

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

Blessed Cajuns, LLC, et al.,

Plaintiffs,

v.

Isabella Casillas Guzman, et al.,

Defendants.

Case No. 4:21-cv-00677-O

BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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The plaintiffs respectfully move to certify a class under Rule 23(b)(2). The named plaintiffs represent the proposed class in this action, and it consists of “all restaurant owners and restaurants in the United States who are encountering or who will encounter race or sex discrimination from the Small Business Administration on account of section 5003 of the American Rescue Plan Act.”

The common characteristics of these class members is that they are all restaurant owners or restaurants who suffered losses in revenue due to the COVID-19 pandemic and who qualify for relief under the terms of the Restaurant Revitalization Program. *See* Local Rule 23.2(b)(3). The distinguishing characteristics are that the restaurants they own—or the restaurants themselves—are not majority owned by racial or ethnic minorities or women, and because of this their applications for relief under the Restaurant Revitalization Program will not be prioritized by the Small Business Administration. *See id.*

I. THE COURT SHOULD CERTIFY THE PROPOSED CLASS UNDER RULE 23(b)(2)

A party that moves for class certification must satisfy each requirement of Rule 23(a) and at least one subdivision in Rule 23(b). The proposed class meets each of these requirements.

A. The Proposed Class Is So Numerous That Joinder of All Members Is Impractical

The number of restaurant owners who have been or are being discriminated against because of their race, ethnicity, or sex easily exceeds the numerosity threshold. *See In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 426 (3d Cir. 2016) (“[N]umerosity is generally satisfied if there are more than 40 class members.”).

The defendants’ own public statements in a press release demonstrate the numerosity of the proposed class. On May 18, 2021, the Small Business Administration

announced that it has already received 303,000 applications for relief, representing over \$69 billion in requested funds. *See* Exhibit 1; *see also* <https://tinyurl.com/hm3jsf72> (last visited on May 23, 2021) (“Of the overall submitted applications, 57 percent came from women, veterans, and socially and economically disadvantaged business owners.”). Simple math shows that the remaining 43 percent of non-prioritized applications represent approximately *130,290 applicants*—a number that easily clears the numerosity threshold for class certification.

The local rules of this Court require us to provide the “approximate number of class members.” Local Rule 23.2(b)(1). It is difficult, however, to calculate the precise number of restaurant owners who have been discriminated against—particularly when one includes those who never applied because their applications would not have been prioritized. Based on these data, one can confidently estimate that the proposed class members number at least 100,000, but it is difficult to produce a more precise calculation.

B. There Are Questions Of Law Or Fact Common To The Members Of The Class

The Plaintiffs seek to litigate a question of law common to all class members: Is the Small Business Administration violating the Constitution and Title VI of the Civil Rights Act of 1964 by discriminating on account of race and sex in administering the Restaurant Revitalization Fund? *See* Complaint (ECF No. 1) at ¶¶ 19–20, 26.

This question affects all class members because each of them is subject to discrimination, as none of their applications will be “prioritized” for access to funds under the Restaurant Revitalization Fund, and will likely be denied funding entirely based on the limited pool of money appropriated by Congress.

Each class member will “suffer the same injury,” and that is all that needed to satisfy Rule 23(a)(2)’s commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S.

395, 403 (1977)); *see also Wal-Mart*, 564 U.S. at 360 (“[E]ven a single [common] question will do.” (citation and internal quotation marks omitted)); *In re Deepwater Horizon*, 739 F.3d 790, 812 (5th Cir. 2014) (same). And a ruling on these issues “will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 564 U.S. at 350; *see also M.D. v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012).

C. The Plaintiffs’ Claims Are Typical of The Claims of The Class

The plaintiffs’ claims are more than typical: they are precisely the same as the claims belonging all members of the proposed class. The United States Congress and the Biden Administration have implemented a program that actively discriminates against restaurant owners based on their race, ethnicity, and sex. *See* Exhibit 2; *see also* <http://tiny.cc/skyxtz> (last visited on May 23, 2021). The interests of the plaintiffs are aligned with those of the class, as each class member benefits from a ruling that prevents the Small Business Administration from discriminating against them based on these criteria. *See James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001) (“[T]he test for typicality is not demanding. It focuses on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent.” (citations and quotation marks omitted)); *id.* (“[T]he critical inquiry is whether the class representative’s claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.” (citations and quotation marks omitted)); *see also Wal-Mart*, 564 U.S. at 350 n.5 (“[T]he commonality and typicality requirements of Rule 23(a) tend to merge.” (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–58 n.13 (1982))).

