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Legal Sidebar

The American Rescue Plan Act: Equal Protection Challenges

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Following the enactment of the American Rescue Plan Act (ARPA) earlier this year, several lawsuits have been filed in federal court alleging that certain race- or sex-conscious relief that the ARPA authorizes is unconstitutional on equal protection grounds. These complaints have challenged aspects of the ARPA authorizing the Restaurant Revitalization Fund (RFF) program administered by the Small Business Administration (SBA) and a loan forgiveness plan administered by the Department of Agriculture (USDA); among other requested relief, plaintiffs sought court injunctions to halt their implementation. As the SBA and USDA began to implement these programs, several federal courts, including a federal court of appeals for the Sixth Circuit, granted motions to preliminarily or temporarily enjoin the agencies from implementing these programs until the litigation is resolved.

This Sidebar discusses equal protection principles at play in these legal challenges. It then highlights aspects of the Sixth Circuit decision concerning an equal protection challenge to the SBA-administered RFF program, and several federal district court decisions addressing similar challenges to the USDA-administered loan forgiveness program. The Sidebar closes with potential considerations for Congress.

Equal Protection Principles

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall … deny to any person within its jurisdiction the equal protection of the laws." As a general matter, the same equal protection obligations apply to the federal government through the Fifth Amendment. Thus, where federal legislation includes relief or targeted benefits to groups based on race or sex, such legislation may trigger equal protection claims. While the federal government can consider race or sex in narrow circumstances, such as to remedy past and present discrimination by a state actor against such groups, the Constitution's equal protection guarantees require that the government have sufficient justification for doing so.

To make that determination, federal courts apply "strict scrutiny" to racial classifications, a test that requires the government to demonstrate a compelling interest for considering race and show that its action was "narrowly tailored" to further that interest. When remedying discrimination is asserted as a compelling interest, Supreme Court precedent requires that the government show sufficient evidence for concluding that remedial action was necessary. In addition, a court will examine whether the remedial

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action is "narrowly tailored" to address the discrimination Congress sought to address. For sex-based classifications, the government must show that its consideration of sex serves an important government interest, and that its action was "substantially related" to achieving that interest. As part of these analyses, courts may examine whether the government's remedial action was too broad, benefiting groups for which there was little or no evidence of intentional discrimination. Conversely, if race- or sex-conscious legislation fails to provide redress to groups that experienced the discrimination the government intended to address, such underinclusiveness may also inform a court's analysis.

As discussed in more detail below, the courts that have addressed equal protection challenges to the RFF and USDA loan forgiveness program thus far have concluded that the government fell short in these showings. More specifically, the courts have drawn those conclusions by examining whether Congress had sufficient evidence from which to determine that the challenged programs addressed discrimination against the specified groups, and whether the programs were narrowly tailored to counter the alleged discrimination.

Challenged ARPA Programs

The ARPA established the RFF, a $28.6 billion relief fund, to help small, privately owned foodservice businesses with payroll and expenses. During the fund's first 21 days in operation, ARPA directed the SBA to process only priority applicants, businesses owned and controlled by women, veterans, or "socially and economically disadvantaged" people. The legislation defines "socially and economically disadvantaged," through reference to the Small Business Act, as "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." Under an applicable SBA regulation, some applicants are presumed to be "socially disadvantaged" because they belong to a specified race or ethnicity. Others claiming the designation, including anyone alleging societal discrimination based on membership in an ethnic or racial group not listed in the regulation, may qualify as "socially disadvantaged" if they show, by a preponderance of the evidence, that they have experienced discrimination or bias. Other than the 21-day period for priority businesses, funds are distributed on a first-come, first-served basis. Arguing that the fund might run out before nonpriority applicants could be considered, several business owners who did not qualify for the preference filed suit.

In a case recently decided in the Sixth Circuit, *Vitolo vs. Guzman*, the plaintiff sought a temporary restraining order and then a preliminary injunction to stop the SBA from prioritizing based on race or sex. In addition, several similar restaurant lawsuits have been filed in other districts. In an expedited appeal, the Sixth Circuit granted the injunction and ordered the SBA to "fund the plaintiffs' grant application, if approved, before all later-filed applications." It declined plaintiffs' request for a broader injunction barring SBA from distributing any RRF funds.

