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-CCB

PLAINTIFFS' MEMORANDUM IN REPLY
TO DEFENDANTS' OPPOSITION TO INJUNCTIVE RELIEF

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ARGUMENT

This is a case about unlawful agency action. And the agency in this case continues to act unlawfully, in complete disregard for the congressional purpose of the statute it administers. Unless this Court exercises its constitutional office to rein in this administrative overreach, the Defendants will continue to regulate as if they are above the law.

On the day that Defendants' opposition brief was due to this Court, SBA announced yet another amendment to the Criminal History Rule—the fourth in less than three months and the second since the Plaintiffs filed their complaint. This time, SBA amended the rule to ensure that the Plaintiffs in this case and plaintiffs in *Defy Ventures* would finally become eligible for a PPP loan, on the eve of the program's expiration. After three months of suffering harm at the hands of the Defendants' unlawful actions, Plaintiffs are grateful that their lawsuit has already effected change and will help similarly situated small businesses before the PPP expires. But even in its current iteration, the Criminal History Rule disregards the congressional purpose in creating the PPP. To allow SBA to evade judicial review by persisting along its unlawful course would be an incomplete victory for both the Plaintiffs and the rule of law. Absent a court order, nothing prevents SBA from amending its Criminal History Rule a fifth or sixth time, and nothing prevents SBA from doing so before Plaintiffs secure the PPP loans that the CARES Act promised.

I. SBA'S ELEVENTH-HOUR AMENDMENTS TO THE CRIMINAL HISTORY RULE DO NOT DEPRIVE THIS COURT OF ARTICLE III JURISDICTION

On June 24, 2020, the same day that the Defendants' response brief was due in this case, SBA once again amended its Criminal History Rule, issuing its fourth iteration of the PPP application in less than three months ("June 24 Amendment"). Defendants are correct that the Plaintiffs' businesses are now eligible for PPP loans under the terms of the June 24 Amendment. Plaintiffs and their

employees appreciate that their lawsuit inspired this belated change in SBA's regulatory position. But the fact remains that even in its most-recent, least-restrictive form, SBA's Criminal History Rule is unlawful. And it is this Court's constitutional prerogative to rule on the merits despite the Defendants' attempt to evade judicial review by tailoring a nationally applicable rule around the facts of this particular case. Plaintiffs' case remains ripe for two main reasons: (1) as Defendants have shown repeatedly since the passage of the CARES Act, they are willing and able to change the Criminal History Rule on a whim without explanation; and (2) Defendants' unlawful actions injured the Plaintiffs' businesses for over 75 days during a pandemic and economic collapse when the congressional purpose of the PPP was to direct relief to *all* small businesses as expediently as possible.

A. Defendants' Voluntary Cessation Does Not Deprive this Court of Jurisdiction

The Supreme Court has ruled repeatedly that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Otherwise, the Defendants would be "free to return to [their] old ways." *Id.* (citation omitted). A case remains justiciable unless a subsequent event has "made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (emphasis added). Defendants here cannot meet the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.*

Despite the expedited briefing schedule on which this case has proceeded, SBA has amended the challenged rule *twice* since the Plaintiffs instituted this lawsuit just 16 days ago, on June 10, 2020. Defendants' errant whims are obvious to all. Not only are the Defendants "free to return to [their] old ways," but SBA's erratic rulemaking, untethered from law or reason, substantiates the risk that unlawful behavior will recur. *See id.*

It is reasonably certain that Defendants' unlawful behavior is likely to recur because Defendants have not even bothered to cease behaving unlawfully. Instead, they've simply tailored their unlawful behavior in a way that seeks to avoid judicial scrutiny. This Court should not countenance such behavior. The Criminal History Rule is still without basis in law and its amendments are as arbitrary as ever. Article III empowers this Court to say so.

B. Plaintiffs' Claims Are Still in Controversy

In addition to seeking an injunction requiring the Defendants to effectively hold the Plaintiffs' place in the PPP queue, the Plaintiffs sought a declaratory judgment that the Criminal History Rule is unlawful and an injunction prohibiting its continued enforcement. Although the Defendants have revised the rule twice in two weeks, the current iteration of the Criminal History Rule is just as unlawful as its predecessors and the Defendants continue to enforce their unlawful rule.

