

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

**PLAINTIFFS' MOTION FOR LEAVE TO FILE  
SECOND AMENDED COMPLAINT**

The plaintiffs respectfully ask for leave to file a second amended complaint. The second amended complaint will seek damages under *Bivens* on behalf of restaurateurs who applied for relief shortly after the Restaurant Revitalization Fund opened for applications on May 3, 2021, but who never obtained funds on account of the unconstitutional race and sex preferences established in section 5003 of the American Rescue Plan Act. It will also seek declaratory relief and a permanent injunction to prevent the defendants from clawing back money awarded to the plaintiffs in violation of the statutory command of section 5003.

Rule 15(b) allows a party to seek leave to amend “at any time, even after judgment . . . to conform [the pleadings] to the evidence and to raise an unpleaded issue.” Fed. R. Civ. P. 15(b). And a court “should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). Leave to amend is appropriate and consistent with justice because the circumstances of this case have changed now that the Restaurant Revitalization Fund is fully depleted, and the plaintiffs must alter their requested relief to reflect this fact. Leave to amend is appropriate and consistent with justice for

the additional reason that the plaintiffs that will be added the case have no other remedy to pursue now that the funds have been spent.

We have attached a clean copy of our proposed second amended complaint, as well as a redlined version that shows all the proposed changes.

### CONCLUSION

The plaintiffs' motion for leave to file a second amended complaint should be granted.

Respectfully submitted.

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Dated: July 30, 2021

*Counsel for Plaintiffs and  
the Proposed Class*

### CERTIFICATE OF CONFERENCE

I certify that I have conferred with Christopher D. Dodge, counsel for the defendants, and he informed me that the defendants oppose this motion.

/s/ Jonathan F. Mitchell  
JONATHAN F. MITCHELL  
*Counsel for Plaintiffs and  
the Proposed Class*

### CERTIFICATE OF SERVICE

I certify that on July 30, 2021, I served this document through CM/ECF upon:

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*Counsel for Defendants*

/s/ Jonathan F. Mitchell  
JONATHAN F. MITCHELL  
*Counsel for Plaintiffs and  
the Proposed Class*

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

**Blessed Cajuns LLC; Janice Smith;  
Jason Smith; PSBH LLC; Eric  
Nyman; Lynds Inn, LLC; Andrew  
Lynds; Heather Brown; OCF Cafe  
LLC; Ori Feibush; GBB Hospitality  
Group LLC; GBB Services LLC;  
Jimmy Loup; 7th Avenue Property  
Management Inc.; Eric Schiller,**

Plaintiffs,

v.

**Isabella Casillas Guzman, in her  
individual capacity and in her official  
capacity as administrator of the Small  
Business Administration; United States  
Small Business Administration,**

Defendants.

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

**PLAINTIFFS' SECOND AMENDED COMPLAINT**

Section 5003 of the American Rescue Plan Act appropriated \$28.6 billion to create the Restaurant Revitalization Fund, which is administered by the Small Business Administration. This fund provided relief for restaurants harmed by the COVID-19 pandemic, but the statute required Administrator Guzman to give discriminatory preferences to restaurants owned by women and racial minorities. The statute provides that during the first 21 days of this program, which started on May 3, 2021, the administrator of the SBA must “prioritize awarding grants” to businesses owned by women and racial minorities. *See* American Rescue Plan Act § 5003(c)(3)(A) (attached as Exhibit 1).

These race and sex preferences are patently unconstitutional, and this Court moved quickly to enjoin their enforcement with respect to the original named plaintiffs in this litigation. *See* Order of May 28, 2021, ECF No. 18. In response to this Court’s preliminary-injunction order of May 28, 2021, the defendants represented to this Court that they would cease processing all “priority” applications until the Small Business Administration “completes processing all previously filed non-priority applications, and only then if the RRF is not first exhausted.” Supplemental Declaration of John A. Miller, ECF No. 28-1 at ¶ 8.

