

The Race Card in ARPA's Food Supply Deck

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Other Views:

- Elazar Sontag, *Congress's Restaurant Revitalization Fund Is Out of Money and Restaurants Are Still in Need*, EATER, July 2, 2021, <https://www.eater.com/2021/5/18/22442063/restaurant-revitalization-fund-sba-applications-exceed-funding>.
- Elliot Minberg, *Trump Judge Grants Preliminary Injunction Against Important Part of Congressional COVID Relief Law and Indicates it is Unconstitutional: Confirmed Judges, Confirmed Fears*, PEOPLE FOR THE AMERICAN WAY, May 28, 2021, <https://www.pfaw.org/blog-posts/trump-judge-grants-preliminary-injunction-against-important-part-of-congressional-covid-relief-law-and-indicates-it-is-unconstitutional-confirmed-judges-confirmed-fears/>.
- Ariana Figueroa, *Warnock works to remedy decades of USDA discrimination against Black farmers*, WISC. EXAMINER, May 3, 2021, <https://wisconsinexaminer.com/2021/05/03/warnock-works-to-remedy-decades-of-usda-discrimination-against-black-farmers/>.
- Michael Morley, *Plaintiff-Oriented Injunctions in Equal Protection Cases: Wynn v. Vilsack and the American Rescue Plan Act of 2021*, NOTICE & COMMENT, June 28, 2021, <https://www.yalejreg.com/nc/wynn-v-vilsack-and-the-american-rescue-plan-act-of-2021/>.

It is an old aphorism that a prudent person should not watch the making of sausage or legislation. In this era of mega-bills running hundreds of pages and involving huge sums of money, the analogy of sausage to legislation is especially fitting. That is certainly true of the fourth installment of COVID-19 relief legislation, the American Rescue Plan Act of 2021 (ARPA).¹ This law was passed by Congress with little debate on a near-party-line vote and signed by a recently inaugurated President Joe Biden. It appropriated \$1.9 trillion for various beneficiaries, some justified by the extraordinary circumstances of the pandemic, and some the reflection of special interests hiding in its hastily assembled 658 pages.

Two ARPA provisions appear to violate the Due Process Clause of the Fifth Amendment, which prohibits denying to any person the equal protection of the laws.² First, the law provides for a \$28.6 billion Restaurant Revitalization Fund (RRF), to be administered by the Small Business Administration (SBA).³ The SBA adopted fund dispersal guidelines that prioritized restaurants owned by women, racial minorities, and veterans. For the first 21 days of providing this RRF money, the SBA excluded restaurants owned by non-veteran white males from eligibility.⁴ Second, ARPA provides for forgiving up to 120 percent of United States Department of Agriculture (USDA) loans to “socially disadvantaged” farmers and ranchers, defining social disadvantage by race and ethnicity and excluding similarly situated whites.⁵ These provisions were challenged early in their implementation process.

I. SBA'S RACE AND SEX PRIORITIES

There is no question that the food service industry was hurt badly by COVID-19, and for many of those businesses, recovery will not be quick. RRF money was appropriated to help the recovery process, but the scale of the industry will make it difficult to make a dent. In 2018, there were 660,775 restaurants in the United States.⁶ Moreover, SBA's definition of food business beneficiaries is quite expansive: in addition to conventional restaurants, food trucks, caterers, bars, bakeries, wineries, distilleries, and other food service establishments are eligible for

1 Pub. L. No. 117-2. President Biden signed ARPA on March 11, 2021.

2 *United States v. Windsor*, 570 U.S. 744, 774 (2013).

3 ARPA, § 5003, 15 U.S.C.A. § 9009c (Support for Restaurants). *See id.* at § 9009c(b) (Restaurant Revitalization Fund).

4 *See id.* at § 9009c(c)(3) (Priority in Awarding Grants).

5 ARPA, § 1005 (Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers).

6 *Number of Restaurants in the United States from 2011 to 2018*, STATISTA, <https://www.statista.com/statistics/244616/number-of-qsr-fsr-chain-independent-restaurants-in-the-us/>.

relief money.⁷ Each qualifying business is eligible for up to \$10 million in grants, which have to be expended by recipients by March 11, 2023.⁸ Even the \$28.6 billion appropriated will not cover all the food industry's needs.

SBA could have defined its grant priorities economically or epidemiologically, for example by providing relief to individual firms according to the states or regions that were hurt most by COVID-19. Since the agency believed restaurants owned by women and minorities were disproportionately harmed by the pandemic,⁹ it could have distributed funds to the most impacted zip codes, which would have been a race- and sex-neutral plan raising no constitutional issues. Instead, following the relevant ARPA statutory provision, SBA created priorities based on identity group categories used in various other federal programs. Small businesses owned at least 51% by women, "socially and economically disadvantaged individuals," or veterans were put at the head of the grant distribution line.¹⁰

The term "socially and economically disadvantaged individuals" is a euphemism for racial and ethnic minorities. It is used in other SBA programs, federal transportation disadvantaged business enterprise (DBE) programs,¹¹ numerous state and local minority- and women-owned business enterprise (MWBE) programs, and now in the USDA's debt relief program. Decades before Critical Race Theory catapulted into the nation's discourse by dividing oppressed and oppressors into racial categories, a series of obscure bureaucratic decisions created a list of races and ethnicities that presumptively determined who were "socially and economically disadvantaged" persons.¹² The list developed almost three decades ago has almost never been altered and now includes:

Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru);

Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal) . . .¹³

Persons identified with these racial or ethnic groups are presumed disadvantaged unless someone comes forward "with credible evidence to the contrary."¹⁴ These categories have not been revisited and exclude U.S. citizens with roots in several Asian and Middle Eastern countries who might objectively be "socially and economically disadvantaged," except that they are bureaucratically considered to be "white." Nevertheless, in all of the litigation regarding federal, state, and local contracting and aid preferences, the group list above has almost never been challenged,¹⁵ and the cases have been decided on other issues.