When plaintiffs seek a declaration that "some ongoing underlying policy" is unlawful, as opposed to "an isolated agency action," then the mooting of a specific claim will not necessarily moot the claim for a declaratory judgment that the specific action was unlawful. *Cf. Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 1994) (explaining that a request for declaratory relief is not moot if the case is "capable of repetition, yet evading review" or falls within the "voluntary cessation" doctrine). In this case, it is important to note that the Plaintiffs suffered cognizable harm due to the prior iterations of the Criminal History Rule. For three months amidst a global pandemic and economic collapse, the Defendants unlawfully withheld the privilege of a PPP loan from the Plaintiffs. A declaration that SBA acted unlawfully in causing them that harm remains an active controversy.

II. THIS COURT MAY ENJOIN SBA'S UNLAWFUL RULEMAKING

In yet another attempt to evade the rule of law, SBA claims that the judiciary has no authority to enjoin the agency's unlawful behavior. Def. Opp. Br. 41. Relying on three inapposite cases that rejected attempts to enjoin or garnish SBA's funds based on its behavior in the commercial space, the Defendants state boldly that "[t]he Fourth Circuit has *repeatedly* enforced [t]his statutory restriction in suits involving SBA[.]" Def. Opp. Br. 41 (emphasis theirs). As Judge Hollander recognized in her decision two days ago, however, the decisions on which Defendants rely "offer[] little guidance" as to whether 15 U.S.C. § 634(b)(1) prohibits injunctive relief against SBA when the agency exceeds its statutory or constitutional authority. *Tradeways, Ltd. v. U.S. Dep't of Treasury*, No. ELH-20-1324, 2020 WL 3447767, *10 (D. Md. June 24, 2020). And absent the inapposite cases on which they rely, the Defendants do not meaningfully distinguish the PPP cases from across the country that have determined courts may enjoin SBA.

Section 634(b)(1), provides that the SBA Administrator may

> sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property[.]

Applying the canon of *ejusdem generis*, Judge Hollander reasoned that the term "injunction" in § 634(b)(1) should not be read "more broadly than the company it keeps." *Tradeways*, 2020 WL 3447767, at *10. "[A]n injunction directing a private party to perform on a contract is qualitatively different from an injunction ordering the federal government to refrain from unconstitutional conduct." *Id.*

Judge Hollander suggested "that the term 'injunction' in § 634(b)(1) should be read to prohibit courts from interfering with the SBA's commercial operations or property, but not to bar all relief, such as where the SBA exceeds its statutory authority." *Tradeways*, 2020 WL 3447767, at *11.

As the U.S. Bankruptcy Court for the Middle District of Florida recently explained in another PPP case, the First Circuit has done "yeoman's work tracing the origin of § 634(b)(1)'s 'no injunction' language back 80 years to the Supreme Court's decision in *Federal Housing Administration v. Burr* [, 309 U.S. 242 (1940)]." *In re Gateway Radiology Consultants, P.A.*, No. 8:20-ap-00330, 2020 WL 3048197, at *8 (Bankr. M.D. Fla. June 8, 2020) (citing *Ulstein Maritime, Ltd. v. United States*, 833 F.3d 1052, 1056 (1st Cir. 1987)). Congress added statutory language barring attachments, injunctions, garnishments, and other similar proceedings to agencies' enabling statutes after the Supreme Court in *Burr* ruled that sue-or-be-sued provisions like that in SBA's enabling statute subjected agencies to garnishments based on their involvement in financial transactions. 309 U.S. at 244-45. Congress responded by including clauses like that in § 643(b)(1) "to keep creditors or others suing the government from hindering and obstructing agency operations through mechanisms such as attachment of funds." *Ulstein Maritime*, 833 F.3d at 1056. But that is not the type of injunction that Plaintiffs have sought in this case.