D. The Plaintiffs Will Fairly and Adequately Protect the Interests of The Class

The plaintiffs will fairly and adequately represent the interests of their fellow class members, and there are no conflicts of interest between the plaintiffs and the other members of this class.

The class members consist of all restaurant owners and restaurants in the United States who are encountering or who will encounter race or sex discrimination from the Small Business Administration on account of section 5003 of the American Rescue Plan Act. There is no conceivable conflict of interest that could arise from the plaintiffs' efforts to prevent the defendants from discriminating against them on a classwide basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”). A classwide injunction will serve only to protect the constitutional rights of each of the class members, as well as the rights guaranteed under the Civil Rights Act of 1964.

The plaintiffs are appropriate class representatives because they have a vested interest in ensuring the success of this litigation, and preventing the defendants from discriminating against anyone because of their race, ethnicity, or sex. The plaintiffs' attorneys are self-financing this litigation, and the legal issues are straightforward and the case will not be expensive to litigate. *See* Local Rule 23.2(c).

E. The Proposed Class Satisfies Rule 23(b)(2)

The final criterion for class certification under Rule 23(b)(2) is that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Supreme Court has held that this requirement is satisfied “when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart*, 564 U.S. at 360;

see also id. at 361–62 (“[T]he relief sought must perforce affect the entire class at once . . .”). That is precisely what the plaintiffs request: a single injunction that stops the defendants from discriminating against any of the class members on the basis of their race, ethnicity, or sex. No one is seeking individualized relief for any class member or for any subset of the class. *Compare with M.D.*, 675 F.3d at 845 (disapproving class certification under Rule 23(b)(2) when individualized relief was sought). The plaintiffs request a simple, classwide injunction that halts the prioritization of applications and the disbursement of funds because of the applicant’s race, ethnicity, or gender.

In addition, the defendant agencies are “act[ing] . . . on grounds that apply generally to the class.” Fed. R. Civ. P. 23(b)(2). The Restaurant Revitalization Fund has the same prioritization scheme applicable to all applicants. *See* Exhibit 2; *see also* <http://tiny.cc/skyxtz> (last visited on May 23, 2021). Because this prioritization scheme discriminates against all class members, it makes “final injunctive relief or corresponding declaratory relief . . . appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); *see also Wal-Mart*, 564 U.S. at 360 (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.”).

II. CLASS DISCOVERY IS NOT NEEDED

The representative plaintiffs believe that class discovery is unnecessary given that the classes unquestionably satisfy the numerosity requirement of Rule 23(a)(1). *See* Local Rule 23.2(f). The plaintiffs’ attorneys’ fees will be paid on a contingency basis if the action is successful. *See* 42 U.S.C. § 1988(b); Local Rule 23.2(g). The remaining information required by Local Rule 23.2 is inapplicable because certification is sought solely under Rule 23(b)(2) and the representatives are not seeking damages or monetary relief, so notice need not be given to absent class members. *See* Local Rule

23.2(e). In addition, this is not a diversity action, so there is no need to determine a jurisdictional amount. *See* Local Rule 23.2(d).

CONCLUSION

The motion for class certification should be granted.

Respectfully submitted.

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Dated: May 23, 2021

*Counsel for Plaintiffs and
the Proposed Class*

CERTIFICATE OF CONFERENCE

I certify that I e-mailed Christopher D. Dodge, counsel for the defendants, at 8:57 P.M. pacific time on May 23, 2021, to ask his position on the motion, but I had not yet heard back from him at the time we filed.

/s/ Jonathan F. Mitchell
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CERTIFICATE OF SERVICE

I certify that on May 23, 2021, I served this document through CM/ECF upon:

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PRESS RELEASE

Last Call: Administrator Guzman Announces Final Push for Restaurant Revitalization Fund Applications

Qualifying eating establishments should submit applications by the May 24th deadline

May 18, 2021 | Release Number 21-38

Contact U.S. Small Business Administration at Press_Office@sba.gov

WASHINGTON – Administrator Isabella Casillas Guzman announced that eligible eating establishments have until Monday, May 24, 8 p.m. ET, to submit applications to the Restaurant Revitalization Fund.