According to SBA rules, during the initial application period for RRF funds, only prioritized food businesses—those owned by racial minorities, women, or veterans—could apply.¹⁶ After that, relief applications by a food business owned by a white male could be processed. There are about 40,000 Chinese and a similar number of Mexican restaurants alone in the U.S.,¹⁷ so if white males remained relegated to the back of the application line, they might have been left out altogether.

The RRF race and sex preferences were almost immediately challenged in Texas and Tennessee. The plaintiffs, however, faced a difficult litigation problem. SBA had established a limited window of 21 days—May 3–24—for processing applications for its priority groups.¹⁸ A few days into the program window, SBA announced that \$2.7 billion had already been distributed

7 ARPA, § 5003(a)(4) (defining "eligible entity").

8 *Id.* at (c)(4)(A)(i). See also Brendan Tuytel, *A Guide to the Restaurant Revitalization Fund*, BENCH, Apr. 28, 2021, <https://bench.co/blog/operations/restaurant-revitalization-fund-grant/>.

9 See Vitolo v. Guzman, 999 F.3d 353, 2021 WL 2172181, at *22–23 (6th Cir. May 27, 2021) ("Moreover, minority-owned businesses were more likely to be in areas with higher rates of COVID-19 infections.").

10 ARPA, § 5003(c)(3)(A).

11 See George R. La Noue, *Follow the Money: Who Benefits from the Federal Aviation Administration's DBE Program?* 38 AM. REV. PUB. ADMIN. 480 (2008).

12 See George R. La Noue & John Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 J. POL'Y HISTORY 439 (Fall 1994). See also George R. La Noue & John Sullivan, *Gross Presumptions*, 41 SANTA CLARA L. REV. 103 (2000).

13 13 C.F.R. § 124.103(b)(1) (establishing a "rebuttable presumption" that members of these groups are "socially disadvantaged"). See also 7 U.S.C. Sect. 2279(a)(5) (defining "socially disadvantaged farmer or rancher" as one who "is a member of a socially disadvantaged group") and *id.* at (a)(6) (defining "socially disadvantaged group" as one "whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities").

14 13 C.F.R. § 124.103(b)(3). Judge Richard Posner noted, "The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive." *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 418 (7th Cir. 1991).

15 Justice Sandra Day O'Connor noted in *Croson* that Richmond, following the then-current federal categories, had included "Spanish-speaking, Oriental, Indian, Eskimo and Aleut persons" as beneficiaries of its race-based goals, which she called a "random inclusion" of groups "that may never have suffered from discrimination in the city's construction industry." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989). Because of that statement, lawyers now consider that the narrow tailoring prong of strict scrutiny requires evidence of current discrimination against each specific racial or ethnic group of beneficiaries.

16 ARPA, § 5003(c)(3).

17 Roberto A. Ferdman, *Why delicious Indian food is surprisingly unpopular in the U.S.*, WASHINGTON POST, March 4, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/03/04/why-delicious-indian-food-is-surprisingly-unpopular-in-the-u-s/>. This assumes that Mexican and Chinese restaurants are Mexican- and Chinese-owned.

18 ARPA, § 5003(c)(3)(A). U.S. Small Bus. Admin., *Restaurant Revitalization Funding Application*, Form 3172 (effective April 19, 2021), available at <https://www.sba.gov/document/sba-form-3172-restaurant-revitalization-funding-application-sample>.

to 21,000 restaurants whose owners were in its priority groups.¹⁹ For restaurants owned by non-veteran white males to obtain any relief, the litigation had to proceed on a very fast track, which normally handicaps plaintiffs.

A. Greer's Ranch Café v. Guzman

In Texas, Greer's Ranch Café, a small business that lost almost \$100,000 during the pandemic, sued the SBA over its race and sex preferences.²⁰ Philip Greer, a white male, prepared an application for RRF, but he did not file it because his race and sex barred him from being considered during the limited priority window. Consequently, he sought a Temporary Restraining Order (TRO) to bar RRF awards based on race and sex. Such orders are considered "an extraordinary remedy" since federal judges are usually reluctant to interfere early in the process of administering federal programs.²¹ Judge Reed O'Connor laid out four requirements the plaintiff had to satisfy to be entitled to a TRO: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) the balance of hardships weighs in the movant's favor; and (4) the issuance of the preliminary injunction will not dissuade the public interest.²² Judge O'Connor found that Greer's Ranch Café met all four criteria.²³

There was another hurdle that Greer's restaurant had to overcome. Since the restaurant had not applied for RRF funds, did it have standing? The Department of Justice (DOJ)—representing Guzman and the SBA—argued it did not. Still, the evidence of the restaurant's financial loss due to COVID-19 and that the owner's declared intent to file was deterred by SBA priorities led the court to conclude it had standing.²⁴

