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#### Why do we need the ERA? New Decision from the 6th Circuit Answers the Question

At the ERA Project we get asked all the time: "why do we need the Equal Rights Amendment (ERA)?" "Doesn't the Constitution already prohibit sex discrimination?" "What difference would it make to add explicit sex discrimination protections in the Constitution as the 28<sup>th</sup> Amendment?"

Well, last week the 6<sup>th</sup> Circuit Court of Appeals (the federal appeals court covering Ohio, Michigan, Kentucky, and Tennessee) provided a perfect example of why the anti-discrimination protections contained in the U.S. Constitution need to be updated and strengthened, and how the ERA could do this. The case, <u>Vitolo v. Guzman</u>, involved a challenge to a key provision of the \$1.9 trillion COVID-19 stimulus package signed into law by President Biden in March 2021. The program targeted economic sectors particularly impacted by the pandemic, such as restaurant owners, providing "a one-off monetary lifeline aimed at ameliorating short-term economic devastation."<sup>1</sup> Congress built into the aid application process a 21-day fast track for restaurant owners hardest hit by the pandemic: women and "socially and economically disadvantaged" people, a.k.a. people of color.<sup>ii</sup> Other restaurant owners could apply for aid during this period as well, but applications from women and people of color would be processed first. Nevertheless, Antonio Vitolo, the white male owner of Jake's Bar and Grill in Harriman, Tennessee, challenged the fast track application procedure, claiming that it discriminated against him on the basis of his sex and race.

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In defense of the policy to prioritize aid to women- and people of color-owned businesses, the government provided the court with extensive evidence, showing that womenowned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefits from earlier federal COVID-19 relief programs.<sup>iii</sup> The government also presented overwhelming evidence showing that restaurants owned by people of color were more vulnerable to economic distress than those owned by white entrepreneurs.<sup>iv</sup> Further, women and people of color were more likely to be employed in retail, accommodation, food services, and personal care services industries, which were hardest hit by government shut-down orders and a decrease in foot traffic.

Notwithstanding the strong evidence showing that women- and people of color-owned businesses were hardest hit by the effects of COVID-19, Judge Amul Thapar (a Trump appointee) ruled for Vitolo, finding that the government "fails to show that prioritizing womenowned restaurants serves an important government interest."<sup>v</sup> He continued by refusing to acknowledge the overwhelming evidence of the role that gender-based inequality plays in the economy: "there is no need to use sex as a proxy when the government seeks to remedy a problem that is purely economic."<sup>vi</sup> With regard to the prioritization of applicants of color, Judge Thapar wrote, "[w]hen the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government are not nearly enough."<sup>vii</sup> Judge Thapar's decision illuminated so clearly why the existing constitutional prohibitions against

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discrimination have been ineffective in addressing widespread sex- and race-based inequality, and how difficult it is to address and remedy clearly documented disadvantage suffered by women and people of color, as was the aim of the COVID-19 stimulus package.

Why is this case particularly relevant to debates about the ERA? It illustrates how important it is to amend the U.S. Constitution not only to include explicit protections against sex-based discrimination, but also to modernize the way that courts approach the concept of equality more generally. Some gender equality advocates have proclaimed that the ERA's great promise would be to elevate sex discrimination claims to the same level of protection now granted to race discrimination claims, subjecting them to "strict scrutiny" by courts. But the Vitolo v. Guzman case makes it abundantly clear that no one who really cares about equality would advance this position only, since the kind of legal scrutiny afforded to race discrimination cases has been entirely ineffective in addressing systemic racism in the United States, and instead has been successfully manipulated by right-wing advocates as a tool more suited to undermine equality by protecting the rights of white people, like Antonio Vitolo, than dismantling structural discrimination against people of color. The same is true for the sex discrimination protections to be found in the constitution: when Congress acted affirmatively to address the disproportionate gendered-effects on the economy of COVID-19-1.3 million women-owned businesses that were forced to shutter their doors during the peak of the epidemic<sup>viii</sup>—these measures were seen by courts to amount to discrimination against men rather than reasonable attempts to address structural discrimination against women in the

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economy. This view of equality requires the government to act in ways that are "sexually neutral" even when clear data shows that sex neutrality will perpetuate rather than remediate gender-based injustice.

Finalizing the ERA, and adding it to the Constitution as the 28<sup>th</sup> Amendment, holds the promise of not only ending the embarrassment that the U.S. Constitution is the only modern constitution not to include explicit protections against sex discrimination, but of updating what we mean by equality and equal citizenship. The ERA could be the vehicle to infuse the constitution with the power to do more than identify the bad apples who bear personal animus toward women, and more than require the government to be "sex neutral" in its policy-making; instead the constitutional concept of equality could guarantee that the government has the tools to address and remedy what all the data shows clearly: that gender-based inequality, like race-based inequality, runs through the very fabric of our laws, political institutions, and economy.