“If our nation’s food and beverage industry is going to fully recover, we must ensure as many of the hardest-hit businesses get the economic aid they need,” said Administrator Guzman. “We are committed to creating easy to navigate programs and removing barriers that have kept many of our nation’s smallest businesses from accessing these crucial economic lifelines. The SBA will continue to be as entrepreneurial as the small businesses we serve, and we will continue to work as fast as possible to deliver the relief our businesses need so urgently.”





said Tom Bene, President & CEO of the National Restaurant Association. "The funds that have already been distributed will help accelerate the recovery of thousands of restaurants and bring much-needed capital to communities across the country."

The \$28.6 billion Restaurant Revitalization Fund signed into law by President Joe Biden established an initial \$5 billion set-aside established by Congress for applicants with gross receipts not more than \$500,000. To further ensure an equitable distribution of funds, Administrator Guzman created two additional funding allocations to ensure the smallest of the small restaurants and other eating establishments have equitable access: 1) \$500 million for applicants with 2019 gross receipts not more than \$50,000, and 2) \$4 billion for applicants with 2019 gross receipts between \$500,000 and \$1,500,000. In the first two weeks of the RRF program, and after 600 targeted community outreach events in multiple languages, SBA has received from priority groups:

- **12,898 applications** from businesses with not more than \$50,000 in pre-pandemic revenue requesting \$290 million in funds
- **73,671 applications** from businesses with not more than \$500,000 in annual pre-pandemic revenue requesting \$6.1 billion in funds
- **34,010 applications** from businesses with \$500,000 - \$1,500,000 in annual pre-pandemic revenue requesting \$8.4 billion in funds

Designed to ensure the smallest of small eating establishments get the relief needed, set-asides continue a commitment to an equitable distribution of funds to hard-hit communities. Because SBA still has potential set-aside funding available for eligible establishments with 2019 annual revenue of not more than \$50,000, it will keep the application portal open until Monday, May 24, 8 p.m. ET. While all qualified restaurants may submit applications, more than \$220 million of a \$500 million set-aside remains in the Restaurant Revitalization Fund (RRF). Eligible establishments that meet this revenue standard are encouraged to apply through SBA-recognized point-of-sale vendors or directly via the SBA online application portal.

To date, the RRF program has received more than 303,000 applications representing over \$69 billion in requested funds, and nearly 38,000 applicants have been approved for more than \$6 billion. Of the overall submitted applications, 57 percent came from women, veterans, and socially and economically disadvantaged business owners. During the first two weeks of the program, SBA has received applications from:





- More than **71,000** economically and socially disadvantaged individuals

For those interested in applying to the Restaurant Revitalization Fund, visit sba.gov/restaurants.

###

About the U.S. Small Business Administration

The U.S. Small Business Administration makes the American dream of business ownership a reality. As the only go-to resource and voice for small businesses backed by the strength of the federal government, the SBA empowers entrepreneurs and small business owners with the resources and support they need to start and grow their businesses. It delivers services to people through an extensive network of SBA field offices and partnerships with public and private organizations. To learn more, visit www.sba.gov.

Related programs: [Disaster](#), [RRF](#)

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Restaurant Revitalization Fund

This program provides emergency assistance for eligible restaurants, bars, and other qualifying businesses impacted by COVID-19.

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COVID-19 Relief Options

[Paycheck Protection Program](#)

[COVID-19 Economic Injury Disaster Loans](#)

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APPLY NOW

Applications are now open. See [How to apply](#) for more detail.

This application can be filled out in Spanish if your internet browser is set to display in Spanish. To do this, set your browser's language setting (typically found under "Advanced Settings") to Spanish. Most browsers will require a restart to display in that language.

Program details

The American Rescue Plan Act established the Restaurant Revitalization Fund (RRF) to provide funding to help restaurants and other eligible businesses keep their doors open. This program will provide restaurants with funding equal to their pandemic-related revenue loss up to \$10 million per business and no more than \$5 million per physical location. Recipients are not required to repay the funding as long as funds are used for eligible uses no later than March 11, 2023.

[Sign up to receive email alerts from SBA as additional information about the Restaurant Revitalization Fund becomes available.](#)

Supplemental documents

- [Restaurant Revitalization Fund program guide](#)
- [Restaurant Revitalization Fund sample application](#) (SBA Form 3172)

Get help with your application

Federal guidelines require that we provide the same amount of information to each applicant. Therefore, SBA staff are limited on responses we can provide to applicants, including specific questions regarding RRF eligibility, potential award amount, and other detailed information. Some key information to know:

- For detailed information about how to calculate your award amount, please consult page 7-9 of the [RRF program guide](#).
- The IRS 4506T form is signed with your application during the e-sign process. You do not need to submit an additional 4506T.
- If you are entering a state in the address section(s) use the abbreviation in capital letters (e.g., PA, TX, ME, WA, etc.).