On June 30, 2021, the Small Business Administration announced that it was closing the Restaurant Revitalization Fund because the \$28.6 billion that had been allocated to the Fund was exhausted. *See* Exhibit 4. At no point prior to this point did the Small Business Administration publish a list of which businesses had received relief, when those business applied, and when they were funded.<sup>1</sup>

Most of the plaintiffs in this case had their applications approved and received payments from the Fund after this Court issued its preliminary injunction but before the Fund closed. But plaintiff GBB Hospitality Group LLC and its owner, Jimmy Loup, never had their application approved—even though Mr. Loup submitted the application within the first few minutes after the Fund began accepting applications on May 3, 2021. Plaintiff 7th Avenue Property Management Inc. and its owner, Eric Schiller, likewise never had their application approved, even though Mr. Schiller submitted his application on May 5, 2021.

The application submitted by GBB Hospitality Group LLC and Mr. Loup, as well as the application submitted by 7th Avenue Property Management Inc. and Mr.

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1. As described below, the Small Business Administration subsequently responded to a Freedom of Information Act request with a list of all business that received awards, the award amount, and the approval date. *See* Small Business Administration, *Restaurant Revitalization Fund (RRF) FOIA*, <https://bit.ly/3y6Xblt> (last visited July 30, 2021).

Schiller, would have been approved if Administrator Guzman had not deployed the patently unconstitutional use of race and sex preferences that the plaintiffs sued to enjoin. GBB Hospitality Group LLC and Mr. Loup and 7th Avenue Property Management Inc. and Mr. Schiller therefore seek damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to compensate them for this denial of their constitutional rights.

### **JURISDICTION AND VENUE**

1. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.
2. Venue is proper because a substantial part of the events giving rise to the claims occurred in this judicial district. *See* 28 U.S.C. § 1391(b)(2).

### **PARTIES**

3. Plaintiff Blessed Cajuns LLC is a limited liability company incorporated under the laws of Texas, operating under the name “The Lost Cajun Keller.” It operates in Keller, Texas.
4. Plaintiff Jason Smith is co-owner of Blessed Cajuns LLC. He resides in Fort Worth, Texas.
5. Plaintiff Janice Smith is co-owner of Blessed Cajuns LLC. She resides in Fort Worth, Texas.
6. Plaintiff PSBH LLC is a limited liability company incorporated under the laws of Pennsylvania, operating under the name “Penn Hotel Sports & Raw Bar.” It operates in Camp Hill, Pennsylvania.
7. Plaintiff Eric Nyman owns PSBH LLC.
8. Plaintiff Lynds Inn LLC is a limited liability company incorporated under the laws of Vermont. It operates in Waitsfield, Vermont.

9. Plaintiff Andrew Lynds is a co-owner of Lynds Inn LLC. He resides in Waitsfield, Vermont.

10. Plaintiff Heather Brown is a co-owner of Lynds Inn LLC. She resides in Lee County, Florida.

11. Plaintiff OCF Cafe LLC is a limited liability company incorporated under the laws of Pennsylvania.

12. Plaintiff Ori Feibush is the owner of OCF Cafe LLC. He resides in Philadelphia County, Pennsylvania.

13. Plaintiff GBB Hospitality Group LLC is a limited liability company incorporated under the laws of Texas, doing business under the name “Grub Burger Bar.”

14. Plaintiff GBB Services LLC is a pass-through payroll company owned by GBB Hospitality Group LLC.

15. Plaintiff Jimmy Loup is the owner, founder and CEO of Grub Burger Bar. He resides in Brazos County, Texas.

16. Plaintiff 7th Avenue Property Management Inc. is an S-corporation incorporated under the laws of Florida, doing business under the name “Gaspars Grotto.”

17. Plaintiff Eric Schiller is a co-owner of 7th Avenue Property Management Inc. He resides in Hillsborough County, Florida.

18. Defendant Isabella Casillas Guzman is administrator of the Small Business Administration. Administrator Guzman is sued in her official capacity.

19. Defendant United States Small Business Administration is an agency of the United States government.

### **STATEMENT OF FACTS**

20. Section 5003 of the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), provides aid to restaurants that have been harmed by the COVID-19



pandemic. It appropriates \$28.6 billion to create the Restaurant Revitalization Fund, which will be administered by the Small Business Administration.

21. Section 5003 provides that during the first 21 days of this program, which started on May 3, 2021, the administrator of the SBA must “prioritize awarding grants” to businesses owned by women and racial minorities. *See* American Rescue Plan Act § 5003(c)(3)(A) (attached as Exhibit 1).