Both parties agreed strict scrutiny was the relevant standard for review. Following *Croson* and *Adarand*, this standard requires the government to show a compelling interest to justify race and sex preferences, and that those preferences are narrowly tailored.²⁵ Typically, in a DBE or M/WBE case, the issue of compelling interest turns on the validity of the findings of a specific and

recent disparity study.²⁶ No such contemporary study exists on a national scale for the restaurant industry. The last attempt at such a national study was conducted in 1998 by the U.S. Department of Commerce.²⁷ The 12-page Benchmark Limits study compared the relative availability of minority firms to their utilization in federal contracting.²⁸ The study found a mixed pattern of under- and over-utilization, but it never concluded why those patterns existed. After that study, a federal district court struck down the application of a racial preference in a military equipment simulation contract because:

The fact that Section 8(a) is constitutional on its face, however, does not give the SBA . . . or any other governmental agency carte blanche to apply it without reference to the limits of strict scrutiny. Rather agencies have a responsibility to decide if there has been a history of discrimination in a particular industry.²⁹

So the DOJ was forced to justify the RRF race and sex priorities according to strict scrutiny with the evidence at hand. It cited a report by the House Committee on Small Business which found that, during the pandemic, "[w]omen—especially mothers and women of color—are exiting the workforce at alarming rates, [and] eight out of ten minority-owned businesses are on the brink of closure"³⁰ The Committee entered into the record several studies and expert reports that found minority- and women-owned businesses generally were more likely to encounter capital and credit problems.³¹ Judge O'Connor, however, concluded that the SBA's evidence was insufficient with respect to restaurants because "it lacks the industry-specific inquiry need to support a compelling interest for a government-imposed racial classification."³²

Nevertheless, although the court found that the RRF race and sex priorities did not have the required compelling interest, the plaintiff had not adequately briefed the need for relief that would extend beyond his personal situation to an injunction of the program as a whole.³³ The only remedy that could be ordered was an injunction that the plaintiff be permitted to file an application during the remainder of the priority period and

19 Press Release, SBA, *Recovery for the Smallest Restaurants and Bars: Administrator Guzman Announces Latest Application Data Results for the Restaurant Revitalization Fund*, May 12, 2021, <https://www.sba.gov/article/2021/may/12/recovery-smallest-restaurants-bars-administrator-guzman-announces-latest-application-data-results>.

20 Complaint, Greer's Ranch Café v. Guzman, No. 4:21-cv-00651 (N.D. Tex. filed May 13, 2021), available at <https://wordpress.aflegal.org/wp-content/uploads/2021/05/1-Greers-Ranch-Cafe-v.-Guzman-Complaint-5.13.2021.pdf>. Greer's Ranch Café is represented by America First Legal, a new nonprofit litigation firm.

21 Greer's Ranch Café v. Guzman, No. 4:21-cv-00651-O, 2021 WL 2092995, at *4 (N.D. Tex. May 18, 2021) (order granting TRO), available at <https://s3.documentcloud.org/documents/20773795/order-granting-tro-against-biden-administration.pdf> (citing *Albright v. City of New Orleans*, 46 F. Supp. 2d 523, 532 (E.D. La. 1999)).

22 *Id.* at *5.

23 *Id.* at *17.

24 *Id.* at *6-10.

25 *Croson*, 488 U.S. 469; *Adarand v. Peña*, 515 U.S. 200 (1995).

26 George R. La Noue, *Public Contracting Litigation after Croson: Data, Disparities & Discrimination*, 22 FEDERALIST SOC'Y REV. 8 (2021), available at <https://fedsoc.org/commentary/publications/public-contracting-litigation-after-croson-data-disparities-discrimination>.

27 George R. La Noue, *To the "Disadvantaged" Go the Spoils?*, 138 THE PUBLIC INTEREST 91 (Winter 2000).

28 Small Disadvantaged Business Procurement Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (June 30, 1998) (Department of Commerce Benchmark Study).

29 *DynaLantic Corp. v. Department of Defense*, 885 F. Supp. 2d 237, 282 (D.D.C. 2012).

30 H.R. Rep. 117-7, at 2 (2021), available at <https://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf>.

31 *Greer's Ranch Café*, 2021 WL 2092995, at *12.

32 *Id.* at *14.

33 *Id.* at *17 n.11.

that SBA be required to consider his application as though it were filed on May 13, the date of his complaint.³⁴

B. Vitolo v. Guzman

Even without a judicially recognized compelling interest, SBA dodged the Texas bullet regarding wider remedies, but it was soon back in court over the same issues. Antonio Vitolo, co-owner of Jake's Bar and Grill LLC, sued the SBA in the Eastern District of Tennessee challenging the same race and sex preferences.³⁵ Because of the pandemic, Vitolo's restaurant had an estimated loss of about \$104,000. The establishment was owned 50% by Antonio Vitolo and 50% by his wife. Ironically, Vitolo's wife is Hispanic, so if 51% of the business had been put in her name, Jake's Bar would have eligible for SBA's priorities.³⁶

The plaintiffs sought a TRO prohibiting SBA from paying out RRF grants unless they were processed in a race- and sex-neutral manner. They also asked for a declaratory judgment that SBA's race and gender classifications are unconstitutional, together with a permanent order enjoining SBA from using these factors in determining eligibility or priorities in distributing RRF grants. In these complaints, all the central constitutional issues were in play.

