

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:20-cv-03594-PAB-KMT

ETIENNE HARDRE and
SDG MURRAY, LTD d/b/a LOCALS BARBERSHOP, a Colorado limited liability company,

Plaintiffs,

v.

BETSY MARKEY, in her official capacity as Executive Director of the Colorado Office of
Economic Development and International Trade; and
JARED POLIS, in his official capacity as Governor of Colorado,

Defendants.

**FIRST AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND NOMINAL DAMAGES**

Plaintiffs Etienne Hardre and SDG Murray, LTD d/b/a Locals Barbershop, by and through
counsel, hereby allege:

INTRODUCTION

1. Etienne Hardre is the majority owner of Locals Barbershop, a once-bustling
barbershop in Colorado Springs. Like many other small businesses, Locals Barbershop has had to
navigate capacity restrictions and decreased revenue over the past year.

2. In December 2020, Colorado enacted legislation providing relief for small
businesses. Yet provisions of the legislation, both in the original version signed into law in
December 2020 and the amended version in effect today, violate the Equal Protection Clause of

the Fourteenth Amendment because they discriminate among small business owners on a ground that is prohibited under the Constitution: their race.

3. Senate Bill 20B-001 (SB 20B-001) was passed by the General Assembly on December 3, 2020, and signed into law by the Governor on December 7, 2020. Plaintiffs filed this case shortly after, seeking to enjoin SB 20B-001's race-based classifications, which limited economic relief and stimulus only to "minority-owned businesses." Among other things, SB 20B-001 appropriated \$4 million for COVID-19 relief payments to "minority-owned businesses" and provided growth and start-up capital for only those businesses. Locals Barbershop and other businesses that are not minority-owned businesses were excluded from being considered for these funds.

4. In January 2021, Colorado amended the law by enacting Senate Bill 21-001, which is attached to Exhibit 1 of this complaint.¹ Senate Bill 21-001 appropriates \$4 million for COVID-19 relief payments to "disproportionately impacted businesses" and provides relief payments, grants, loans, and technical support for those businesses. *See* Exh. 1 § 1(3) (relief payments, grants, and loans); *id.* § 1(4) (technical support). SB 21-001 gives a preference to minority-owned businesses in providing those funds. *See id.* § 1(3)(b)(I). Further, a minority-owned business automatically qualifies as a "disproportionately impacted business" under Senate Bill 21-001. A non-minority-owned business cannot qualify as a "disproportionately impacted business" unless it shows that it can meet one of the other criteria specified in the bill, such as having five or fewer employees or that it is located in an economically distressed area. *See id.* Exh. 1 § 1(2)(c).

¹ The relevant portions of Senate Bill 21-001 have been codified at Colo. Rev. Stat. § 24-48.5-127.

5. Plaintiffs bring this lawsuit to challenge the racial preferences in Senate Bill 21-001 as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES

Plaintiffs

6. Plaintiff Etienne Hardre (“Plaintiff Hardre”) is an individual who is domiciled in the State of Colorado. Plaintiff Hardre is Caucasian.

7. Plaintiff SDG Murray, LTD d/b/a Locals Barbershop (“Plaintiff Locals Barbershop”) is a limited liability company organized under the laws of the State of Colorado. Plaintiff Locals Barbershop is a barbershop located in Colorado Springs, Colorado. Plaintiff Hardre owns more than 51% of the membership units of Plaintiff Locals Barbershop.

8. Plaintiff Hardre and Plaintiff Locals Barbershop are collectively referred to as “Plaintiffs.”

Defendants

9. Defendant Betsy Markey (“Director Markey”) is sued in her official capacity as the Executive Director of the Colorado Office of Economic Development and International Trade (Colorado Office of Economic Development). The Colorado Office of Economic Development is a Colorado state agency. Senate Bill 21-001 directs the Colorado Office of Economic Development to administer a program to provide relief payments, grants, and loans to disproportionately impacted businesses; to establish a process for disproportionately impacted businesses to apply for

a relief payment, grant, or loan under the program; and to establish policies setting forth the parameters and eligibility for the program. *See* Exh. 1 § 1(3).

10. Defendant Jared Polis (“Governor Polis”) is sued in his official capacity as the Governor of the State of Colorado. “[W]hen [the defendant] is an administrative agency, or the executive branch of government, or even the state itself, the Governor, in his official capacity, is a proper defendant because he is the state’s chief executive.” *Wildgrass Oil & Gas Comm. v. Colorado*, 447 F. Supp. 3d 1051, 1061 (D. Colo. 2020) (quoting *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004)). In addition, the Office of Economic Development is an office within the Office of the Governor. Col. Rev. Stat. § 24-48.5-101(1). The Executive Director of the Office of Economic Development serves as the special assistant to the governor for economic development. *See id.*; *see also id.* § 24-48.5-101(2)(f) (the Office of Economic Development “shall . . . advis[e] the governor and the general assembly on issues affecting the business community”). And Senate Bill 21-001 directs the Office of Economic Development to “submit a report to the governor [and committees in each house of the General Assembly] detailing how the office is expending the money appropriated for the purposes of this section.” Exh. 1 § 1(6).

