23-1086-cv

United States Court of Appeals

for the

Second Circuit

MC MANAGEMENT OF ROCHESTER LLC., PANE VINO LLC., PHARAOHS GC INC., VENETO WESTSIDE LLC., MJM FITCH, INC., 759 CANANDAIGUA, INC., GRAND CENTRAL WINE BAR, LLC., WILLIAM JAMES DEVELOPMENT CORP., RAPHAEL'S CORP., WMK MANAGEMENT, INC.,

Plaintiffs-Appellants,

– v. –

JOSEPH R. BIDEN, in his official capacity as President of the United States, NANCY PELOSI, in her official capacity as the Speaker of the United States House of Representatives, CHARLES SCHUMER, in his official capacity as the United States Senate Majority Leader, KEVIN MCCARTHY, in his official capacity as Minority Leader of the United States House of Representatives, MITCH MCCONNELL, in his official capacity as Minority Leader of the United States Senate, ISABEL CASILLAS GUZMAN, in her official capacity as Administrator of the United States Small Business Administration, THE UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

EDWARD P. YANKELUNAS
TIVERON LAW PLLC
Attorneys for Plaintiffs-Appellants
2410 North Forest Road, Suite 301
Amherst, New York 14068
(716) 636-7600

CP COUNSEL PRESS (800) 4-APPEAL • (512958)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MC MANAGEMENT OF ROCHESTER LLC., *et al.*

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Docket No. 23-1086

Pursuant to Federal Rule of Appellate Procedure Rule 26.1(a), Plaintiffs-Appellants, MC MANAGEMENT OF ROCHESTER, LLC., PANE VINO LLC., PHARAOHS GC INC., MJM FITCH INC., VENETO WESTSIDE LLC., 759 CANANDAIGUA, INC., GRAND CENTRAL WINE BAR, LLC., RAPHAEL'S CORP., WILLIAM JAMES DEVELOPMENT CORP., and WMK MANAGEMENT, INC., by and through their attorneys, TIVERON LAW, PLLC, hereby declare that (1) they have no parent corporation and (2) no publicly held corporation owns more than 10% of the stock of the above-listed entities.

Dated: Amherst, New York
November 10, 2023

/s/Edward P. Yankelunas, Esq.

Edward P. Yankelunas, Esq.
Tiveron Law, PLLC
Attorneys for Plaintiffs-Appellants
2410 N. Forest Road, Suite 301
Getzville, New York 14068
(716) 636-7600
eyankelunas@tiveronlaw.com

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STATEMENT OF JURISDICTION

This action was filed in the Western District of New York and presents claims relative to the violation of the Appellants' constitutionally protected equal protection and due process rights and, as such, presents a federal question pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal from the District Court's final Judgment dismissing all claims. 28 U.S.C. § 1291.

This appeal is from a final Order and Judgment that disposes of all claims. On June 27, 2023, Judge Elizabeth A. Wolford issued a Decision and Order ("Decision") granting the motion of the Defendants to dismiss the Complaint pursuant to FRCP 12(b)(1) and 12(b)(6). Plaintiff-Appellant timely filed its notice of appeal on July 28, 2023.

STATEMENT OF ISSUES/QUESTIONS PRESENTED

1. Did the District Court err when it applied a preponderance burden to Appellants for a facial attack of subject-matter jurisdiction pursuant to 12(b)(1)?
2. Did the District Court err when it sua sponte took judicial notice of facts outside the pleadings subjecting Appellants to a preponderance burden without an opportunity to respond?
3. Did the District Court err when it denied Appellants leave to amend despite Appellants having a meritorious *Bivens* claim for damages?
4. Did the District Court err when it determined that Appellants' requests for declaratory relief did not possess a likelihood of future injury?

STATEMENT OF FACTS

On March 11, 2021, the President of the United States signed the American Rescue Plan Act ("ARPA") into law and through Section 5003 of the ARPA Congress appropriated $28.6 billion for the Restaurant Revitalization Fund ("RRF") to be administered by Isabel Casillas Guzman as Administrator of the Small Business Administration ("SBA"). The ARPA provides that the "Administrator shall use amounts in the Fund to make grants" to restaurants that require grant support due to "the uncertainty of current economic conditions."

Section 5003(c)(3) of ARPA provides a priority to certain applicants: "During the initial 21-day period in which the Administrator awards grants under this subsection, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, [veterans], or socially and economically disadvantaged small business concerns" (hereinafter "priority applicants"). To qualify as a "priority applicant", the small business concern must be a restaurant that is at least 51% owned and controlled by women, veterans or the "socially and economically disadvantaged."

The ARPA incorporates another federal law called the Small Business Act, which provides that "[s]ocially disadvantaged individuals are those who have been 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." 15 U.S.C. § 637(a)(4)(A).

SBA regulations further define "socially disadvantaged individuals" and "economically disadvantaged individuals" as individuals who belong to certain racial groups. 13 C.F.R. §§ 124.103, 104. To be included into one of those racial categories, individuals must be a member of one of the following groups: "Black Americans; Hispanic Americans; Native Americans (including Alaska Natives and Native Hawaiians); Asian Pacific Americans; or Subcontinent Asian Americans." The Appellants in this action are listed below. Despite being entitled to the RRF funds applied for, no RRF grants were awarded to any of the Appellants[1]:

- Plaintiff MC Management applied for an RRF grant on May 3, 2021 and the anticipated RRF award was $7,034,823.00.
- Plaintiff Pane Vino applied for an RRF grant on May 17, 2021 and the anticipated RRF award was $636,588.00.
- Plaintiff Pharaohs applied for an RRF grant on May 18, 2021 and the anticipated RRF award was $2,025,418.00.
- Plaintiff Veneto Westside applied for an RRF grant on May 4, 2021 and the anticipated RRF award was $142,166.40.
- Plaintiff MJM Fitch applied for an RRF grant on May 3, 2021 and the anticipated RRF award was $421,458.89.
- Plaintiff 759 Canandaigua applied for an RRF grant on May 3, 2021 and the anticipated award was $547,406.29.

[1] The amounts of the RRF grants applied for and the dates of the Appellants' applications are referenced in the Appellants' Complaint (Paragraphs 37-46).

- Plaintiff Grand Central applied for an RRF grant on May 3, 2021 and the anticipated RRF award was $455,981.30.

- Plaintiff William James Development applied for an RRF grant while funds were available, and the anticipated award was $505,328.00.