22. Plaintiffs Jason and Janice Smith own the Lost Cajun Keller. They submitted an application for relief under the Restaurant Revitalization Fund on May 5, 2021. Their application indicated that they were eligible for up to \$187,753.17 worth of relief.

23. Plaintiff Eric Nyman owns the Penn Hotel Sports & Raw Bar. He submitted an application for relief under the Restaurant Revitalization Fund on May 3, 2021. His application indicated that he was eligible for up to \$640,424.65 worth of relief.

24. Plaintiffs Andrew Lynds and Heather Brown own the Lynds Inn LLC. They have submitted an application for relief under the Restaurant Revitalization Fund. Their application indicated that they were eligible for up to \$630,082 worth of relief.

25. Plaintiff Ori Feibush owns OCF Cafe LLC. He submitted an application for relief under the Restaurant Revitalization Fund on May 3, 2021. His application indicated that he was eligible for up to \$946,497.62 worth of relief.

26. Plaintiff Jimmy Loup owns GBB Hospitality Group LLC. He submitted an application for relief under the Restaurant Revitalization Fund on May 3, 2021. His application indicated that he was eligible for up to \$6,709,795.00 in relief.

27. Plaintiff Eric Schiller owns 7th Avenue Property Management Inc. He submitted an application for relief under the Restaurant Revitalization Fund on May 5, 2021. His application indicated that he was eligible for up to \$1,489,118.86 in relief.

28. None of the plaintiffs qualify as a “socially disadvantaged individual” or “economically disadvantaged individual” under the SBA’s regulations. *See* 13 C.F.R.

§§ 124.103, .104. They were therefore subjected to unconstitutional race and sex discrimination by the “priorities” that the statute commands for minority- and women-owned businesses.

29. On May 23, 2021, plaintiffs Blessed Cajuns LLC, Janice Smith, Jason Smith, PSBH LLC, and Eric Nyman filed suit to stop the defendants from prioritizing applications according to race and to enforce a first-come-first-served system that removes any advantage that applicants may have received from the 21-day “priority” window. That same day, the plaintiffs moved for class certification and a preliminary injunction.

30. On May 28, 2021, this Court granted the plaintiffs’ application for a preliminary injunction. The Court limited its relief to plaintiffs Blessed Cajuns LLC, Janice Smith, Jason Smith, PSBH LLC, and Eric Nyman—the only named plaintiffs in the case at that time—as the proposed class had not yet been certified. The Court ordered the defendants to process the named plaintiffs’ applications “as if the SBA had initiated processing of those applications at the time the applications were filed.” Order (ECF No. 18) at 11. It also enjoined the defendants from processing or considering any Restaurant Revitalization Fund application filed later in time than the named plaintiffs’ applications “until their applications have been processed and considered in accordance with a race-neutral, sex-neutral ‘first come, first served’ policy.” *Id.*

31. The defendants responded to this order by quickly processing those plaintiffs’ applications and disbursing the funds into their bank accounts. *See* Defendants’ Response to Order of May 29, 2021 (ECF No. 19).

32. The defendants represented to the Court that the Small Business Administration had made changes *sua sponte* to begin processing other non-priority applications, including applications from the plaintiffs who subsequently joined this lawsuit, and had stopped processing priority applications. *Id.* During the hearing of June 3,

2021, the defendants' counsel acknowledged that these changes were contrary to the requirements of § 5003(c)(3)(A) and had been made by the Small Business Administration without following the rulemaking requirements of the Administrative Procedure Act.

33. To ensure that the funds awarded to the plaintiffs are not clawed back by the defendants following the expiration of this suit, the plaintiffs require a permanent injunction to enforce their awards from the Restaurant Revitalization Fund as lawfully granted.

34. On June 30, 2021, the Small Business Administration announced that it was closing the Restaurant Revitalization Fund because the \$28.6 billion that had been allocated to the Fund was exhausted. *See* Exhibit 4.

35. Yet Mr. Loup's application was never approved before the Fund was depleted on June 30, 2021—even though Mr. Loup applied within minutes after the Fund opened for applications on May 3, 2021. The portal for the Restaurant Revitalization Fund was supposed to open at 11:00 A.M. central time on May 3, 2021, but it actually opened at 10:04 A.M. central on May 3, 2021, and Mr. Loup had his application submitted by 10:26 A.M. that day. *See* Exhibit 2.