11. Director Markey and Governor Polis are collectively referred to as “Defendants.”

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 because this action arises under federal law, namely 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

13. This Court has personal jurisdiction over Defendants because this action arises out of their contacts with the State of Colorado and concerns their acts as officers of this state.

14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because this action concerns acts and omissions of political departments of the State of Colorado.

GENERAL ALLEGATIONS

Colorado's Initial COVID-19 Relief Bill (Senate Bill 20B-001)

15. In November 2020, Governor Polis called a special session of the Colorado General Assembly to consider legislation to address and mitigate the economic impacts of the COVID-19 pandemic. During the special session, the General Assembly passed a COVID-19 relief bill (SB 20B-001), which was signed into law by Governor Polis on December 7, 2020. A copy of SB 20B-001 was attached as Exhibit 1 to Plaintiffs' original complaint. *See* ECF No. 1-1. SB 20B-001 carved out certain COVID-related relief for minority-owned businesses, which it defined as any "business that is at least fifty-one percent owned, operated, and controlled by an individual who is a member of a minority group, including an individual who is African American, Asian-Indian, Asian-Pacific American, Hispanic American, or Native American." *Id.* § 8(1)(c).

16. SB 20B-001 appropriated \$4 million for use by the Colorado Minority Business Office to provide "relief payments, grants and loans to minority-owned businesses." *See id.* § 8(2). It further directed the Colorado Minority Business Office to use a portion of the funds "to provide technical assistance and consulting support to minority-owned businesses across the state." *See id.* § 8(3). In all, SB 20B-001 provided three primary forms of economic relief exclusively to minority-owned businesses: direct relief payments, grants and loans for startup capital, and funds to provide minority-owned business leaders with professional development and networking opportunities.

Colorado's Amended COVID-19 Relief Bill (Senate Bill 21-001)

17. In January 2021, the General Assembly passed Senate Bill 21-001 to amend the program established by SB 20B-001. According to state Senator James Coleman, the General Assembly had recognized that it “may need to make a change because of litigation.”² According to Senator Faith Winter, one of Senate Bill 21-001’s sponsors, the amended legislation seeks to funnel “\$4 million to go to those small businesses that have been most disproportionately impacted by COVID, and minority ownership is a significant factor in that.”³

18. Governor Jared Polis signed Senate Bill 21-001 into law on January 21, 2021. Section 1 of Senate Bill 21-001 is codified as Colorado Revised Statute § 24-48.5-127. A copy of Senate Bill 21-001 is attached to this amended complaint as Exhibit 1.

19. Senate Bill 21-001 revises the program established by SB 20B-001 to instead appropriate COVID relief funds and provide support for businesses designated as “disproportionately impacted businesses.”

20. Unlike the original COVID-19 Relief Bill, which directed funds to the Colorado Minority Business Office, Senate Bill 21-001 directs that the funds be used and overseen by the Colorado Office of Economic Development. *See* Exh. 1 § 3.

21. Senate Bill 21-001 appropriates \$4 million for (a) “Relief payments to disproportionally impacted businesses that have been most impacted by COVID-19 and have

² Alex Burness, *Colorado tried to help minority-owned businesses. A white man sued, and lawmakers are backtracking.*, Denver Post, Jan. 13, 2021, <https://www.denverpost.com/2021/01/13/minority-business>.

³ *Id.*

lacked meaningful access to federal loans and grants under the CARES Act”; and (b) “Grants and loans to disproportionately impacted businesses for start-up and growth capital.” Exh. 1 § 1(3)

22. Senate Bill 21-001 directs part of the appropriated money for the Office of Economic Development to “provide technical assistance and consulting support to minority-owned disproportionately impacted businesses across the state.” Exh. 1 § 1(4).

23. Senate Bill 21-001 defines a “disproportionately impacted business” as a business that meets at least one of seven criteria:

- (I) Has five or fewer employees, including the business owner;
- (II) Is a minority-owned business;
- (III) Is located in an economically distressed area;
- (IV) The business owner lives in an economically distressed area;
- (V) The business owner has low or moderate income, as determined by the Office of Economic Development based on the United States Department of Housing and Urban Development’s low- and moderate-income data used in the community development block grant program;
- (VI) The business owner has low or moderate personal wealth, based on household net worth as determined by the office, applying relevant federal or state data; or
- (VII) The business owner has had diminished opportunities to access capital or credit.

Exh. 1 § 1(2)(c).