- Plaintiff Raphael's applied for an RRF grant on May 19, 2021 and the anticipated award was $83,098.00.

- Plaintiff WMK applied for an RRF grant while funds were available, and the anticipated award was $2,853,127.32.

The non-priority Appellants are not 51% owned and controlled by women or the minority groups described in the above-referenced SBA regulations and provisions of the Small Business Act. As a result, the Appellants did not qualify for priority consideration for RRF grants based on race or gender and, therefore, their applications were not considered during the initial 21 day priority period which began on May 3, 2021. According to the Government's submission to the District Court in support of its motion, during that period of time (by May 18, 2021) the SBA had received applications requesting over $69 billion in funds. (Govt. Mem., p. 4).

The Appellants in this action sought a declaration by the District Court that, as parties entitled to receive grants under the RRF program, the Appellants' equal protection rights have been violated and, furthermore, that the Appellants had a constitutionally protected property interest in the receipt of RRF funds and that the Appellants' corresponding due process rights were violated by the Government causing the Appellants to be deprived of RRF funds for which they qualified based

on the SBA's unconstitutional and discriminatory administration of the RRF program. As a remedy to redress the injury in fact sustained by Appellants which is traceable to the Government's unconstitutional conduct, the Appellants seek damages.

SUMMARY OF ARGUMENT

This Court should remand this case to the District Court and instruct the Court to apply the correct pleading standard for Rule 12(b)(1) motions to dismiss that are facial attacks upon the pleadings. Upon doing so, Defendants' motion to dismiss under Rule 12(b)(1) would be denied and the District Court could consider Defendants' motion to dismiss under Rule 12(b)(6). The Court could also take judicial notice of the facts previously considered, and transform Defendants' motion to dismiss into a summary judgment motion under Rule 56.

Alternatively, this Court should remand this case to the District Court and provide Appellants an opportunity to be heard under the heightened pleading standard raised *sua sponte* by the District Court. For efficiency purposes, Appellants respectfully ask this Court to decide whether Appellants have Article III standing for their declaratory judgment and damages causes of action. This Court's consideration of these issues would effectuate judicial efficiency as the District Court has previously treated Defendants' motion to dismiss as a facial attack under Rule 12(b)(1) subjecting Appellants to a preponderance burden to establish Article

III standing. For the reasons explained below in Appellants' brief, these legal conclusions are flawed and do not correctly apply the Court's *Bivens* case precedent or likelihood of future injury. The District Court has already ruled upon these issues despite its procedural errors. Therefore, this Court should reach the underlying merits of Appellants' Article III standing.

Appellants can establish subject-matter jurisdiction for its damages claim through a *Bivens* action. Furthermore, Appellants can satisfy the likelihood of future injury for Appellants' declaratory relief claims due to the imminent likely harm by Congress creating another "prioritization period" where it directs Federal Officials to violate citizen's constitutional rights on a short-term basis to avoid judicial review.

The District Court's determination that Appellants cannot establish Article III standing for its damages claim is a misapplication of *Bivens* and its progeny established by the Supreme Court. First, Appellants' claims arise in the same context as the Supreme Court's decision in *Passman*, and its precedent should be followed. Second, even if Appellants' cause of action for damages arises in a new context, there are no special hazards that prevent the Judiciary from crafting a remedy. Under the circumstances presented here, the Judiciary must be the branch to craft any remedy as Congress has shown through the legislation passed in this instance it

cannot be trusted to craft a remedy in this specific sphere due to the legislative directions to violate the Constitution.

Finally, some of Appellants' requests for declaratory relief are not seeking relief from a past injury, but rather attempting to clarify a citizens' rights to relief when a future injury occurs. Although the prioritization period has ended and the SBA Administrator has voiced her intention to not further violate the Constitution, a future injury is still likely. The original constitutional injury was a direct result of the unconstitutional direction to discriminate by gender that was inserted into the statutory language by the Congress and approved by the President. Under the scope of its powers articulated under *Madbury v. Madison*, the Judiciary must clarify the remedies available when the Congress deliberately instructs Federal agents to violate citizens' constitutional rights through a temporary scheme that will evade full judicial review. These directions are designed to avoid ordinary constitutional review, as the "priority period" under which the unconstitutional conduct occurs will have terminated and the application of the prioritization period will be moot.

Based on all the following, Appellants seek the reversal of the District Court's Order. Appellants contend that a remand with proper instruction for leave to amend and an opportunity to be fully heard under the pleading standard is appropriate. Given the opportunity, Appellants can properly establish Article III standing under their *Bivens* claim, and their entitlement to declaratory relief given Congress'

unconstitutional direction to the SBA Administrator which caused Appellants' constitutional rights to be violated and subjected them to damage of their property rights.

STANDARD OF REVIEW

When reviewing a District Court's determination of its subject matter jurisdiction, the Second Circuit Court of Appeals reviews factual findings for clear error and legal conclusions *de novo*. *McCarthy v. Navistar Fin. Corp. (In re Vogel Van & Storage)*, 59 F.3d 9 (2d Cir. 1995).

When a defendant moves to dismiss for lack of standing, the Second Circuit's standard of review depends on whether the defendant brings a "facial" challenge, "based solely on the allegations of the complaint" or a "fact-based" challenge, "proffering evidence beyond the [p]leading." *Carter v. HealthPort Technologies, LLC*, 822 F.3dd 47, 56-57 (2d. Cir. 2016). A facial attack challenges the sufficiency of the jurisdictional facts alleged, not the facts themselves." *Id* at 56; *Tasini v. New York Times Co.*, 184 F. Supp. 2d 350, 353 (S.D.N.Y.). When the Rule 12(b)(1) motion is facial, i.e., based solely on the allegations of the complaint or the complaint and exhibits attached to it (collectively the "pleading"), the plaintiff has no evidentiary burden. *Id*. The task of the District Court for a facial attack is to determine whether the pleading "allege[s] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue. *Id*.

Alternatively, a defendant is permitted to make a fact-based Rule 12(b)(1) motion, proffering evidence beyond the pleading. *Id*. A factual attack "challenges whether sufficient facts exist for the court to determine that it has jurisdiction to hear the plaintiffs' claims. *Holland v. JPMorgan Chase Bank, N.A.*, 2019 U.S. Dist. LEXIS 146553 (2019). On a factual challenge, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). In opposition to such a motion, the plaintiffs will need to come forward with evidence of their own to controvert that presented by the defendant. *Id*. However, the plaintiffs are entitled to rely on the allegations in the pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing. *Id*.

