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

BLESSED CAJUNS LLC et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-00677-O**
	§	
ISABELLA CASILLAS GUZMAN et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Plaintiffs' Motion for Leave to File Second Amended Complaint (ECF No. 33), filed July 30, 2021; Defendants' Response (ECF No. 35), filed August 3, 2021; and Plaintiffs' Reply (ECF No. 37),[1] filed August 8, 2021. Having considered the motion, briefing, and applicable law, the Court **GRANTS** the motion.

I. BACKGROUND

This case involves the constitutionality of the sex- and race-based distribution preferences of the Restaurant Relief Fund ("RRF"), created by section 5003 of the American Rescue Plan Act of 2021 ("ARPA"). The Court previously addressed and now incorporates by reference the relevant background facts from its May 28, 2021, Order. *See* Mem. Op. 1–5, ECF No. 18. In that Order, the Court preliminarily enjoined Defendants to process Plaintiffs' RRF applications in the order in which they had been received and from processing or considering an RRF application filed later in time before doing so. *Id.* at 11–12. Plaintiffs filed an Amended Complaint as a matter of course shortly thereafter. Am. Compl., ECF No. 21. On June 3, 2021, the Court held a hearing on the continued need for a preliminary injunction. *See* ECF Nos. 23,

[1] Because of the scope of the issues presented, the Court **GRANTS** Plaintiffs' Unopposed Motion for Leave to Exceed Page Limits for Reply (ECF No. 38).

29. During June, Defendants regularly updated the Court on the status of the RRF's remaining grants, and Plaintiffs withdrew their motion for class certification. *See* ECF Nos. 28, 30, 31. After a month passed, the Court ordered a joint status report to detail the remaining issues. *See* Order, ECF No. 32. In response, Plaintiffs filed the present opposed Motion for Leave to File Second Amended Complaint, adding two plaintiffs and seeking damages on their behalf under *Bivens* based on the same theory of unconstitutional race and sex discrimination in the distribution of the RRF. Mot. 1, ECF No. 33. The Proposed Second Amended Complaint also seeks declaratory relief and permanent injunctive relief to prevent Defendants from clawing back the money awarded to the original plaintiffs. *See* Proposed Second Am. Compl. ¶¶ 46(a),(e), ECF No. 33-1. The Motion is ripe for the Court's consideration. *See* Resp., ECF No. 35; Reply, ECF No. 37.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 15

Under Federal Rule of Civil Procedure 15, "the court should freely give leave when justice so requires." *Goulla v. Greentree*, No. A-17-cv-407-LY-ML, 2018 WL 6267878 at *9 (W.D. Tex. Aug. 30, 2018), *report and recommendation adopted*, No. A-17-cv-407-LY, 2019 WL 2563831 (W.D. Tex. Feb. 6, 2019). A movant is required to give the court some notice of the nature of his or her proposed amendments. *Id.* However, even if proper notice is given, the court may deny relief if it finds the motion for leave is the product of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). When futility is a concern, the Court should look to Rule 12(b)(6). *See Thomas v.*

Chevron U.S.A., Inc., 832 F.3d 586, 592 (5th Cir. 2016). Courts should deny leave if the theory presented in the amendment lacks legal foundation or has been adequately presented in a prior version of the complaint. *Chevron*, 832 F.3d at 591.

B. Mootness

"The doctrine of mootness arises from Article III of the Constitution, which provides federal courts with jurisdiction over a matter only if there is a live 'case' or 'controversy.'" *Dierlam v. Trump*, 977 F.3d 471, 476 (5th Cir. 2020), *cert. denied sub nom. Dierlam v. Biden*, 141 S. Ct. 1392 (2021) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). "Accordingly, to invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013) (cleaned up). This case-or-controversy requirement persists "through all stages of federal judicial proceedings." *Id.* Thus, "[i]f an intervening event renders the court unable to grant the litigant 'any effectual relief whatever,' the case is moot." *Dierlam*, 977 F.3d at 476 (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012). "Further, a case is not necessarily moot because it's uncertain whether the court's relief will have any practical impact on the plaintiff." *Dierlam*, 977 F.3d at 477 (citing *Chafin*, 568 U.S. at 175) ("Courts often adjudicate disputes where the practical impact of any decision is not assured."). "When conducting a mootness analysis, a court must not 'confuse[] mootness with the merits.'" *Dierlam*, 977 F.3d at 477 (quoting *Chafin*, 568 U.S. at 174). A court "need only ask whether the plaintiff's requested relief is 'so implausible that it may be

disregarded on the question of jurisdiction[,]'" leaving for later "to decide whether [the plaintiff] is in fact entitled to the relief he seeks.'" *Id.* (quoting *Chafin*, 568 U.S. at 177).