24. Under Senate Bill 21-001, a minority-owned business qualifies as a disproportionately impacted business regardless of whether it meets any of the other six criteria in the preceding paragraph. A minority-owned business qualifies for relief under Senate Bill 21-001, including grants and loans, regardless of whether it has five or fewer employees, it is located in an economically distressed area, or the business owner has low or moderate personal wealth. But a non-minority-owned business must meet at least one of the other six criteria to qualify as a disproportionately impacted business.

25. A minority-owned business is defined in Senate Bill 21-001 as “a business that is at least fifty-one percent, owned, operated, and controlled by an individual, who is a member of a minority group, including an individual who is African American, Hispanic American, or Asian American.” Exh. 1 § 1(2)(g).

26. Senate Bill 21-001 also gives a preference to minority-owned businesses over other disproportionately impacted businesses. The Bill directs the Colorado Office of Economic Development to establish the “terms of and eligibility for a relief payment, grant, or loan, with preference given to disproportionately impacted businesses” that qualify as a minority-owned business and meet at least one other criterion in the section defining disproportionately impacted business. *Id.* § 1(3)(b)(I).

Senate Bill 21-001’s Effect on Plaintiffs

27. Plaintiff Hardre became the owner of Plaintiff Locals Barbershop in 2014. Prior to the COVID-19 pandemic, Plaintiff Locals Barbershop was a successful small business employing a number of barbers.

28. Plaintiff Hardre depends on the income he generates from Plaintiff Locals Barbershop for his livelihood.

29. The COVID-19 pandemic has inflicted significant economic harm on the business revenue of Plaintiff Locals Barbershop and, by extension, on Plaintiff Hardre.

30. Among other things, Plaintiff Locals Barbershop was forced to shut down for several weeks during the beginning of the pandemic pursuant to an executive order issued by Governor Polis. Since that time, Plaintiff Locals Barbershop has had to reduce its operations to comply with social distancing and occupancy limitations imposed by Governor Polis and local health officials. Plaintiff Locals Barbershop has complied with all such requirements.

31. Plaintiff Locals Barbershop's year-over-year revenue has declined by over 33%. During the months of the government-mandated shutdown, Plaintiff Locals Barbershop's revenue was a tiny fraction of the same months in prior years.

32. Plaintiff Locals Barbershop continues to struggle financially because of the economic downturn precipitated by the COVID-19 pandemic.

33. To stay in business, Plaintiff Locals Barbershop would apply for any available economic assistance from the State of Colorado, including the economic relief payments appropriated by Section 1 of Senate Bill 21-001.

34. Plaintiffs would likewise avail themselves of the technical assistance and consulting support provided in Section 1 of Senate Bill 21-001.

35. Senate Bill 21-001's designation of all minority-owned businesses as disproportionately impacted businesses and its express preference for minority-owned businesses,

see Exh. 1 §§ 1(2)(c)(II), 1(3)(b)(I), reduce the likelihood that Plaintiffs will be able to obtain funds earmarked for disproportionately impacted businesses.

CLAIM FOR RELIEF

(42 U.S.C. § 1983 – Violation of the Equal Protection Clause)

36. Plaintiffs incorporate the prior allegations of this amended complaint.

37. 42 U.S.C. § 1983 provides a private right of action to those aggrieved by constitutional violations undertaken by state actors under color of law, including those at issue in this amended complaint.

38. Senate Bill 21-001 was enacted and will be enforced by state actors, under color of state law.

39. In relevant part, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

40. Senate Bill 21-001’s provisions that give a preference to minority-owned businesses for certain COVID-related relief violate the Equal Protection Clause of the Fourteenth Amendment.

41. Section 1 of Senate Bill 21-001 is subject to strict scrutiny because it classifies individuals based on their race. The bill expressly provides preferential access to certain economic stimulus to members of racial minority groups, including individuals who are African American, Hispanic American, and Asian American.

42. Defendants do not have a compelling interest in giving racial preferences to minority-owned businesses in Senate Bill 21-001.

43. Colorado has not identified with specificity in Senate Bill 21-001 or otherwise any racial discrimination to be remedied by making facial racial classifications. Colorado does not have a strong basis in evidence upon which to conclude that remedial action is necessary with regard to any supposed racial discrimination that SB 20B-001 and Senate Bill 21-001 were intended to remedy.

44. Nor can Colorado prove that the racial preferences encompassed in Senate Bill 21-001 are narrowly tailored even if it could demonstrate a compelling government interest. Among other things, Colorado could adopt race-neutral remedies, such as stimulus payments and other relief based on geographic areas or sectors of the economy most impacted by the COVID-19 pandemic, without reference to race.