Accepting the government's position would prohibit a court from enjoining SBA when the agency acts unconstitutionally. Surely Congress would have said so explicitly if the purpose of § 634(b)(1) were to produce such an absurd result. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). This Court should reject SBA's attempt to place itself above the law.

III. SBA'S ELEVENTH-HOUR AMENDMENTS TO THE CRIMINAL HISTORY RULE ARE UNLAWFUL

A. The CARES Act Grants No Authority to SBA to Promulgate the Criminal History Rule

Through the Paycheck Protection Program, Congress made an unprecedented $659,000,000,000 available to all small business concerns and instructed SBA to administer the

program as quickly as possible. The PPP is within Title I of the CARES Act, which Congress called the "Keeping Workers Paid and Employed Act." Congress stated the law's purpose plainly.

To achieve this purpose, Congress specified that a borrower need only certify that the economic uncertainty caused by COVID-19 made the loan necessary; that the business will use the PPP loan to retain workers and make payroll, in addition to covering other acceptable business costs; and that the business has not or will not receive another PPP loan. 15 U.S.C. § 636(a)(36)(G)(i)(I)–(IV). And to further expediate the loan process, Congress delegated directly to SBA lenders certain authority that typically belongs to SBA. *Id.* § 636(a)(36)(F)(ii)(I). Specifically, Congress instructed lenders to determine the eligibility of an applicant based on only two criteria: (1) the business must have been operating as of February 15, 2020 and (2) the business must have had employees or independent contractors whom it was paying salaries and for whom it was paying payroll taxes. *Id.* § 636(a)(36)(F)(ii)(I)–(II)(bb).

Despite this simple and streamlined system, SBA has asserted some inherent discretion to exclude PPP applicants for a variety of reasons not contemplated by the unambiguous text of the CARES Act. But SBA has only the authority that Congress grants to it. And in the PPP context, there is no textual basis for SBA's assertion of authority to exclude a business based on its owner's criminal record.

B. SBA's Interpretation of the CARES Act Deserves No Deference

Even if Congress's failure to state explicitly that persons with criminal records are also eligible for PPP loans somehow makes the CARES Act ambiguous, this Court should not defer to SBA's interpretation for several reasons. *First*, this is an extraordinary case in which Congress would not have delegated such authority implicitly. *Second*, reflexive deference to agencies violates our constitutional compact. *Third*, deference to a government-litigant violates due process of law. And *fourth*, SBA's Criminal History Rule fails *Chevron*'s Step 2.

1. Congress Does Not Delegate Extraordinary Authority Implicitly

The Supreme Court has cautioned that "[i]n extraordinary cases," courts should "hesitate before concluding that Congress [] intended [] an implicit delegation" of authority to an administrative agency. *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015). When Congress passed the Affordable Care Act, tax credits for health insurance a "key reform[]" that "involved billions of dollars in spending each year and affected the price of health insurance for millions of people[.]" *Id.* The availability of these tax credits was a "question of deep 'economic and political significance,'" which was "central to the statutory scheme." *Id.* at 2489. Accordingly, the Court concluded that "had Congress wished to assign that question to an agency, it *surely* would have done so expressly." *Id.* (emphasis added).

The same is true here. Few acts of Congress are so "extraordinary" that they can begin to rival the Affordable Care Act in scope and economic impact, but the CARES Act is certainly one that does. For the PPP alone, Congress made $659,000,000,000 available for fully guaranteed, fully backed government loans specifically for small businesses. These loans differ in purpose, scope, and impact from any other loan product that SBA administers through § 7(a). As discussed, Congress structured the program to grant this financial relief to small businesses as quickly as possible, delegating to lenders the authority to determine applicant eligibility. *See* 15 U.S.C. § 636(a)(36)(F)(ii)(I)–(II)(bb). If Congress wished to simultaneously include an implicit delegation to SBA to add unnecessary confusion, red tape, and exclusions to the PPP, it surely would have said so expressly. Just as the Supreme Court did in *King v. Burwell*, this Court should reject the agency's request to interpret congressional silence as a grant of authority. *See* 135 S. Ct. at 2489; *see also Chamber of Commerce of U.S. v. N.L.R.B.*, 721 F.3d 152, 161 (4th Cir. 2013) ("Mere ambiguity in a statute is not evidence of congressional delegation of authority. Rather, the ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity.") (cleaned up).