The Second Circuit reviews the District Court's determination of whether to take judicial notice of facts for abuse of discretion. *Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406 (2d Cir. 2008).

To satisfy Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). Each element of standing must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation,

and at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d. Cir. 2017).

When a party requests leave to amend his complaint, permission generally should be freely granted. *Grullon v. City of New Haven*, 720 F.3d 133, 140 (2d Cir. 2013); See also Fed. R. Civ. P. 15(a)(2); *Foman v, Davis*, 371 U.S. 178, 182 (1962).

Declaratory relief may be ordered pursuant to the Declaratory Judgment Act "in the case of actual controversy" 28 U.S.C. § 2201 (2010). A court must entertain a declaratory judgment action: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Cont'l Cas. Co v, Coastal Sav. Bank*, 977 F.2d 724, 737 (2d Cir. 1992).

Here, Appellants do not challenge the District Court's factual findings upon which it took judicial notice. Instead, Appellants assert the District Court made a series of legal missteps all of which are subject to *de novo* review.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED AS A MATTER OF LAW BY APPLYING THE WRONG EVIDENTIARY BURDEN TO APPELLANTS TO ESTABLISH ARTICLE III STANDING

When a defendant moves to dismiss for lack of standing based solely on the allegations of the complaint, the plaintiff has no evidentiary burden and the task of the District Court is to determine whether the pleading alleges facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue. *Carter v. HealthPort Technologies, LLC,* 822 F.3dd 47, 56-57 (2d. Cir. 2016). Attacking the allegations of the complaint is a "facial attack," which challenges the sufficiency of the jurisdictional facts alleged, not the facts themselves." *Id* at 56; *Tasini v. New York Times Co.,* 184 F. Supp. 2d 350, 353 (S.D.N.Y.). When subjected to a "facial attack" pursuant to Rule 12(b)(1), the plaintiff has no evidentiary burden. *Sonterra Capital Master Fund, Ltd. v. UBS AG,* 954 F.3d 529 (2d Cir. 2020). The task of the District Court for a facial attack is to determine whether the pleading "allege[s] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue. *Id.*

Alternatively, if a defendant makes a fact-based Rule 12(b)(1) motion, they must proffer evidence beyond the pleading. *Id*. A factual attack "challenges whether sufficient facts exist for the court to determine that it has jurisdiction to hear the plaintiffs' claims. *Holland v. JPMorgan Chase Bank, N.A.,* 2019 U.S. Dist. LEXIS

146553 (2019). On a factual challenge, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

For Rule 12(b)(1) purposes, this Court has found that "[i]n resolving the question of jurisdiction, the district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493 (2d Cir. 2002). Appellants assert that the District Court cannot rely on evidence outside the pleadings when the Defendants have only made a "facial attack" against a plaintiff's pleadings.

In this case, the District Court relied upon its ability to refer to evidence outside the pleadings and subjected Appellants to a preponderance burdern in its Decision and Order. (Dec. at 6)[2]. The Court's application of a preponderance burden as contemplated under a "factual attack" pursuant to Rule 12(b)(1) was an error of law as Defendants' did not properly provide any evidence beyond the pleadings. Therefore, Defendants' attack on Appellants' pleadings was nothing but a "facial attack" and no evidentiary burden should have applied.

[2] References are to the District Court's Decision and Order which is included in the Record on Appeal.

On November 28, 2022, Defendants filed their motion to dismiss, noting: "[f]or the reasons stated in the attached memorandum, the defendants respectfully move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction or, alternatively, under Rule 12(b)(6) for failure to state a claim upon which relief can be granted…." The only document provided in support of Defendants' motion to dismiss for lack of jurisdiction and failure to state a claim was a "Memorandum in Support" filed by U.S. Department of Justice attorney Kevin Wynosky. Under this Court's precedent, it is an error of law for a District Court to consider factual allegations made in a memorandum of law without converting the motion into one for summary judgment. See *Fonte v. Bd. Of Managers of Cont'l Towers Condo,* 848 F.2d 24 (1988).

As a result, Defendants' factual allegations should not have been considered by the District Court and Defendants' Rule 12(b)(1) motion for lack of jurisdiction amounts to a "facial attack" on Appellants' pleadings which is subject to no evidentiary burden to show Article III standing. See *Carter v. HealthPort Techs., LLLC*, 822 F.3d 47 (2d Cir. 2016). Pursuant to *Fonte* and *Carter*, the task of the District Court was to determine whether Appellants' pleadings alleged facts that affirmatively and plausibly suggest the plaintiffs have standing to sue.

Here, the District Court misapplied the Court's precedent and found that Appellants had a burden of preponderance to show that Article III standing exists.

Therefore, the District Court erred by applying the wrong evidentiary standard. This Court should remand this case to the District Court with instructions to apply the correct burden to the Governments Rule 12(b)(1) motion to dismiss, along with instructions on the merits of Article III standing as addressed by Appellants herein. See *infra*, Points III and IV.

POINT II

EVEN IF THE DISTRICT COURT CAN CONSIDER EVIDENCE OUTSIDE THE PLEADINGS *SUA SPONTE* TO CREATE A FACTUAL ATTACK ON APPELLANTS' PLEADINGS, APPELLANTS MUST BE GIVEN FULL OPPORTUNITY TO BE HEARD ON THE HEIGHTENED PLEADING BURDEN

A factual attack "challenges whether sufficient facts exist for the court to determine that it has jurisdiction to hear the plaintiffs' claims. *Holland v. JPMorgan Chase Bank, N.A.*, 2019 U.S. Dist. LEXIS 146553 (2019). On a factual challenge, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

In its Rule 12(b)(1) analysis, the District Court relied upon facts that were outside of Appellants' pleadings of which it took judicial notice. (Dec. n.2 at 3). Defendants did not raise these facts through an affirmation but improperly raised them through their Memorandum of Law in Support of their Motion to Dismiss. If the District Court's consideration of these facts outside the pleadings is permitted

under this Court's precedent, the District Court's actions amount to a *sua sponte* factual attack on the pleadings and Appellants must be given an opportunity to be fully heard under the newly applicable evidentiary burden.

The District Court conducted a "factual attack" on Appellants pleadings, noting that Appellants were required to meet a preponderance evidentiary burden in order to satisfy Article III standing. (Dec. at 6-8). Specifically, the Court noted that "to satisfy the requirements of Article III standing, plaintiffs must demonstrate (1) an injury-in-fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief. (Dec. at 8); *Hu v. City of New York*, 927 F.3d 81, 89 (2d Cir. 2019).