36. In like manner, Mr. Schiller's application was never approved before the Fund was depleted on June 30, 2021—even though Mr. Schiller applied only two days after the Fund opened for applications on May 3, 2021.

37. According to the Small Business Administration's data, and despite the adjustments made in response to the injunction issued by this Court, only 6,758 of the 101,006 grants (6.7%) went to business owners who were not members of the "priority" demographic groups. 34% of the grants went to businesses owned by socioeconomically disadvantaged persons, almost 44% went to women-owned businesses, and 5.7% were distributed to businesses owned by veterans.

38. Indeed, although the Small Business Administration did not proactively provide granular details about the operation of the program—that is, who received what and when—the Small Business Administration did release data in response to a Freedom of Information Act (FOIA) request that display the results of the defendants’ discriminatory actions in awarding grants based on the constitutionally forbidden grounds of race and gender. *See* Small Business Administration, *Restaurant Revitalization Fund (RRF) FOIA*, <https://bit.ly/3rB0bnG> (last visited July 22, 2021).

39. Sorting by date of award in the spreadsheet that the Defendants released through FOIA appears to show that, prior to this Court’s injunction on May 28, 2021, and the United States Court of Appeals for the Sixth Circuit’s decision of May 27, 2021, in *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), the defendants had not approved a single non-priority application. *See* Small Business Administration, *Restaurant Revitalization Fund (RRF) FOIA*, <https://bit.ly/3rB0bnG> (last visited July 22, 2021) (sorting by “Approval Date” in Column B and comparing the approval date with the priority categories in columns V–X). But during this period, and beginning a mere four days after the application period opened, the defendants approved tens of thousands of applications for individuals based on their self-identification as a socially and economically disadvantaged business, or a women-owned business. *Id.* Unfortunately, the data produced by the Defendants do not indicate *when* each of the listed businesses applied for relief.

### CLAIM FOR RELIEF

40. The Constitution prohibits the federal government from discriminating on account of race or ethnicity. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). The Constitution likewise prohibits the federal government from engaging in sex discrimination absent an “exceedingly persuasive justification.” *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

41. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the grounds of race, color, or national origin in any program that receives federal funds. *See* 42 U.S.C. § 2000d.

42. The Small Business Administration violated Mr. Loup and Mr. Schiller's rights and the rights of their companies under the Constitution and Title VI by discriminating on account of race and sex in administering the Restaurant Revitalization Fund.

43. The Small Business Administration's unconstitutional race and sex preferences are the but-for cause of Mr. Loup and Mr. Schiller's failure to obtain relief from the Restaurant Revitalization Fund.

44. The Court should therefore award Mr. Loup, GBB Hospitality Group LLC, and GBB Services LLC damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in an amount equal to what they would have received had their application been considered in a colorblind and sex-neutral process. *See Davis v. Passman*, 442 U.S. 228, 243–44 (1979). The Court should award similar relief to Mr. Schiller and 7th Avenue Property Management Inc.

45. The Court should also enter a declaration that the discriminatory provisions of Section 5003 of the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), are unconstitutional, and a permanent injunction prohibiting the defendants from recovering Restaurant Revitalization Funds disbursed to the plaintiffs contrary to the purported statutory requirements of section 5003(c)(3)(A).

#### **DEMAND FOR RELIEF**

46. The plaintiffs respectfully requests that the court:

- a. declare section 5003(c)(3)(A) of the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), unconstitutional because it

requires discrimination on account of race and sex in awarding funds under the Restaurant Revitalization Fund;

- b. declare that the Small Business Administration and Administrator Guzman violated the constitutional rights of Mr. Loup, GBB Hospitality Group LLC, and GBB Services LLC damages, as well as Mr. Schiller and 7th Avenue Property Management Inc., by discriminating on account of race and sex in administering the Restaurant Revitalization Fund;
- c. award Mr. Loup, GBB Hospitality Group LLC, and GBB Services LLC damages against Administrator Guzman in her individual capacity;
- d. award Mr. Schiller and 7th Avenue Property Management Inc. damages against Administrator Guzman in her individual capacity;
- e. enter a permanent injunction enjoining the defendants from recovering Restaurant Revitalization Funds disbursed to plaintiffs contrary to the purported statutory requirements of section 5003(c)(3)(A);
- f. award costs and attorneys' fees under 42 U.S.C. § 1988;
- g. award all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

