at this point, merely a fig leaf to cover a grave unconstitutional injury.

In short, this case is not moot. Priority applicants still have an unconstitutional head start in the processing and eventual awarding of RRF grants. This Court can still fully remedy the clear constitutional violation by ordering Defendant to *pay* grant requests in the order that they were received, without regard to race or gender, regardless of how long they take to *process*. This simple order would prevent the awarding and funding of priority applications before earlier-received non-priority applications. No application should be permitted to jump the line based on race and gender, which is what has happened and will continue, until the fund is depleted, if SBA's process continues.

Plaintiffs-Appellants therefore respectfully request an injunction as soon as possible to prevent the continued unconstitutional funding scheme devised by SBA and Congress. For the reasons explained in Plaintiffs' earlier submission, this program constitutes an extraordinarily broad racial preference. That the government has attempted to usher the funds to preferred racial groups out the door as soon as possible does not obviate the constitutional injury. It makes that injury permanent no matter what happens to any remaining funds. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). The clear national constitutional injury makes this a case where, in the absence of review and an injunction, a case could otherwise be evade review and one in which a national injunction is appropriate.

Sincerely,

/s/ Daniel P. Lennington
Daniel P. Lennington
Counsel of Record
Plaintiffs-Appellants