Appellant does not contest that this would be the applicable and appropriate standard if Defendants had submitted factual evidence outside the pleadings with their Rule 12(b)(1) motion to dismiss. Appellant also does also not contest that under this Court's precedent, the District Court can take judicial notice of evidence beyond the pleadings. *Luckett v. Bure*, 290 F.3d 493 (2d Cir. 2002).

However, the District Court misapplied the law when it took judicial notice of facts outside the pleading without either converting the motion into a Rule 56 summary judgment motion or providing Appellants an opportunity to properly

respond to the raised evidentiary burden. The District Court relied upon facts outside of the pleadings, noting that that the priority period expired and funding for the RRF has run out. (Dec. at 9). Based on these facts, the Court concluded that all Appellants' claims seeking declaratory relief were based on "past injury." The District Court relied upon Declarations submitted by the SBA in other litigation to conclude that "there is no plausible mechanism by which Plaintiffs could be subject to a future injury of the same type alleged in the complaint, even if additional RRF funds were to somehow become available." Although Appellants disagree with these conclusions (See *infra* Points III and IV), they only came about as a result of the court's judicial notice of these facts *sua sponte*.

As an initial matter, it is not clear if a District Court can raise factual attacks under Rule 12(b)(1) *sua sponte* when the Defendants have failed to do so. In *Nwoye v. Obama*, the New York Southern District Court outlined the circumstances in which a Court may act *sua sponte* and dismiss a Complaint. 2023 U.S. Dist. LEXIS 125697 (S.D.N.Y. July 20, 2023). The Court found a District Court may *sua sponte* dismiss an action as frivolous when: (1) the factual contentions are clearly baseless, (2) the claim is based on an indisputably meritless legal theory; or (3) when it is clear that the defendants are immune from suit. *Montero v. Travis*, 171 F.3d 757, 760 (2d. Cir 1999). The Southern District did not examine whether a Rule 12(b)(1) motion was an appropriate realm for a *sua sponte* dismissal. There are no allegations that

Appellants' factual contentions are baseless, and Appellants can show meritorious causes of action and circumstances which prevent application of sovereign immunity in the present circumstances. See *infra*, Points III and IV.

As a result, Appellants assert that it is an error of law for a District Court to dismiss a Complaint *sua sponte* when Defendants have only brought a facial challenge to the pleadings under Rule 12(b)(1). Nonetheless, even if this Court concludes that the District Court can raise such issues *sua sponte* under Rule 12(b)(1), it should provide the same opportunity for Appellants to be heard as provided for under Rule 12(b)(6).

In *Fonte v. Bd. Of Managers of Cont'l Towers Condo*, 848 F.2d 24 (1988), this Court made clear that it was legal error for a District Court to consider factual allegations made in a memorandum of law without converting the motion to one for summary judgment. This Court articulated that Rule 12(b) gives District Courts two options when matters outside the pleadings are presented in response to a Rule 12(b)(6) motion: (1) exclude the additional material and decide the motion on the complaint alone or (2) convert the motion to one for summary judgment under Rule 56 and afford all parties the opportunity to present supporting material. 848 F.2d 24, 25 (2d Cir. 1988).

Rule 12(d) of the Federal Rules of Civil Procedure contemplates reliance on matters outside the pleadings on a motion under Rule 12(b)(6) or 12(c), but does not

contemplate a conversion into a Rule 56 motion in the case of a claim of lack of subject-matter jurisdiction under Rule 12(b)(1). Rule 12(d) provides:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

Although Rule 12(d) does not anticipate a Rule 56 conversion in the context of a 12(b)(1) motion, Appellants assert that this would ordinarily be unnecessary as the Defendants would need to include the relevant information from outside their pleadings through an affirmation. If they did so, the plaintiff would know that he would be subject to a Rule 12(b)(1) facial challenge, and that he must show a preponderance of evidence to establish Article III standing. However, when Defendants fail to do so, plaintiffs would reasonably conclude that they had no evidentiary burden to meet.

The District Court notes Appellants did not object to Defendants' reliance on these sworn declarations submitted by the SBA in other litigation related to the RRF, nor have they contested the accuracy of the information set forth therein. (Dec. n. 4 at 10). Appellants did not challenge the Defendants use of the declarations or public documents, but they had no need to do so given the burden they needed to satisfy under this Court's precedent in *Carter v. HealthPort Techs., LLLC*, 822 F.3d 47 (2d

Cir. 2016). If the District Court were to rely upon this information pursuant to Rule 12(b)(6), Appellants would have been provided an opportunity to present all the arguments outlined in this brief in Points III and IV and supplement them with additional factual information and evidence.

Appellants were denied the opportunity to provide supporting material in a similar manner due to an altered pleading standard applied by the District Court. Here, as the Court noted in *Fonte*, "[b]ecause no answer ha[s] been filed…it would [be] permissible for the plaintiffs to present [allegations] as an amendment to the complaint in response to the 12(b)(6) motion." *Id.* Appellants have outlined why they can establish Article III standing even under the preponderance evidentiary burden, and it is respectfully submitted that this Court should direct the District Court to consider these arguments. Even if this Court is not fully convinced by these arguments, Appellants should be permitted an opportunity to respond pursuant to a Rule 56 summary judgment motion and provide additional factual support and evidence. Therefore, this Court should remand this matter to the District Court to provide Appellants an opportunity to respond under the appropriate pleading burden and amend its Complaint as necessary.

POINT III

APPELLANTS CAN MEET ARTICLE III STANDING FOR THEIR THIRD CAUSE OF ACTION SEEKING DAMAGES AS A MATTER OF LAW

To satisfy Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). Each element of standing must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation, and at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d. Cir. 2017).

Appellants' claim for damages against the SBA Administrator is sufficient to establish an injury in fact as they were unable to get their RRF applications funded within the priority period contemplated under 15 USCS §9009c due to discriminatory preferences along race and gender-based characteristics outlined in the applicable legislation. Appellants' injuries are fairly traceable to the SBA Administrator's conduct, as she processed the RRF Applications according to the unconstitutional directives provided in the legislation by Congress and signed by the President of the United States. The District Court does not appear to dispute these allegations, but instead claims that Appellants' damages cannot be addressed due to sovereign immunity. (Dec. at 11-12).

