IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CARMEN'S CORNER STORE, *et al.*, Plaintiffs, v. U.S. SMALL BUSINESS ADMINISTRATION, *et al*, Defendants.	Case No. 1:20-cv-01736-GLR

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Carmen's Corner Store, Retail4Real, and Altimont Mark Wilks (collectively, "Plaintiffs") submit this Memorandum of Law in Support of their Motion for an Emergency Temporary Restraining Order and Preliminary Injunction (the "Motion") against the United States Small Business Association ("SBA"); Jovita Carranza, in her official capacity as Administrator of SBA; Steven Mnuchin, in his official capacity as Secretary of the United States Department of the Treasury; and the United States of America (collectively, "Defendants"). Respectfully, Plaintiffs ask this Court to grant expedited relief on the papers and/or hold a hearing on Plaintiffs' request for injunctive relief as soon as practical.

PRELIMINARY STATEMENT

Plaintiffs ask the Court to temporarily and preliminarily enjoin the Defendants from using Part III.2.b.iii (now, the "Amended Criminal History Rule") of the Interim Final Rule governing the administration of PPP loans and to further enjoin the Defendants from depleting the funds available for PPP loans below the amount needed for Plaintiffs to receive the $31,500 in loans that the Plaintiffs' businesses require. If the Court does not temporarily enjoin the Defendants, the Plaintiffs will suffer further irreparable harm.

Plaintiffs are likely to succeed on the merits of the four claims in their Verified Complaint because the plain text of the CARES Act unambiguously sets the only considerations for PPP eligibility and did not delegate any discretion or authority to SBA to exclude businesses that meet the limited statutory conditions that Congress enumerated. Additionally, the Amended Criminal History Rule is arbitrary and capricious because SBA, without any rational explanation, departed from the limited factors that Congress enumerated for its consideration, which resulted in a rule that is antithetical to the important problem that Congress sought to address. Because the Defendants have a ministerial, nondiscretionary duty to administer the CARES Act based on the eligibility criteria set by Congress,

the Plaintiffs are also likely to succeed on their claims for administrative and equitable mandamus, respectively.

An order by this Court enjoining the Defendants from unlawfully denying PPP loans to Carmen's Corner Store and Retail4Real based on Mr. Wilks's criminal history is the only relief available to the Plaintiffs. Without emergency injunctive relief, which will prevent SBA from depleting the PPP funds, the Plaintiffs face irreparable harm, including financial ruin and out-of-work employees. The risk of this hardship greatly outweighs any potential hardship to the Defendants, and the public interest favors an injunction in this case.

FACTS RELEVANT TO THE MOTION FOR PRELIMINARY INJUNCTION

For a more complete recitation of the facts relevant to the case, please refer to the Verified Complaint filed on June 10, 2020. (Compl., ECF No. 1).

A. Defendants Have Unlawfully Denied PPP Loans to the Plaintiffs' Businesses

1. Plaintiffs Carmen's Corner Store and Retail4Real have both suffered significant business losses due to COVID-19 and the related executive orders and economic downturn.

2. To mitigate financial losses and stabilize its business in the face of retailers' reducing contracts for automotive parts, Retail4Real applied for a PPP loan.

3. On April 8, 2020, Mr. Wilks submitted an application on behalf of Retail4Real seeking a $10,000 PPP loan from AmeriServ Bank in Hagerstown, Maryland.

4. AmeriServ operates as a delegatee of SBA in the processing and approval or denial of the PPP loan that Retail4Real sought. 15 U.S.C. § 636(a)(36)(F)(ii)(I)

5. Retail4Real is fully qualified under the text of the CARES Act to receive a PPP loan. *See* 15 U.S.C. § 636(a)(36)(F)(ii)(II).

6. Retail4Real intended and still intends to use the funds from a PPP loan in accordance with the PPP provisions of the CARES Act, Pub. L. No. 1160136, § 1102(a)(2)(F)(i), 134 Stat. 281 (2020).

7. The Paycheck Protection Program Application Form that Mr. Wilks completed asked two questions related to his criminal history:

> a. 5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?
>
> b. 6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?

(Compl. Ex. 11, p.1, ECF No. 1-11) [hereinafter, "PPP Application"].

8. Despite the fact that the CARES Act did not exclude small businesses based on an owner's criminal history, SBA's PPP application included an explicit, categorical prohibition: "*If questions (5) or (6) are answered "Yes," the loan will not be approved.*" PPP Application, p. 1 (emphasis in original).

9. On April 13, 2020, Carmen S. Fox, an Assistant Vice President of AmeriServ Financial Bank in Hagerstown, spoke with Mr. Wilks to inform him that his loan would be rejected due to his answers to questions 5 and 6. Wilks Affidavit, ¶¶ 10, 12 (A copy of Mr. Wilks' Affidavit is attached as Exhibit 1).

10. Ms. Fox also provided Mr. Wilks a copy of a document that explained that businesses are

> ineligible if an owner of 20 percent or more of the equity of the applicant is presently incarcerated, on probation, on parole; subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or within the last five years, for any felony, has been convicted; pleaded guilty; pleaded nolo contendere; been placed on pretrial diversion; or been placed on any form of parole or probation (including probation before judgment).

(Compl. Ex. 12, ECF No. 1-12) (underlining in original).

11. Following their conversation, Mr. Wilks forwarded Ms. Fox a copy of the April 6 letter from eleven Congressmen to Defendants Carranza and Mnuchin and asked that AmeriServ not deny his loan "because of a provision that shouldn't exist in th[e] application process." (Compl. Ex. 13, p.1, ECF No. 1-13). Ms. Fox thanked Mr. Wilks and said she would forward the letter to AmeriServ Bank Vice President George Chaney. *Id.*

12. To this day, Mr. Wilks has not received a PPP loan for Retail4Real; although, he is uncertain whether AmeriServ processed his application or denied him outright based on his response to questions 5 and 6. Wilks Aff., ¶ 16.

13. Mr. Wilks filled out the application completely and included all necessary documents. And Retail4Real meets the considerations set out in the CARES Act, § 1102(a)(2)(F)(i).

14. Carmen's Corner Store also determined that it should apply for a PPP loan to mitigate the significant business losses it has suffered due to the economic downturn and government's orders.

15. To mitigate losses and pay rent and the salaries of its out-of-work employees during the closure, Carmen's Corner Store determined it should apply for a PPP loan in the amount of $21,500 to cover employee salaries and rent.

16. Carmen's Corner Store is fully qualified under the text of the CARES Act to receive a PPP loan.

17. Carmen's Corner Store intended and still intends to use the funds from a PPP loan in accordance with the PPP provisions of the CARES Act.

18. The PPP loan application, however, indicates expressly that Carmen's Corner Store is ineligible for a PPP loan based on questions 5 and 6. Given that AmeriServ, as SBA's delegatee, denied or refused to process Retail4Real's PPP loan application based on those questions, it would be

futile for Carmen's Corner Store to apply, absent a court order, because the Defendants would also deny a PPP loan to Carmen's as well.