45. Plaintiff Locals Barbershop has been significantly impacted by the COVID-19 pandemic as described above and would promptly apply for any COVID-related relief. Yet because it is not a “minority-owned business,” Senate Bill 21-001 puts Plaintiffs at a disadvantage in obtaining COVID-19 relief funds.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (a) Declare the minority-owned business provisions of Senate Bill 21-001—namely, sections 1(2)(c)(II) and (3)(b)(I) (codified at 24-48.5-127(2)(c)(II) and (3)(b)(I))—unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

- (b) Permanently enjoin Defendants from enforcing or giving any effect to the minority-owned business provisions of Senate Bill 21-001—namely, sections 1(2)(c)(II) and (3)(b)(I) (codified at 24-48.5-127(2)(c)(II) and (3)(b)(I))—in distributing the COVID-19 relief payments, grants, loans, and technical support and from otherwise discriminating on the basis of race under Senate Bill 21-001;
- (c) Award nominal damages in the amount of \$1.00. This Court’s ability to grant nominal damages in this case may be limited by Supreme Court case law. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 & n.24 (1997). Plaintiffs includes this claim for relief to preserve it for subsequent proceedings;
- (d) Issue an award of attorneys’ fees and costs in this action pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988; and
- (e) Provide such other and further relief as the Court deems just and proper.

Dated: February 18, 2021.

LEWIS | KUHN | SWAN PC

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Docket Text:

MEMORANDUM OPINION re Plaintiffs' [20] Motion for Summary Judgment, Defendants' [26] Cross-Motion for Summary Judgment, Defendant-Intervenor's [28] Cross-Motion for Summary Judgment. Signed by Judge Trevor N. McFadden on 2/18/2021. (lctnm3)

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6832c17402ade2637cd62658d7b5e58b420fe599f165a4fed832c6cd1cd1]]

Exhibit 1

Ntc of Amended Compl. / Proposed Compl.

Court: D. Colo. Case No. 20cv3594

Pacific Legal Foundation
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Sacramento, CA 95814 – 916.419.9111

**IN THE UNITED STATES DISTRICT COURT-
FOR THE DISTRICT OF COLORADO**

Civil Action No.: ~~_____~~ 1:20-cv-03594-PAB-KMT

ETIENNE HARDRE, and
SDG MURRAY, LTD d/b/a LOCALS BARBERSHOP, a Colorado limited liability company,-
-
Plaintiffs,

v.

~~COLORADO MINORITY BUSINESS OFFICE,
ROSY ABURTO MCDONOUGH BETSY MARKEY,~~ in her official capacity as Executive
Director of the Colorado ~~Minority Business Office,~~ of Economic Development and International
Trade; and
JARED POLIS, in his official capacity as Governor of Colorado,

Defendants.

**FIRST AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND NOMINAL DAMAGES**

Plaintiffs Etienne Hardre and SDG Murray, LTD d/b/a Locals Barbershop, by and through
counsel, ~~Lewis Kuhn Swan PC,~~ submit their Complaint for Declaratory and Injunctive Relief
(“Complaint”) as follows hereby allege:

INTRODUCTION

1. This Complaint concerns Etienne Hardre is the majority owner of Locals
Barbershop, a once-bustling barbershop in Colorado Springs. Like many other small businesses,
Locals Barbershop has had to navigate capacity restrictions and decreased revenue over the past
year.

2. In December 2020, Colorado enacted legislation providing relief for small businesses. Yet provisions of the legislation, both in the original version signed into law in December 2020 and the amended version in effect today, violate the Equal Protection Clause of the Fourteenth Amendment because they discriminate among small business owners on a ground that is prohibited under the Constitution: their race.

1. Senate Bill 20B-001 (“SB1”) which (SB 20B-001) was passed by the Colorado General Assembly on December 3, 2020, and signed into law by the Governor of the State of Colorado on December 7, 2020.

2. Specifically, Plaintiffs filed this Complaint seeks declaratory and injunctive relief related to the unconstitutional case shortly after, seeking to enjoin SB 20B-001’s race-based classifications in SB1, including those in Section 8 of the bill which provide certain, which limited economic relief and stimulus only to “minority-owned businesses. Those provisions will be codified at.” Colo. Rev. Stat. § 24-49.5-106.

3. Among other things, SB1 appropriates SB 20B-001 appropriated \$4 million for COVID-19 relief payments for to “minority-owned businesses.” Excluded from this appropriation are” and provided growth and start-up capital for only those businesses owned. Locals Barbershop and operated by Caucasians. These other businesses are that are not minority-owned businesses were excluded from participating in being considered for these relief payments for no reason other than the racial identities of the business owners. funds.

4. In January 2021, Colorado amended the law by enacting Senate Bill 21-001, which is attached to Exhibit 1 of this complaint.¹ Senate Bill 21-001 appropriates \$4 million for COVID-19 relief payments to “disproportionately impacted businesses” and provides relief payments, grants, loans, and technical support for those businesses. See Exh. 1 § 1(3) (relief payments, grants, and loans); id. § 1(4) (technical support). SB 21-001 gives a preference to minority-owned businesses in providing those funds. See id. § 1(3)(b)(I). Further, a minority-owned business automatically qualifies as a “disproportionately impacted business” under Senate Bill 21-001. A non-minority-owned business cannot qualify as a “disproportionately impacted business” unless it shows that it can meet one of the other criteria specified in the bill, such as having five or fewer employees or that it is located in an economically distressed area. See id. Exh. 1 § 1(2)(c).

