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NCLA Lawsuit Forces Change in SBA Regulation to Make Hundreds of PPP Loan Applicants Eligible

Carmen’s Corner Store, et al. v. U.S. Small Business Administration, et al.

Washington, DC (June 26, 2020)—Altimont Mark Wilks, a small business owner from Hagerstown, Md., who was unlawfully barred from applying for a much-needed Paycheck Protection Program (“PPP”) loan, can finally breathe a sigh of relief. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a motion for a [temporary restraining order and preliminary injunction](#) against the Small Business Administration (SBA) on Mr. Wilks’s behalf on June 17. The Government’s opposition brief was due Wednesday, June 24. But in response to NCLA’s lawsuit, SBA once again amended its Criminal History Rule just hours before filing its opposition brief. The new changes vastly expand the number of businesses that are eligible for PPP loans under the CARES Act. The new Rule will allow our client [Mr. Wilks and other small business owners with criminal records](#) to apply for much-needed funds that should have never been denied in the first place.

In our [memorandum in reply](#) to the Government’s opposition to the injunctive relief filed today in the U.S. District Court for the District of Maryland, NCLA argues that SBA’s eleventh-hour amendments to the Criminal History Rule are unlawful and do not deprive the court of jurisdiction to determine the legality of SBA’s latest change to the challenged rule. The agency has amended the Criminal History Rule twice since Mr. Wilks filed his [complaint](#) in *Carmen’s Corner Store, et al. v. U.S. Small Business Administration, et al.* NCLA believes that SBA’s “erratic rulemaking” substantiates the risk that the agency will change the rules once more before Plaintiffs secure the PPP loans that the CARES Act provides.

Congress tasked SBA with managing the PPP loans—\$659,000,000,000 in total—for businesses with fewer than 500 employees. But the agency disqualified Mr. Wilks from applying because he is still on probation. In doing so, SBA disregarded the intent of Congress to make loans available to *all* small businesses expeditiously during a national crisis. NCLA argues that SBA exceeded the statutory authority that Congress delegated to the agency. The lawsuit challenges unlawful portions of SBA’s Interim Final Rule that purport to implement PPP, and it calls out the agency’s Criminal History Rule as an arbitrary and capricious exercise of power.

NCLA will continue to press for regulations that adhere to the statute as written by Congress, and NCLA will plead with the Court not to defer to SBA’s interpretation of the CARES Act. Among other problems, as explained in NCLA’s brief, giving *Chevron* deference to SBA’s Interim Final Rule would offend the requirement for judicial independence in Article III of the Constitution as well as violate the Fifth Amendment’s due process protections, which prohibit judges from displaying bias toward SBA (e.g., by according it *Chevron* deference).

NCLA is also representing Michael Loughrey and his business MoveCorp in a similar [complaint](#) filed yesterday in the U.S. District Court for the District of Columbia against the SBA.

NCLA released the following statements:

“While Mr. Wilks and his employees are happy his lawsuit inspired changed in SBA’s regulatory position, to allow the agency to evade judicial review would be an incomplete victory for both the Plaintiffs and the rule of law.”

— **Jared McClain, Staff Counsel, NCLA**

“The Government has changed the regulations, for the same statute, at least four times in less than three months. As no American can be sure what the future will bring, we continue to press the Court to rule against the SBA’s unlawful seizure of legislative power from Congress.”

— **John J. Vecchione, Senior Litigation Counsel, NCLA**

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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