Appellants' assert that sovereign immunity is inapplicable in the instant case due to the direction provided by the Legislative and Executive branches that specifically ordered the SBA and its Administrator to violate Appellants' constitutional rights. Appellants acknowledge that damages claims are not typically permitted against the United States unless there has been an explicit waiver of sovereign immunity, but argues that in this context, the Judiciary is suited to create both a damages remedy as well as a constitutional remedy given the express direction to violate the constitution that was contained within 15 USCS 9009c. *See* infra, Point IV.

Even if this Court decides that a damages remedy can only be maintained against a Federal Official in his individual capacity, Appellants can maintain a *Bivens* claim against the SBA Administrator and should be permitted to amend their complaint to pursue this remedy.

The proper test for determining whether a case presents a new *Bivens* context is whether the case is different in a meaningful way from previous *Bivens* cases decided by the Supreme Court. *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017). If the case arises under a new *Bivens* context, a special-factors analysis should be conducted by the court to determine whether congressionally uninvited intrusion is inappropriate action for the Judiciary to take. *Id* at 143.

The purpose of *Bivens* is to deter the officer and is not designed to hold officers responsible for acts of their subordinates. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The most important question is who should decide whether to provide a damages remedy, Congress, or the Courts. *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020); *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).

The District Court claimed that no *Bivens* claim against the SBA Administrator based on prioritization of the RRF funds is available under the Supreme Court precedent established in *Ziglar v. Abbasi*, 582 U.S. 120 (2017) and *Egbert v. Boule*, 142 S. Ct 1793 (2022). (Dec. at 13-14). The District Court determined as a matter of law that the Appellants' case arises in a new context and there are special factors present necessitating the Judiciary to defer to Congress to create a damage remedy. (Dec. at 15-16).

The District Court made an error of law by finding that Appellants' claim for damages against the SBA Administrator arises in a new context not previously considered under *Bivens* precedent. Furthermore, even if Appellants' damages claim arises in a new context, the Judiciary and not Congress must create a legal remedy due to the specific circumstances of Appellants' injury and the lack of any special factors creating a need to defer to Congress.

A. Appellants' Damages Claim Does Not Differ from *Davis v. Passman* in a Meaningful Way

Appellants' claim for damages arises in the context as decided by the Court in *Davis v. Passman*, 442 U.S. 228, 229 (1979). In *Davis v. Passman*, the issue presented for the Supreme Court was "whether a cause of action and a damages remedy can also be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated." 442 U.S. 228, 229 (1979). Prior to reaching the Supreme Court, the Fifth Circuit sitting *en banc* found that Congress had failed to create a damages remedy for violations of the Due Process Clause of the Fifth Amendment and a proposed damage remedy is not constitutionally compelled, so it was not necessary to countermand the will of Congress and create such a remedy. *Id* at 232-233.

The Court's rationale in *Passman* regarding whether Davis had a constitutionally protected right under the Fifth Amendment is applicable to Appellants' case. The Court noted, "To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objections. *Id* at 235. "The equal protection clause thus confers on petitioner a federal constitutional right to be free from gender discrimination which cannot meet these requirements." *Id*.

It is undisputed in this case that Appellants were subjected to gender-based discrimination, which prioritized grants "to small business concerns owned and controlled by women", to the detriment of all other non-preferred genders who had small business concerns during the 21-day prioritization period. See 15 USCS § 9009c(3)(A). Therefore, just as in *Passman*, Appellants have a right under the equal protection component of the Due Process clause to be free from gender discrimination.

The Supreme Court previously iterated the need for the Judiciary to consider constitutional rights unable to be reviewed by other means:

> At least in the absence of a textually demonstrable constitutional commitment of an issue to coordinate political department, *Baker v. Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Id at 243. Therefore, as was the case in *Passman*, Appellants clearly have a cause of action. The Supreme Court next grappled with whether a damages remedy was an appropriate form of relief under the circumstances. *Id* at 245.

Notably, the Court in *Passman* did not address specific factual issues that created entitlement to relief, but rather articulated principles that are applicable when

a plaintiff suffers gender discrimination by a person who in theory is entitled to protection afforded by sovereign immunity. Specifically, the Court noted that damages have been regarded as ordinary relief for invasion of personal interests in liberty, the relief required would be judicially manageable, and equitable relief would be unavailable as the plaintiff was entitled to damages or nothing. *Id* at 245-246.

Appellants' circumstances are not meaningfully different in this case. Appellants' damages are judicially manageable as a grant of damages for what amount would have been approved in RRF relief can be determined without difficult questions of valuation or causation. Additionally, equitable relief would be unavailing as Defendants and the District Court have pointed out, there are no more RRF grant funds to be dispersed. For Appellants, as it was for Davis in the *Passman* case, it is damages or nothing.

The only applicable circumstance that has changed since the Supreme Court decided *Passman* is that recovery of damages under *Bivens* has been emphasized by the Court as "a disfavored judicial activity." *See Ziglar* at 1843; *Egbert* at 1803. However, simply because recognizing a cause of action is disfavored, does not mean it should not be granted if the circumstances here are not meaningfully different from those in *Passman*.

In fact, the other two factors considered by the Court in *Passman* are equally applicable to the circumstances here. First, legislators ought to generally be bound by the law as ordinary people subject to the protections of the Speech and Debate Clause. *Passman* at 246. In *Passman*, the legislator at issue was one congressman in an employment decision, and not in the context of legislation from Congress directing a Federal Official to violate the Constitution. However, to the extent this is a meaningful difference, it only further necessitates the need for legislators to not be above the law and discriminate against American citizens with impunity. Here, the *Bivens* claim permits Appellants to recover damages from a Federal Official who was directed and carried out an unconstitutional order as opposed to Congressmen who are protected by the Speech and Debate Clause in certain contexts. Therefore, this is even more reason why this Court should permit a *Bivens* action in this context and why it is not meaningfully different from *Passman*.

The *Passman* Court also emphasized that no explicit declaration prevents persons from recovering money damages from those responsible for the injury, and that no deluge of litigation is likely as plaintiffs must demonstrate their constitutional rights have been violated and Congress could create other remedies. These concerns are even less pressing in the present case given the Court's subsequent disfavoring of relief of the type created in *Bivens*. Appellants' situation is rare as it arose due to a Federal Officials' enforcement of an unconstitutional order that was directed by

Congress and signed by the President of the United States. Further, this direction to violate Appellants' constitutional rights was limited to a "priority period which prevented appropriate judicial review once the period has expired and the funds had been distributed." Therefore, there is practically no danger that the Court's consideration of Appellants' claim under the same context as decided in *Passman* would expand *Bivens* litigation in any meaningful way.