19. Even without the explicit statement on the PPP loan application that loans will be denied for answering questions 5 and 6 affirmatively, Plaintiffs believe that SBA would deny PPP loan applications from Retail4Real and Carmen's Corner Store based on 13 C.F.R. § 120.110(n), which has no applicability to PPP loans.

20. The ongoing denial of PPP loans to Plaintiffs' businesses threatens their financial viability and will continue to so, absent immediate judicial intervention.

B. The Defendants Are Unlawfully Denying PPP Loans to Businesses with Owners Who Have a Criminal History

21. The CARES Act declares that, "in addition to small business concerns, *any business concern*, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan," so long as the business employs 500 or fewer employees or, "if applicable," employs less than "the size standard in number of employees established by the Administration for the industry in which the business concern … operates." *Id.* § 1102(a)(2)(36)(D)(i) (emphasis added). Sole proprietorships and independent contractors are eligible for PPP loans. *Id.* § 1102.

22. In recognition that SBA traditionally declared some classes of businesses ineligible for SBA loans, Congress included a section in the PPP entitled, "Increased Eligibility for Certain Small Businesses and Organizations," 15 U.S.C. § 636(a)(36)(D).

23. To accomplish this increase in eligibility, Section 1102 amended 15 U.S.C. § 636(a)(36)(F)(ii) to limit the considerations on which SBA can base eligibility for a PPP loan guarantee. *See* CARES Act § 1102.

24. SBA may consider only two factors in determining PPP loan eligibility: whether a borrower "(aa) was in operation on February 15, 2020; and (bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or (BB) paid independent contractors, as reported on a Form 1099-MISC." 15 U.S.C. § 636(a)(36)(F)(ii)(II).

25. "While Congress may once have been willing to permit the SBA to exclude these businesses from its (the SBA's) lending programs, that willingness evaporated when the COVID-19 pandemic destroyed the economy and threw tens of millions of Americans out of work. Simply put, Congress did not pick winners and losers in the PPP. Instead, through the PPP, Congress provided temporary paycheck support to *all* Americans employed by *all* small businesses that satisfied the two eligibility requirements—even businesses that may have been disfavored during normal times. Thus, the SBA's PPP Ineligibility Rule is invalid because it contravenes the PPP." *DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin.*, —— F. Supp. 3d at ——, No. 20-CV-10899, 2020 WL 2315880, at *1 (E.D. Mich. May 11, 2020).

26. The CARES Act also includes a "catch-all" provision to prevent SBA from applying to PPP loans the ineligibility rules that SBA applies to its other loan programs:

> Neither may the SBA continue to apply these rules pursuant to § 636(a)(36)(B), which states: "Except as otherwise provided in this paragraph, the [SBA] may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection." 15 U.S.C. § 636(a)(36)(B). This provision likely constitutes a catch-all governing procedures otherwise unaffected by the mandate of the CARES Act and the PPP and does not detract from the broad grant of eligibility.

DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., —— F. 3d at ——, No. 20-1437, 2020 WL 2988528, at *2 (6th Cir. May 15, 2020).

27. On April 15, 2020, SBA promulgated an Interim Final Rule implementing sections 1102 and 1106 of the CARES Act, which "applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are

exhausted." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. at 20,811, 20,817 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) ("Interim Final Rule").

28. SBA recognized the expediency with which Congress wanted PPP loans administered and sought to limit discretion and delay in the lending process by authorizing lenders, which act as SBA's delegatees. *See* 15 U.S.C. § 636(a)(36)(F)(iii). The Interim Final Rule instructed lenders to issue loans in reliance on a borrower's certifications that the borrower is eligible for a PPP loan. *Id.* § 636(a)(36)(G)(i).

29. In contravention of the text of the CARES Act and in excess of its administrative authority, SBA included in the Interim Final Rule a non-exhaustive list of businesses that SBA deemed ineligible for PPP, including businesses for which "[a]n owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years[.]" Interim Final Rule, § III.b.2.iii (the "Criminal History Rule").

30. In the Interim Final Rule SBA also referenced 13 C.F.R. § 120.110, which provides in relevant part: "The following types of businesses are ineligible [for SBA business loans]: … Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or crime of moral turpitude." 13 C.F.R. § 120.110(n).

31. On June 12, 2020, two days after the Plaintiffs filed their Verified Complaint, SBA announced that it was amending the Interim Final Rule ("Amended Interim Final Rule") to reduce the "look-back" period under the Criminal History Rule. (A copy of the Amended Interim Final Rule is attached as Exhibit 2).

32. The Amended Interim Final Rule modified Part III.2.b.iii (now, the "Amended Criminal History Rule") as follows:

> *b. Could I be ineligible even if I meet the eligibility requirements in (a) above?*
> You are ineligible for a PPP loan if, for example:
> * * *
> iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year[.]

Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Revisions to First Interim Final Rule (to be codified at 13 C.F.R. pt. 120, Part III.2.b.iii) (June 12, 2020).

33. SBA offered the following explanation for the change:

> The First Interim Final Rule provided, among other things, that a PPP loan will not be approved if an owner of 20 percent or more of the equity of the applicant has been convicted of a felony within the last five years. After further consideration, the Administrator, in consultation with the Secretary of the Treasury (the Secretary), has determined that a shorter timeframe for felonies that do not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance is more consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act of 2018 (Pub. L. 115-391).

Id. at Part III.1.

34. Notably, SBA based its Amended Criminal History on its understanding of the First Step Act of 2018, a general statute outside of SBA's expertise. *See W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003) ("[W]hen the administrative interpretation is not based on expertise in the particular field … but is based on general common law principles, great deference is not required.") (citation omitted).

35. SBA failed to explain how the restrictions imposed by its Amended Criminal History Rule, while less egregious than the initial Criminal History Rule, are required by or consistent with the First Step Act—let alone the CARES Act, the statute that SBA is administering.

36. In conjunction with the Amended Interim Final Rule, SBA issued a revised PPP loan application ("Revised PPP Application"):

> a. 6. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, **or within the last year, for any felony**, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?

(A copy of the Revised PPP Application is attached as Exhibit 3) (emphasis added).

37. The Revised PPP Application retains the original application's explicit warning that applicants will be denied based on criminal history: "*If questions (5) or (6) are answered "Yes," the loan will not be approved.*" (Exh. 3) (emphasis in original).

38. Although SBA continues to recognize that "the intent of the [CARES] Act is to provide relief to America's small businesses expeditiously" and to "provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency[,]" *compare* Amended Interim Final Rule, Exh. 1; *with* Interim Final Rule, 85 Fed. Reg. at 20,811-12, SBA's Amended Criminal History Rule is still counter to that purpose and beyond the authority that Congress delegated to SBA in the CARES Act.