5. Plaintiffs bring this lawsuit to challenge the racial preferences in Senate Bill 21-001 as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES

Plaintiffs

4.6. Plaintiff Etienne Hardre (“Plaintiff Hardre”) is an individual who is domiciled in the State of Colorado. Plaintiff Hardre is Caucasian.

5.7. Plaintiff SDG Murray, LTD d/b/a Locals Barbershop (“Plaintiff Locals Barbershop”) is a limited liability company organized under the laws of the State of Colorado.

¹ The relevant portions of Senate Bill 21-001 have been codified at Colo. Rev. Stat. § 24-48.5-127.

Plaintiff Locals Barbershop is a barbershop located in Colorado Springs, Colorado. Plaintiff Hardre owns more than 51% of the membership units of Plaintiff Locals Barbershop.

~~6.8.~~ Plaintiff Hardre and Plaintiff Locals Barbershop are collectively referred to as “Plaintiffs.”

Defendants

~~9.~~ Defendant Betsy Markey (“Director Markey”) is sued in her official capacity as the Executive Director of the Colorado Office of Economic Development and International Trade (Colorado Office of Economic Development). The Colorado Office of Economic Development is a Colorado state agency. Senate Bill 21-001 directs the Colorado Office of Economic Development to administer a program to provide relief payments, grants, and loans to disproportionately impacted businesses; to establish a process for disproportionately impacted businesses to apply for a relief payment, grant, or loan under the program; and to establish policies setting forth the parameters and eligibility for the program. *See* Exh. 1 § 1(3).

~~7.~~ Defendant Jared Polis (“Governor Polis”) is sued in his official capacity as the Governor of the State of Colorado. “[W]hen [the defendant] is an administrative agency, or the executive branch of government, or even the state itself, the Governor, in his official capacity, is a proper defendant because he is the state’s chief executive.” *Wildgrass Oil & Gas Comm. v. Colorado*, 447 F. Supp. 3d 1051, 1061 (D. Colo. 2020) (quoting *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004)). In addition, the Office of Economic Development is an office within the Office of the Governor. Col. Rev. Stat. ~~Defendant Colorado Minority Business Office is a political subdivision of the State of Colorado created by Colo. Rev. Stat. §§ 24-49.5-101 et seq. Colorado created the Minority Business office to further the “goal of providing the best~~

~~opportunities for minority business enterprises to enter the mainstream of Colorado’s economy.”~~

~~Colo. Rev. Stat. § 24-49.5-101.~~

~~8. Defendant Rosy Aburto McDonough (“Director McDonough”) is the Director of the Colorado Minority Business Office. Plaintiffs herein sue Director McDonough in her official capacity.~~

~~9. Defendant Jared Polis (“Governor Polis”) is the Governor of the State of Colorado. Plaintiffs herein sue Defendant Polis in his official capacity.~~

~~10. The Colorado Minority Business Office, § 24-48.5-101(1). The Executive Director of the Office of Economic Development serves as the special assistant to the governor for economic development. See id.; see also id. § 24-48.5-101(2)(f) (the Office of Economic Development “shall . . . advis[e] the governor and the general assembly on issues affecting the business community”). And Senate Bill 21-001 directs the Office of Economic Development to “submit a report to the governor [and committees in each house of the General Assembly] detailing how the office is expending the money appropriated for the purposes of this section.” Exh. 1 § 1(6).~~

~~10.11. Director McDonough, Markey and Governor Polis are collectively referred to as “Defendants.”~~

JURISDICTION AND VENUE

~~11. This Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C.~~

~~12.~~ ~~§~~ ~~§~~ 1331 because this action arises under federal law, namely 42 U.S.C. § 1983 and the Equal Protection Clause ~~in~~of the Fourteenth Amendment to the Constitution of the United States.

~~12.~~13. This Court has personal jurisdiction over Defendants because this action arises out of their contacts with the State of Colorado and concerns their acts as officers of this ~~State~~state.

~~13.~~14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because this action concerns acts and omissions of political departments of the State of Colorado.

GENERAL ALLEGATIONS

Special Session and Passage of SB1

Colorado's Initial COVID-19 Relief Bill (Senate Bill 20B-001)

~~14.~~—In November 2020, Governor Polis called a special session of the Colorado General Assembly to consider legislation to address and mitigate the economic impacts of the COVID-19 pandemic.