In *Egbert*, the Supreme Court articulated that *Passman* carries little weight, and argues it diverges from the current analytical framework in three important ways. First, the *Passman* Court concluded that a *Bivens* action must be available if there is "no effective means other than the judiciary to vindicate the purported Fifth Amendment right." As articulated in *Egbert*, the absence of relief does not necessarily imply the courts should award money damages. While this precedent might undercut some of *Passman*'s rationale, it also does not prevent relief on these grounds when sought within the same context anticipated under *Passman*.

Second, *Passman* indicated that a damages remedy is appropriate unless Congress explicitly declares that a claimant may not recover money damages. The *Egbert* Court makes clear that the Court defers to congressional inaction only if the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms. Here, Congress cannot have provided adequate remedial mechanisms as it directed the unconstitutional conduct through

legislation that caused Appellants' injuries. Therefore, it is necessary for the Judiciary to create a deterrent effect through Federal Officials not to commit unconstitutional conduct, even when directed by Congress to do so.

Third, when assessing the "special factors," *Passman* asked whether a court is competent to calculate damages without difficulty, whereas today the court asks whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy at all. There are no reasons to think that Congress might doubt the efficacy or necessity of a damages remedy unless Congress itself wants to discriminate against Appellants and other Americans by creating temporary periods of grant awards where it can discriminate against unfavored groups.

Based on the above rationale, none of the reasons the *Egbert* Court found *Passman* unapplicable are relevant here. Further, Appellants suffered gender discrimination of the very type that was addressed in *Passman* under the Fifth Amendment. Thus, this Court should find that Appellants' claim for damages arises in the same context as *Passman* and that Appellants have proved their entitlement to relief by a preponderance of the evidence.

B. A Special-Factor Analysis Clarifies that it would be Irrational to Defer to Congress in these Circumstances

Even if this Court finds that Appellants' damages claim arises in a new *Bivens* context, there are no special factors present that suggest this Court should defer creation of a remedy to Congress. Rather, the direction of Congress to violate

Appellants' constitutional rights through legislation for a temporary period to avoid judicial review requires a conclusion that the Judiciary should and must be the branch to craft a relief under the circumstances.

In *Ziglar*, the Court recognized that *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. *Ziglar*, 582 U.S. at 134.

Applying the principle articulated in *Bush v. Lucas*, 462 U.S. 367, 380 (1983), the *Ziglar* Court determined the most important question when addressing whether an implied cause of action under the Constitution itself should be permitted is whether Congress or the courts should decide whether to provide for a damages remedy. *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). As the *Ziglar* Court noted, "[i]n most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal ability." While this may be true "in most instances," it is not true in all instances. It certainly cannot be true when the legislature is the very body that directed the Federal Official to engage in unconstitutional conduct. Deferring to Congress when it explicitly seeks to empower Federal officials to violate the Constitution and subject Americans to constitutional abuses makes a mockery of the Court's proposed question in *Ziglar* and *Bush* of "who should decide."

"[S]pecial factors counselling hesitation" is not defined, but the necessary inference is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or inaction, to consider and weigh the costs and benefits of allowing a damages action to proceed. *Ziglar*, 582 U.S. at 136. Since Congress directed the SBA Administrator to violate Appellants' constitutional rights in the instant case, there is no sound reason to think Congress might doubt the efficacy or necessity of a damages remedy to enforce the law and correct a wrong. To the extent that Congress might think so, Congress itself is violating the Constitution which puts review and consideration solely under the auspices of the Judiciary, as determined in *Marbury v. Madison*.

C. The Supreme Court Precedent Articulated in *Ziglar* and *Egbert* Support a Determination that the Judiciary Must Craft a Damages Remedy When Congress and the President of the United States Direct a Federal Official to Violate American Citizens' Constitutional Rights.

The District Court applied the *Bivens* framework articulated in *Ziglar* and *Egbert*, but erred as a matter of law when it determined Appellants cannot pursue a *Bivens* remedy under the circumstances presented here. (Dec. at 16). The District Court simply asserted that the current context "is a novel one" providing no explanation or rationale as to why *Passman* would not provide a remedy in the current context. *Id*. The District Court determined that multiple reasons existed to defer to Congress in the present circumstances to decide the availability of a damages remedy:

> [(1)] the fact that Congress legislated extensively in the area of pandemic-related relief yet chose not to provide a damages remedy of the type sought by [Appellants]; [(2)] the fact that recognizing a *Bivens* claim in this context would entangle the federal judiciary in Congress's and the SBA's policy-related decisions regarding pandemic-related relief; and [(3)] the fact that recognizing a *Bivens* claim in this context would engender extensive litigation and potentially open up SBA officials to billions of dollars in personal liability, thus diverting their attention entirely from their job-related functions.

(Dec. at 16).

None of these "special factors counselling hesitation" provide a rational reason to override the obvious necessity of a Judicial determination when a Federal Official violates the Constitution at the express direction of Congress. To the first factor, it is obvious that Congress will not seek to provide a remedy for pandemic-related relief for Appellants when they directed Federal Officials to deny them federal grant relief in violation of the Equal Protection and Due Process Clause of the Constitution. Therefore, Congress's absence of a proposed remedy despite extensive litigation is of no consequence to the circumstances here.

Second, there is no danger of the Judiciary being entangled in Congress's and the SBA's policy-related decisions beyond the constitutional review anticipated in *Marbury v. Madison* which applies to all legislation that is proposed to violate the Constitution of the United States. Congress's creation of a "temporary provision" under which they directed Federal Officials to violate the Constitution prevents a

normal constitutional review of the legislation due to mootness. Therefore, there is no sound reason not to allow the Judiciary to simply exercise its review under the *Bivens* context when necessary to prevent Federal Officials from violating Americans constitutional rights at the urging of Congress and the Executive branch.

Finally, the third reason articulated by the District Court is inherent in the motivation behind *Bivens* as originally contemplated. The purpose of a *Bivens* action is to defer the officer. *Meyer*, 510 at 485. While sovereign immunity provides protection for members of Congress and the President, a *Bivens* action against the SBA Administrator will caution the Legislative and Executive branches from express directions to federal officials to violate American's constitutional rights. Further, it will incentivize Federal Officials to refrain from violating the Constitution at the express direction of the other branches.