39. Through its passage of the CARES Act, Congress did not delegate to SBA the authority to determine who is and is not morally worthy of a PPP loan. *See DV Diamond Club*, 2020 WL 2988528, at *2 ("[T]he Act's specification that 'any business concern' is eligible, so long as it meets the size criteria, is a reasonable interpretation. That broad interpretation also comports with Congress's intent to provide support to as many displaced American workers as possible and, in doing so, does not lead to an 'absurd result' as the SBA claims. Finally, by specifying 'any business concern,' Congress made clear that the SBA's longstanding ineligibility rules are inapplicable given the current circumstances.").

40. Even if Congress had delegated that power to SBA—which it did not—the Amended Interim Final Rule is an arbitrary and capricious exercise of that power. *Sierra Club v. U.S. Dep't of the*

Interior, 899 F.3d 260, 293 (4th Cir. 2018) (describing arbitrary-and-capricious agency action as when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

41. On Friday April 3, 2020, SBA issued additional guidance in which it exempted faith-based organizations from SBA's affiliation rules that had made some faith-based organizations ineligible for PPP loans under SBA's regulations. Affiliate Rules for Paycheck Protection Program, 85 Fed Reg. at 20,817 (Apr. 3, 2020) (to be codified at 13 C.F.R. pt. 121).

42. SBA typically refuses to make its loans available to "[b]usinesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting[.]" 13 C.F.R. § 120.110(k).

43. The Administrator announced that SBA would change its PPP ineligibility rules for these faith-based businesses because SBA did not have a compelling interest "in denying emergency assistance to faith-based organizations that are facing *the same economic hardship to which the CARES Act responded* and who would be eligible for PPP but for their faith-based organizational and associational decisions." Affiliate Rules for Paycheck Protection Program, 85 Fed Reg. at 20819 (emphasis added).

44. The Administrator failed to explain why SBA determined it should grant PPP eligibility to faith-based businesses typically excluded by 13 C.F.R. § 120.110(k) but not do the same for persons with a criminal record typically excluded by 13 C.F.R. § 120.110(n).

C. Defendants Have Unlawfully Deemed the Plaintiffs Ineligible for PPP Loans

45. Like most other small businesses affected by this historic economic downturn, Carmen's Corner Store and Retail4Real need financial assistance and loan forgiveness in order to survive.

46. The CARES Act provided for PPP loans to assist small businesses financially while they suffer a significant drop in trade and income as a result of the historic economic downturn that resulted from COVID-19 and the government's attempts to combat that virus.

47. The plain text of the CARES Act is clear and unambiguous as to which businesses are eligible for PPP loans.

48. Because the CARES Act makes unambiguously clear which businesses are eligible for PPP loans, SBA lacked authority to promulgate the Criminal History Rule or the Amended Criminal History Rule.

49. The Amended Criminal History Rule, which purports to restrict or clarify which businesses are eligible for PPP loans, is short of statutory right and unlawful as it is contrary to the text of the CARES Act and beyond the specific authority that Congress delegated to SBA through the CARES Act. *See City of Arlington, Tex. v. FCC*, 596 U.S. 290, 307 (2013) (explaining that a rule that exceeds an agency's statutory grant of authority is without legal basis and, therefore, is unlawful).

50. SBA's Amended Criminal History Rule has resulted in the Plaintiffs' ineligibility for PPP loans that the Plaintiffs are otherwise qualified for under the plain text of the CARES Act.

D. Plaintiffs Have Experienced and, Without Immediate Injunctive Relief, Will Continue to Experience, Concrete and Particularized Harm as a Direct Result of the SBA's Amended Criminal History Rule

51. As a direct result of SBA's Amended Criminal History Rule, and the Defendants' and their delegatee's application of that rule against the Plaintiffs, the Plaintiffs and their employees have

suffered and will continue to suffer irreparable injuries including but not limited to financial ruin and business ruination.

52. Without an emergency court order, Plaintiffs will be permanently unable to obtain a PPP loan as Congress provided for in the CARES Act.

53. The funds allocated for PPP are being granted on a first-come, first-served basis until SBA dispenses the funds, and the program ends entirely on June 30, 2020. 85 Fed. Reg. at 20,812-13.

54. Considering the pressures and workload that the CARES Act and the COVID-19 pandemic have placed on SBA, as well as the program's scheduled expiration on June 30, 2020, the Plaintiffs reasonably fear that the PPP funds will be exhausted before Plaintiffs could appeal SBA's decision.

55. Without the urgent aid of an order by this Court, there is no time for the Plaintiffs to obtain relief while PPP funds still remain.

56. If the Plaintiffs remain unable to obtain PPP loans, they may lack the staff and financial resources to reopen following the COVID-19 pandemic, which would cause permanent damage to businesses that have been a success story in the Hagerstown community.

57. The Plaintiffs' businesses will be in dire financial condition and at risk of being unable to regain the success they enjoyed before the pandemic-related economic downturn.

58. As a direct and proximate result of the Amended Criminal History Rule portion of the Interim Final Rule, the Defendants and their delegatee have caused Plaintiffs and their employees irreparable harm including but not limited to financial ruin and business ruination. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (affirming that "substantial loss of business and perhaps even bankruptcy" are the type of irreparable harm that justifies interim relief); *DV Diamond Club*, 2020 WL 2988528, at *3 ("Plaintiffs are also at a substantial risk of losing their businesses.").

59. The Plaintiffs have been damaged and will continue to be damaged irreparably by Defendants' conduct. No adequate remedy at law is available that could compensate Plaintiffs for their damages.

60. The hardship that the Plaintiffs will experience greatly exceeds any hardship that the Defendants will incur by having to fulfill their statutory duty of administering PPP loans to *all* small businesses who meet the conditions set out in the CARES Act rather than only those businesses that the Defendants have arbitrarily declared eligible. Any marginal increase in the cost of the PPP program will be negligible and pale in comparison to the very real cost that the Plaintiffs have felt and continue to feel.

61. The public interest also favors granting injunctive relief as requested by the Plaintiffs. The Hagerstown community has benefited from Mr. Wilks's reintegration to the community and from his generosity, as the community has also benefited from the generosity and success of the Plaintiffs' businesses. (Compl. Ex. 5, p. 3, ECF No. 1-05.) By passing the CARES Act, Congress reflected the public's will of providing PPP loans to all businesses. The three separate letters from legislators to SBA make the public's interest clear.

62. The Plaintiffs are entitled to declaratory and urgent injunctive relief invalidating and restraining enforcement of the Amended Criminal History Rule. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (setting out the elements for permanent injunctive relief).

ARGUMENT

This Court has the authority to issue a temporary restraining order ("TRO") and preliminary injunctive relief. Fed. R. Civ. P. 65. A preliminary injunction is appropriate when a plaintiff demonstrates: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in plaintiff's favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also J.O.P. v. U.S.*

Dep't of Homeland Sec., 409 F. Supp. 3d 367, 376 (D. Md. 2019) ("The substantive requirements for a TRO and a preliminary injunction are identical."). "A preliminary injunction, which may be entered only after notice, is distinguished from a TRO, which may be entered without notice, only by its duration—a preliminary injunction is of indefinite duration extending during the litigation, while a TRO is limited in duration to 10 days plus one 10-day extension." *U.S. Dept. of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n.1 (4th Cir. 2006) (*comparing* Fed. R. Civ. P. 65(a) *with* Fed. R. Civ. P. 65(b)).

