Trouble With ARPA

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Overview

The American Rescue Plan Act of 2021 (ARPA) allocated approximately $29 billion to a "Restaurant Revitalization Fund" for grants to help restaurant owners meet payroll and other expenses. *ARPA, §5003(b)(2)(A).* Another section of ARPA, §1005, is a USDA loan "pay-off" program. But, priority is given to certain restaurants and only certain people can get their ag loans paid off. There's the rub. If you're in the select group, all is well. If you're not, then you are out of luck. But, are the programs constitutional?

The constitutionality of parts of ARPA – that's the focus of today's blog post.

Restaurant Revitalization Fund (RRF)

As noted above, ARPA creates a fund for grants to help restaurant owners meet payroll and other expenses. The funded grants are to aid small, privately owned restaurants rather than large chain restaurants. *ARPA, §5003(a)(4)(C).* The Small Business Administration (SBA) processes the applications and distributes the funds. During the application process, restaurant owners must certify to the SBA that the grant is necessary to support ongoing operations. *ARPA, §5003(c)(2)(A).*

The fund is not unlimited – the SBA distributes the money from the fund on a first-come, first-served basis, with a catch. The catch is that fund distributions during the first 21 days are restricted to applicants that are at least 51 percent owned and controlled by women, veterans, or the "socially and economically disadvantaged." *ARPA §5003(c)(3)(A).* Non-priority restaurants may apply during the initial 21-day period, but they will not receive a grant until the initial period expires. *Id.* If the fund is depleted by then, the non-priority restaurants will not receive any funds – the fund will not be replenished.

The *Vitolo* case. In *Vitolo v. Guzman, Nos. 21-5517/5528, 2021 U.S. App. LEXIS 16101 (6th Cir. May 27, 2021),* the plaintiffs, a married couple, owned a restaurant. The husband is white and his wife is Hispanic, and they each owned 50 percent of the restaurant. They submitted an application on May 3, the first day the RRF became available. That's when they learned that restaurants that are majority owned by women and minorities would be prioritized and that they weren't eligible for any grant funds during the priority period. They were notified that they would be eligible for $104,590 from the RRF if money remained in the fund after the priority distribution period. Because the restaurant was not at least 51 percent owned by a woman or veteran, the plaintiffs had to qualify as "socially and economically disadvantaged" to get priority status. ARPA defines social and economic disadvantage by reference to the Small Business Act. Under that legislation, "socially disadvantaged" is defined as a person having been "subjected to racial or ethnic prejudice" or "cultural bias" based solely on immutable characteristics. *15 U.S.C. §637(a)(5); 13 C.F.R. §124.103(a).* A person is considered "economically disadvantaged" if (1) he is socially disadvantaged; and (2) he faces "diminished capital and credit opportunities" compared to non-socially disadvantaged people who operate in the same industry. *15 U.S.C. §637(a)(6)(A).* If a person falls into one of the racial or ethnic groups, the SBA simply presumes that the person qualifies as socially disadvantaged. If the presumption doesn't apply, an applicant must prove that they have experienced racial or ethnic discrimination or cultural bias by a preponderance of the evidence.

The plaintiffs sued to end the explicit racial and sex/ethnic priority preferences in the RRF's grant funding process (13 C.F.R. §124.103) on the basis that the funding was unconstitutionally discriminatory. The trial court did not issue a restraining order or injunction. On appeal, the appellate court granted the plaintiff's motion for an expedited appeal. The court concluded that the government had no compelling interest in giving some races of people priority access to the RRF, and that the SBA was engaged in nothing less than "racial gerrymandering." In addition, the appellate court concluded that granting priority to RRF funds to women constituted sex-based discrimination that was presumptively invalid, and that the government failed to provide any "exceedingly persuasive justification" for such discrimination. Indeed, the appellate court pointed out that all women-owned restaurants were prioritized even if they were are not economically disadvantaged. Thus, the government failed to carry its burden of showing that its discriminatory policy passed the substantial-relation test.

Accordingly, the appellate court granted the plaintiff an injunction pending appeal, noting that the plaintiffs will win on the merits of their constitutional claim. The appellate court ordered the government to fund the plaintiff's grant application upon approval before all later-filed applications without regard to processing time or the applicant's race or sex. Veteran-owned restaurants can continue to receive priority funding. The preliminary injunction is to remain in place until the case is resolved on the merits, or all appeals are exhausted.

USDA Loan Forgiveness

Section 1005 of ARPA directs the U.S. Secretary of Agriculture to pay up to 120 percent of the outstanding debt in existence as of January 1, 2021, of a "socially disadvantaged farmer or rancher." *H.R. 1319, §1005(a)(2).* A "socially disadvantaged farmer or rancher" is defined as a person that is a member of a "socially disadvantaged group" which is defined, in turn, 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. *H.R. 1319, §1005(b)(3), referencing 7 U.S.C. 2279(a).* In short, the loan forgiveness program is based entirely on the race of the farm or ranch borrower.

The payment is to either be a direct pay-off of the borrower's loan or be paid to the borrower with respect to any of the borrower's USDA direct farm loans and any USDA-guaranteed farm loan. *H.R. 1319, §§1005(a)(2)(A)-(B).* Also included is a Commodity Credit Corporation Farm Storage Facility Loan.

On it's website (https://www.farmers.gov /americanrescueplan), the USDA stated that, "Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. . . . After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA." It advises that, in June 2021, the FSA will begin to process signed letters for payments, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt." *Id.* $3.8 billion was allocated to the program.

The *Foust* case. In May the loan forgiveness program was challenged on constitutional grounds as being racially discriminatory. In *Foust, et al. v. Vilsack, No. 21-C-548, 2021 U.S. Dist. LEXIS 108719 (E.D. Wisc. Jun. 10, 2021),* the court entered a universal temporary restraining order barring the USDA from forgiving any loans pursuant to ARPA §1005 until the court rules on the plaintiffs' motion for a preliminary injunction. The court noted that the plaintiffs', twelve white farmers from nine states, would suffer irreparable harm without the issuance of the restraining order; did not have adequate traditional legal remedies; and had likelihood of success on the merits. The court concluded that the USDA lacked a compelling interest for the racial classifications of the loan forgiveness program and failed to target any specific episode of past or present discrimination. The court also determined that the USDA had no evidence of intentional discrimination by the USDA in the implementation of recent ag subsidies and pandemic relief efforts. As

such, the USDA failed to establish that it had a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications.

The court also determined that the plaintiffs were likely to succeed on the merits of their claim that the USDA's use of race-based criteria in the administration of the program violates their right to equal protection under the law. The court further determined that if it did not issue the injunction, the USDA would spend the allocated funds for the loan forgiveness program and forgive the loans of minority farmers while the case is pending and would have no incentive to provide similar relief on an equitable basis to others. The court stated, "Plaintiffs are excluded from the program based on their race and are thus experiencing discrimination at the hands of their government." Accordingly, the court held that the plaintiffs had established a strong likelihood that Section 1005 of the ARPA is unconstitutional and that the public interest favored the issuance of a temporary restraining order.

The court's order bars the USDA from forgiving any loans pursuant to Section 1005 of ARPA until the court rules on the plaintiffs' motion for a preliminary injunction.

Conclusion

One would think that in 2021, the U.S. government would not be discriminating in its programs based on immutable characteristics. I guess not.