2. Article III Requires Judges to Exercise Independent Judgment

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 the rule."). The independence of the Judicial Branch and its judges is vital to sustaining liberty.

The American colonists carried the principle of judicial independence with them across the Atlantic. *See* The Declaration of Independence, ¶ 3 (objecting to judges "dependent on [King George III's] will alone"). After revolting against tyranny, the Founders cast their first substantive vote at the Constitutional Convention of 1787 to create a government that separated power among three co-equal branches. *See* 1 Records of the Federal Convention of 1787 30-31 (Max Farrand ed., Yale Univ. Press 1911). Separating governmental power preserves liberty, in part, because each branch jealously checks any attempt by the other branches to shift the power balance set by the Constitution.

Arguably no branch is more vital to protecting liberty from factious politics than the judiciary. Our constitutional backstop, the independent judiciary ensures that the political branches cannot encroach upon or diminish constitutional liberties. To do so effectively, the judiciary—and its independent judges—must guard the judicial role against political encroachment and be wary of ceding judicial power to the other branches. For instance, although Congress can limit the courts' jurisdiction, the legislature cannot direct the manner in which the court exercises the judicial power. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329 (1816) ("If, then, it is the duty of [C]ongress to vest the judicial power of the United States, it is a duty to vest *the whole judicial power*."); *see also Yakus v. U.S.*,

312 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (Congress cannot "direct that [jurisdiction] be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them."). Nor can the Executive Branch share in the judicial power. *U.S. v. Nixon*, 418 U.S. 683, 704 (1974). It is vital to our constitutional structure that the courts remain free from outside influence.

The judicial office carries with it a duty of independent judgment. *See* James Iredell, To the Public, *N.C. Gazette* (Aug. 17, 1786) (describing the Article III duty of judges as "[t]he duty of the power"). Each judge who holds the judicial office under Article III swears an oath to the Constitution and is duty-bound to exercise his or her own office independently. *See* Philip Hamburger, Law and Judicial Duty 507-12 (2008) (discussing judges' internal duty of independent judgment).

Through the independent judicial office, the Founders sought to ensure that judges would not administer justice based on someone else's interpretation of the law. *See* 2 Records of the Federal Convention of 1787, 79 (Nathaniel Gorham explaining that "the Judges ought to carry into the exposition of the laws no prepossessions with regard to them"); The Federalist No. 78 (Alexander Hamilton) ("The interpretation of laws is the proper and peculiar province of the courts."). This obligation of independence is reflected in the opinions of the founding era's finest jurists. *See, e.g.*, *Georgia v. Brailsford*, 2 U.S. 415, 416 (1793) (Iredell, J., dissenting) ("It is my misfortune to dissent … but I am bound to decide, according to the dictates of my own judgment."); *The Julia*, 14 F. Cas. 27, 33 (C.C.D. Mass. 1813) (Story, J.) ("[M]y duty requires that whatsoever may be its imperfections, my own judgment should be pronounced to the parties."); *U.S. v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (Marshall, J.) ("[W]hether [the point] be conceded by others or not, it is the dictate of my own judgment, and in the performance of my duty I can know no other guide.").

Reflexive diminishes the judicial office and, with it, the structural safeguards the Framers erected as a bulwark against tyranny. *Cf. Miller v. Johnson*, 515 U.S. 900 (1995) (holding that deference