~~15.~~—~~The Colorado General Assembly convened on December 1, 2020 for~~ During the special session ~~called by Governor Polis.~~

~~16.~~—~~SB1 was among~~ the ~~bills~~ General Assembly passed ~~during the special session~~ ~~and enacted a~~ COVID-19 relief bill (SB 20B-001), which was signed into law by Governor Polis on December 7, 2020. A copy of ~~SB1 is~~ SB 20B-001 was attached as Exhibit 1.

~~17.~~—~~Included in SB1 is an appropriation in the amount of \$4 million for use by the Colorado Minority Business Office to provide “relief payments, grants and loans to~~ Plaintiffs’ original complaint. See ECF No. 1-1. SB 20B-001 carved out certain COVID-related relief for

minority-owned businesses.” ~~Exh. 1, § 8(2).² The bill further directs the Colorado Minority Business Office to use a portion of the funds for “to provide technical assistance and consulting support to minority-owned businesses across the state.” *Id.*, § 8(3).~~

~~18. — The bill mandates that the Colorado Minority Business Office use a portion of the appropriated funds for “relief payments to minority-owned businesses that have been most impacted by COVID-19[.]” *Id.*, § 8(2)(a)(I)(A).~~

~~19.15. SB1 expressly classifies individuals based on race. The legislation defines a “minority-owned business”, which it defined as any “business that is at least fifty-one percent owned, operated, and controlled by an individual who is a member of a minority group, including an individual who is African American, Asian-Indian, Asian-Pacific American, Hispanic American, or Native American.” *Id.*, § 8(1)(c).~~

~~20.16. SB1 provides three primary forms of economic relief exclusively to minority—SB 20B-001 appropriated \$4 million for use by the Colorado Minority Business Office to provide “relief payments, grants and loans to minority-owned businesses.” *See id.* § 8(2). It further directed the Colorado Minority Business Office to use a portion of the funds “to provide technical assistance and consulting support to minority-owned businesses across the state.” *See id.* § 8(3). In all, SB 20B-001 provided three primary forms of economic relief exclusively to minority-owned businesses: direct relief payments, grants and loans for startup capital, and funds to provide minority-owned business leaders with professional development and networking opportunities.~~

~~21. — SB1 directs Director McDonough to establish a process for minority-owned~~

~~²Section 8 of SB1 will be codified at Colo. Rev. Stat. § 24-49.5-106, such that this citation will eventually be found at Colo. Rev. Stat. § 24-49.5-106(2). Plaintiffs cite to the bill itself.~~

~~businesses to apply for these economic stimulus benefits. A threshold requirement to applying, however, is that the business be “minority owned” as defined by SB1.~~

~~**Businesses owned primarily by Caucasians are not permitted to participate in Colorado’s Amended COVID-19 Relief Bill (Senate Bill 21-001)**~~

~~17. In January 2021, the General Assembly passed Senate Bill 21-001 to amend the program established by SB 20B-001. According to state Senator James Coleman, the General Assembly had recognized that it “may need to make a change because of litigation.”³ According to Senator Faith Winter, one of Senate Bill 21-001’s sponsors, the amended legislation seeks to funnel “\$4 million to go to those small businesses that have been most disproportionately impacted by COVID, and minority ownership is a significant factor in that.”⁴~~

~~18. Governor Jared Polis signed Senate Bill 21-001 into law on January 21, 2021. Section 1 of Senate Bill 21-001 is codified as Colorado Revised Statute § 24-48.5-127. A copy of Senate Bill 21-001 is attached to ~~this economic~~ amended complaint as Exhibit 1.~~

~~19. Senate Bill 21-001 revises the program established by SB 20B-001 to instead appropriate COVID relief. This exclusion is based solely on the racial identity of the business owners. funds and provide support for businesses designated as “disproportionately impacted businesses.”~~

³ Alex Burness, *Colorado tried to help minority-owned businesses. A white man sued, and lawmakers are backtracking.*, Denver Post, Jan. 13, 2021, <https://www.denverpost.com/2021/01/13/minority-business>.

⁴ *Id.*

20. Unlike the original COVID-19 Relief Bill, which directed funds to the Colorado Minority Business Office, Senate Bill 21-001 directs that the funds be used and overseen by the Colorado Office of Economic ~~Impacts of the COVID-19 Pandemic~~ Development. See Exh. 1 § 3.

21. Senate Bill 21-001 appropriates \$4 million for (a) “Relief payments to disproportionately impacted businesses that have been most impacted by COVID-19 and have lacked meaningful access to federal loans and grants under the CARES Act”; and (b) “Grants and loans to disproportionately impacted businesses for start-up and growth capital.” Exh. 1 § 1(3)

22. Senate Bill 21-001 directs part of the appropriated money for the Office of Economic Development to “provide technical assistance and consulting support to minority-owned disproportionately impacted businesses across the state.” Exh. 1 § 1(4).