Judge Travis McDonough began his opinion in *Vitolo v. Guzman* by describing the economic chaos the pandemic had caused.³⁷ He noted House committee testimony by economist Lisa Cook that 27% of small white-owned firms reported in a survey prior to the pandemic they were at risk or in distress, while that was true of 49% of small Hispanic-owned firms and 57% of small black-owned firms.³⁸ She attributed that disparate outcome to the fact that white-owned firms have better relationships with large banks.³⁹ In upholding the SBA priorities, the judge described other committee testimony about the general problems minority- and women-owned small businesses faced.⁴⁰ There was little information specific to restaurants, however, and no pre- or post-pandemic disparity study which, according to *Croson*, would have had to control for the qualifications, willingness, and ability of the restaurant businesses being compared.⁴¹

Vitolo then made an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal to the Sixth Circuit.⁴² The motion was the equivalent of a Hail Mary football pass since the plaintiff was asking the appellate court to interrupt its appellate calendar to render an immediate opinion on an extremely important constitutional issue involving billions of dollars. The panel was split in its response. Judges Amul Thapar⁴³ and Alan Eugene Norris saw the immediate need of hearing the case since "[t]he key to getting a grant is to get in the queue before the money runs out."⁴⁴ They found the case was not moot because "[t]here is a real risk that the RRF funds would run out before Vitolo's application could be processed."⁴⁵ In fact, SBA subsequently reported to a restaurant industry publication that as of nine days after applications opened, more than 260,000 businesses had already applied for relief funds totaling more than \$65 billion.⁴⁶

The majority then considered the four factors for granting a preliminary injunction and came to the same conclusion as the Texas court.⁴⁷ In evaluating the likelihood that the plaintiff would win on the merits, the majority noted *Croson's* binding holding that governmental racial classifications cannot rest on "a generalized assertion that there has been past discrimination in an entire industry."⁴⁸ The government seeking to defend a race or gender preference must provide evidence of intentional discrimination,⁴⁹ specifically active or passive governmental discrimination.⁵⁰ The majority found that the SBA rules were based only on general allegations of "societal discrimination," which were not sufficient to support a compelling interest in reversing the effects of past discrimination.⁵¹

Further, the majority noted that the government did not justify the inclusion of the specific racial and ethnic groups on its preferred list, which was both overinclusive and underinclusive.⁵² Judge Thapar's opinion made a point no other judge has publicly raised about the socially and economically disadvantaged group

³⁴ *Id.* at *17. See also *Blessed Cajuns v. Guzman*, No. 4:2021cv00677 (N.D. Tex. May 28, 2021) (order granting preliminary injunction). In *Blessed Cajuns*, a similar case in the same district styled as a class action, Judge O'Connor again found that the plaintiffs met the criteria for a preliminary injunction.

³⁵ Complaint, *Vitolo*, 999 F.3d 353, available at <https://will-law.org/wp-content/uploads/2021/05/Vitolo-v-Guzman-Complaint-Stamped.pdf>. The plaintiffs are represented by the Wisconsin Institute for Law & Liberty (WILL).

³⁶ *Vitolo*, 999 F.3d 353, at *2.

³⁷ *Vitolo v. Guzman*, 2021 WL 2132106, at *1 (E.D. Tenn. May 25, 2021).

³⁸ *Id.* at *3.

³⁹ *Id.*

⁴⁰ *Id.* at *3-4 (citing *Access Denied: Challenges for Women- and Minority-Owned Businesses Accessing Capital and Financial Services During the Pandemic*, at 9 (July 9, 2020), available at <https://www.govinfo.gov/content/pkg/CHRG-116hhrg43195/pdf/CHRG-116hhrg43195.pdf>).

⁴¹ *Croson*, 488 U.S. at 509.

⁴² *Vitolo*, 999 F.3d 353.

⁴³ Judge Thapar had a particularly interesting background related to this decision. After his family emigrated from India, he became the first South Asian federal judge in American history. His father owned a heating and air conditioning supply company, and his mother owned a restaurant at one time. Given SBA's definitions, Judge Thapar would have been presumptively a socially and economically disadvantaged person, and his mother's restaurant would have been eligible for RRF priority funding.

⁴⁴ *Vitolo*, 999 F.3d 353, at *2.

⁴⁵ *Id.* at *6.

⁴⁶ Jessica Fu, *What, exactly, is going on with the Covid-19 restaurant relief fund?*, THE COUNTER, June 10, 2021, <https://thecounter.org/covid-19-restaurant-relief-fund-stephen-miller-sba/>.

⁴⁷ *Vitolo*, 999 F.3d 353, at *14. See *supra* notes 22-23 and accompanying text.

⁴⁸ *Id.* at *8 (citing *Croson*, 488 U.S. at 498).

⁴⁹ *Id.* (citing *Croson*, 488 U.S. at 503).

⁵⁰ *Croson*, 488 U.S. at 492.

⁵¹ *Vitolo*, 999 F.3d 353, at *8.