to the Department of Justice's statutory interpretation would impermissibly "surrender[] to the Executive Branch [the Court's] role in enforcing the constitutional limits [at issue]"). Even when Congress has tasked an agency with promulgating binding rules or guidelines, it remains the judiciary's role to "say what the law is" in any case or controversy about the meaning and application of those agency-made provisions. *Marbury*, 5 U.S. at 177; *See Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts "to 'decide' that the text means what the agency says"). The duty of independent judgment is the very office of an Article III judge; *Chevron* cannot lawfully require judges to abdicate this duty. *Cf. Yarborough v. Alvarado*, 541 U.S. 652, 663-64 (2004) (discussing the "substantial element of judgment" that federal judges must exercise "when applying a broadly written rule to a specific case"). The Defendants' opinion of how to best interpret the CARES Act deserves no more weight than the heft of its persuasiveness. *Cf. TetraTech, Inc. v. Wisc. Dep't of Revenue*, 914 N.W.2d 21, 53 (Wisc. 2018) (""Due weight' is a matter of persuasion, not deference.").

Judicial independence, as a duty and obligation, persists today. This principle is so axiomatic, in fact, that it seldom appears in legal argument; the mere suggestion that a judge might breach his or her duty of independent judgment is a scandalous insinuation. But abandoning judicial independence is precisely what reflexive deference requires. Rather than defer to SBA in reviewing the CARES Act, this Court must say for itself "what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177.

3. Deference to a Government-Litigant Violates the Due Process Clause

Judicial deference is problematic enough in cases between two private parties. But when government is a litigant and asks the court to defer to its legal interpretations, judicial deference tips the scales of justice unfairly and violates the due process of law.

Faithful application of *Chevron* in cases in which the government is a party violates the Fifth Amendment's Due Process Clause by requiring judges to exhibit bias in favor of an agency's legal

interpretation. This bias jeopardizes judicial impartiality. *See Com. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (holding that judicial bodies "not only must be unbiased but also must avoid even the appearance of bias."). 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." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). By ensuring a neutral arbiter, due process "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.*

Moreover, due process requires more than procedural fairness. The government must act "through judges whose office require[s] them to exercise independent judgment in accord with the law." Philip Hamburger, Is Administrative Law Unlawful? 173 (2014). Through the Due Process Clause, the Constitution incorporates the common-law maxim that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10 (James Madison).

Judicial bias need not be personal bias to violate due process—it can also be institutional. In fact, institutionalized judicial bias is more pernicious, as it systematically subjects parties across the entire judiciary to bias rather than only a party before a particular judge. Most judges recognize that personal bias requires recusal. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (basing recusal on "all the circumstances of this case"). Recusal is equally appropriate when deference regimes institutionalize bias by purporting to require judges to favor the government's position in cases in which the government is a party.[1] *See In re Murchison*, 349 U.S. 133, 136 (1955) (reasoning that the

[1] A judge who felt compelled to apply *Chevron* but who was unwilling to recuse himself or herself could also write a *dubitante* opinion. *Am. Inst. for Int'l Steel, Inc. v. U.S.*, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019) (Katzmann, J., *dubitante*) (collecting *dubitante* opinions).

"stringent" due-process requirement of impartiality may require recusal by "judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties").

As a matter of course, *Chevron* institutionalizes bias by requiring courts to "defer" to the government's legal interpretation in violation of a defendant's right to due process. *Cf.* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Rather than exercise their own judgment about what the law is, judges defer systematically to the judgment of one of the litigants before them. The government litigant wins simply by showing that its preferred interpretation of the commentary is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). A judge cannot simply prefer the Plaintiffs' reading of the CARES Act or think the government's reading is wrong. If *Chevron* applies, the government must be *manifestly* wrong.

No rationale can defend a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and that commands systematic bias in favor of the government's preferred interpretations of the CARES Act. Government-litigant bias doctrines, like *Chevron* deference, deny due process by favoring the government's litigation position. *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (agreeing that the Constitution forbids adjudicatory proceedings that are "infected by … bias"); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure" that might lead a judge "not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.").

The Due Process concerns are readily apparent in this case. Defendants have repeatedly changed their binding rules without notice or explanation, forcing the Plaintiffs to litigate against a moving target. To then tip the scales in the Defendants' favor would be profoundly unfair and would offend the due process of law.