After the Sixth Circuit remand to the district court, other plaintiffs joined Vitolo's suit. The district court in *Vitolo* declined to enter individual injunctions for the new plaintiffs, pointing out that the SBA had stated that it was no longer processing priority applications ahead of nonpriority applications. On June 1, 2021, SBA awarded Vitolo's business $104,590.20 in RRF funds. The government has argued that, given it no longer prioritizes applications, plaintiffs are already receiving requested relief and that once RRF funds are exhausted, the cases will be moot.

Apart from the RRF, the ARPA mandates monetary relief for minority farmers, in the form of loan forgiveness. Specifically, a section of the ARPA directs USDA to provide each "socially disadvantaged farmer or rancher" a payment up to 120% of outstanding qualified debt (loans the USDA made or guaranteed), cancelling the debt and defraying resulting tax burdens. The statute defines "socially disadvantaged farmer or rancher" by cross-reference to the Food, Agriculture, Conservation, and Trade Act of 1990 as one who belongs to a group "subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." USDA has defined the groups

as "Black/African American, American Indian, Alaskan native, Hispanic/Latino, Asian, or Pacific Islander." White farmers have brought claims, including a class action, in Texas, Wisconsin, Florida, and Oregon, alleging that the debt relief program violates equal protection because it excludes them on account of race. To date, several courts have imposed nationwide orders forbidding USDA from making the ARPA farm payments.

Based on the district courts' orders, the USDA has stopped issuing ARPA payments. Processing continues, however, and USDA suspended payments on some loans pending resolution of the litigation. USDA has stated it will "forcefully defend" the ARPA program.

Remedying Discrimination with a "Strong Basis in Evidence" and "Narrowly Tailored" Action

The federal court decisions enjoining the RFF and USDA programs have in large part emphasized the government's failure to show that Congress had a "strong basis in evidence" to support its remedial actions. While legislation may sometimes take race and sex into account to remedy discrimination, Supreme Court precedent requires, among other showings, that the government based its action upon adequate evidence of discrimination. Federal appellate courts have repeatedly observed that the evidence necessary to satisfy the "strong basis in evidence" standard will turn on the specific facts of a case and the challenged action at issue.

In reviewing the race-based prioritization of SBA loans, the Sixth Circuit in *Vitolo* held that the plaintiff would likely prevail in his equal protection claim, as the government offered "little evidence" of past discrimination "against the many groups to whom it grants preferences." Although the Court acknowledged that the government offered evidence that Hispanic- and Black-owned businesses disproportionately failed during the Coronavirus Disease 2019 (COVID-19) pandemic, the government did not sufficiently link that disparity to intentional discrimination or show any government participation in such discrimination.

In addition, the court of appeals found that the racial preference was not narrowly tailored—the second prong of the strict scrutiny test—because it was both overbroad and underinclusive. The RFF racial prioritization was overbroad, the court concluded, because it applied to "vast swaths" of the population, as opposed to those racial minorities for which the government had offered some evidence of harm. On the RFF's underinclusiveness, the court pointed out that requiring a prioritized business be "at least 51% owned by women or minorities" excluded businesses owned by Black investors, for example, with smaller shares than 51%. As further illustration, the court noted that the plaintiff's restaurant was 50% owned by a Hispanic female, and observed that it was "far from obvious why that 1% difference in ownership is relevant." The Sixth Circuit also identified "race-neutral" alternatives that Congress could have enacted to achieve its goals before turning to a prioritization based on race. "Because these race-neutral alternatives exist," the court stated, "the government's use of race is unconstitutional." The Sixth Circuit also concluded that the prioritization of female-owned businesses did not survive the more lenient standard of review applied to gender-based preferences.