The Plaintiffs can readily demonstrate all four preconditions for the Court to issue a TRO and/or a preliminary injunction.

I. CARMEN'S CORNER STORE IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

Plaintiffs seeking preliminary injunctive relief must demonstrate that they are likely to succeed on the merits. *Winter,* 555 U.S. at 20. Although plaintiffs must make a clear showing that their success is likely, they need not show a certainty of success. *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013). Moreover, plaintiffs need not demonstrate a likelihood of success on each and every claim for a preliminary injunction to be appropriate. *Id.* at 328-29.

Plaintiffs' allegations meet this threshold requirement regarding their claims that SBA has exceeded its authority by excluding Plaintiffs' businesses from PPP Loans, as required by the text of the CARES Act.

A. SBA Lacks the Authority to Limit the Type of Businesses that Are Eligible for a PPP Loan

Plaintiffs present purely legal questions concerning the scope of administrative authority. Under the familiar *Chevron* analysis of agency regulations, courts ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). "Only 'if the statute is silent or ambiguous with respect to the specific issue' [do courts] proceed to *Chevron*'s second step, asking 'whether the agency's answer is based on a permissible construction of the statute.'" *Chamber of Commerce of U.S. v. N.L.R.B.*, 721 F.3d 152, 160 (4th Cir. 2013) (quoting *Chevron*, 467 U.S. at 843). Under *Chevron*'s first step, we must use the "traditional tools of statutory construction" to ascertain congressional intent. *Chamber of Commerce,* 721 F.3d at 160 (quoting 467 U.S. at 842 n.9).

The Fourth Circuit has explained:

> **We thus look to the text of the statute, along with the overall statutory scheme, legislative history, the history of evolving congressional regulation in the area, and other relevant statutes.** We are only to employ the deference of step two when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. Because we do not presume a delegation of power simply from the absence of an express withholding of power, we do not find that *Chevron*'s second step is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power.

Chamber of Commerce, 721 F.3d at 160 (emphasis added) (cleaned up).

Plaintiffs are likely to succeed on the merits because the plain text of the PPP section of the CARES Act is unambiguous and did *not* delegate authority to SBA to determine that certain categories of businesses are ineligible for PPP loans despite those businesses' meeting the conditions that Congress set out in the statutory text.

The CARES Act declares that, "in addition to small business concerns, *any business concern*, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan," so long as the business employs 500 or fewer employees. CARES Act, § 1102(a)(2)(36)(D)(i) (emphasis added).

Congress recognized that SBA excludes some categories of businesses from other products of loans that it administers, so Congress included a section in the PPP portion of the CARES Act entitled, "Increased Eligibility for Certain Small Businesses and Organizations." 15 U.S.C. § 636(a)(36)(D). To accomplish this increase in eligibility, the CARES Act specified the two—and *only* two—

considerations that SBA could account for in determining PPP loan eligibility: whether a borrower "(aa) was in operation on February 15, 2020; and (bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or (BB) paid independent contractors, as reported on Form 1099-MISC." 15 U.S.C. § 636(a)(36)(F)(ii)(II). The CARES Act includes no additional qualifications or considerations for PPP loan applicants, and thus no additional qualifications may be imposed on an applicant.

Congress reinforced this purpose by including in the CARES Act what the United States Court of Appeals for the Sixth Circuit has described as a "catch-all" provision to prevent SBA from applying its ineligibility rules to PPP loans:

> Neither may the SBA continue to apply these rules pursuant to § 636(a)(36)(B), which states: "Except as otherwise provided in this paragraph, the [SBA] may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection." 15 U.S.C. § 636(a)(36)(B). This provision likely constitutes a catch-all governing procedures otherwise unaffected by the mandate of the CARES Act and the PPP and does not detract from the broad grant of eligibility.

DV Diamond Club, 2020 WL 2988528, at *2.

As the United States District Court for the Eastern District of Michigan has explained in another case challenging the Interim Final Rule's exclusion of certain businesses from the PPP, Congress's willingness to allow SBA to exclude certain businesses from government-backed loans

> evaporated when the COVID-19 pandemic destroyed the economy and threw tens of millions of Americans out of work. Simply put, **Congress did not pick winners and losers in the PPP.** Instead, through the PPP, **Congress provided temporary paycheck support to *all* Americans employed by *all* small businesses that satisfied the two eligibility requirements—even businesses that may have been disfavored during normal times.**

DV Diamond Club, 2020 WL 2315880, at *1 (emphasis added).

The plain meaning of the statutory text supports the understanding "*any* business concern" would include the Plaintiffs' businesses. "[T]he word 'any' naturally carries 'an expansive meaning.'"

SAS Inst., Inc. v. Iancu, —— U.S. ——, 138 S. Ct. 1348, 1354 (2018) (citation omitted). There is simply no room for interpretation or clarification by SBA.

The overall statutory scheme of the CARES Act, the legislative purpose, and the history of other relevant statutes all confirm that Congress intended to make PPP loans available for *all* small businesses, including those SBA typically excludes from its other loan programs through 13 C.F.R. § 120.110. *See Chamber of Commerce,* 721 F.3d at 160 (considering legislative scheme and context at *Chevron* Step 1). As SBA alluded to in the Amended Interim Final Rule, this Congress has sought to mitigate the collateral consequences of criminal convictions through programs like the First Step Act of 2018. Congress then passed the CARES Act to help *all* small businesses. It more than strains credulity to believe that the CARES Act did not specify explicitly that persons with a criminal record are eligible for PPP loans because Congress wished to delegate to SBA the authority to undermine the First Step Act and not because when Congress said "*any* business," Congress meant *any* business.

1. Two District Courts and the Sixth Circuit Agree with Plaintiffs

Decisions by two district courts and the Sixth Circuit bolster the likelihood that the Plaintiffs will succeed on the merits at trial. At issue in these cases was a similar ineligibility provision in the Interim Final Rule that deemed businesses of a "prurient sexual nature" ineligible for PPP loans. Each court determined that the text of the CARES Act is clear and unambiguous as to which businesses are eligible for PPP loans.

The Sixth Circuit recently denied SBA's request for a stay pending appeal of the injunction entered by the U.S. District Court for the Eastern District of Michigan, which had ruled that "SBA's PPP Ineligibility Rule is invalid because it contravenes the PPP." *DV Diamond Club*, 2020 WL 2315880, at *1. With respect to the unlawfulness of SBA's denying PPP loans to businesses of a prurient sexual nature, the Sixth Circuit explained:

> "[T]he Act's specification that 'any business concern' is eligible, so long as it meets the size criteria, is a reasonable interpretation. That broad interpretation also comports with Congress's intent to provide support to as many displaced American workers as possible and, in doing so, does not lead to an "absurd result" as the SBA claims. Finally, by specifying 'any business concern,' Congress made clear that the SBA's longstanding ineligibility rules are inapplicable given the current circumstances.").

