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' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

The Court should grant the plaintiffs' motion for leave to file a second amended complaint in this case.

The defendants make much about the plaintiffs' predicament over the course of this litigation and the way the case has proceeded; litigation that only became necessary because of the defendants' intentional unconstitutional discrimination against the plaintiffs when administering the Restaurant Revitalization Fund (RRF). But none of their arguments warrant the Court's denial of the plaintiffs' request to amend the pleadings in this case, which the Court should freely permit "when justice so requires." Fed. R. Civ. P. 15(a)(2).

The defendants protest that the plaintiffs have adapted their pleadings and theory of the case. "Plaintiffs have prosecuted this case on the theory that they required immediate preliminary injunctive relief to avoid the irreparable harm that would ensue if the [RRF] exhausted its funding without processing their applications." Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 1. Despite the skeptical way the defendants describe the theory, there is nothing wrong with the way

the plaintiffs sought preliminary injunctive relief in this case. Indeed–absent the issuance of an immediate preliminary injunction–the defendants would have continued their unconstitutional discrimination and awarded all the funds from the RRF to restaurant owners because of their race and sex. *See* Pls.' Second Am. Compl., ECF No. 33-1 at 8 (describing that the defendants awarded no funding to non-prioritized businesses until the issuance of injunctions against the defendants' discriminatory administration of the RRF). If anything, the plaintiffs' theory of the case was precisely correct at that preliminary stage.

The defendants continue: "Plaintiffs repeatedly told the Court that, absent such relief, their ability to receive any relief at all would be severely prejudiced because 'there is no mechanism to 'claw back' this money once it is dispensed, and the defendants' sovereign immunity makes it impossible for the plaintiffs to recover damages if these unconstitutional race and sex preferences wind up excluding them from the Restaurant Revitalization Fund.'" *Id.* (citation omitted). Again, there is nothing incorrect about such statements. Undoubtedly, the plaintiffs lack the ability to force the defendants to "claw back" money once it is dispensed. But that does not mean that the defendants could not try to do so on their own later, given the haphazard, subregulatory way they administered the RRF.

The second amended complaint seeks additional and different claims–including for damages under *Bivens* for restaurateurs who did not receive funding from the RRF, declaratory relief, and a permanent injunction that prevents the defendants from clawing money back that they were awarded. *See* Pls.' Second Am. Compl., ECF No. 33-1 at 9-10. And while the defendants assert that the Court should deny the motion, the arguments the defendants advance are wrong, particularly at this stage of the case.

In general, the defendants assert (1) that the case became moot on June 20, 2021; (2) that the plaintiffs should file an entirely new complaint; and (3) that the plaintiffs

did not assert a claim for relief. For the reasons outlined below, each assertion is incorrect. Should the defendants seek to file a motion to dismiss under Rule 12(b)(6) after the Court grants the motion to amend the pleadings, they can certainly do so. But at this stage, the Court need not make final judgment on all elements of the proposed amended pleadings and should instead permit the plaintiffs to amend their complaint as requested.

I. This Case Is Not Moot

The defendants assert that "[t]his case became moot on June 30, 2021, when the RRF became exhausted and closed because, at that time, no further relief requested in the operative amended complaint was available to Plaintiffs." Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 8. The defendants are wrong.

Before the Court issued a preliminary injunction in this case prohibiting the defendants from discriminating against the existing named plaintiffs in this case because of their race and sex, the defendants previously asserted that the claims asserted by the plaintiffs were moot because of the end of the 21-day priority processing period. *See* Def.'s Resp. to Pls.' Mot. for Prelim. Inj, ECF No. 11 at 3. The Court rejected those assertions. Order, ECF No. 18 at 6-8. In so doing, the Court cited caselaw from the Supreme Court and the Fifth Circuit that is still relevant to the case at this stage of proceedings:

> Mootness is the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness). *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). A matter is moot when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012); *see also Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 524–25 (5th Cir. 2008) ("If a case has been

> rendered moot, a federal court has no constitutional authority to resolve the issues that it presents."). As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984). The government must show that it has completely and irrevocably eradicated the effects' of the program's race and sex preferences. *Vitolo v. Guzman*, Nos. 21-5517/5528, at 5 (6th Cir. May 27, 2021) (quoting *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979)).