⁵² *Id.* at *9.

categories: “the schedule of racial preferences detailed in the government’s regulation—preferences for Pakistanis, but not for Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.”⁵³ There is no good reason this should be acceptable—just decades of rote bureaucratic repetition and judicial abdication. Now that Judge Thapar has raised the issue, we can expect judges to ask government witnesses wherever group membership on the list is relied upon to distribute preferences; we can also expect that cases involving such questions will be brought more frequently.⁵⁴

The majority concluded that the government’s RRF prioritization failed to meet strict scrutiny’s requirements of both a compelling interest and narrow tailoring. The majority found that SBA had failed to prove that women-owned restaurants were discriminated against by anybody, which was the government’s burden if it was to show a compelling interest in undoing the effects of past discrimination.⁵⁵ SBA also failed to meet narrow tailoring because it did not attempt to find race- and sex-neutral alternatives to help the neediest restaurants before turning to preferences.⁵⁶ Thus, Vitolo’s restaurant, like Greer’s, was entitled to have its grant application considered without regard to processing time or considerations of race or sex.⁵⁷ But the Sixth Circuit also granted a preliminary injunction on the race- and sex-based priority process “until the case is resolved on the merits and all appeals are exhausted.”⁵⁸

Judge Bernice Bouie Donald dissented. “It took nearly 200 years for the Supreme Court to firmly establish that our Constitution permits the government to use race-based classifications to remediate past discrimination,” she said, citing *Bakke*, but “[i]t took only seven days for the majority to undermine that longstanding and enduring principle.”⁵⁹ Her interpretation of Justice Lewis Powell’s *Bakke* plurality opinion was unusual. After reviewing the judicial evolution of the Equal Protection Clause and Title VI of the Civil Rights Act from laws aimed at protecting “Negroes” to laws that protected all persons from racial and ethnic discrimination, Powell wrote in *Bakke*, “[o]ver the years, this Court has consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.”⁶⁰ Powell continued:

The concept of “majority” and “minority” necessarily reflect temporary arrangements and political judgments

53 *Id.*

54 See David E. Bernstein, *The Modern American Law of Race*, S. CAL. L. REV. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592850.

55 *Id.* at *13.

56 *Id.* at *10-11.

57 *Id.* at *14-15.

58 *Id.* at *15.

59 *Id.* at *16 (Donald, J., dissenting) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

60 *Bakke*, 438 U.S. at 294 (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967) (internal citation omitted)).

. . . [T]he white “majority” itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality⁶¹

Judge Donald argued to the contrary: “The majority’s reasoning suggests we live in a world in which centuries of intentional discrimination and oppression of racial minorities have been eradicated” and that the COVID-19 pandemic did not exacerbate those disparities.⁶² She thought the congressional testimony regarding racial disparities among restaurant owners created a compelling interest in remedying past discrimination, and she was particularly concerned that because of the majority’s “unusual procedure in handling this appeal, we are now left with a binding published opinion, etched in the stone of time.”⁶³

The Sixth Circuit panel’s preliminary injunction and Judge Thapar’s questioning of the whole concept of the racial and ethnic categorization of “socially and economically” disadvantaged persons placed the DOJ in a difficult position. If it appealed en banc, the precedents in the circuit were not favorable.⁶⁴ The majority had carefully cited Supreme Court precedents supporting its ruling,⁶⁵ and the DOJ might have believed that the high Court would not be favorable to the RRF’s use of racial priorities and might even strike down the whole race-based “socially and economically disadvantaged” concept. Furthermore, the political optics of excluding from relief white male-owned restaurants in every congressional district in the country might have been unattractive. In any event, on June 3, the SBA announced that it was halting its race- and sex-based priority payments and would now process claims from white male-owned restaurants filed on time before accepting any more from the priority group.⁶⁶

The RRF was overwhelmed with relief claims. There have been delays in obtaining relief for some deserving firms, and there is not nearly enough money now to satisfy all valid claims. Minority- and women-owned firms that had received notice that they would receive payments have been getting emails from the SBA saying it would have to cancel their grants due to the lawsuits. Naturally, this is upsetting to the owners.⁶⁷ On June 10,

61 *Id.* at 295-96.

62 *Vitolo*, 999 F.3d 353, at *16.

63 *Id.* at *27.

64 See Michigan Road Builders Ass’n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987); United Black Firefighters Ass’n v. City of Akron, 976 F.2d 999 (6th Cir. 1992); Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) (en banc); Associated General Contractors, Inc v. Drabik, 214 F.3d at 736 (6th Cir. 2000).

65 *Adarand*, 515 U.S. at 234-35; League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006); Parents Involved in Community Schools v. Seattle, 551 U.S. 701, 720, 748 (2007).

66 Declaration of John A. Miller, SBA Deputy Associate Administrator for Capital Access, June 3, 2021.

67 Jessica Fu, “It feels like a punishment” *The Restaurant Revitalization Fund was supposed to help businesses recover from the pandemic. It’s plunging them into financial uncertainty.*, THE COUNTER, June 24, 2021, <https://>

a bipartisan group in both Houses filed a proposal to supplement the RRF by \$60 billion.⁶⁸

In its new policy, SBA is still prioritizing COVID-19 relief based on race and sex. First, it was women and racial minorities, and now it is white males. Readers may remember the old slogan, “Two wrongs do not make a right.” New challenges to the SBA policy may prove that dictum to be legally sound.