For assistance preparing your application, you can access the following:

- [RRF knowledge base support documentation](#)
- [Application portal screenshots](#)
- Call center support: 844-279-8898

You can also watch a previously recorded webinar training to help you prepare:

- [Webinar: Special briefing on RRF with SBA and Public Private Strategies Institute](#)
- [Webinar: Learn how to apply for RRF](#)

For assistance with your submitted application:

- Submit a message using the application platform inbox (preferred)
- Call center support: 844-279-8898

Who can apply

Eligible entities who have experienced pandemic-related revenue loss include:

Restaurants

- Food stands, food trucks, food carts
- Caterers
- Bars, saloons, lounges, taverns
- Snack and nonalcoholic beverage bars
- Bakeries (onsite sales to the public comprise at least 33% of gross receipts)
- Brewpubs, tasting rooms, taprooms (onsite sales to the public comprise at least 33% of gross receipts)
- Breweries and/or microbreweries (onsite sales to the public comprise at least 33% of gross receipts)
- Wineries and distilleries (onsite sales to the public comprise at least 33% of gross receipts)
- Inns (onsite sales of food and beverage to the public comprise at least 33% of gross receipts)
- Licensed facilities or premises of a beverage alcohol producer where the public may taste, sample, or purchase products

[Cross-program eligibility on SBA COVID-19 relief options](#)

How to apply

You can apply through SBA-recognized Point of Sale (POS) vendors or directly via SBA in a forthcoming online application portal:

<https://restaurants.sba.gov>. Participating POS providers include Square, Toast, Clover, NCR Corporation (Aloha), and Oracle. If you are working with Square or Toast, you do not need to register beforehand on the <https://restaurants.sba.gov> application portal.

Registration with SAM.gov is not required. DUNS or CAGE identifiers are also not required.

If you would like to prepare your application, view the sample application form. You will be able to complete this form online. Please do not submit RRF forms to SBA at this time.

[SBA Form 3172](#)

Additional documentation required:

- Verification for Tax Information: IRS Form 4506-T, completed

and signed by Applicant. Completion of this form digitally on the SBA platform will satisfy this requirement.

- Gross Receipts Documentation: Any of the following documents demonstrating gross receipts and, if applicable, eligible expenses
 - Business tax returns (IRS Form 1120 or IRS 1120-S)
 - IRS Forms 1040 Schedule C; IRS Forms 1040 Schedule F
 - For a partnership: partnership's IRS Form 1065 (including K-1s)
 - Bank statements
 - Externally or internally prepared financial statements such as Income Statements or Profit and Loss Statements
 - Point of sale report(s), including IRS Form 1099-K

For applicants that are a brewpub, tasting room, taproom, brewery, winery, distillery, or bakery:

- Documents evidencing that onsite sales to the public comprise at least 33.00% of gross receipts for 2019, which may include Tax and Trade Bureau (TTB) Forms 5130.9 or TTB. For businesses who opened in 2020, the Applicant's original business model should have contemplated at least 33.00% of gross receipts in onsite sales to the public.

For applicants that are an inn:

- Documents evidencing that onsite sales of food and beverage to the public comprise at least 33.00% of gross receipts for 2019. For businesses who opened in 2020, the Applicant's original business model should have contemplated at least 33.00% of gross receipts in onsite sales to the public.

When to apply

Applications are now open.

Priority period	SBA will accept applications from all eligible applicants, but only process and fund priority group applications. See "Priority groups"
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Days 1 through 21

During this period, SBA will fund applications where 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 “Set asides” below.

Open to all applicants

SBA will accept applications from all eligible applicants and process applications in the order in which they are approved by SBA.

Days 22 through funds exhaustion

Priority groups

- A small business concern that is at least 51 percent owned by one or more individuals who are:
 - Women, or
 - Veterans, or
 - Socially and economically disadvantaged (see below).
- Applicants must self-certify on the application that they meet eligibility requirements
- **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.
- **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.