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\* admitted *pro hac vice*

Dated: July 30, 2021

*Counsel for Plaintiffs and  
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**CERTIFICATE OF SERVICE**

I certify that on July 30, 2021, I served this document through CM/ECF upon:

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PLAINTIFFS' SECOND AMENDED COMPLAINT

Section 5003 of the American Rescue Plan Act appropriated \$28.6 billion to create the Restaurant Revitalization Fund, which is administered by the Small Business Administration. This fund provided relief for restaurants harmed by the COVID-19 pandemic, but the statute required Administrator Guzman to give discriminatory preferences to restaurants owned by women and racial minorities. The statute provides that during the first 21 days of this program, which started on May 3, 2021, the administrator of the SBA must "prioritize awarding grants" to businesses owned by women and racial minorities. See American Rescue Plan Act § 5003(c)(3)(A) (attached as Exhibit 1).

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Deleted: The Supreme Court of the United States said 125 years ago that: ¶  
[T]he constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race. All citizens are equal before the law. The guaranties of life, liberty, and property are for all persons, within the jurisdiction of the United States, or of any state, without discrimination against any because of their race. Those guaranties, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the nation and of the state, without reference to considerations based upon race. ¶  
*Gibson v. State of Mississippi*, 162 U.S. 565, 591 (1896); see also *Bolling v. Sharpe*, 347 U.S. 497 (1954) (citing *Gibson* and holding that segregation in the District of Columbia public schools violated the Due Process Clause of the Fifth Amendment). ¶

Equal rights under law is the cornerstone of American constitutional jurisprudence: the principle that all citizens, regardless of status, wealth, race, color, religion, or creed, have the same rights and are entitled to the same standard of justice. These are the principles etched into our founding documents, fought for on our nation's battlefields, written into the Gettysburg Address, and delivered from the steps of the Lincoln Memorial by Martin Luther King. ¶

As a nation, we are devoted to the task of satisfying these sacred ideals and providing equal rights to citizens of all races, as the Constitution requires. Profound progress has been made, and extraordinary milestones reached, throughout our history, serving as an inspiration to humanity and the nations of the world. Yet, today, the Small Business Administration lurches America dangerously backward, reversing the clock on American progress, and violating our most sacred and revered principles by ... [1]

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These race and sex preferences are patently unconstitutional, and this Court moved quickly to enjoin their enforcement with respect to the original named plaintiffs in this litigation. See Order of May 28, 2021, ECF No. 18. In response to this Court’s preliminary-injunction order of May 28, 2021, the defendants represented to this Court that they would cease processing all “priority” applications until the Small Business Administration “completes processing all previously filed non-priority applications, and only then if the RRF is not first exhausted.” Supplemental Declaration of John A. Miller, ECF No. 28-1 at ¶ 8.

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On June 30, 2021, the Small Business Administration announced that it was closing the Restaurant Revitalization Fund because the \$28.6 billion that had been allocated to the Fund was exhausted. See Exhibit 4. At no point prior to this point did the Small Business Administration publish a list of which businesses had received relief, when those business applied, and when they were funded.<sup>1</sup>

Deleted: should promptly enjoin their enforcement. Doing so will promote equal rights under the law for all American citizens and promote efforts to stop racial discrimination, because “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., concurring). ...

Most of the plaintiffs in this case had their applications approved and received payments from the Fund after this Court issued its preliminary injunction but before the Fund closed. But plaintiff GBB Hospitality Group LLC and its owner, Jimmy Loup, never had their application approved—even though Mr. Loup submitted the application within the first few minutes after the Fund began accepting applications on May 3, 2021. Plaintiff 7th Avenue Property Management Inc. and its owner, Eric Schiller, likewise never had their application approved, even though Mr. Schiller submitted his application on May 5, 2021.