Id. at 6-7 (cleaned up). Although the Court rightfully focused on the administration of the RRF and the continued availability of funds in the RRF at that stage of the case to dismiss the defendants' mootness arguments–after all, that was the focus of the requested preliminary injunction–the Court did not address the plaintiffs' remaining claims at that time.

Throughout this case, the plaintiffs sought several forms of relief from the Court. *See* Pls.' Class-Action Compl. at 6-7 (seeking class certification, a declaration from the Court that implementing race or sex exclusions in SBA programs is unconstitutional, a temporary restraining order, preliminary injunction, and permanent Injunction to prevent the use of race or sex preferences in SBA programs, costs and attorneys' fees, and all other relief that the Court deemed just, proper, or equitable); Pls.' First Am. Class-Action Compl., ECF No. 21 at 8 (seeking the same relief); Pls.' Second Am. Compl., ECF No. 33-1 at 9-10.

To date, the Court has issued a preliminary injunction that enjoined the defendants and required them to process and consider the plaintiffs applications for RRF grants "as if the SBA had initiated processing of those applications at the time the applications were filed," and preventing them from "processing or considering any RRF application filed later in time than [the plaintiffs' applications] until their applications have been processed and considered in accordance with a race-neutral, sex-neutral "first come, first served" policy." Order, ECF No. 18 at 11 (footnote omitted). The Court has not been able to consider, nor has it granted any of the additional

previously requested relief to the plaintiffs. The defendants have not yet even filed an answer to the plaintiffs' existing amended complaint.

While the plaintiffs now seek to amend their complaint to pursue additional and different relief, the defendants' contention that the case was moot as of June 30 is incorrect. The plaintiffs have maintained a "concrete interest" in the outcome of the litigation, *Ellis v. Railway Clerks*, 466 U.S. at 442, and to the plaintiffs, such an interest was not "small."[1]

II. The Defendants' Novel Position That the Plaintiffs Need to File a New Lawsuit Lacks Merit

The defendants' contentions that the plaintiffs should file an entirely new claim lack merit.

According to the defendants, "[p]laintiffs now request leave to pursue an entirely new case." Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 18. And further, according to the defendants:

> After months of representing to the Court that preliminary relief was necessary due to the unavailability of damages in this case, Plaintiffs have turned around and requested just such damages. And they do so not on behalf of the existing Plaintiffs in the case but with entirely new Plaintiffs who have no connection to this judicial district. Further still, they seek those damages from a new Defendant, as Plaintiffs move to add Administrator Guzman to the case in her individual capacity. The proper course to pursue such novel claims on behalf of new Plaintiffs against a new Defendant is clear—the new Plaintiffs should file a fresh lawsuit in an appropriate venue.

Id. (citation omitted). The defendants are incorrect.

[1] The defendants acknowledge that one of the named plaintiffs, Lynds Inn, did not receive funding under the RRF. Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at n. 12. That plaintiff–who immediately corrected minor errors in their RRF application after receiving notification–has a particular interest in the requested declaratory relief.

First, nothing that the plaintiffs represented about the need for injunctive relief due to the unavailability of general damages was incorrect. Damages remain unavailable in the ordinary course and are only sought in this case under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) because other than declaratory relief, "there are available no other alternative forms of judicial relief" than a claim under *Bivens*. *Davis v. Passman*, 442 U.S. 228, 245 (1979).

Second, it is not the case that neither of the proposed new plaintiffs lack ties to this judicial district. Grub Burger Bar has three restaurants in the Dallas-Forth Worth metropolitan area. *See* Grub, *Restaurant Locator*, https://bit.ly/3lFo38X (last visited Aug. 6, 2021).

Third, while the proposed second amended complaint does, in fact, seek damages against the SBA Administrator in her individual capacity under *Bivens*, the precise underlying discriminatory action already present in this case continues to be present with the claim under *Bivens*. That is, that the defendants discriminated against the plaintiffs because of race and sex while the defendants administered the RRF.