See DV Diamond Club, 2020 WL 2988528, at *2.

Similarly, the Western District of Wisconsin reasoned that "one can find nothing in either the CARES Act or the Small Business Act to suggest that Congress wanted to exclude the plaintiffs from the PPP because of the nature of their business." *Camelot Banquet Rooms, Inc. v. Small Bus. Admin.*, No. 20-C-0601, 2020 WL 2088637, at *5 (W.D. Wis. May 1, 2020). Holding that the plaintiffs were likely to succeed on the merits of a similar claim, the court concluded as follows: "[G]iven Congress's clear intent to extend PPP loans to all small businesses affected by the pandemic[,] . . . it seems highly unlikely that Congress intended the SBA to apply its exclusions to the PPP." *Id.* at *7.

As these courts all recognized, the plain text of the CARES Act, as well as the law's greater context and Congress's stated intent, demonstrates that Congress intended to extend PPP loans to all small businesses affected by the pandemic and did not authorize the SBA to carve out exceptions to the criteria specified in the CARES Act itself.

2. SBA's PPP Amended Criminal History Rule Is Not Entitled to Deference

Even if this Court were inclined to find that the CARES act is ambiguous, SBA's Amended Criminal History Rule is "contrary to the statute" and not entitled to deference. *See United States v. Mead Corp.* 533 U.S. 218, 227 (2001). *Compare DV Diamond Club*, 2020 WL 2988528, at *2 (ruling that SBA's PPP ineligibility rules fail under *Chevron* Step 1) *with Diocese of Rochester v. U.S. Small Bus. Admin*, —— F. Supp. 3d at ——, No. 6:20-CV-06243-EAW, 2020 WL 3071603, at *7–9 (W.D.N.Y. June 10, 2020) (holding, under *Chevron* Step 1, that the CARES Act was ambiguous because "nothing in the

CARES Act requires that a bankrupt debtor be eligible for participation in the PPP" and, under *Chevron* Step 2, that SBA's explanation for excluding bankrupt debtors was not arbitrary).

SBA is not entitled to deference because the PPP Amended Criminal History Rule is not "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845. Moreover, deference is inappropriate because SBA's Amended Criminal History Rule, which excludes whole categories of small businesses from PPP eligibility without individualized consideration, is not a product of agency expertise, nor did the CARES Act delegate to SBA any authority to exercise its expertise or discretion in administering PPP loans. *See N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (rejecting an agency's call for deference to its expertise when its decision was based on "conclusory rationales rather than examination of the facts of each case"); *Bd. of Governors of Univ. of N. Carolina v. U.S. Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990) (explaining that agency deference is inappropriate absent a legislative delegation to the agency's expertise); *Maryland v. Pruitt*, 320 F. Supp. 3d 722, 731 (D. Md. 2018) (explaining that when Congress expresses its intent unambiguously, even in areas typically involving agency expertise, "Congress has taken the decision out of the agency's hands"). "Agency expertise notwithstanding, the courts remain the final authorities on issues of statutory constructions, and must not stand aside and rubberstamp administrative decisions that seem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Shanty Town Assocs. Ltd. P'ship v. E.P.A.*, 843 F.2d 782, 790–91 (4th Cir. 1988) (cleaned up).

This case reflects why Article III courts should not defer to the legal interpretations of administrative agencies. Congress passed a law that stated unambiguously how the Executive Branch should administer that law. Many legislators then made clear to the Defendants that they were misinterpreting the law. To allow the Executive Branch to ignore the plainly stated will of the legislature would completely distort and disregard the separation of powers.

Article III of the Constitution vests "the judicial power of the United States" in the courts and creates the judicial office held by "[t]he judges, both of the Supreme Court and inferior courts." U.S. CONST. art. III, § 1. The judicial power includes the authority to decide cases and controversies; a judge's office includes a duty to exercise independent judgment in the interpretation and application of law in each case. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.").

The judicial office requires judges to "exercise independent judgment in accord with the law." PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 173 (2014). Judicial deference to the agency's interpretation would display bias toward SBA, the government litigant in this case. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (explaining that a neutral judiciary "safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process"). This Court should reject any request by SBA for favorable treatment.

Plaintiffs' reading of the CARES Act comports with Congress's purpose in providing for PPP loans in that Congress made PPP loans available to *all* business concerns that meet the considerations set out in the CARES Act, § 1102(a)(2)(F)(i); *see also See DV Diamond Club*, 2020 WL 2988528, at *2. SBA's Amended Criminal History Rule exceeds the statutory limitations that Congress placed on SBA's authority to promulgate rules to administer PPP loans. *See* 5 U.S.C. § 706(2)(C).

B. SBA's Amended Criminal History Rule Is Arbitrary and Capricious

Plaintiffs are also likely to succeed on their claim that the SBA's Amended Criminal History Rule is arbitrary and capricious. A reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Mayor & City Council of Baltimore v. Azar*, —— F. Supp. 3d at ——, No. CV RDB-19-1103, 2020 WL 1873947,

at *3 (D. Md. Apr. 15, 2020) (quoting 5 U.S.C. § 706(2)(A)). An agency's action "is arbitrary and capricious if 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *J.O.P. v. U.S. Dep't of Homeland Sec.*, No. GJH-19-1944, 2020 WL 2932922, at *18 (D. Md. June 3, 2020) (quoting *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018)).

Although arbitrary-and-capricious review is deferential, "a court must 'conduct a searching and careful review to determine whether the agency's decision 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Friends of Capital Crescent Trail v. U.S. Army Corps of Eng'rs*, —— F. Supp. 3d at ——, No. CV JKB-19-106, 2020 WL 1849704, at *5 (D. Md. Apr. 13, 2020) (quoting *Sierra Club*, 899 F.3d at 270).

A facial review of SBA's Criminal History Rule proves that the rule is arbitrary and capricious. In promulgating the Criminal History Rule, as well as the Amended Criminal History Rule, SBA disregarded the limited factors that Congress enumerated for its consideration, the result of which is a rule that contravenes the important problem that Congress sought to address. *See J.O.P.*, 2020 WL 2932922, at *18. Because SBA considered factors beyond the limited scope of its authority and promulgated antithetical to the congressional purpose of the PPP, any explanation that SBA could offer is necessarily inadequate. *See Capital Crescent Trail*, 2020 WL 1849704, at *5.

SBA and its delegatees also acted arbitrarily and capriciously when they denied Retail4Real's PPP application based on the Criminal History Rule. Given that the Plaintiffs meet all the statutory criteria for PPP loans, no non-arbitrary reason exists to exclude Carmen's Corner Store or Retail4Real from the group of "*any* business concerns" that Congress sought to benefit through PPP. CARES Act, § 1102(a)(1)(B)(2)(D)(i) (emphasis added).