Set asides

1. \$5 billion is set aside for applicants with 2019 gross receipts of not more than \$500,000
2. An additional \$4 billion is set-aside for applicants with 2019 gross receipts from \$500,001 to \$1,500,000
3. An additional \$500 million is set-aside for applicants with 2019 gross receipts of not more than \$50,000

*SBA reserves the right to reallocate these funds at the discretion of the Administrator.

Funding amount

Payment calculations

For detailed information about how to calculate your award amount, please consult page 7-9 of the [RRF program guide](#).

Calculation 1: for applicants in operation prior to or on January 1, 2019:

- 2019 gross receipts minus 2020 gross receipts minus PPP loan amounts

Calculation 2: for applicants that began operations partially through 2019:

- (Average 2019 monthly gross receipts x 12) minus 2020 gross receipts minus PPP loan amounts

Calculation 3: for applicants that began operations on or between January 1, 2020 and March 10, 2021 and applicants not yet opened but have incurred eligible expenses:

- Amount spent on eligible expenses between February 15, 2020 and March 11, 2021 minus 2020 gross receipts minus 2021 gross receipts (through March 11, 2021) minus PPP loan amounts

For those entities who began operations partially through 2019, you may elect (at your own discretion) to use either calculation 2 or calculation 3.

Maximum and minimum amounts

SBA may provide funding up to \$5 million per location, not to exceed \$10 million total for the applicant and any affiliated businesses. The minimum award is \$1,000.

Gross receipts

For the purposes of this program, gross receipts does not include:

- Amounts received from Paycheck Protection Program (PPP) loans (First Draw or Second Draw)
- Amounts received from Economic Injury Disaster Loans (EIDL)
- Advances on EIDL (EIDL Advance and Targeted EIDL Advance)
- State and local grants (via CARES Act or otherwise)
- SBA Section 1112 payments

Allowable use of funds

Funds may be used for specific expenses including:

- Business payroll costs (including sick leave)
- Payments on any business mortgage obligation
- Business rent payments (note: this does not include prepayment of rent)
- Business debt service (both principal and interest; note: this does not include any prepayment of principal or interest)
- Business utility payments
- Business maintenance expenses
- Construction of outdoor seating
- Business supplies (including protective equipment and cleaning materials)
- Business food and beverage expenses (including raw materials)
- Covered supplier costs
- Business operating expenses

What to expect after you have applied

- As outlined by Congress, SBA will review applications from priority applications groups first. Applicants who have submitted non-priority applications will remain in "Review" status while priority applications are processed during the first 21 days. We do not anticipate communicating with applicants in "Review" status during this period.
- Following a successful application submission, all applications will enter "IRS verification" status. This process may take up to seven days and allows the SBA to validate your application submission.

Information about RRF in other languages

RRF applications must be submitted in English or Spanish. We provide documents in additional languages to help you understand eligibility requirements, fill out applications, and answer frequently asked questions.

Español	العربية	中文简体	中文繁體	Français	Deu
ગુજરાતી	Kreyòl Ayisyen	हिन्दी भाषा	Italiano	日本語	한국
Polski	Português	русский	Tagalog	Tiếng Việt	ไทย
ইউ	Soomaali	Kiswahili	Lea Fakatonga	Fosun Chuuk	Kaji Maji

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U.S. Small Business Administration | 409 3rd St, SW.
Washington DC 20416

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

Blessed Cajuns, LLC, et al.,
Plaintiffs,

v.

Isabella Casillas Guzman, et al.,
Defendants.

Case No. 4:21-cv-00677-O

**[PROPOSED] ORDER GRANTING
MOTION FOR CLASS CERTIFICATION**

The plaintiffs' motion for class certification is granted.

The Court certifies the following class under Rule 23(b)(2) of the Federal Rules of Civil Procedure:

All restaurant owners and restaurants in the United States who are encountering or who will encounter race or sex discrimination from the Small Business Administration on account of section 5003 of the American Rescue Plan Act.

Blessed Cajuns, LLC, Janice Smith, Jason Smith, PSBH LLC, and Eric Nyman are appointed class representatives. Jonathan F. Mitchell, Gene P. Hamilton, Robert Henneke, Charles W. Fillmore, and H. Dustin Fillmore are appointed class counsel under FRCP 23(g). The class claim is:

Whether the Small Business Administration violated the Constitution and Title VI of the Civil Rights Act of 1964 when it discriminates on account of race and sex in administering the Restaurant Revitalization Fund.

Dated: _____, 2021

REED O'CONNOR
UNITED STATES DISTRICT JUDGE