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

Case 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.

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**MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs Etienne Hardre and SDG Murray, LTD d/b/a Locals Barbershop move pursuant to Fed. R. Civ. P. 65 for a preliminary injunction enjoining Defendants from enforcing or giving any effect to the minority-owned business preference of Senate Bill 21-001 in distributing COVID-19 relief funds. *See* Colo. Rev. Stat. § 24-48.5-127(2)(c)(II); *id.* § 24-48.5-127(3)(b)(I).

**CERTIFICATE OF CONFERRAL**

Pursuant to D.C.COLO.LCivR 7.1(a), counsel for Plaintiffs state that they conferred with counsel for Defendants via email on February 16, 2021. Counsel for Defendants indicated that they oppose the relief requested in this motion.

## INTRODUCTION

The COVID-19 pandemic, along with emergency measures designed to minimize its spread, have devastated small businesses across the country. In December 2020, the Colorado General Assembly enacted a comprehensive COVID relief package designed to alleviate the economic impacts of the pandemic on small businesses across the state. Rather than making the entire appropriation available to all small businesses, the General Assembly carved out $4 million exclusively for minority-owned businesses. After Plaintiffs—a once-bustling barbershop in Colorado Springs and its owner—brought this lawsuit, the General Assembly amended its law by allocating the same $4 million for "disproportionately impacted businesses."

Yet the new law is no less unconstitutional than the previous one. In particular, the law provides a preference for certain businesses based solely on their owners' race: a minority-owned business automatically qualifies as a disproportionately impacted business under the new law; a non-minority-owned business must show that it meets separate criteria. And even as to disproportionately impacted businesses, the current law directs the Colorado Office of Economic Development to give a preference in providing relief payments, grants, and loans to minority-owned businesses. *See* Colo. Rev. Stat. § 24-48.5-127(3)(b)(I). The current law thus draws a distinction based on a racial classification. Accordingly, it cannot pass constitutional scrutiny unless it is narrowly tailored to a compelling governmental interest.

It meets neither requirement. The minority-owned business preference does not further a compelling interest because the General Assembly has failed to assert that the preference remedies any racial discrimination in a relevant local industry. And it is not narrowly tailored because the

law does not explain why the same race-neutral methods that Colorado uses to distribute other COVID relief funds do not suffice to distribute the $4 million at issue here.

This Court should issue a preliminary injunction preventing Defendants from enforcing the minority-owned business preference. All four elements of the preliminary injunction standard are satisfied: Plaintiffs are likely to succeed on the merits of their Equal Protection claim; they will suffer irreparable harm in the absence of preliminary relief; the balance of harms tips in Plaintiffs' favor; and an injunction is in the public interest. Defendants currently expect to implement the program at the beginning of April 2021. A preliminary injunction is thus needed to ensure that the funds are distributed in a manner consistent with the Constitution.

## BACKGROUND

### I. Plaintiffs Etienne Hardre and Locals Barbershop

Plaintiffs in this case are Locals,[1] a once-bustling barbershop, and its owner Etienne Hardre. Mr. Hardre took over Locals in 2014 and has proudly served as its majority owner ever since. *See* First Am. Compl. ¶ 27; Hardre Decl. ¶ 2. The barbershop occupies prime real estate in a vibrant Colorado Springs shopping center. It shares the center with the only Trader Joe's in Colorado Springs and one of the only two Costco stores in town, among other popular businesses. In light of its location, as well as Locals' own success, Mr. Hardre was confident that 2020 would be a banner year for the barbershop.

Then came COVID-19. The coronavirus pandemic devastated many small businesses, and Locals was no exception. *See* Hardre Decl. ¶ 3. Near the beginning of the pandemic, Governor

[1] For ease of reference, Plaintiffs will refer to Plaintiff SDG Murray, LTD d/b/a Locals Barbershop by its trade name.

Polis issued an executive order that forced Locals to shut down for several weeks. *See id.* ¶ 4. Since that time, Locals has reduced its operations drastically to comply with social distancing and occupancy limitations imposed by both Governor Polis and local health officials. *Id.* ¶ 5. For example, when Locals re-opened on May 1, 2020, it operated at only 25 percent capacity pursuant to a public health order. *Id.* As a result, Locals' year-over-year revenue has declined by over 33 percent. *Id.* ¶ 3.