II. USDA RACE-BASED DEBT RELIEF PROGRAMS

ARPA also establishes a USDA debt relief program.⁶⁹ As part of the legislation, “Congress appropriated ‘such sums as may be necessary to pay for the cost of loan modifications and payments to ‘socially disadvantaged’ farmers and ranchers.”⁷⁰ Any loans issued by the USDA are eligible for up to 120% forgiveness, as long as the farmer or rancher who received the loan is “socially disadvantaged.”⁷¹ ARPA incorporates the definition of this term from 7 U.S.C. § 2279(a), which defines a socially disadvantaged farmer or rancher as one from a “socially disadvantaged group,” which is defined as “a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.”⁷² “In other words,” summarized a court considering a challenge to the provision, “the loan forgiveness program is based entirely on the race of the farmer or rancher.”⁷³

According to the USDA announcement by the Administrator of the Farm Service Agency, “socially disadvantaged” food producers have faced “systemic discrimination” with cumulative effects that have led or contributed to, among other consequences, a substantial reduction in their numbers, a reduction of the amount of farmland they control, and a cycle of debt that was exacerbated during the COVID-19 pandemic.⁷⁴ No hearings or documents were cited in USDA’s statement.

National Public Radio captured the story with the headline “Black Farmers Will Receive Stimulus Aid After Decades of USDA Discrimination,” and two black farmers were interviewed who had been denied loans.⁷⁵ But the new ARPA debt relief

program was more complex than the NPR story related because, in addition to benefitting black farmers, the program defined socially disadvantaged beneficiaries as encompassing farmers of “American Indian or Alaskan native, Hispanic or Latino, and Asian American or Pacific Islander” descent.⁷⁶ The beneficiaries did not have to be currently in arrears on their USDA loans to have debt forgiven, and a January 26, 2021, federal rule stopped all debt collections, foreclosures, and evictions for borrowers of any race.⁷⁷ Agriculture Secretary Thomas Vilsack testified before the House Committee on Agriculture about USDA’s commitment to undoing discrimination against socially disadvantaged farmers through, among other things, the debt relief program established by ARPA and the same law’s “approximately \$1 billion in additional funding for assistance and support to socially disadvantaged producers and groups.”⁷⁸

Under the new debt relief plan, food producers are permitted to “verify, update or submit a new ethnicity and race designation” with their local USDA service centers so checks can be sent quickly,⁷⁹ although socially disadvantaged persons do not actually have to apply for loan forgiveness but receive it automatically.⁸⁰ Secretary Vilsack said that the USDA “must redress the discrimination that has proven to be systemic,” and argued that “[b]y focusing on determining whether producers can prove specific, individualized discrimination, our past actions have failed to do the necessary work tailored to addressing the systemic discrimination socially disadvantaged producers face.”⁸¹ Food producers who are white, however, cannot have their debt canceled, regardless of their individual circumstances or the effect of the pandemic on their business. At the end of the USDA announcement, Zach Ducheneaux, the Administrator for the Farm Service Agency, provides an explanation for the program: the Biden-Harris Administration’s USDA is committed “to equity across the Department by removing systemic barriers and building a workforce more representative of America.”⁸²

There has been a substantial decrease in the amount of farmland owned by blacks in the 20th century, partly caused by urban migration.⁸³ Some of the loss, however, has been caused by discrimination. In 2010, black farmers won a \$1.25

thecounter.org/restaurant-relief-program-businesses-financial-purgatory-sba-covid-19/.
 68 Fu, *supra* note 46.
 69 ARPA, § 1005(a)(2).
 70 Faust v. Vilsack, No. 21-C-548, 2021 WL 2409729, at *1 (E.D. Wisc. June 10, 2021) (Decision and Order Granting Plaintiffs’ Motion for a TRO), available at <https://will-law.org/wp-content/uploads/2021/06/ORDER-on-TRO.pdf> (citing ARPA § 1005(a)(1)).
 71 *Id.* (citing 1005(a)(2)).
 72 *Id.* (citing 1005(b)(3), which cites 7 U.S.C. § 2279(a)(5)).
 73 *Id.*
 74 Zach Ducheneaux, *American Rescue Plan Socially Disadvantaged Farmer Debt Repayments*, USDA Blog, March 26, 2021, <https://www.farmers.gov/connect/blog/loans-and-grants/american-rescue-plan-socially-disadvantaged-farmer-debt-payments>.
 75 Seth Bodine, *Black Farmers Will Receive Stimulus Aid After Decades of USDA Discrimination*, NPR, March 17, 2021, available at <https://www.npr.org/2021/03/17/978288305/black-farmers-will-receive-stimulus-aid-after-decades-of-usda-discrimination>.