The application submitted by GBB Hospitality Group LLC and Mr. Loup, as well as the application submitted by 7th Avenue Property Management Inc. and Mr.

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### JURISDICTION AND VENUE

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### PARTIES

3. Plaintiff Blessed Cajuns LLC is a limited liability company incorporated under the laws of Texas, operating under the name “The Lost Cajun Keller.” It operates in Keller, Texas.
4. Plaintiff Jason Smith is co-owner of Blessed Cajuns LLC. He resides in Fort Worth, Texas.
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pandemic. It appropriates \$28.6 billion to create the Restaurant Revitalization Fund, which will be administered by the Small Business Administration.

21. Section 5003 provides that during the first 21 days of this program, which started on May 3, 2021, the administrator of the SBA must “prioritize awarding grants” to businesses owned by women and racial minorities. *See* American Rescue Plan Act § 5003(c)(3)(A) (attached as Exhibit 1).

22. Plaintiffs Jason and Janice Smith own the Lost Cajun Keller. They submitted an application for relief under the Restaurant Revitalization Fund on May 5, 2021. Their application indicated that they were eligible for up to \$187,753.17 worth of relief.

23. Plaintiff Eric Nyman owns the Penn Hotel Sports & Raw Bar. He submitted an application for relief under the Restaurant Revitalization Fund on May 3, 2021. His application indicated that he was eligible for up to \$640,424.65 worth of relief.

24. Plaintiffs Andrew Lynds and Heather Brown own the Lynds Inn LLC. They have submitted an application for relief under the Restaurant Revitalization Fund. Their application indicated that they were eligible for up to \$630,082 worth of relief.

25. Plaintiff Ori Feibush owns OCF Cafe LLC. He submitted an application for relief under the Restaurant Revitalization Fund on May 3, 2021. His application indicated that he was eligible for up to \$946,497.62 worth of relief.

26. Plaintiff Jimmy Loup owns GBB Hospitality Group LLC. He submitted an application for relief under the Restaurant Revitalization Fund on May 3, 2021. His application indicated that he was eligible for up to \$6,709,795.00 in relief.

27. Plaintiff Eric Schiller owns 7th Avenue Property Management Inc. He submitted an application for relief under the Restaurant Revitalization Fund on May 5, 2021. His application indicated that he was eligible for up to \$1,489,118.86 in relief.

28. None of the plaintiffs qualify as a “socially disadvantaged individual” or “economically disadvantaged individual” under the SBA’s regulations. *See* 13 C.F.R.

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§§ 124.103, .104. They were therefore subjected to unconstitutional race and sex discrimination by the “priorities” that the statute commands for minority- and women-owned businesses.

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29. On May 23, 2021, plaintiffs Blessed Cajuns LLC, Janice Smith, Jason Smith, PSBH LLC, and Eric Nyman filed suit to stop the defendants from prioritizing applications according to race and to enforce a first-come-first-served system that removes any advantage that applicants may have received from the 21-day “priority” window. That same day, the plaintiffs moved for class certification and a preliminary injunction.

Deleted: <#>On May 18, 2021, the Small Business Administration issued a press release announcing that it has already received 303,000 applications for relief, representing over \$69 billion in requested funds. See Exhibit 2. And so far, “nearly 38,000 applicants have been approved for more than \$6 billion.” *Id.* “Of the overall submitted applications, 57 percent came from women, veterans, and socially and economically disadvantaged business owners.” *Id.* ¶

This raises the possibility that the entire \$28.6 billion that Congress allocated to the Restaurant Revitalization Fund will be depleted before any white applicants can even be considered for relief under the program. ¶

30. On May 28, 2021, this Court granted the plaintiffs’ application for a preliminary injunction. The Court limited its relief to plaintiffs Blessed Cajuns LLC, Janice Smith, Jason Smith, PSBH LLC, and Eric Nyman—the only named plaintiffs in the case at that time—as the proposed class had not yet been certified. The Court ordered the defendants to process the named plaintiffs’ applications “as if the SBA had initiated processing of those applications at the time the applications were filed.” Order (ECF No. 18) at 11. It also enjoined the defendants from processing or considering any Restaurant Revitalization Fund application filed later in time than the named plaintiffs’ applications “until their applications have been processed and considered in accordance with a race-neutral, sex-neutral ‘first come, first served’ policy.” *Id.*

31. The defendants responded to this order by quickly processing those plaintiffs’ applications and disbursing the funds into their bank accounts. See Defendants’ Response to Order of May 29, 2021 (ECF No. 19).