<sup>&</sup>lt;sup>i</sup> Vitolo v. Guzman, Nos. 21-5517/5528, Slip Op. at 21 (6th Cir. May 27, 2021).

<sup>&</sup>lt;sup>ii</sup> See *id*. (6th Cir. May 27, 2021).

<sup>&</sup>lt;sup>iii</sup> See, e.g., Long-Lasting Solutions for a Small Business Recovery: Hearing Before the Committee on Small Business, at 55 (July 15, 2020), *available at* <u>https://www.congress.gov/116/chrg/CHRG-</u> <u>116hhrg41297/CHRG-116hhrg41297.pdf</u> (academic study noting that "female-owned companies are less likely to receive private investment"); Supporting Small and Minority-Owned Businesses Through the Pandemic, at 35 (Feb. 4, 2021), *available at*: <u>https://www.congress.gov/117/chrg/CHRG-</u> <u>117hhrg43965/CHRG-117hhrg43965.pdf</u> (prepared statement of Nneka Brown-Massey noting survey results showing that "[w]omen-owned businesses had to wait longer, and in some cases were 10 times less likely to hear in a couple days from their lenders compared to their male counterparts" when seeking relief from earlier federal COVID-19 relief programs); *id*. (noting that women were "twice as likely . . . to not receive what they applied for" relative to male applicants, meaning they were forced to reduce pay and make other financial sacrifices at a higher rate).

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<sup>iv</sup> Since the start of the crisis, business owners of color had been especially and unfairly hard hit. Active black-and Latino-owned businesses have declined by 41 percent and 32 percent respectively. Asian American-owned business owners dropped by 26 percent. By comparison, active white business owners declined by 17 percent. These business owners of color are from the same communities that were the most adversely affected by the Great Recession, and unfortunately, they are the ones most likely to have been underserved by the Paycheck Protection Program ("PPP"). Paycheck Protection Program: Loan Forgiveness & Other Challenges: Hearing Before the House Committee on Small Business, at 10-11 (June 17, 2020), available at:https://www.congress.gov/116/chrg/CHRG-116hhrg41293/CHRG-116hhrg41293.pdf (testimony of Ashley Harrington); see also id. at 18 ("I think historically communities, individuals and business owners of color have lacked access to credit through traditional means, even through the SBA, which is a government guaranteed program."); id. at 58 (Harrington testifying in writing that commercial lenders administering the PPP prioritize lending to businesses with more employees, while minority-owned businesses tend to have fewer employees, thereby systematically directing PPP funds away from minority-owned businesses); id. at 74-92 (Harrington written statement explaining how the PPP disproportionately failed to assist minority-owned businesses). Long-Lasting Solutions for a Small Business Recovery: Hearing Before the Committee on Small Business, at 9-10 (July 15, 2020), available at:https://www.congress.gov/116/chrg/CHRG-116hhrg41297/CHRG-116hhrg41297.pdf; see also id. at 55-57 (academic study detailing higher loan denial rates, and concomitant lack of access to necessary credit, for minority-and woman-owned businesses); id. at 71 (written testimony of Dr. Lisa Cook explaining that before the pandemic, 27% of white-owned businesses were financially "at risk" or "in distress," compared to 49% of small Hispanicowned firms and 57% of small black-owned firms, meaning that minority-owned firms were more exposed to an adverse economic shock, and were especially vulnerable to COVID-19 because they are "overrepresented [in] accommodation and food services, personal and laundry services, and retail"); id. at 72 (written testimony of Dr. Lisa Cook explaining that minority-owned businesses had greater difficulty accessing PPP credit due to the PPP's "heavy reliance on large banks, with whom [minority-owned businesses] have had historically poor relationships").

<sup>v</sup> Vitolo, Nos. 21-5517/5528, Slip Op. at 13.

<sup>vi</sup> *Id*. at 14.

<sup>vii</sup> *Id*. at 9.

<sup>viii</sup> See Sarah Maiellano, *How COVID-19 Is Hurting Women-Owned Restaurants, Philadelphia's "sisterhood of chefs" worry about the future of dining and their place in the restaurant industry*, James Beard Foundation Blog, October 2, 2020, *available at:* <u>https://www.jamesbeard.org/blog/how-covid-19-</u> <u>is-hurting-women-owned-restaurants;</u>

Robert W. Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-Stage Losses From The April 2020 Current Population Survey*, National Bureau of Economic Research, June 2020, *available at:* <u>http://www.nber.org/papers/w27309</u>.