Like many other small business owners affected by the economic downturn and executive orders, Mr. Hardre welcomes economic relief. At the start of the pandemic, Mr. Hardre received federal loans pursuant to the Paycheck Protection Program (PPP). More recently, Mr. Hardre was elated to hear that Colorado was providing state-level COVID relief and technical assistance to businesses affected by the pandemic and hampered by attendant government-mandated operating restrictions. Plaintiffs seek to apply for that relief and compete for it on equal footing with other businesses affected by COVID-19. Hardre Decl. ¶ 6.

## II. SB 20B-001: Colorado's Initial COVID-19 Relief Bill

In a special session in December 2020, the General Assembly enacted and Governor Polis signed SB 20B-001. *See* Fa Decl., Exh. 1 (SB 20B-001). The Bill incorporated the General Assembly's finding that "[d]ue to the COVID-19 pandemic and the ongoing public health emergency that Colorado has been battling since March of 2020, many small businesses in the state, including those that are subject to mandatory capacity restrictions, have suffered severe declines in revenue during the pandemic." *Id.* §1(a).

Yet the Bill segregated $4 million of COVID relief solely for minority-owned businesses, ostensibly based on the assertion that "[s]mall, minority-owned, and women-owned businesses are

among those most impacted by the pandemic." *Id.* § 1(b). Because Locals' majority owner Etienne Hardre is Caucasian, Locals Barbershop did not qualify for any of the $4 million appropriated pursuant to SB 20B-001. This $4 million carve-out for minority-owned businesses included funds that Locals desperately needed, including "relief payments, grants and loans," *see id.* § 8(2), and funds "to provide technical assistance and consulting support." *See id.* § 8(3).

## III. SB 21-001: Colorado's Amended COVID-19 Relief Bill and the Minority-Owned Business Preference

After Plaintiffs filed this civil rights lawsuit, the General Assembly passed, and Governor Polis signed, Senate Bill 21-001 to amend the appropriation for minority-owned business established by SB 20B-001.[2] The amended COVID-19 relief bill, however, did not eliminate the preference for minority-owned businesses. Instead, it allocated the same $4 million appropriated in the original bill, now designated for "disproportionately impacted businesses," in a way that still prefers businesses that are owned by racial minorities. Specifically, the amended bill defines "disproportionately impacted business" as a business that meets at least one of seven criteria—one of which is whether the business is minority-owned. *See* Fa Decl., Exh. 2 (SB 21-001) § 1(2)(c).[3] Under the amended bill, a business is a "disproportionately impacted business" if it:

> (I) has five or fewer employees, including the business owner,
>
> (II) is a minority-owned business,
>
> (III) is located in an economically distressed area,

[2] Senate Bill 21-001 has been codified at Colo. Rev. Stat. § 24-48.5-127. For ease of reference, Plaintiffs will refer to the law as SB 21-001 throughout this motion. A copy of SB 21-001 is attached as Exhibit 2 to the Fa Declaration.

[3] The amended legislation also transferred the authority to implement the program from the Minority Business Office to the Office of Economic Development and International Trade (also known simply as the "Office of Economic Development"). *See* Fa Decl., Exh. 2 §1(2)(h).

> (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.

*Id.*

Other provisions of the bill define these criteria with more specificity. A minority-owned business is defined 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." *Id.* § 1(2)(g).[4] A minority-owned business automatically qualifies as a disproportionately impacted business; a non-minority-owned business must meet one of the other criteria. SB 21-001 further states that an "economically distressed area" includes "a state opportunity zone, an enterprise zone, or an historically underutilized business zone." *Id.* § 1(2)(d).[5]

Beyond that, SB 21-001 requires the Office of Economic Development to "establish policies setting forth the parameters and eligibility for the program," including caps on the amount

[4] The bill did not explain the reason for the change in terminology from SB 20B-001, which defined a minority-owned business as a business owned, operated and controlled by an individual who is "African American, Asian-Indian, Asian-Pacific American, Hispanic American, or Native American." *See* Fa Decl., Exh. 1 § 8(1)(c).