In short, the defendants appear to simply not like the amended complaint. But that is not sufficient to justify denying leave to amend a complaint under Rule 15(a)(2), which the Court should grant "when justice so requires." Fed. R. Civ. P. 15(a)(2), a "mandate [that] is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. The Plaintiffs Adequately Plead Their Additional Claims

The plaintiffs adequately plead a claim under *Bivens*.

Specifically, plaintiffs raise personal allegations against Administrator Guzman, can fit their claim under an existing *Bivens* context, and even if not, the two special circumstances the defendants raise do not militate against recognizing a *Bivens* action here. Further, Plaintiffs have adequately plead the need for a permanent injunction.

The defendants contend that Administrator Guzman is protected by qualified immunity because Plaintiffs failed "to make even a single allegation against her suggesting that she is personally liable for Plaintiff's claimed constitutional injury." Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 16. But that is false. Plaintiffs clearly alleged that their applications for funding "would have been approved if Administrator Guzman had not deployed the patently unconstitutional use of race and sex preferences." Pls.' Second Am. Compl., ECF No. 33-1 at 3. *See also id.* at 1 ("Administrator Guzman . . . g[a]ve discriminatory preferences to restaurants owned by women and racial minorities."). It is hard to find a clearer "alleg[ation of] the personal involvement" of a *Bivens* defendant. *See Stone v. Wilson*, No. 4:20-CV-406-O, 2021 WL 2936055, at *4 (N.D. Tex. July 13, 2021) (O'Connor, J.).

Administrator Guzman has bragged about this unconstitutional discrimination. Complaining that "businesses . . . owned by women and people of color . . . were left out of early rounds of relief," Guzman boasted that she was "proud of the work we did to begin to rectify these inequities," and that "[m]oving forward, we will continue to prioritize equity in *all* SBA's programs and services." James T. Madore, *SBA: Equity Now a Top Priority In Awarding COVID-19 Relief to Businesses*, Newsday (June 2, 2021) (emphasis added), https://www.newsday.com/business/sba-grants-covid-discrimination-minority-women-veteran-1.50265552. In short, Guzman is personally involved.

The defendants appear to take the position that experiencing discrimination from a government official on account of an individual's race or sex is a "novel" claim under *Bivens*. Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 23. While such a claim may not have been as frequently raised before—presumably, because the federal government has refrained from such discrimination for decades–the Supreme Court's decision in *Davis v. Passman* provides precedent for precisely such a remedy. 442 U.S. 228 (1979). The defendants attempt to narrowly characterize

Davis to try and prevent Plaintiffs' *Bivens* claim from fitting in that context. *See* Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 24 (characterizing *Davis* as "a Fifth Amendment damages remedy for sex discrimination in employment by a Congressman.). In so doing, though the defendants try to limit *Davis* to its *facts* rather than its *context*. And the Supreme Court and this Court have characterized *Davis* much more broadly. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1854-1855 (2017) ("The Court held [in *Davis*] that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination."); *Morrison v. Wilson*, No. 4:20-CV-00222-O, 2021 WL 2716596, at *5 (N.D. Tex. June 30, 2021). *Davis* is the situation where a high-ranking federal government official abuses his or her office by unconstitutionally engaging in gender discrimination. The very same thing occurred here. The plaintiffs' claim is thus not novel but fits squarely into recognized *Bivens* contexts.

However, if the Court treats the plaintiffs' *Bivens* claim as a new context, the defendants' arguments as to why it should not survive because there is an alternative remedy do not withstand close scrutiny. The defendants claim the new plaintiffs, just like the original plaintiffs, "could have sought an injunction to require that their RRF applications be processed without regard to any allegedly discriminatory criteria." Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 25. And because "the new proposed Plaintiffs did not take advantage of this possible remedy," their *Bivens* claim "should not be recognized." *Id*.