Similar themes appear in the federal district court decisions addressing equal protection challenges to the USDA loan forgiveness program for minority farmers. A district court in Wisconsin, for example, ruled that plaintiffs would likely succeed on the merits of their claim, justifying a restraining order, because the government had "not established that the loan-forgiveness program targets a specific episode of past or present discrimination." A federal district court in Texas also concluded that the government had failed to demonstrate a "strong basis in evidence" for the loan forgiveness program, as the government's evidence cited certain statistical racial disparities (in access to USDA programs, for example), without linking such disparities to the intentional discrimination required to satisfy the standard. Similarly, in Florida, a court

expressed "serious concerns" about whether the government had established a firm basis in evidence (particularly for certain included ethnic groups), but ruled that the case turned on the program's failure to satisfy narrow tailoring.

On the issue of narrow tailoring, the district court in Wisconsin found the loan forgiveness program likely overbroad, offering relief "without actually considering the financial circumstances of the applicant." Citing to the Sixth Circuit's *Vitolo* decision, the district court further concluded that the program was not narrowly tailored, as the government failed to show that Congress meaningfully explored whether race-neutral policies could address the harm it sought to remedy. Meanwhile, the district court in Florida saw "little if anything" narrowly tailored in the debt relief provision. The court pointed out that the program benefited those who succeeded in securing USDA loans, but concluded that the government did not show that this "particular group" of disadvantaged farmers suffered discrimination. Relatedly, the court questioned the plan's underinclusiveness in that, among other things, it offered no remedy to minority farmers who were discriminatorily denied farm loans altogether. The plan was also overinclusive, the court said, given the breadth of the racial groups included in the beneficiary group. The district court in Texas, citing to the Florida court's analysis, also concluded that the program was not narrowly tailored as equal protection requires.

Potentially Unique Considerations

Though the Sixth Circuit panel held in *Vitolo* that the RFF program was likely unconstitutional, the decision elicited a dissenting opinion on various aspects of the panel's reasoning. Among other things, the dissenting judge expressed concern that COVID-19 emergency legislation, here a "one-off monetary lifeline aimed at ameliorating short-term economic devastation," might call for "a different kind of deference to the legislature" than afforded in routine equal-protection analysis. The dissenter did not note precedent for this novel standard but, in pandemic circumstances, she opined, "Congress deemed that it needed to act fast."

Considerations for Congress

Not every consideration of race in legislation will amount to a racial classification that triggers strict scrutiny. For example, the collection of racial data does not, standing alone, trigger equal protection concerns. At least one potential legislative option, however, to avoid triggering strict (or intermediate) scrutiny is to target relief based on race- or sex-neutral characteristics. For example, legislation could target relief for communities based on metrics such as the availability or absence of certain services or resources in certain communities. Legislation could also direct relief or benefits based on geographic distinctions, such as degree of urbanization, population density, or proximity to certain resources or environmental hazards. Relatedly, legislation could also direct benefits or relief based on population characteristics, such as populations with low participation rates in banking, home or land ownership, and internet access.

Should Congress seek to enact legislation responsive to specific discrimination, and thus target certain racial groups for relief, such remedial action will generally require the development of a legislative record—a "strong basis in evidence." The evidence must justify Congress's conclusion that a particular group or groups suffered intentional discrimination in a given context, setting, or industry. Such a legislative record might include congressional hearings and testimony, for example, presenting evidence supporting an inference of intentional discrimination, in contrast to general assertions of society-wide discrimination.

Federal courts' equal protection analyses are highly fact- and context-specific. In other words, the invalidation of certain legislation on equal protection grounds does not mean that similar—or even the same—tools are unconstitutional in the context of another law or program, or where supported by more

evidence of intentional discrimination against the groups granted relief. To that end, some governmental entities have—after first or multiple attempts—successfully reintroduced race-conscious relief after an equal protection challenge. To accomplish this, amended or reauthorized legislation may need to be supported, for example, by additional fact-finding and evidence of intentional discrimination. In addition, such amended or reauthorized legislation might consider how to more narrowly tailor the remedy at issue, such as which groups are included and excluded from the beneficiary class.

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