23. Senate Bill 21-001 defines a “disproportionately impacted business” as a business that meets at least one of seven criteria:

(I) Has five or fewer employees, including the business owner;

(II) Is a minority-owned business;

(III) Is located in an economically distressed area;

(IV) The business owner lives in an economically distressed area;

(V) The business owner has low or moderate income, as determined by the Office of Economic Development based on the United States Department of Housing and Urban Development’s low- and moderate-income data used in the community development block grant program;

(VI) The business owner has low or moderate personal wealth, based on household net worth as determined by the office, applying relevant federal or

state data; or

(VII) The business owner has had diminished opportunities to access capital or credit.

Exh. 1 § 1(2)(c).

24. Under Senate Bill 21-001, a minority-owned business qualifies as a disproportionately impacted business regardless of whether it meets any of the other six criteria in the preceding paragraph. A minority-owned business qualifies for relief under Senate Bill 21-001, including grants and loans, regardless of whether it has five or fewer employees, it is located in an economically distressed area, or the business owner has low or moderate personal wealth. But a non-minority-owned business must meet at least one of the other six criteria to qualify as a disproportionately impacted business.

25. A minority-owned business is defined in Senate Bill 21-001 as “a business that is at least fifty-one percent, owned, operated, and controlled by an individual, who is a member of a minority group, including an individual who is African American, Hispanic American, or Asian American.” Exh. 1 § 1(2)(g).

26. Senate Bill 21-001 also gives a preference to minority-owned businesses over other disproportionately impacted businesses. The Bill directs the Colorado Office of Economic Development to establish the “terms of and eligibility for a relief payment, grant, or loan, with preference given to disproportionately impacted businesses” that qualify as a minority-owned business and meet at least one other criterion in the section defining disproportionately impacted business. *Id.* § 1(3)(b)(I).

22. Senate Bill 21-001's Effect on Plaintiffs

23-27. Plaintiff Hardre ~~formed~~became the owner of Plaintiff Locals Barbershop in 2014. Prior to the COVID--19 pandemic, Plaintiff Locals Barbershop was a successful small business employing a number of barbers.

24-28. Plaintiff Hardre depends on the income he generates from Plaintiff Locals Barbershop for his livelihood.

25-29. The COVID-19 pandemic has inflicted significant economic harm on the business revenue of Plaintiff Locals Barbershop and, by extension, on Plaintiff Hardre.

26-30. Among other things, Plaintiff Locals Barbershop was forced to shut down for several weeks during the beginning of the pandemic pursuant to an executive order issued by Governor Polis. Since that time, Plaintiff Locals Barbershop has had to reduce its operations to comply with social distancing and occupancy limitations imposed by Governor Polis and local health officials. Plaintiff Locals Barbershop has complied with all such requirements.

27-31. Plaintiff Locals Barbershop's year-over-year revenue has declined by over 33%. During the months of the government-mandated shutdown, Plaintiff Locals Barbershop's revenue was a tiny fraction of the same months in prior years.

28-32. Plaintiff Locals Barbershop continues to struggle financially because of the economic downturn precipitated by the COVID-19 pandemic.

29-33. To stay in business, Plaintiff Locals Barbershop would apply for any available economic assistance from the State of Colorado, including the economic relief payments

appropriated by Section ~~8 of SB1 that are currently reserved exclusively for minority-owned businesses~~1 of Senate Bill 21-001.

~~30.34.~~ Plaintiffs would likewise avail themselves of the technical assistance and consulting support provided in Section ~~81 of SB1~~Senate Bill 21-001.

~~35. Senate Bill 21-001's designation of all minority-owned businesses as disproportionately impacted businesses and its express preference for minority-owned businesses, see Exh. 1 §§ 1(2)(c)(II), 1(3)(b)(I), reduce the likelihood that Plaintiffs will be able to obtain funds earmarked for disproportionately impacted businesses.~~

CLAIM FOR RELIEF

(42 U.S.C. § 1983 – Violation of the Equal Protection Clause)

~~31.36.~~ Plaintiffs incorporate the prior allegations of this ~~Complaint~~amended complaint.

~~32.37.~~ 42 U.S.C. § 1983 provides a private right of action to those aggrieved by constitutional violations undertaken by state actors under color of law, including those at issue in this ~~Complaint~~amended complaint.

~~38. Senate Bill 21-001 was enacted and will be enforced by state actors, under color of state law.~~

~~33.39.~~ In relevant part, ~~U.S. Const. amend., XIV, § 1~~the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

~~34.40. SB1's provision limiting certain economic stimulus payments~~Senate Bill 21-001's provisions that give a preference to minority-owned businesses ~~violates~~for certain COVID-related

~~relief violate~~ the Equal Protection Clause of the Fourteenth Amendment ~~by unconstitutionally making facial racial classifications.~~

~~35.41.~~ Section ~~81~~ of ~~SB1~~ Senate Bill 21-001 is subject to strict scrutiny because it classifies individuals based on their race. The bill expressly ~~limits~~ provides preferential access to certain economic stimulus to members of racial minority groups, including individuals who are “African American, ~~Asian-Indian, Asian-Pacific American,~~ Hispanic American, ~~or Native~~ and Asian American.” ~~Exh. 1., § 8(1)(c).~~