This argument, clever as it is, imposes a statute of limitations on plaintiffs where none exists. Nothing in the Act or the law more broadly required plaintiffs to challenge its constitutionality before its funds were depleted. Nor could the plaintiffs have known that funds would run out so quickly or that "approximately 147,000 applicants from the priority group applied for more than the initial $28.6 billion in the RRF." Barry Kurtz, *Potential Replenishment of the Restaurant Revitalization Fund*, JD Supra

(June 16, 2021), https://www.jdsupra.com/legalnews/potential-replenishment-of-the-2613341/. And so being perfectly within their legal rights to challenge the Act's unconstitutional distribution of funds after the money had run out meant that seeking an injunction was not a viable remedy. Thus, only a *Bivens* claim was left to the plaintiffs to bring. Generally, the law applauds plaintiffs who wait and see if they are going to suffer injury rather than rushing to litigate.

Denying the viability of a *Bivens* claim because the plaintiffs did not seek a preliminary injunction sooner would incentivize the government to violate constitutional rights quickly before people can seek injunctive relief so that the government can then claim a *Bivens* action is unavailable. Those are not the kinds of incentives the Constitution expects courts to promote. Thus, a preliminary injunction is not the kind "alternative, existing process" recognized by the Court, such as "civil-services regulations" or "state tort law," neither of which are available here. *See Ziblar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) (citations omitted). *See also Morrison*, 2021 WL 2716596, at *7 (pointing to a statute and a federal program as a type of "potential, alternative remedy"). In fact, by the defendants' own logic, a *Bivens* claim would never be available to the plaintiffs if injunctive relief was an option. But while that may be the case in certain contexts, such as "conditions-of-confinement claims," *id.*, that is not the law broadly and certainly not the case here.

With no real alterative remedy to defeat the plaintiffs' *Bivens* claim, the defendants are forced to argue that the special factor of the separation of powers is triggered here. *See* Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 18-19. That argument is twofold: recognizing a *Bivens* action here would intrude on Congress since Congress did not authorize such and it would intrude on an executive agency because "it would insert the Judiciary into how agencies, such as the SBA, carry out Congress's instructions." *Id.* at 19. Note, though, how the defendants want to have it both ways. They want to distinguish the scenario here from other *Bivens*

contexts because those "concerned discretionary acts by individuals that arguably were unlawful," but here government actors were just carrying out what ARPA required. *Id*. Yet, somehow, a *Bivens* claim is also interfering with executive discretion.

Regardless, the Constitution's separation of powers cannot be used as an excuse to allow Congress to get away with authorizing the Executive Branch to violate the Constitution and force the Judiciary to sit on its hands. Ours is also a system of checks and balances. The "most significant role[] for judges is . . . to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of the popular will." Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989). *See also* James Madison, Federalist No. 51 (ed. Clinton Rossiter, 2003) ("The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.").

If Congress and the Executive team up to violate the Constitution, the only protection left if the Judiciary. And without a *Bivens* claim here, there is no protection for the plaintiffs. It is thus the Judiciary's constitutional duty to "interfere" with "a Senate-confirmed head of an executive agency acting within the scope of her official duties" when in so doing she openly violates the Constitution. *See* Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 26.

Next, the defendants fall back on qualified immunity. *See id*. at 26-27. To defeat qualified immunity, a plaintiff must plead "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The defendants do not even attempt to argue that the second prong is not met. How could they– Guzman's discrimination because of race and gender has been "clearly established" as unconstitutional for decades. *See Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

So instead, the defendants aim all their fire at the first prong, contending that the plaintiffs failed to adequately allege Guzman's personal involvement in violating the Constitution. But as noted above, her own words betray her leadership in making sure the SBA gives preference to "women and people of color." Madore, *SBA: Equity Now a Top Priority In Awarding COVID-19 Relief to Businesses.* And as already noted, the Second Amended Complaint clearly alleges she was personally involved in the constitutional breaches that gave rise to the plaintiffs' injuries. Pls.' Second Am. Compl., ECF No. 33-1 at 1, 3. Given the stage of the proceedings, the plaintiffs' pleadings are sufficient to overcome a qualified immunity defense.