[5] A "state opportunity zone" is a census tract designated by the Colorado Office of Economic Development as an opportunity zone. Fa Decl., Exh. 2 § 1(2)(i). An "enterprise zone" is designated by Colorado law. *Id.* § 1(2)(e) (citing Colo. Rev. Stat. § 39-30-103). And a "historically underutilized business zone" is an area so designated by the United States Small Business Administration under its HUBZone program. *Id.* §1(2)(f).

of a relief payment, grant, or loan; deadlines for applying for a relief payment, grant, or loan; grant requirements and loan repayment terms; and "[a]ny other policies necessary to operate the program." *Id.* § 1(3)(b). As relevant here, SB 21-001 requires the Office to provide a preference to businesses that qualify as minority-owned and that meet at least one other criterion in the section defining disproportionately impacted businesses. *Id.* § 1(3)(b)(I). The Office of Economic Development expects to implement this program in April 2021. Fa Decl. ¶ 6.

## IV. Procedural History

Plaintiffs filed their initial complaint shortly after Governor Polis signed the original Bill (SB 20B-001) in December 2020. *See* ECF No. 1. The General Assembly subsequently amended the law by enacting SB 21-001, which the Governor signed on January 21, 2021. On February 18, 2021, Plaintiffs filed an amended complaint seeking to halt the minority-owned business preference in SB 21-001. This motion for a preliminary injunction follows.

## STANDARD OF DECISION

To obtain a preliminary injunction, Plaintiffs must establish that four equitable factors weigh in their favor: (1) they are substantially likely to succeed on the merits; (2) they will suffer irreparable injury if the injunction is denied; (3) their threatened injury outweighs the injury the opposing parties will suffer under the injunction; and (4) the injunction would not be adverse to the public interest. *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). The third and fourth factors merge where, like here, the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

In this Circuit, a movant for certain types of disfavored injunctions must make a "strong showing" on the likelihood of success on the merits and balance of harm factors. *See Free the*

*Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019). An injunction is disfavored if "(1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Id.* Here, the Court need not decide whether the stricter standard applies because a preliminary injunction is warranted under either standard. *See id.* at 797–98.

## ARGUMENT

### A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

Plaintiffs will likely prove that the minority-owned business preference in SB 21-001 violates the Equal Protection Clause. Laws that distribute benefits or burdens on the basis of racial classifications, such as SB 21-001, are subject to strict scrutiny. *See Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). This stringent standard is necessary because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* (internal quotations omitted). And because racial classifications "carry a danger of stigmatic harm," they must be "strictly reserved for remedial settings," lest they "promote notions of racial inferiority and lead to a politics of racial hostility." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Colorado's minority-owned business preference plainly imposes racial classifications. Like the program invalidated in *Croson*, SB 21-001 defines a minority-owned business 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." Fa Decl., Exh. 2 § 1(2)(g).

The minority-owned business preference "distributes burdens or benefits on the basis of individual racial classifications" in two respects. *Parents Involved*, 551 U.S. at 720. First, SB 21-001 expressly requires the Colorado Office of Economic Development to prioritize minority-owned businesses in distributing COVID-19 relief payments, grants, and loans. *See* Fa Decl., Exh. 2 § 1(3)(b)(I). Second, the process for qualifying as a disproportionately impacted business differs for minority-owned and non-minority-owned businesses. A minority-owned business, unlike a non-minority-owned business, automatically qualifies as a disproportionately impacted business regardless of whether it meets any of the other criteria. *Id.* § 1(2)(c)(II). This mechanical treatment of all minority-owned businesses as "disproportionately impacted businesses" threatens to deplete the pot of scarce resources for needy minority-owned and non-minority-owned businesses alike.[6]

As a result, the minority-owned business preference is subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). That stringent standard places the burden on Defendants to show that Colorado's minority-owned business preference both (1) furthers a compelling governmental interest, and (2) is narrowly tailored to further that interest. *Id.* at 220. Plaintiffs are likely to succeed in proving that the preference fails both requirements.

[6] Consider, by analogy, a small boutique hotel that offered a free stay in a limited number of rooms during Memorial Day weekend to two groups of people: individuals who had previously stayed with the hotel and any Caucasian resident in the state. A court would have little difficulty holding, under the relevant statutory provisions, that the hotel engaged in racial discrimination, and that individuals who had previously stayed with the hotel were injured by the hotel's gratuitous extension of this benefit to people on the basis of race.