Furthermore, none of the special factors considered by the Supreme Court in *Ziglar* or *Egbert* are present here. There is no danger of the courts interfering in an intrusive way with the sensitive functions of the Executive branch. No inquiry into sensitive issues of national security is required under the circumstances. The circumstances for Appellants are similar to *Bivens* and *Davis*, "damages or nothing." See *Ziglar*, 582 U.S. at 144. Appellants are not challenging the SBA's COVID-19 response or grant decisions beyond the constitutional limitations placed on them by the Constitution of the United States and subject to judicial review.

There is a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the nation in times of great peril. Given Congress's explicit direction to Federal Officials to violate Appellants' constitutional rights and discriminate against them based on their immutable characteristics, this balance must be struck by the Judiciary. As the Supreme Court has previously articulated, no act of Congress can authorize a constitutional violation. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

Previously, in *Egbert*, the Supreme Court chastised the Ninth Circuit for analyzing whether *Bivens* relief is appropriate in light of the balance of circumstances in the "particular case." *Egbert*, 142 S. Ct. at 1798. Instead, a court must ask more broadly if there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate. *Id*. Here, there is no reason to think judicial intrusion would be harmful or inappropriate. Instead, such intrusion would likely go far to prevent unconstitutional acts by Congress and Federal officials. Such is the rationale articulated by the *Egbert* Court, as *Bivens* is concerned solely with deterring the constitutional acts of individual officers and the focus is whether the Government has put in place safeguards to prevent constitutional violations from recurring. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001); *Egbert*, 142 S. Ct. at 1806-07. Congress and the Executive have not created a remedial process in the

present context sufficient to secure an adequate level of deterrence, and they have clearly indicated a desire to do the opposite and encourage constitutional abuses. See *Id*.

Therefore, none of these "special factors" create any hesitation for the Judiciary to craft a damages remedy for the Appellants, and arguably incentivize them to do so to protect application of the Constitution and prevent abuses by the Legislative and Executive branches by utilizing temporary provisions in legislation under which they direct Federal Officials to violate the Constitution. If this issue is not addressed by the Judiciary now, it will undoubtedly present further abuses and violations of the Constitution. As a result, this Court should permit Appellants to amend their complaint and seek a *Bivens* action against the SBA Administrator in her individual capacity, or provide alternative vehicles to pursue relief to the extent this Court deems it appropriate under Supreme Court precedent.

POINT IV

APPELLANTS SHOULD BE PERMITTED TO SEEK DECLARATORY RELIEF

Declaratory relief may be ordered pursuant to the Declaratory Judgment Act "in the case of actual controversy" 28 U.S.C. § 2201 (2010). A court must entertain a declaratory judgment action: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, or (2) when it will terminate and

afford relief from the uncertainty, insecurity, and controversy given rise to the proceeding. *Cont'l Cas. Co v. Coastal Sav. Bank*, 977 F.2d 724, 737 (2d Cir. 1992).

In this case, the District Court dismissed Appellants' claims for declaratory relief, stating that "Plaintiffs' claims in this case are based entirely on past injury" and "there is no plausible mechanism by which Plaintiffs could be subject to a future injury of the same type alleged in the complaint, even if additional RRF funds were to somehow become available." (Dec. at 9-10).

To plead injury in fact, a plaintiff must allege "that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Spokeo*, 578 U.S. at 339. At the pleading state, this requirement has been repeatedly described as a "low threshold." *John*, 858 F.3d at 736.

Generally, a plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future. *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d. Cir. 1998). Past exposure to illegal conduct does not in itself show a present case or controversy injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 564 (1992).

In explaining the Court's rationale as to why a future injury is not possible, the District Court notes that the RRF has been depleted, and that the SBA has confirmed

that applications will be granted without reference to priority status. *Id* at 11. Appellants acknowledge that declaratory relief cannot rely on past injury to satisfy standing but must show a likelihood of injury in the future. *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir 1988). However, when the illegal and unconstitutional conduct was ordered or authorized by the Government entity, as is the case here, a likelihood of injury in the future can be established. *See L.A. v. Lyons*, 461 U.S. 95, 106 (1983).

As the District Court noted, Appellants asked the court for various declaratory relief over three causes of action against the Small Business Administration, Congress, and the President of the United States. (Dec. at 7). Appellant does not dispute that the request for its RRF applications to be granted and funded without the unconstitutional preferences is no longer necessary given the declaration by the SBA that they will no longer consider unconstitutional preferences when awarding RRF grant money. However, Appellants asserted four other requests for declaratory relief for which they can make an adequate showing of a likelihood of future injury to survive Defendants' motion to dismiss.

Appellants also sought a declaration that (1) the SBA violated the Equal Protection Clause by applying race and gender-based preferences in its processing applications for RRF funding; (2) Appellants' applications must be granted and funded by the Defendants; (3) The SBA violated Appellants' Due Process rights by

failing to ensure equal access and funding after making funding decisions on an unconstitutional basis; and (4) Congress and the President violated Appellants' property interests under the Due Process Clause of the Constitution.

The District Court found that none of these avenues of declaratory relief met the requirements for Article III standing "because they do not face an ongoing or imminent injury." (Dec. at 8). For the reasons that follow, Appellants' assert the District Court's conclusions were an error and misapplication of the standing doctrines established by this court.

A. The Congress and the President Directed the SBA and its Administrator to Violate Appellants' Constitutional Rights, Which Creates an Ongoing Threat of Future Injury if not Properly Addressed by the Court.

Here, President Biden, Nancy Pelosi, Chuck Shumer, and other members of Congress ordered and directed the SBA and its Administrator to violate the Constitution. See 15 USCS §9009c. The text of 15 USCS §9009c as passed by Congress and signed by President Biden directly states:

> During the initial 21-day period in which the Administrator awards grants under this subsection, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women…The Administrator may take such steps as necessary to ensure that eligible entities described in this subparagraph have access to grant funding under this section after the end of such 21-day period.

15 USCS § 9009c(3)(A).

This statutory language contains a direct order and directive from Congress and President Biden directing the SBA Administrator to violate the constitutional rights of Appellants and others similarly situated who do not happen to have the Government's preferred characteristics. *Id*. The statutory language also mandates that the Administrator "shall" prioritize small business concerns owned and controlled by women and removes any discretion from his enforcement. *Id*.

Therefore, the SBA Administrator carried out the orders on behalf of Congress and the President to injure the Appellants and deny them RRF funds because of their immutable characteristics. Such discrimination will always be a concern if the branches are allowed to pass temporary discrimination periods, where they can discriminate freely but then avoid any damages or liability once the temporary period has expired. This approach is especially dangerous given the sovereign immunity provided to Congress for their legislative acts and the President's entitlement to absolute immunity.