III. ANALYSIS

Plaintiffs request leave to file their Proposed Second Amended Complaint. Mot. 1, ECF No. 33. Defendants oppose the leave, contending that (1) the case became moot when RRF closed, (2) plaintiffs are effectively filing a new case, and (3) the claims in Plaintiffs' Proposed Second Amended Complaint are futile. *See* Resp. 8–23, ECF No. 35. The Court concludes that Plaintiffs' case was not mooted by the closure of the RRF and that leave is proper in this instant.

Courts "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a); *see Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000) (Courts have "discretion to deny a motion to amend if it is futile[.]"). But "Rule 15 cannot be used to cure a jurisdictional defect." *Fed. Recovery Servs. v. United States*, 72 F.3d 447, 453 (5th Cir. 1995). When a court lacks jurisdiction, the party seeking leave to amend is in no position to do so. *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."); *accord Fox v. Bd. of Trs. of State Univ. of New York*, 148 F.R.D. 474, 487–89 (N.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2nd Cir. 1994) ("Rule 15(a) does not allow original plaintiffs to amend their complaint after a finding of mootness.").

Here, the Court finds no such mootness to bar leave to amend at this early juncture of the case. In Plaintiffs' First Amended Complaint, the live pleading, Plaintiffs request two forms of relief that remained unresolved by the Court's preliminary injunction order, even after the exhaustion of RRF funds: (1) "declaratory relief" that RRF's "race and sex preferences [are] unconstitutional," *see* Am. Compl. ¶¶ 40(b), 31; and (2) a "permanent injunction that prevents

Administrator Guzman and her successors from implementing any race or sex preferences in SBA programs[.]" *See Id.* ¶ 40(c). These unresolved claims permeate to the Proposed Second Amended Complaint in which Plaintiffs request (1) a "declar[ation that] section 5003(c)(3)(A) of the American Rescue Plan Act of 2021 [is] . . . unconstitutional because it requires discrimination on account of race and sex in awarding funds under the [RRF]" and (2) a "permanent injunction enjoining [D]efendants from recovering [RRF] [f]unds disbursed to [P]laintiffs . . .." Proposed Second Am. Compl. ¶¶ 46(a), (e), ECF No. 33-1. The addition of parties and claims (especially at this early stage of litigation) does not alter the mootness analysis for the original Plaintiffs' claims.

Similarly, the Court rejects Defendants' contention that Plaintiffs' counsel's statements about mootness are a bar to this Court's subject matter jurisdiction. *See* Resp. 8, ECF No. 35 (citing Dodge Decl., Ex. 1 at 13:23–14:13 (Mr. Mitchell: "When there really is zero possibility of that because the money is gone, then we do think mootness would be the appropriate disposition.")) "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Rollins v. Home Depot USA, Inc.*, No. 20-50736 (5th Cir. Aug. 9, 2021) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)) (internal quotation marks omitted). Thus, Plaintiffs' counsel's statements have no bearing on whether this case is moot.

In short, Original Plaintiffs were not "left with no cause of action upon which [they] could recover . . .." *Summit Office Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir. 1981). Regardless of the remaining funds in the RRF or Plaintiffs' counsel's representations, the Court is and has been capable of providing meaningful relief to Plaintiffs in the form of

declaratory relief and a permanent injunction but has yet to do so.[2] *See Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th Cir. 2013) ("Mootness applies when intervening circumstances render the court no longer capable of providing meaningful relief to the plaintiff."); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) ("The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."). Thus, the Court concludes that it has subject matter jurisdiction over this case, that before it are Plaintiffs with valid causes of action properly seeking to amend their complaint, and that this is precisely the sort of request at the early stages of litigation in which Rule 15(a) counsels the Court to grant leave as, here, "justice so requires."[3] Accordingly, the Court will grant the motion for leave.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion for Leave to File Second Amended Complaint (ECF No. 33).[4] Plaintiffs shall file their Second Amended Complaint on or before **August 11, 2021, at 5:00 P.M.**

SO ORDERED on this **10th day** of **August, 2021**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

[2] Depending on the underlying facts, the Court also may have not provided full relief to Plaintiff Lynds Inn based on the unconstitutional discrimination, but the Court need not reach that conclusion here.

[3] Defendant's futility arguments are best resolved at the Rule 12(b) or summary judgment stage with the benefit of full briefing. *See* Resp. 15–23, ECF No. 35; *see United States v. Cytogel Pharma, LLC*, No. cv 16-13987, 2018 WL 3495859, at *2 (E.D. La. July 20, 2018) ("In many cases where futility is not clear, courts find the better course is to grant leave to amend and allow the opposing party to respond to the amended claim with a motion to dismiss or motion for summary judgment.").

[4] Like Defendants, the Court is mindful of its ongoing duty to scrutinize its own jurisdiction. *See Gasch v. Hartford Acc. & Indem. Co.*, 491 F.3d 278, 281 (5th Cir. 2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)) ("[S]ubject-matter delineations must be policed by the courts on their own initiative."). Thus, should subject matter jurisdiction come into doubt, the Court will order briefing and invites Defendants to file a Rule 12(b)(1) motion at any point in the litigation. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (A Rule 12 (b)(1) motion "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.").