### 1. Colorado's Minority-Owned Business Preference Does Not Further a Compelling Interest

The Supreme Court has recognized only two interests as compelling enough to justify racial classifications: (1) remedying the past effects of de jure discrimination; and (2) diversity in higher education. *Parents Involved*, 551 U.S. at 720–22. The interest in diversity in higher education is plainly inapplicable here. Thus, Defendants can only justify the minority-owned business preference by proving an interest in remedying the past effects of de jure discrimination. To meet this burden, they must satisfy two conditions. *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003). "First, [they] must identify the past or present discrimination with some specificity." *Id.* (internal quotations omitted). "Second, [they] must also demonstrate that a strong basis in evidence supports [the] conclusion that remedial action is necessary." *Id.* (internal quotations omitted). These criteria are met where the record contains "extensive evidence supporting [the government's] position that it had a strong basis in evidence for concluding that" racial classifications "were necessary to remediate discrimination against" minority-owned businesses. *Id.* at 990. For example, they were met where the information upon which racial classifications were predicated indicated persistent discrimination in a local industry in which the government was, "at least, an indirect participant." *Id.*

Defendants can make no such showing here. Colorado's initial COVID-19 relief bill attempted to justify its racial classifications with a scant assertion that "[s]mall, minority-owned, and women-owned businesses are among those most impacted by the pandemic." Fa Decl., Exh. 1 § 1(b). The current iteration of the minority-owned business preference, which was enacted after

Plaintiffs filed their lawsuit, attempts to bolster the government's interest by citing a collection of studies and articles. *See id.*, Exh. 2 § 1. But that attempt falls flat.

The documents referenced in SB 21-001 cannot show a compelling interest in remedying the past effects of de jure discrimination for two reasons. First, the bulk of documents cited in the current bill refer to evidence of disparities between businesses that are minority-owned and businesses that are not. Without more, there may be "numerous explanations" for those disparities, including "past societal discrimination in education and economic opportunities" and differing "career and entrepreneurial choices." *Croson*, 488 U.S. at 503.

Second, the documents cited in SB 21-001 do not show racial discrimination in any "local industry," much less one in which the government was either a direct or, "at least, an indirect participant." *Concrete Works*, 321 F.3d at 990. On the contrary, the documents range from a study conducted by the Federal Reserve Bank of New York, *see* Fa Decl., Exh. 2 § 1(1)(h)(I), to a summary of simulations conducted by an economics professor in a working paper published by the Stanford Institute for Economic Policy Research. *See id.* § 1(f)-(g). Nowhere do the several pages of findings claim either persistent discrimination in Colorado or that the government was at least a passive participant in such discrimination. *See id.* § 1. That is fatal to any assertion of a compelling interest here. At most, a few of the reports allege broad lending discrimination, *see id.* § 1(1)(h)(II) (citing an article by the Brookings Institution). But such allegations "are of little probative value in establishing identified discrimination" in any particular industry in Colorado. *See Croson*, 488 U.S. at 500.

**2. Colorado's Minority-Owned Business Preference Is Not Narrowly Tailored**

The minority-owned business preference also is not narrowly tailored. The narrow tailoring analysis requires Defendants to engage in "serious, good faith consideration of workable race-neutral alternatives" that would allow them to achieve the interest they believe to be compelling. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). SB 21-001 fails to mention any consideration of race-neutral alternatives. That omission is especially devastating where, as here, such alternatives appear readily available. For example, if Colorado believed that lending discrimination around the country disproportionately affect minority-owned businesses in this state, *see* Fa Decl., Exh. 2 § 1(1)(h)(II), it could ramp up enforcement of its antidiscrimination laws in lending. Or it could take the Supreme Court's decades-old suggestion to provide "training and financial aid for disadvantaged entrepreneurs of all races." *Croson*, 488 U.S. at 509–10. Indeed, both the initial and current iteration of Colorado's COVID-19 relief bill shows that the General Assembly understands how to distribute COVID relief without resorting to racial classifications, as the initial bill provides $37 million in COVID relief for businesses in certain industries. *See* Fa Decl., Exh. 1 § 2(3) (appropriation); *id.* § 2(1)(f) (listing eligible industries). And many of the criteria for disproportionately impacted businesses contained in SB 21-001 do not rely on racial classifications. *See id.*, Exh. 2 § 1(2)(c).