76 Ducheneaux, *supra* note 74.
 77 *Id.*
 78 See Opening Statement of Thomas J. Vilsack Before the House Committee on Agriculture – Remarks as Prepared, March 25, 2021, available at <https://www.usda.gov/media/press-releases/2021/03/25/opening-statement-thomas-j-vilsack-house-committee-agriculture>.
 79 Ducheneaux, *supra* note 74.
 80 *Id.*
 81 Vilsack, *supra* note 78.
 82 Ducheneaux, *supra* note 74.
 83 See Chuck Abbott, ‘Justice’ bill would transfer up to 32 million acres to Black farmers, FERN’S AG INSIDER, Nov. 19, 2020, <https://thefern.org/ag-insider/justice-bill-would-transfer-up-to-32-million-acres-to-black-farmers/>. The proposed Justice for Black Farmers Act died, but some saw the USDA debt relief program as a substitute with a greatly expanded list of beneficiaries. S.300, 117th Congress (2021), available at <https://www.congress.gov/bill/117th-congress/senate-bill/300/all-info>.

billion settlement from USDA in what was called the Pigford II agreement, enabling black farmers who missed the deadlines for filing complaints of discrimination between 1981 and 1997 to obtain a remedy.⁸⁴ There are important differences between the Pigford settlements and the new USDA debt relief program. For one thing, only black farmers were involved in the settlements, whereas ARPA empowers the USDA to forgive the loans of any farmers as long as they are not white.

Further, to benefit from the Pigford settlement agreement, each farmer individually had to make a discrimination complaint, while in the new USDA program, any farmer with USDA debt who is a member of a statutorily defined socially and economically disadvantaged group is eligible for relief. Beneficiaries under the new program merely have to review and sign a letter mailed to them from the Farm Service Agency verifying the amount of their debt and their race or ethnicity.⁸⁵ They do not have to allege or prove any previous discrimination.

Apparently, there is no relevant agricultural disparity study, and certainly not one that encompasses all of the racial and ethnic groups prioritized by the USDA program. Further, courts have not been sympathetic to using current racial preferences to remedy discrimination dating from earlier decades, which would leave the door wide open to government reallocations whenever there was a political majority to support them.

A. Faust v. Vilsack

On April 29, 2021, a dozen farmers in nine states—represented by the Wisconsin Institute for Law & Liberty (WILL)—filed a class action in the Eastern District of Wisconsin asking for declaratory relief and an injunction.⁸⁶ On June 10, Judge William C. Griesbach granted a motion for a TRO enjoining USDA from forgiving any loans under the ARPA program.⁸⁷ He began his opinion by quoting at length from the *Vitolo* opinion decided thirteen days earlier.⁸⁸ He found that the government had no compelling interest to support the racial

preferences in its debt relief program.⁸⁹ Judge Griesbach pointed to the *Croson* holding that a “generalized assertion that there has been past discrimination in an entire industry” does not establish a compelling interest in remedying past discrimination.⁹⁰ He concluded that “[a]side from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agricultural subsidies and pandemic relief efforts.”⁹¹ Furthermore, the judge found the USDA program was not narrowly tailored because there was no consideration of race-neutral programs, such as those that would require “individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding.”⁹²

B. Wynn v. Vilsack

Two weeks later, Judge Marcia Morales Howard of the Middle District of Florida also found the USDA debt relief program unconstitutional. Her reasoning, if sustained on appeal, presents a powerful challenge to all race-based public aid or contracting programs.⁹³ Scott Wynn, a white farmer denied USDA debt relief, was represented by the Pacific Legal Foundation (PLF) and asked the court to enjoin the Section 1005 plan.⁹⁴ In her 49-page opinion, Judge Howard considered the cautions against nationwide injunctions,⁹⁵ but she ultimately held that “[t]he implementation of Section 1005 will be swift and irreversible, meaning the only way to avoid Plaintiff’s irreparable harm is to enjoin the program.”⁹⁶ The parties were then required to “proceed with the greatest of speed” in completing discovery to the end of “reaching a final adjudication in this case.”⁹⁷

In coming to her conclusion, the judge found the plaintiff met his burden on all four requirements for a preliminary injunction.⁹⁸ Judge Howard considered USDA’s arguments that Section 1005 had a compelling interest, but she found “serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section

84 Jasmin Melvin, *Black Farmer win \$1.25 billion in discrimination suit*, REUTERS, Feb. 18, 2010, <https://www.reuters.com/article/us-usa-farmers-pigford/black-farmers-win-1-25-billion-in-discrimination-suit-idUSTRE61H5XD20100218>.

85 U.S. Department of Agriculture, American Rescue Plan Debt Payments, (effective Jan. 1, 2021), <https://www.farmers.gov/americanrescueplan>.

86 Complaint, *Faust*, 2021 WL 2409729, available at <https://will-law.org/wp-content/uploads/2021/04/Vilsack-Draft-complaint-v12.pdf>. The Mountain States Legal Foundation (Tenth Circuit), Southeastern Legal Foundation (Sixth Circuit), and American First Legal (Fifth Circuit) are also representing white plaintiffs challenging the USDA debt relief program in separate cases. In the Tenth Circuit case, the plaintiff is a Wyoming white female rancher, Liesl Carpenter, who with her husband runs a ranch with 500 cattle on 2,400 acres which she inherited from her grandparents along with a substantial debt on the drought-afflicted land. Valerie Richardson, *White farmers, ranchers fight Biden administration’s race-based loan program*, WASHINGTON TIMES, May 27, 2021, <https://www.washingtontimes.com/news/2021/may/27/white-farmers-ranchers-fight-biden-administrations/>.

87 *Faust*, 2021 WL 2409729, at *5.

88 *Id.* at *2-3.

89 *Id.* at *3.

90 *Id.* (quoting *Vitolo*, 2021 WL 2172181, at *4-5, which quotes *Croson*, 488 U.S. at 498) (internal quotation marks omitted).