~~36.42.~~ Defendants do not have a compelling interest in ~~limiting the COVID-19 economic stimulus in Section 8 of the bill to members of the defined~~ giving racial ~~minority groups.~~ In fact, ~~SB1 itself acknowledges that “many small~~ preferences to minority-owned businesses in ~~the state.~~ ~~.. have suffered severe declines in revenue during the pandemic,”~~ *id.*, § 1(1)(a), and that “small, minority owned, and women owned businesses among those most impacted by the pandemic[.]” *id.*, § 1(1)(b). Senate Bill 21-001.

~~37.43.~~ Colorado has not identified with specificity in ~~SB1~~ Senate Bill 21-001 or otherwise ~~the~~ any racial discrimination to be remedied by making facial racial classifications. ~~In any event,~~ Colorado does not have a strong basis in evidence upon which to conclude that remedial action is necessary with regard to any supposed racial discrimination that ~~SB1 was~~ SB 20B-001 and Senate Bill 21-001 were intended to remedy.

~~38.44.~~ Nor can Colorado prove ~~SB1 is~~ that the racial preferences encompassed in Senate Bill 21-001 are narrowly tailored even if it could demonstrate a compelling government interest. Among other things, Colorado could adopt race-neutral remedies, such as stimulus payments and

other relief based on geographic areas or sectors of the economy most impacted by the COVID-19 pandemic, without reference to race.

~~39. — Based on the foregoing, Section 8 of SB1 is facially unconstitutional.~~

~~40. — Plaintiffs alternatively make an as-applied challenge to the minority business provisions in SB1.~~

~~41-45. Plaintiff Locals Barbershop has been significantly impacted by the COVID-19 pandemic as described above and would be a candidate for relief for the economic benefits in Section 8 of SB1 if Plaintiff Hardre or his business were permitted to apply promptly apply for any COVID-related relief. Yet because it is not a “minority-owned business,” Senate Bill 21-001 puts Plaintiffs at a disadvantage in obtaining COVID-19 relief funds.~~

~~42. — But for Plaintiff Hardre’s race, Plaintiff Locals Barbershop would be qualified to apply for the economic benefits in Section 8 of SB1. Plaintiff Locals Barbershop, through its majority owner Plaintiff Hardre, would in fact promptly apply for said benefits if eligible to do so.~~

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (a) Declare the minority-owned business ~~stimulus~~ provisions in Section 8 of SB1 of Senate Bill 21-001—namely, sections 1(2)(c)(II) and (3)(b)(I) (codified at 24-48.5-127(2)(c)(II) and (3)(b)(I))—unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
- (b) — Permanently enjoin Defendants from enforcing ~~the race-based qualifications for~~

~~the economic stimulus prescribed in SB1;~~

~~(e)(b) Permanently enjoin or giving any effect to the minority-owned business provisions of Senate Bill 21-001—namely, sections 1(2)(c)(II) and (3)(b)(I) (codified at 24-48.5-127(2)(c)(II) and (3)(b)(I))—in Defendants from distributing any the COVID-19 relief payments, loans, grants, or other economic loans, and technical support provided in SB1 due to race-based classifications and from otherwise discriminating on the basis of race under Senate Bill 21-001;~~

~~(d) Award Plaintiffs damages from their exclusion from the economic stimulus in Section 8 of SB1;~~

~~(c) Award Plaintiffs their Award nominal damages in the amount of \$1.00. This Court's ability to grant nominal damages in this case may be limited by Supreme Court case law. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 & n.24 (1997). Plaintiffs includes this claim for relief to preserve it for subsequent proceedings;~~

~~(e)(d) Issue an award of attorneys' fees and costs as permitted by law in this action pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988; and~~

~~(f)(e) Provide such other and further relief as the Court deems just and proper.~~

Dated: ~~December 8, 2020.~~ February 18, 2021.

~~/s/ Michael D. Kuhn~~

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U.S. District Court - District of Colorado

District of Colorado

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Case Name: Hardre et al v. Colorado Minority Business Office et al

Case Number: [1:20-cv-03594-PAB-KMT](#)

Filer: Etienne Hardre
SDG Murray, LTD

Document Number: [25](#)

Docket Text:

NOTICE of Filing Amended Pleading re [24] Amended Complaint by Plaintiffs Etienne Hardre, SDG Murray, LTD (Attachments: # (1) Exhibit 1 - Complaint with markup)(Fa, Wencong)

1:20-cv-03594-PAB-KMT Notice has been electronically mailed to:

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86823e365fe70cb6c625077c56b2314cfc0800b894c99d4308ec5b616a5a]]

Document description:Exhibit 1 - Complaint with markup

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