Congress intended the PPP "to give *all* small businesses a lifeline." (Compl. Ex. 8, p. 3, ECF No. 1-08) [hereinafter, "April 6 Letter"]. In furtherance of this purpose, the CARES Act enumerated the two considerations on which SBA could base PPP eligibility. The statute did not include any additional delegation of authority for SBA to craft other considerations of eligibility. The congressional purpose for passing the CARES Act and the PPP was clear from the statutory text, as Administrator Carranza recognized. *See* 85 Fed. Reg. at 20,811-12, 20819; Compl. ¶ 61, 66. And if the unambiguous statutory text were not clear enough, nearly 100 legislators who passed the CARES Act have enunciated its purpose in three separate letters that Congress did not intend for SBA "to exclude business owner[s] who have made mistakes, paid their debt, and turned their lives around." (Compl. Ex. 9, p. 2, ECF No. 1-09) [hereinafter, "April 30 Letter"]; *see also* (Compl. Ex. 10, p. 2, ECF No. 1-10) [hereinafter, "April 15 Letter"] (objecting to SBA's "troubling" decision to "exclude[] applicants with criminal history" from the PPP loan process). Put simply, the Criminal History Rule "w[as] not intended by Congress at all." (April 6 Letter, p. 1). And neither was the Amended Criminal History Rule.

In addition to lacking statutory authorization, SBA's Criminal History Rule did not "properly reflect[] Congress's and the Administration's support for second chances following a record of bipartisan criminal justice reforms in Congress dating back more than a decade." (April 30 Letter, p. 1). The Criminal History Rule is "harmful" and "exclusionary" and undermines Congress's support for "second chances, a stronger economy, and safer communities[.]" (April 30 Letter, p. 2); *see also* Press Release, Senate Committee on Small Business and Entrepreneurship, *Cardin, Portman Urge SBA Not to Penalize Small Business Owners with Previous Criminal Records During Coronavirus Pandemic* (April 30, 2020), *available at* https://www.sbc.senate.gov/public/index.cfm/2020/4/cardin-portman-urge-sba-not-to-penalize-small-business-owners-with-previous-criminal-records-during-coronavirus-pandemic ("Preventing emergency loans from being distributed to businesses owned by individuals with criminal

records will have catastrophic consequences for people who have done exactly what society asked of them: they turned away from crime, started a business to support themselves and their families, and contributed to their communities.").

Further, as discussed above, *supra* Section I.A.2, SBA cannot rely on some ephemeral claim that this rule was the product of its expertise. Not only did Congress not ask for SBA's expertise in setting the criteria for PPP loans, but SBA's decision to make Plaintiffs' businesses ineligible for PPP loans involved no special expertise or agency discretion. *Cf. Yeshiva Univ.*, 444 U.S. at 691 (rejecting an agency's call for deference to its expertise when its decision was based on "conclusory rationales rather than examination of the facts of each case"). There's good reason why Congress did not defer to any expertise that SBA may claim to have in determining which loan applicants are more likely to repay government-backed loans: PPP loans are *fully forgivable* and intended for *all* small businesses. CARES Act §§ 1102(a)(1)(B)(2)(D)(i); 1106(b).

SBA's Amended Criminal History Rules, which excludes businesses categorically without any individualized consideration, is not the product of any expertise or discretion. Contrasting the PPP loan application to other SBA programs demonstrates this point. When evaluating applications for other types of SBA loans, the agency engages in an individualized review of applicants with criminal history. *See* SBA Standard Operating Procedure 50 10 5(K) – Lender and Development Company Loan Programs (Apr. 1, 2019) (describing the individualized review of applications by businesses owned by persons with a criminal history). By contrast, as evidenced by the PPP loan application, the (Amended) Criminal History Rule is a categorical denial of eligibility, completely untethered from any expertise or discretion SBA may have when evaluating applications for its other loan programs. *See Roe v. Dep't of Def.*, 947 F.3d 207, 228 (4th Cir. 2020), *as amended* (Jan. 14, 2020) (rejecting the government's categorical ban on deploying HIV-positive service members was arbitrary and capricious because "[t]he Government did not articulate a satisfactory explanation at the time the

deployment policy was adopted" and "even considering the explanations offered in litigation, the policy fails to withstand review under the APA").

Another important consideration of the PPP that SBA ignored entirely is that *employees* of businesses owned by owners with criminal history were intended beneficiaries of the PPP. *DV Diamond Club*, 2020 WL 2315880, at *3 ("The stated purpose of the PPP is to protect the employment and livelihood of employees."); *see also* April 6 Letter, p. 3 (Congress did not intend to exclude "*employees* of the formerly incarcerated"); Press Release, *Cardin, Portman Urge SBA Not to Penalize Small Business Owners* (The "catastrophic consequences" of the Criminal History Rule "extend to the[] employees as well."). In promulgating its ill-conceived Criminal History Rule, SBA failed to consider the economic impact of the employees it hung out to dry. This oversight is particularly difficult to excuse considering that Congress dubbed the relief loans the *Paycheck* Protection Program. Yet, the Criminal History Rule denies paychecks to the employees of businesses owned by persons with a criminal record absent any fault of the employees. It's unclear whether SBA thinks that employees should check a business owner's criminal history when applying for a job, or if SBA is merely content to punish any unfortunate employees who work for business owners deemed unworthy by agency bureaucrats. Either way, the Criminal History Rule "will only hurt the economy, and further diminish the workforce and the tax base they generate." April 30 Letter, p. 1.

SBA's actions since promulgating the initial Criminal History Rule reinforce just how arbitrarily and capriciously the agency has acted. The original PPP loan application excluded businesses owned by persons with a felony conviction in the last seven years. *See SBA's Bumpy Guidance on Criminal History Requirements for Stimulus Loans*, Collateral Consequences Resource Center (April 3, 2020), *available at* https://ccresourcecenter.org/2020/04/03/sbas-bumpy-guidance-on-criminal-history-requirements-for-stimulus-loans/. After two days with a seven-year look-back, SBA adopted the five-year look-back that it applied for over two months. *See id.*; *see also* PPP Loan Application.

Then, on June 10, 2020, Secretary Mnuchin testified before the Senate Small Business Committee and suggested that SBA would revise the look-back period to three years. *See Treasury Secretary Mnuchin Announced 3 Big Changes to the PPP Small Business Loan Program as $130 Billion in Aid Sits Unused*, Business Insider (June 10, 2020), *available at* https://www.businessinsider.com/ppp-small-business-loan-changes-treasury-mnuchin-announced-big-unused-2020-6#the-trump-administration-doesnt-plan-to-release-the-names-of-businesses-that-received-ppp-loans-1. And two days later, after Plaintiffs filed the underlying action, SBA revised the rule to a one-year look-back. *See* Amended Criminal History Rule. The arbitrary manner in which SBA has adopted and revised the look-back provision—untethered from any reasoned basis or agency expertise—speaks for itself.