The "random inclusion of racial groups" for which there is no evidence of past discrimination further demonstrates that a program is not narrowly tailored. *See Croson*, 488 U.S. at 506. As stated above, the General Assembly failed to provide any evidence of racial discrimination in any relevant local industry. And although the General Assembly recited one study concluding that, on average, black business owners were more likely to be denied PPP loans

due to lending discrimination, *see* Fa Decl., Exh. 2 § 1(1)(h)(II), the bill that it enacted ostensibly provides a preference for a business owned by *any* racial minority. *Id.* § 1(2)(g). The inclusion of various racial minority groups in the minority-owned business preference, regardless of whether the group has suffered racial discrimination in a relevant local industry, "suggests that perhaps the [General Assembly's] purpose was not in fact to remedy past discrimination." *Croson*, 488 U.S. at 506. All considered, Plaintiffs have made a strong showing of their likelihood of success on the merits.

### B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION

The minority-owned business preference inflicts irreparable harm on Plaintiffs by violating their right to equal protection under the law. *See Free the Nipple*, 916 F.3d at 805. As the Tenth Circuit recently observed, courts routinely "consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Id.* at 805. As the court explained, what makes an injury "irreparable" is the inadequacy of a monetary remedy after a full trial—and "any deprivation of any constitutional right fits that bill." *Id.* at 806. Because the minority-owned business preference violates the Equal Protection Clause, Plaintiffs need not show any further irreparable harm. *See id.*

In all events, Plaintiffs will suffer additional irreparable harm. Nearly $349 billion of federal CARES Act loans nationwide were exhausted in merely 13 days.[7] It stands to reason that the $4 million of COVID relief funds subject to the minority-owned business preference will likewise be depleted quickly. Absent a preliminary injunction, those funds will almost certainly be

[7] Lisa Desjardins, *It took 13 days for the Paycheck Protection Program to run out of money. What comes next?*, PBS Newshour, Apr. 16, 2020, https://to.pbs.org/3jZpf4k.

exhausted well before this case resolves on the merits, thus depriving Plaintiffs of equal opportunity to compete for those scarce funds. And the Eleventh Amendment would prevent Plaintiffs from seeking monetary damages after the fact. *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (where Eleventh Amendment bars retrospective monetary relief against a state, the plaintiff's injury is irreparable).

### C. THE BALANCE OF HARMS TIPS IN FAVOR OF PLAINTIFFS AND THE PUBLIC INTEREST WOULD BE SERVED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION

The third and fourth factors merge when, like here, the government is the opposing party. *Nken*, 556 U.S. at 435. The irreparable harms that Plaintiffs will suffer without a preliminary injunction outweigh the harm that the preliminary injunction would cause Defendants. When a constitutional right hangs in the balance, even a temporary loss of that right usually trumps any harm to Defendants. *Free the Nipple*, 916 F.3d at 806. Moreover, Defendants are not at risk of suffering any harm at all. Plaintiffs' proposed injunction would not prevent Defendants from distributing COVID-19 relief. On the contrary, it would only require them to do so in a manner that comports with the Equal Protection Clause. By contrast, Plaintiffs would suffer an irreparable violation of their constitutional rights absent a preliminary injunction. And on the ground, Plaintiffs would be forced to compete for scarce funds distributed in a way that disadvantages non-minority-owned businesses like Locals. Thus, Plaintiffs have made a strong showing that their threatened injury outweighs any potential harm in granting the injunction. Moreover, "it is always in the public interest to prevent a violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (internal quotations omitted). Thus, the public interest factor weighs in Plaintiffs' favor. The requested injunction is also in the public interest because it would

not inhibit COVID relief from going to businesses that have suffered economic impacts from the pandemic; it would just mean that the relief would be distributed on factors other than race.

### D. NO SECURITY SHOULD BE REQUIRED

Trial courts have "wide discretion under Rule 65(c) in determining whether to require security." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (internal quotation omitted). Here, Defendants cannot show that the issuance of a preliminary injunction would cause them any harm. *See, e.g., Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). No bond or other security should be required.

## CONCLUSION

Plaintiffs' Motion for a Preliminary Injunction should be granted.

DATED: February 19, 2021.

Respectfully submitted,

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