91 *Id.* at *3.

92 *Id.*

93 *Wynn v. Vilsack*, No. 3-21-cv-514-MMH-JRK (M.D. Fla. June 23, 2021) (Order Granting Preliminary Injunction), available at <https://pacificlegal.org/wp-content/uploads/2021/05/Wynn-v-Vilsack-Order-granting-PI.pdf>.

94 Complaint, *id.*, available at <https://pacificlegal.org/wp-content/uploads/2021/05/5.18.21-Wynn-v-Vilsack-Complaint.pdf>. Wynn operated a farm that produced sweet potatoes and corn, and he also raised cattle. At the time of the lawsuit, he owed USDA \$300,000. PLF also filed complaints on behalf of a Texas farmer (*McKinney v. Vilsack*) and an Illinois farmer (*Kent v. Vilsack*).

95 *Wynn*, No. 3-21-cv-514-MMH-JRK, at *46.

96 *Id.* at *47-48.

97 *Id.* at *48.

98 *Id.* at *46.

1005's race-based remedial action."⁹⁹ But she deferred a final ruling on that issue.¹⁰⁰ Then she went into new judicial territory. Even if a compelling interest for this race-based program could be established, she concluded Section 1005 was not narrowly tailored because it provided debt relief to all minority farmers whether or not there was any evidence of discrimination against them as individuals.¹⁰¹

Typically, in cases involving race-based programs, the issue is whether statistics showing general disparities or other evidence demonstrates discrimination against a particular group, and whether such evidence creates a compelling interest in remedying the identified discrimination. If the answer is yes, all members of that group—whether or not they have personally suffered discrimination—become eligible for race-based preferences. In the segregation era, it didn't matter whether individual African-Americans were educated, affluent, or successful entrepreneurs, all still suffered from racial discrimination. In the 21st century, that argument can still be made, but it will be harder to prove, as Judge Howard's opinion shows.

USDA has announced that it plans to appeal the *Faust* and *Wynn* decisions, and there is litigation on the same issues in other jurisdictions.¹⁰² Unlike with the RRF program, which has access to limited funds, Congress appropriated "such sums as may be necessary" for the agricultural debt relief program, so there are no immediate financial constraints on the government.¹⁰³

III. EQUITY AND EQUAL PROTECTION

The two RRF cases and the ongoing USDA litigation may be only the beginning of a long-term conflict over how the concepts of equity and equal protection should inform the use of race in government programs to determine beneficiaries. It may be that the use of racial preferences in ARPA constitutes an overreach that will undermine those preferences at every government level. Indeed, after a quiescent period, conservative litigating agencies including America First Legal, Mountain States Legal, Pacific Legal, Southeastern Legal, and WILL seem poised to challenge preferences, and now they have new precedents to use.

There is far more at stake than the allocation of about \$30 billion of federal COVID-19 relief money. The challenges to racialized definitions of socially and economically disadvantaged groups used in so many SBA, Department of Defense, and Department of Transportation programs, if judicially affirmed, have huge implications for decades' worth of previous federal policy. On the other hand, if governments are given free rein to pursue representational equity for every racial minority in

every economic sector, there will be major consequences for most domestic policies and programs. Judicial sorting out of the permissible application of the equity and equal protection theories will affect almost every area of American society.

From the equity viewpoint, when there are substantial group disparities in business ownership, wealth, homeownership, health, education, etc., the Constitution should not stand in the way of race-targeted programs to eliminate those gaps.¹⁰⁴ After all, equity advocates assume the disparities must have been created or influenced by public or private institutional discrimination sometime in the past or present. In almost every jurisdiction in the United States, women and minorities constitute a majority of the population. If mobilized to pursue equity goals of proportional representation or even reparations, there is nothing politically that could stop them.

Under traditional equal protection principles, individuals, not groups, are protected. Race can only be used to remedy relatively recent and specifically identified discrimination, and the remedy must be narrowly tailored to benefit only those individuals or firms who have actually suffered from discrimination. As Justice Sandra Day O'Connor stated in *Croson*, if general statistical disparities were defined as "identified discrimination," that would give "governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."¹⁰⁵

Probably it will take a fresh set of Supreme Court decisions to establish clear lines on whether the equity or equal protection theory will prevail. If the courts hold the racial classifications used in the RRF and the USDA programs unconstitutional, the traditional equal protection theory might yet prevail. But the equity theory is culturally ascendant and seemingly unstoppable. The food producer cases discussed here may provide the vehicle for determining the outcome of this jurisprudential battle.

99 *Id.* at *15. *See also id.* at *30 (labeling the congressional statements supporting Section 1005 as inadequate "perfunctory" findings) (citing Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty., 122 F.3d 895, 927-28 (11th Cir. 1994)).

100 *Id.* at *16.

101 *Id.* at *25-26.

102 Helena Bottemiller Evich, *USDA will 'forcefully defend' debt relief for farmers of color after judge's order*, POLITICO, June 14, 2021, <https://www.politico.com/news/2021/06/14/usda-defend-debt-relief-farmers-of-color-494348>.

103 ARPA § 1005(a)(1).

104 *See, e.g., Vitolo*, 999 F.3d 353, at *16 et seq. (Donald, J., dissenting).

105 *Croson*, 488 U.S. at 499.