The substance of SBA's revisions also exposes the rule's arbitrary nature. Only now, at the eleventh hour, SBA has decided to distinguish between financial crimes and other crimes—like the sale of drugs in 2004—that have no connection at all to a government-backed loan. And despite drawing that distinction, SBA continues, without explanation, to exclude non-financial offenders who have more-recent charges or who happen to still be on parole or probation for older convictions.

The arbitrariness only magnifies when viewed in relation to how SBA has walked back some of its other preliminary ineligibility determinations for PPP loans. SBA initially excluded from PPP loans certain faith-based businesses that are ineligible for other SBA loans under 13 C.F.R. § 120.110(k), just like businesses with owners who have criminal records are ineligible under § 120.110(n). But SBA reversed course and declared that there was no compelling interest "in denying emergency assistance to faith-based organizations that are facing *the same economic hardship to which the CARES Act responded* and who would be eligible for PPP but for their faith-based organizational and associational decisions." 85 Fed. Reg. at 20,817, 20,819 (emphasis added). Similarly, no compelling interest exists to treat differently businesses owned by persons with criminal records. There is simply no compelling interest in denying emergency assistance to a business owner who has turned his life

around and faces the same economic hardship as other small businesses, regardless of whether the business owner remains on probation or parole.

PPP loans serve the specific purpose of saving small businesses during an unprecedented economic crisis. Congress made PPP loans fully forgivable and instructed SBA to administer PPP loans expeditiously. Whatever reasons SBA thinks exist to exclude categories of businesses from other types of 7(a) loans are inapposite here. SBA's Amended Criminal History Rule is "contrary to law, public policy, and common sense." *See* April 6 Letter, p. 1.

C. Plaintiffs Are Likely to Succeed on Their Claim that Defendants Unlawfully Withheld Agency Action

Plaintiffs are likely to succeed on their claim under 5 U.S.C. § 706(1) because Defendants have a statutorily imposed, ministerial duty to administer the PPP and lack any discretion to deny those loans to applicants who meet the statutory considerations set by Congress. Section 706(1) requires that a reviewing court "compel agency action unlawfully withheld or unreasonably delayed[.]" Relief under § 706(1) "is like the mandamus remedy, 'empowering a court only to compel an agency to perform a ministerial or non-discretionary act or to take action upon a matter, without directing how it shall act.'" *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 195 (4th Cir. 2013) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (cleaned up)).

The CARES Act directed SBA to administer PPP loans based on the considerations that Congress set out in the law. Congress did not delegate any discretion to SBA to deem classes of small businesses ineligible for reasons not contained in the CARES Act. SBA's failure to administer PPP loans for some types of small businesses—including those excluded by the Amended Criminal History Rule—is an unlawfully withheld agency action. Plaintiffs are likely to succeed on their claim for relief under 5 U.S.C. § 706(1) because the Defendants must perform the nondiscretionary act of administering PPP loans according to the text of the CARES Act.

D. Plaintiffs Are Likely to Succeed on Their Claim that the Individual Defendants Failed to Carry out a Ministerial Duty

Plaintiffs are also likely to succeed on their mandamus claim for the same reasons that militate in favor of granting "administrative mandamus" under 5 U.S.C. § 706(1). *See Vill. of Bald Head Island*, 714 F.3d at 195.

The "ancient remedy" of mandamus applies in extraordinary circumstances "to compel the fulfillment of a duty which is ministerial, plainly and positively ascertained, and free of doubt." *Grice v. Colvin*, 97 F. Supp. 3d 684, 705 (D. Md. 2015) (citations omitted). A writ of mandamus is proper when three elements are present: "(1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Grice*, 97 F. Supp. 3d at 705 (citation omitted). The second element is satisfied when the defendant's official action is ministerial or nondiscretionary: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under the conditions admitted or proved to exist, and imposed by law." *City of Columbus v. Trump*, —— F. Supp. 3d at ——, No. CV-18-2364-DKC, 2020 WL 1820074, at *22 (D. Md. Apr. 10, 2020) (quoting *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866)).

One such ministerial duty that Defendants must complete is dispensing sums of money as directed by Congress. *City of Columbus*, 2020 WL 1820074, at *22 (citing *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Marbury*, 5 U.S. (1 Cranch) 137). The equitable writ of mandamus is appropriate in this extraordinary circumstance because Congress directed SBA to administer PPP loans expeditiously based on the nondiscretionary criteria set forth in the CARES Act. Like all other applicants that meet the criteria that Congress set, Plaintiffs have a clear right or privilege to have their PPP loan application processed by the Defendants and their delegatees. The Defendants have a clear statutory duty to administer PPP loans for all small businesses that are statutorily eligible under the

PPP. And there is no adequate remedy at law by which the Plaintiffs can compel the Defendants to carry out their statutorily imposed ministerial duty.

Plaintiffs are likely to succeed on their claim for mandamus relief because the Defendants lack any discretion in deciding whether to carry out the ministerial task of administering and processing the Plaintiffs' PPP loan applications, without regard to the unlawful Amended Criminal History Rule, as required by the plain terms of the CARES Act.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS THE COURT IMMEDIATELY ENJOINS SBA'S AMENDED CRIMINAL HISTORY RULE AND ENSURES PLAINTIFFS' ACCESS TO PPP LOANS

A party seeking a preliminary injunction must prove that he is "likely to suffer irreparable harm in the absence of preliminary relief." *Pashby*, 709 F.3d at 328 (quoting *Winter,* 555 U.S. at 20). To establish irreparable harm, the movant must make a clear showing that it will suffer harm that is neither remote nor speculative, but actual and imminent. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 (4th Cir. 2019) (internal quotations omitted). "Additionally, the harm must be irreparable, meaning that it cannot be fully rectified by the final judgment after trial." *Id.* (internal quotations omitted). Under the Fourth Circuit's precedent, "economic damages may constitute irreparable harm where no remedy is available at the conclusion of litigation." *Mountain Valley Pipeline, LLC v. W. Pocahontas Properties Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) (affirming the district court's grant of an injunction where plaintiff would suffer significant unrecoverable financial damages in the absence of an injunction.)

Plaintiffs will suffer irreparable harm in the absence of an injunction. Indeed, if the Court does not grant preliminary injunctive relief, there will likely be no relief available to Plaintiffs *at all.* "The PPP is a short-term program with limited loan guarantees that are offered 'on a first-come, first-served basis. Once the funds Congress appropriated for the PPP are exhausted, the SBA will be unable to guarantee further loans.'" *DV Diamond Club*, 2020 WL 2315880, at *16 (quoting *Camelot*

Banquet Rooms, 2020 WL 2088637, at *11). Not only are PPP loan guarantees being exhausted quickly, the program is set to expire on June 30, 2020. *See* Interim Final Rule, 85 Fed. Reg. at 20,811. And Plaintiffs would have no monetary remedy for such an exclusion because Defendants have sovereign immunity from any claim for monetary damages. *DV Diamond Club*, 2020 WL 2315880, at *16; *cf. 6.56 Acres of Land*, 915 F.3d at 218 (explaining that financial losses are not typically irreparable if they "can be recovered by a prevailing party at the close of litigation"). "[T]he inability to obtain damages implies that any harm the plaintiffs suffer between now and the end of the case will be irreparable." *DV Diamond Club*, 2020 WL 2315880, at *16.