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Deleted: The defendants contend that these actions have mooted the plaintiffs’ requests for classwide relief. See *id.* ¶

32. The defendants represented to the Court that the Small Business Administration had made changes *sua sponte* to begin processing other non-priority applications, including applications from the plaintiffs who subsequently joined this lawsuit, and had stopped processing priority applications. *Id.* During the hearing of June 3,

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2021, the defendants' counsel acknowledged that these changes were contrary to the requirements of § 5003(c)(3)(A) and had been made by the Small Business Administration without following the rulemaking requirements of the Administrative Procedure Act.

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33. To ensure that the funds awarded to the plaintiffs are not clawed back by the defendants following the expiration of this suit, the plaintiffs require a permanent injunction to enforce their awards from the Restaurant Revitalization Fund as lawfully granted.

34. On June 30, 2021, the Small Business Administration announced that it was closing the Restaurant Revitalization Fund because the \$28.6 billion that had been allocated to the Fund was exhausted. See Exhibit 4.

35. Yet Mr. Loup's application was never approved before the Fund was depleted on June 30, 2021—even though Mr. Loup applied within minutes after the Fund opened for applications on May 3, 2021. The portal for the Restaurant Revitalization Fund was supposed to open at 11:00 A.M. central time on May 3, 2021, but it actually opened at 10:04 A.M. central on May 3, 2021, and Mr. Loup had his application submitted by 10:26 A.M. that day. See Exhibit 2.

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36. In like manner, Mr. Schiller's application was never approved before the Fund was depleted on June 30, 2021—even though Mr. Schiller applied only two days after the Fund opened for applications on May 3, 2021.

37. According to the Small Business Administration's data, and despite the adjustments made in response to the injunction issued by this Court, only 6,758 of the 101,006 grants (6.7%) went to business owners who were not members of the "priority" demographic groups. 34% of the grants went to businesses owned by socioeconomically disadvantaged persons, almost 44% went to women-owned businesses, and 5.7% were distributed to businesses owned by veterans.

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38. Indeed, although the Small Business Administration did not proactively provide granular details about the operation of the program—that is, who received what and when—the Small Business Administration did release data in response to a Freedom of Information Act (FOIA) request that display the results of the defendants’ discriminatory actions in awarding grants based on the constitutionally forbidden grounds of race and gender. See Small Business Administration, *Restaurant Revitalization Fund (RRF) FOIA*, <https://bit.ly/3rB0bnG> (last visited July 22, 2021).

39. Sorting by date of award in the spreadsheet that the Defendants released through FOIA appears to show that, prior to this Court’s injunction on May 28, 2021, and the United States Court of Appeals for the Sixth Circuit’s decision of May 27, 2021, in *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), the defendants had not approved a single non-priority application. See Small Business Administration, *Restaurant Revitalization Fund (RRF) FOIA*, <https://bit.ly/3rB0bnG> (last visited July 22, 2021) (sorting by “Approval Date” in Column B and comparing the approval date with the priority categories in columns V–X). But during this period, and beginning a mere four days after the application period opened, the defendants approved tens of thousands of applications for individuals based on their self-identification as a socially and economically disadvantaged business, or a women-owned business. *Id.* Unfortunately, the data produced by the Defendants do not indicate *when* each of the listed businesses applied for relief.

#### CLAIM FOR RELIEF

40. The Constitution prohibits the federal government from discriminating on account of race or ethnicity. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Constitution likewise prohibits the federal government from engaging in sex discrimination absent an “exceedingly persuasive justification.” See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Deleted: <#>The plaintiffs continue to seek classwide relief on behalf 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 5003.1

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41. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the grounds of race, color, or national origin in any program that receives federal funds. See 42 U.S.C. § 2000d.

42. The Small Business Administration violated Mr. Loup and Mr. Schiller's rights and the rights of their companies under the Constitution and Title VI by discriminating on account of race and sex in administering the Restaurant Revitalization Fund.