4. The Criminal History Rule Fails *Chevron* Step 2

As discussed more thoroughly in Plaintiffs' memorandum in support of injunctive relief, there are several reasons why SBA's Criminal History Rule is not entitled to deference under Step 2 of *Chevron*, including: (i) Congress did not seek to rely on SBA's expertise; (ii) SBA did not rely on invoke its own expertise in promulgating the rule; and (iii) the rule is not a "reasonable policy choice." *Chevron*, 467 U.S. at 845.

But the Defendants argue throughout their opposition brief that Congress implicitly relied on SBA to ensure that PPP loans are of "sound value." For one, this makes little sense considering the structure of the PPP. Congress created the SBA as an injection of capital for small businesses, based on the small businesses' own assessment of their needs, and the lenders' assessment of the businesses' eligibility. 15 U.S.C. § 636(a)(36)(F)(ii)(I)–(II)(bb)**.** The PPP is more akin to a grant program than a typical SBA loan under § 7(a). *In re Skefos*, No. 19-29718-L, 2020 WL 2893413, at *11–12 (Bankr. W.D. Tenn. June 2, 2020) (quoting *In re Roman Catholic Church of Archdiocese of Santa Fe*, No. 18-13027 T11, 2020 WL 2096113, at *6 (Bankr. D.N.M. May 1, 2020) ("[T]he 'loans' are really grants. Repayment is not a significant part of the program. That is why Congress did not include creditworthiness as a requirement.").

Moreover, SBA's own PPP rules belie this *post hoc* excuse—SBA "has excused SBA lenders from complying with 13 C.F.R. § 120.150, which enumerates the facts the SBA considers to ensure that any loan made under § 7(a) is of 'sound value.'" *Gateway Radiology*, 2020 WL 3048197, at *14. SBA also seems to insist it was bound by 13 C.F.R. § 120.110(n), but its Criminal History Rule initially excluded more people than that rule, and its more-recent iterations exclude fewer applicants. So, again, this explanation does not withstand scrutiny. In short, the Criminal History Rule is arbitrary, capricious, and contrary to the CARES Act. *See Chevron*, 467 U.S. at 844.

IV. SBA'S CRIMINAL HISTORY RULE IS ARBITRARY AND CAPRICIOUS

A. This Court Should Reject SBA's *Post Hoc* Rationale

Just last week, the Supreme Court reiterated a basic rule of administrative law: "An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, --- U.S. ---, No. 18-587, Slip Op. at 17 (filed June 18, 2020) [hereinafter "*DACA*"]. When an agency changes or rescinds a rule, litigants depend on the courts to view the agency's explanation "critically" to ensure against an "impermissible '*post hoc* rationalization.'" *Id.* at 14-15 (citation omitted); *see also Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) ("[T]he *post hoc* rationalizations of the agency … cannot serve as a sufficient predicate for agency action."). "Considering only contemporaneous explanations for agency action [] instills confidence that the reasons given are not simply 'convenient litigation positions.'" *DACA*, Slip Op. at 16 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)) (cleaned up). Given these concerns, it matters not whether the *post hoc* justification offered during litigation comes from a government attorney or an agency official. *DACA*, Slip Op. at 16. "Permitting agencies to invoke belated justifications … can upset 'the orderly functioning of the process of review,' *forcing both litigants and courts to chase a moving target*." *Id.* (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

When Chief Justice John Roberts delivered the opinion for the Court last week in the *DACA* decision, he hardly could have imagined just how constantly and erratically an agency might move the target. Plaintiffs filed their complaint in this case without the benefit of *any* agency explanation for the Criminal History Rule. Defendants then changed the rule twice—offering an explanation only once, in support of the June 12 amendment—before filing their first substantive brief 16 days later. Only then did Defendants offer a belated explanation from an agency official. *See generally* Miller Decl., ECF No. 10-1. This explanation, however, differed from the only prior explanation the agency had given when it amended the rule on June 12. This Court should see through the Defendants'

transparent attempt to justify the Criminal History Rule *post hoc*. *See DACA*, Slip Op. at 16 (warning that *post hoc* rationales allow an agency to offer new reasons after flaws have been identified in its original position); *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 659 (D. Md. 2018) (holding that "*post hoc* rationalizations cannot rehabilitate a decision unreasoned at the time it was made").