Like many small businesses throughout the country, the Plaintiffs' businesses are suffering and will continue to suffer until the economy rebounds. Congress took the extraordinary step of making $659,000,000,000 available to small businesses in need. Absent immediate injunctive relief, the Plaintiffs' businesses will be forever excluded from the PPP loan process based entirely on an unlawful act of administrative power.

III. THE BALANCE OF THE HARDSHIPS SUPPORTS AN INJUNCTION

To obtain a preliminary injunction, "a plaintiff must also demonstrate that the balance of hardships tips in his or her favor." *Pashby*, 709 F.3d at 329 (citing *Winter*, 555 U.S. at 20). The balance of hardships tips heavily in the Plaintiffs' favor.

On one side of the hardship balance, the Plaintiffs face complete business ruination. To stave of that ruination, Plaintiffs are asking this Court to enjoin $31,500 out of the $659,000,000,000 that Congress allotted for small businesses. That's 0.0000048%, or less than five-millionths of one percent, of the money that Congress tasked SBA with distributing in PPP loans to small businesses. The phrase "drop in the bucket" hardly begins to capture the negligible impact this injunction would have on the overall PPP program—especially as compared to the very real impact that $31,500 would have on the Plaintiffs' struggling businesses and their employees, whom the CARES Act sought to protect. A

press release from the Senate Committee on Small Business & Entrepreneurship highlights the hardship that Plaintiffs will suffer absent an injunction:

> Preventing emergency loans from being distributed to businesses owned by individuals with criminal records will have catastrophic consequences for people who have done exactly what society asked of them: they turned away from crime, started a business to support themselves and their families, and contributed to their communities. These catastrophic consequences extend to their employees as well. An estimated one in three American adults has a criminal record; and because people with records often have trouble finding employment, many of them have gone on to start their own businesses after they have paid for their mistakes.

Press Release, *Cardin, Portman Urge SBA Not to Penalize Small Business Owners.*

On the other side of the hardship balance is the marginal increase in cost of administering the PPP in accordance with the law rather than according to Defendants' arbitrary preferences. There is no harm in requiring the Defendants to follow the law. And any cost associated with the Defendants' alerting their agents and delegatees that SBA's Amended Criminal History Rule is unlawful cannot, in relative terms, approach the financial burdens that face the Plaintiffs without an injunction. The balance tips overwhelmingly in the Plaintiffs' favor.

IV. THE PUBLIC INTEREST SUPPORTS ENJOINING THE DEFENDANTS FROM DEPRIVING PLAINTIFFS OF THE PPP RELIEF CONGRESS INTENDED FOR THEM TO RECEIVE

The public interest also supports an injunction. *See Pashby*, 709 F.3d at 329–30 ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of an injunction.").

As discussed throughout this brief, Mr. Wilks and his businesses are a meaningful part of the Hagerstown community and the source of income for Carmen's employees. *See also* Compl. at ¶¶ 14–30, ECF No. 1. Plaintiffs' economic suffering reverberates throughout the community. "[T]he purpose of the PPP is to protect the employment and livelihood of employees who, through no fault of their own, have found their places of employment closed due to the COVID-19 pandemic. That purpose would be frustrated if the Court did not grant the requested preliminary injunction." *DV*

Diamond Club, 2020 WL 2315880, at *17. "Guaranteeing the plaintiffs' loans now, rather than months from now when this case is over, furthers the public interest in helping all small businesses and their employees get through the pandemic." *Camelot Banquet Rooms*, 2020 WL 2088637, at *13.

Carmen's Corner Store embodies the important American values of entrepreneurship and second chances, while serving others as a "cornerstone of the community." Compl. at ¶ 19, ECF No. 1. Congress has already determined that it is in the public's interest to help businesses like those owned by Mr. Wilks. An injunction would simply stop the Defendants from standing in the way.

V. NO BOND SHOULD BE REQUIRED

Rule 65(c) of the Federal Rules of Civil Procedure provides that a "court may issue a preliminary injunction . . . only if the movant gives security." Interpreting Rule 65, the Fourth Circuit has determined "the district court retains the discretion to set the bond amount as it sees fit *or waive the security requirement*." *Pashby*, 709 F.3d at 332 (emphasis added). This Court need only "expressly address the issue of security before allowing any waiver and cannot disregard the bond requirement altogether." *Id.* (internal quotations omitted).

To determine the amount of an injunction bond, this Court "should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999). Accordingly, the bond amount should reflect the costs that the Defendants might suffer because of the injunction. *Id.* "Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice." *Id.* (citations omitted); *see also Hassay v. Mayor of Ocean City*, 955 F. Supp. 2d 505, 527 (D. Md. 2013) (requiring plaintiff performer to post only nominal bond in the amount of $1.00 because defendant-city's potential economic injury would be "minimal or non-existent"). One such instance in which a

nominal bond is appropriate is when the defendant is the government and the potential injury is "remote," and there is no threat that the plaintiffs will be unjustly enriched. *See J.S.G. ex rel. Hernandez v. Stirrup*, No. CV-20-1026-SAG, 2020 WL 1985041, at *12 (D. Md. 2020).

Plaintiffs respectfully request this court to either waive or set a nominal security requirement because the injunction is in the public interest. Requiring Plaintiffs to post a bond would frustrate the purpose of the PPP and the purpose of the injunction—*i.e.*, to supply struggling small businesses with essential PPP loans as soon as possible so that the businesses may use the funds to pay displaced employees. "If the Court forced the Plaintiffs to expend funds by posting a bond, that would divert money that could be used to pay employees and that are needed to help secure Plaintiffs' financial survival." *DV Diamond Club*, 2020 WL 2315880, at *17.

CONCLUSION

For the foregoing reasons, the Court should immediately, temporarily, and preliminarily enjoin the Defendants from denying loans to the Plaintiffs' businesses based on the Criminal History Rule or Amended Criminal History Rule and require the Defendants to set aside the $31,500 in PPP loans for which the Plaintiffs' businesses would apply until this Court can resolve this case on the merits.

Respectfully submitted,

/s/

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NEW CIVIL LIBERTIES ALLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of June 2020, this Emergency Motion for Temporary Retraining Order and Preliminary Injunction and Memorandum of Law in Support were served via this Court's CM/ECF system. I further certify that I have also effected service on each Defendant through either personal service or certified mail, depending on the current COVID-19 policies of each Defendant's respective office.

/s/
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