Finally, the defendants argue that the plaintiffs have failed to allege a need for a permanent injunction. *See* Def.'s Resp. to Pls.' Mot. for Leave to File Second Am. Compl., ECF No. 35 at 27-30. Specifically, the defendants reject the plaintiffs' proffered need: to protect against a clawback of the money already dished out. And the defendants claim this reason is an about-face with prior positions. But in so arguing, the defendants overlook the law that "[a] permanent injunction is appropriate [when] a defendant's past conduct gives rise to an inference that, in light of present circumstances, there is a reasonable likelihood of future transgression." *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021). Thus, changing facts can lead to changing reasons for the need for a permanent injunction.

And the facts have changed, increasing the likelihood of the government attempting a clawback. First, it has come to light that the defendants might have already performed a clawback with some recipients–regardless of whether such is authorized by the statute. After federal courts found the SBA's discriminatory practices violated the Constitution, "the SBA has had to halt and *rescind* funds granted through its priority program to [minority] and women-owned businesses." Pooja Nair, *Congress Considers Replenishment of Exhausted RRF Funds*, JD Supra (July 6, 2021), https://bit.ly/2VEo69V (emphasis added).

Second, in addition to this demonstrated clawback, given Administrator Guzman's willingness to flout the supreme law of the land and her professed priority of discriminating in favor of "women and people of color" "in *all* SBA's programs and services," Madore, *SBA: Equity Now a Top Priority In Awarding COVID-19 Relief to Businesses,* it is no protection to the plaintiffs that the Act may not authorize a clawback. And the plaintiffs would likely be the first targets, especially given that more "women and people of color" applied for the RRF than there was sufficient funds to disburse. *See* Kurtz, *Potential Replenishment of the Restaurant Revitalization Fund*.

Finally, the Executive Branch's willingness to flaunt judicial warnings that its behavior is unconstitutional has been on full display the past several months–and the troubling pattern was reiterated this week with its about-face on the CDC's eviction moratorium. After the Sixth Circuit ruled that the moratorium was unconstitutional, *see Tiger Lily, LLC v. US Dep't of Housing & Urban Dev.*, No. 21-5256 (July 23, 2021 6th Cir.), a majority of the Supreme Court indicated they believed the moratorium was unconstitutional, but a different majority refused to lift a stay. *See Alabama Assoc. of Realtors v. Dep't of Health & Human Serv's*, No. 20A169 (June 29, 2021). The Justice in both majority camps was Justice Kavanaugh. He justified his willingness to allow an illegal program to continue because it would soon end. *Id*. But, he cautioned, "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." *Id*.

With that judicial reprieve coupled with a warning shot across the bow, the Biden Administration initially chose not to extend the moratorium but asked Congress to do so, announcing such on July 29, 2021. *See Statement by White House Press Secretary Jen Psaki on Biden-Harris Administration Eviction Prevention Efforts*, WH.gov (July 29, 2021), https://bit.ly/3AjFDDr ("President Biden would have strongly supported a decision by the CDC to further extend this eviction moratorium to protect renters at this moment of heightened vulnerability. Unfortunately, the Supreme Court

has made clear that this option is no longer available. . . . In light of the Supreme Court's ruling, the President calls on Congress to extend the eviction moratorium to protect such vulnerable renters and their families without delay."). Yet when Congress did not act within a mere five days, the CDC issued a new eviction moratorium. *See Temporary Protection From Eviction*, CDC (Aug. 3, 2021), https://bit.ly/3jypNOI.

Remarkably, when asked whether he was "sure it's going to pass Supreme Court muster," President Biden conceded that the new moratorium would "not likely pass constitutional muster." *Remarks by President Biden on Fighting the COVID-19 Pandemic*, WH.gov (Aug. 3, 2021), https://bit.ly/3itLCiX. But the President did not care because "by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out to people who are, in fact, behind in the rent and don't have the money." *Id.* In other words, taking unconstitutional actions are just delay tactics to accomplish unconstitutional actions.

Is it any wonder that the Plaintiffs doubt the permanence of the money they have received only because of this Court's order? A permanent injunction is necessary here because the defendants' "past conduct gives rise to an inference that, in light of present circumstances, there is a reasonable likelihood of future transgression." *Valentine*, 993 F.3d at 280.

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The Court should grant the requested leave to file a second amended complaint.

Respectfully submitted.

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I certify that on August 6, 2021, I served this document through CM/ECF upon:

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