The exigent circumstances surrounding the PPP are no excuse for the Defendants' failure to provide a contemporaneous, reasoned explanation of the Criminal History Rule. *See Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 273 (4th Cir. 2018) (rejecting the agency's argument that it lacked the time necessary to implement a regulation based on a proper basis). For one, SBA *did* explain the short-lived iteration of the Criminal History Rule on June 12, 2020. 85 Fed. Reg. at 36,718. SBA explained it amended the Criminal History Rule to be "more consistent with Congressional intent to provide relief to small businesses and also promote[] the important policies underlying the First Step Act." *Id.*

But it failed to explain how the remaining restrictions were any less offensive to the First Step Act or any more consistent with the CARES Act. Second, the same time constraints did not stop SBA from explaining its rule that excluded bankruptcy debtors or its rule that permitted faith-based organizations to participate in the PPP. SBA's excuse for offering a *post hoc* explanation for the Criminal History Rule does not withstand scrutiny.

B. The Conclusory Miller Declaration Is Not a Reasoned Analysis

An agency is free to modify or rescind existing regulations but must provide a rational explanation that connects the facts the agency has found to the choice it has made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). More than merely explain *what* the agency has done, the "reasoned analysis" must explain *why* the agency has chosen the policy at issue. *See id.*; *see also Sierra Club*, 899 F.3d at 293 (ruling that an agency's conclusory explanation that merely recited that a rule was consistent with the statutory purpose failed to provide sufficient reasoning as required

by *State Farm*). Even crediting SBA's *post hoc* rationale, the agency has still failed to explain the *why* behind the Criminal History Rule and its many iterations.

Miller states that the Defendants concluded that "[a]n assurance of good character was deemed necessary to safeguard against the risk of fraud in the streamlined PPP application process." Miller Decl. ¶ 20. He does not, however, connect any facts or evidence to the agency's determination that all persons with a criminal record are of poor character and underserving of financial assistance during a global pandemic and economic collapse.

According to Miller, SBA departed from its typical evaluation process of evaluating an applicant's character in favor of a bright-line Criminal History Rule because evaluating individual business owners would cause delays that "would be incompatible with the need to make PPP loan eligibility determinations as expeditiously as possible." Miller Decl. ¶ 7; *but see DACA*, Slip Op. at 25 (reasoning that it is insufficient for an agency to rely simply on "administrative complexities"). He then states in conclusory fashion what bright line the Defendants drew—which was already self-evident from the rule adopted. Some things that Miller failed to explain are why SBA drew the line that it did, what alternatives it considered and rejected, why blanket PPP ineligibility better served the congressional purpose than delayed PPP eligibility, and what basis the Defendants had for concluding that persons who have committed felonies unrelated to financial crimes pose a greater fraud risk.

Moving on to the June 12 Amendment, Miller says that SBA considered comments that argued "the Rule inappropriately denied PPP financial assistance to individuals with criminal records" and that SBA should narrow its rule to "convictions for fraud or other crimes related to trustworthiness for financial assistance." Miller Decl. ¶ 26. After assuring us that SBA considered these comments, he parrots the language in the revisions to the Criminal History Rule. *Id.* ¶ 27. Notably absent from this explanation is why SBA decided to keep a one-year look-back for non-financial crimes instead of

rescinding that restriction entirely. Nor did Miller explain why SBA continued to apply the rule to persons under indictment for non-financial crimes.

But Miller's half-hearted explanation for the April 12 Amendment far exceeds his explanation for the June 24 Amendment. Miller tells us, "After giving further consideration to these issues, the SBA, in consultation with the Department of Treasury, determined that two additional modifications to the criminal justice restrictions were appropriate to ensure consistenc[y] in its approach to applicants with criminal histories." Miller Decl. ¶ 29. What prompted that "further consideration" between June 12 and June 24? It's anyone's guess, because the Defendants haven't provided cogent reasoning. But anyone with a calendar can tell that the Plaintiffs filed their motion for injunctive relief between those two revisions.