Appellants' requested declaratory relief is narrow and can be designed to work in tandem with established principles of judicial review without violating the necessity of presidential absolute immunity or the Speech and Debate Clause. Appellants do not ask this Court to expand its reach any further beyond the basic ability of this Court to hear constitutional challenges of legislative and executive action that was established in *Marbury v. Madison*, 5 U.S. 137 (1803). Left

unaddressed by the Judiciary, a temporary period of permissible discrimination against American citizens based on their immutable characteristics remains a shield under which the other two branches of government can freely practice discrimination against American citizens.

Further, Congress and the current President clearly view discrimination against Appellants and those that share their protected characteristics as appropriate, and there is no guarantee or protections that they will not implement further discrimination into subsequent legislation. This presents a likelihood of a future injury not just to Appellants, but to all American citizens who were not born as women or minorities and are not subject to the Government's favor.

Application of this rationale presents a situation in which the Judiciary can issue declaratory relief finding the SBA Administrator violated Appellants' constitutional rights without usurping any powers of the political branches. Under this rationale, even though the RRF funds were depleted, Appellants can still recover declaratory relief that prevents the SBA and its Administrator from following unconstitutional mandates from Congress, and that such actions violate Appellants' property interest in the funds that were unconstitutionally distributed. Further, an appropriate remedy can be crafted by the Judiciary for situations in which the other two branches purposefully enact legislation designed to avoid proper judicial review by limiting the period in which the unconstitutional discrimination occurs.

Appellants were subject to such discrimination by Congress, the President, the SBA and the SBA Administrator and possess the requisite standing to pursue declaratory relief to address these concerns.

Despite this future potential abuse, Appellants are not unaware of the necessity to protect members of Congress and the President of the United States from civil litigation pursued as a result of acts taken in their official capacities. See USCS Const. Art. I,§ 6, Cl 1; *United States v. Helstoski*, 442 U.S. 477, 479 (1979); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

It is for this reason, that Appellants believe the Judiciary should address the issue to decide the proper means for Appellants to seek relief. The Judiciary should determine whether relief under these circumstances is properly sought through a *Bivens* cause of action or through a constitutional challenge of the statute as outlined in *Marbury v. Madison*. Whatever vehicle the Judiciary believes to be appropriate, the courts can not allow Congress and the President to instruct Federal Officials to commit unconstitutional acts with impunity. Accordingly, Appellants ask this Court to consider these implications and permit Appellants' requests for declaratory relief to proceed in this action.

B. 15 USCS § 9009c Provides an Avenue for Further Discrimination Against Appellants by the SBA, Congress, and the President.

The District Court took judicial notice of assertions made by the SBA in other litigation that it claims eliminated the possibility of any "plausible mechanism by

which Plaintiffs could be subject to a future injury of the same type alleged in the complaint, even if additional RRF funds were to somehow become available." (Dec. at 10). Specifically, the SBA confirmed that on May 27, 2021, after the statutory priority period expired, it began processing applications from non-priority applicants. *Id* at 9-10. The SBA has further confirmed in other litigation that "because the statutory period is over, SBA will not take priority status into account when issuing new RRF awards." *Id*.

While Appellants appreciate the SBA's assertion that it will now follow the Constitution, the statutory language itself still permits the SBA and its Administrator to discriminate against Appellants and continue to prioritize applications due to race and gender-based considerations. 15 USCS § 9009c(3)(A) provides that "The Administrator may take such steps as necessary to ensure that eligible entities described in this subparagraph have access to grant funding under this section after the end of such 21-day period." Although it is unclear if the SBA could utilize other available monies provided by Congress to the SBA in order to provide RRF funding under this provision, there is no doubt that the SBA or its Administrator could use this provision to continue to discriminate against Appellants and others similarly situated if Congress were to provide more money under the statute. The SBA's unsupported claim that it would not do so, is not enough to prevent future abuses against the Appellants. Therefore, the Appellants have a likely future injury that can

only be prevented by this Court considering and granting the requested declaratory relief.

Finally, the American Rescue Plan Act of 2021, provides that the RRF Fund can receive appropriations beyond the $28.6 billion originally contemplated at the initial funding of the fund by including the express statutory language "[i]n addition to amounts otherwise available . . . " Thus, the ARPA contains still viable avenues under which the SBA, its Administrator, or Congress could prioritize RRF Funds based on unconstitutional considerations. Given all this potential for abuse, this Court should find that Appellants have established Article III standing for its still viable requests for declaratory relief by a preponderance of the evidence.

CONCLUSION

Appellants request this Court to reverse the District Court and instruct the Court to apply the proper evidentiary standard to Defendants' Rule 12(b)(1) motion to dismiss with the appropriate opportunity to be heard.

Appellants also request this Court to find that Appellants have met their preponderance burden for standing under the *Bivens* line of cases and instruct the District Court to permit Appellants leave to amend to pursue the SBA Administrator in her individual capacity.

Finally, Appellants request this court to permit their causes of action for declaratory relief as a proper claim seeking to remedy a likelihood of future injury.

This future injury is ongoing as the result of directed discrimination by the other political branches of government against the Appellants utilizing Federal Officials to avoid judicial review. The Judiciary is the proper branch to consider and craft a remedy if one should be made available. As a result, this case should be permitted to continue to its merits so the Court can consider whether such remedy is appropriate under the circumstances.

Dated: November 10, 2023
Amherst, New York

TIVERON LAW, PLLC

/s/Edward P. Yankelunas, Esq.
Edward P. Yankelunas, Esq.
Attorneys for Plaintiffs-Appellants
2410 North Forest Road, Suite 301
Amherst, NY 14068

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations for F.R.A.P. § 32(a)(7)(b) and L.R. § 32.1(a)(4)(A) because the brief contains 9,966 words.

This brief complies with the type face requirements of F.R.A.P. of § 32(a)(5) and the type style requirements of F.R.A.P. § 32(a)(6) because the brief has been prepared in a proportionally spaced type face using Microsoft Office Word with 14 pt. font size and Times New Roman style font.

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TIVERON LAW, PLLC

/s/Edward P. Yankelunas, Esq.
Edward P. Yankelunas, Esq.
Attorneys for Plaintiffs-Appellants
2410 North Forest Road, Suite 301
Amherst, NY 14068