43. The Small Business Administration's unconstitutional race and sex preferences are the but-for cause of Mr. Loup and Mr. Schiller's failure to obtain relief from the Restaurant Revitalization Fund.

44. The Court should therefore award Mr. Loup, GBB Hospitality Group LLC, and GBB Services LLC damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in an amount equal to what they would have received had their application been considered in a colorblind and sex-neutral process. See *Davis v. Passman*, 442 U.S. 228, 243-44 (1979). The Court should award similar relief to Mr. Schiller and 7th Avenue Property Management Inc.

45. The Court should also enter a declaration that the discriminatory provisions of Section 5003 of the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), are unconstitutional, and a permanent injunction prohibiting the defendants from recovering Restaurant Revitalization Funds disbursed to the plaintiffs contrary to the purported statutory requirements of section 5003(c)(3)(A).

**DEMAND FOR RELIEF**

46. The plaintiffs respectfully requests that the court:

- a. declare section 5003(c)(3)(A) of the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), unconstitutional because it

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Deleted: declare these race and sex preferences unconstitutional and permanently enjoin the administrator of the SBA from implementing any such race or sex exclusions in any of the SBA's programs. ¶  
The Court should also issue a preliminary injunction to prevent the disbursement of funds that were prioritized on race or sex-based grounds during the 21-day window described in section 5003

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Deleted: <#>CLASS-ACTION ALLEGATIONS ¶  
The plaintiffs bring this class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. ¶  
The plaintiffs seek to represent a class 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. ¶  
The number of individuals in this class makes joinder of the individual class members impractical. ¶  
There are questions of law common to the class, including whether the Constitution or Title VI allows the SBA to discriminate on account of race and sex when administering the Restaurant Revitalization Fund. ¶  
The plaintiffs' claims are typical of other members of the class. Each of them seeks to stop the SBA from discriminating on account of race and sex when administering the Restaurant Revitalization Fund. ¶  
The plaintiffs adequately represent the interests of the class, and they have no interests antagonistic to the class. ¶  
A class action is appropriate under Rule 23(b)(2) because the defendants are acting on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the classes as a whole. ¶

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requires discrimination on account of race and sex in awarding funds under the Restaurant Revitalization Fund;

b. declare that the Small Business Administration and Administrator Guzman violated the constitutional rights of Mr. Loup, GBB Hospitality Group LLC, and GBB Services LLC damages, as well as Mr. Schiller and 7th Avenue Property Management Inc., by discriminating on account of race and sex in administering the Restaurant Revitalization Fund;

c. award Mr. Loup, GBB Hospitality Group LLC, and GBB Services LLC damages against Administrator Guzman in her individual capacity;

d. award Mr. Schiller and 7th Avenue Property Management Inc. damages against Administrator Guzman in her individual capacity;

e. enter a permanent injunction enjoining the defendants from recovering Restaurant Revitalization Funds disbursed to plaintiffs contrary to the purported statutory requirements of section 5003(c)(3)(A);

f. award costs and attorneys' fees under 42 U.S.C. § 1988;

g. award all other relief that the Court may deem just, proper, or equitable.

Deleted: a. → certify a class of all restaurant owners and restaurants in the United States that are encountering or that will encounter race or sex discrimination from the Small Business Administration on account of section 5003;

Deleted: b. → award the declaratory relief described in paragraph 21;

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Deleted: enter a temporary restraining order, preliminary injunction, and permanent injunction that prevent Administrator Guzman and her successors from implementing any race or sex preferences in SBA programs

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Respectfully submitted.

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Dated: July 30, 2021

*Counsel for Plaintiffs and  
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**CERTIFICATE OF SERVICE**

I certify that on July 30, 2021, I served this document through CM/ECF upon:

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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 PLAINTIFFS' MOTION FOR  
LEAVE TO FILE SECOND AMENDED COMPLAINT**

The plaintiffs' motion for leave to file a second amended complaint is GRANTED. Within five (5) days of this order, the plaintiffs shall file their second amended complaint through the court's CM/ECF system. The defendants shall file their answers to the second amended complaint within twenty (20) days after the second amended complaint is filed.

Dated: \_\_\_\_\_

\_\_\_\_\_  
REED O'CONNOR  
UNITED STATES DISTRICT JUDGE