C. The Criminal History Rule Is Arbitrary and Capricious

An agency's rule is arbitrary and capricious if (1) the agency "has relied on factors which Congress has not intended it to consider"; (2) the agency "entirely failed to consider an important aspect of the problem"; (3) the agency's explanation "runs counter to the evidence before the agency; or (4) the agency's explanation "is so implausible that it could not be ascribed to a difference in view of the product of agency expertise." *State Farm*, 463 U.S. at 43. When an agency is revising an already-existing policy, it must consider competing interests. *DACA*, Slip Op. at 26. An agency cannot modify a rule in a way that excludes persons from a government program without considering the alternatives and explaining why it settled on the course it charted. *See id.* at 24-25. Simply considering "administrative complexities" is not enough. *Id.* at 25 (reasoning that it is insufficient for an agency to rely simply on "administrative complexities").

This case is distinguishable from Judge Hollander's June 24 decision in *Tradeways*, 2020 WL 3447767. Unlike the plaintiffs in *Tradeways* who asserted simply that SBA's ineligibility rule for bankruptcy debtors was "irrational" and "d[id] not contend that the SBA relied on factors outside the

scope of the CARES Act, failed to give due weight to countervailing considerations, ignored conflicting data, or issued a facially implausible rationale[,]" *id.* at *16, Plaintiffs here maintain that SBA filled the proverbial arbitrariness scorecard. SBA's Criminal History Rule offends nearly every consideration set forth in *State Farm*, 46 U.S. at 43.

By considering a borrower's criminal history, SBA "considered a factor that Congress did not intend [it] to consider." *Getaway Radiology*, at *14. The Criminal History Rule ignored an important consideration of the CARES Act, which was to keep workers paid and employed. *See DACA*, Slip Op at 21 (holding that DHS failed to consider an important part of the problem because its explanation regarding one part of a rule had nothing to do with another part of the rule at issue). SBA's position also "ignores the very nature" of the PPP, which is "structured so that [loans] don't have to be repaid." *Getaway Radiology*, at *14. And, as mentioned above, SBA failed to give appropriate weight to the countervailing interest that a delayed PPP loan for a business owner with a criminal record is more consistent with the purpose of the CARES Act than a bright-line exclusion. That SBA placed its baseless "good character" determination over the factors Congress intended for PPP eligibility was also arbitrary and capricious. *See Ohio River Valley Envtl. Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 97 (4th Cir. 2006) (reasoning that an agency action that "ignor[es] any actual effect that a change might have" has "failed to provide a reasoned explanation based on the evidence before the agency and ignored an important aspect of the problem"); *Healthy Teen*, 322 F. Supp. 3d at 661 (reasoning that the agency failed to show that the purported interest on which it relied was "even a relevant factor in distributing grant funding under the [applicable] program").

V. MANDAMUS RELIEF IS APPROPRIATE BECAUSE SBA'S ADMINISTRATION OF THE PPP IS MINISTERIAL

Since the passage of the CARES Act, the Defendants have displayed complete misunderstanding of the authority that Congress granted. It is unsurprising, then, that the Defendants

misunderstood what ministerial, nondiscretionary action is at the heart of the Plaintiffs' administrative and common-law mandamus claims.

Congress instructed SBA to administer the PPP and issue loan guarantees to any small business that SBA lenders have determined is eligible based on the two eligibility requirements set out by Congress. As discussed throughout this brief, there was no implicit delegation of authority or grant of discretion to the individual defendants to determine that some small businesses are ineligible for PPP loans despite qualifying under the terms of the CARES Act. 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.

CONCLUSION

For the foregoing reasons, the Court should declare that the Criminal History Rule is unlawful in any iteration and enjoin the Defendants' enforcement of that unlawful rule.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that I filed this Reply Brief electronically with the Clerk of the Court for the United States District Court for the District of Maryland by using the CM/ECF system on June 26, 2020. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF.

June 26, 2020

Respectfully,

/s/
Ronald S. Canter