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 OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS & IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Small Business Administration ("SBA") departed from the statutory language of the CARES Act to promulgate an unlawful rule that deprived the Plaintiffs' businesses of emergency aid for over 75 days. It did this during a pandemic and accompanying economic collapse despite the fact that the congressional purpose of the Paycheck Protection Program ("PPP") was to direct relief to *all* small businesses as expediently as possible. When Plaintiffs filed their Verified Amended Complaint, they sought both declaratory and injunctive relief as well as costs, attorneys' fees, and any other relief the Court deems just and proper. To date, the Plaintiffs have received only preliminary injunctive relief. This Court's June 29 memorandum opinion and order granted the Plaintiffs a preliminary injunction allowing them to secure PPP loans. The Court recognized that injunctive relief was necessary, despite SBA's promulgation of the June 24 Criminal History Rule, because the prior, unlawful Criminal History Rule(s) had prevented the Plaintiffs from receiving loans to that point and had created ongoing practical difficulties to their ability to do so. As a result of this Court's order, Plaintiffs have now received the PPP loans that they sought.

Despite the Plaintiffs' receipt of their PPP loans—thanks only to this Court's preliminary injunction—the Plaintiffs are still entitled to a declaratory judgment that the prior iterations of SBA's Criminal History Rule were unlawful. SBA's arbitrary-and-capricious rulemaking in this case caused the Plaintiffs concrete harm and demonstrated a disregard for both the Plaintiffs' rights and the rule of law generally. SBA's voluntary cessation of its unlawful behavior, under threat of lawsuit, does not deprive this Court of its jurisdiction to say that SBA's now-superseded Criminal History Rule(s) were unlawful—particularly considering the likelihood that SBA could repeat that conduct absent a court order. There are no signs that the COVID-19 pandemic is subsiding, and Congress is currently negotiating the next round of relief for small businesses.

The timing of SBA's June 18 and June 24 amendments suggests that SBA rolled back the Criminal History Rule as a direct consequence of the Plaintiffs' complaint in this case, but SBA has

not yet conceded that its prior iterations of the Criminal History Rule were unlawful. Without a court order declaring SBA's past conduct unlawful (as opposed to an opinion ruling only that the Plaintiffs are likely to succeed on the merits), the agency is both able and likely to repeat its prior unlawful conduct in the future, to the detriment of the Plaintiffs and those similarly situated. There is still, then, an ongoing controversy between the parties. Plaintiffs ask this Court to enter judgment declaring unlawful the prior iterations of the Criminal History Rule that SBA promulgated on April 15 and June 18.

UNDISPUTED FACTS[1]

The PPP became law as part of the CARES Act on March 27, 2020. Congress originally allotted $349,000,000,000 for the PPP with the program set to expire on June 30, 2020. CARES Act, Pub. L. 116-136, 134 Stat. 281 (2020). Congress would later amend the law twice: (1) on April 24, Congress increased the funds available for PPP loans to $659,000,000,000, *see* Pub. L. No. 116-139; and (2) on July 4, Congress extended the program deadline from the already-past June 30 to August 8. Pub. L. 116-147.

From the inception of the PPP, SBA adopted a "Criminal History Rule," denying access to PPP loans for businesses owned by persons with a criminal history. *See* 85 Fed. Reg. 20,811 ("April 15 IFR"); *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/.

On April 13, AmeriServ Bank of Hagerstown, a delegate of the Defendants, rejected Mr. Wilks's PPP application for Retail4Real because of Mr. Wilks's answers to the criminal-history

[1] Plaintiffs' verified complaint and motion for preliminary injunction contain a fuller recitation of the factual background. (ECF Dkt. 1; ECF Dkt. 7).

questions on the application. (ECF Dkt. 1, at ¶ 87; ECF Dkt. 7-1, at ¶ 10). Mr. Wilks did not apply a second time, on behalf of Carmen's Corner Store, because it was clear that AmeriServ would also deny a PPP loan to Carmen's Corner Store due to Mr. Wilks's answers to the criminal-history questions on the application. (ECF Dkt. 1, at ¶ 96; ECF Dkt. 7-1, at ¶ 14).

Plaintiffs filed a verified complaint on June 10, 2020, challenging the Criminal History Rule. (ECF Dkt. 1). In the complaint, the Plaintiffs sought both prospective injunctive relief as well as a declaration that the Criminal History Rule was unlawful. On June 17, the Plaintiffs filed a motion for temporary restraining order and preliminary injunction. (ECF Dkt. 7). The next day, SBA revised the Criminal History Rule to shorten the "look back" period for felony convictions. 85 Fed. Reg. 36717-01 ("June 18 IFR"). The June 18 IFR was short-lived, however, as SBA revised the rule again, announcing another amendment contemporaneously with the filing of its June 24 opposition brief in this case. 85 Fed. Reg. 38301 ("June 24 IFR").

This Court entered an opinion and order on June 29, granting in part the Plaintiffs' motion for a preliminary injunction. (ECF Dkt. 18) [hereinafter "June 29 Op."]; (ECF Dkt. 19). As a direct result of this Court's order, the Plaintiffs were belatedly able to secure their PPP loans and pay their employees. Consistent with their unvarying strategy to avoid judgment, the Defendants again insist that this Court lacks the constitutional authority to declare unlawful the Defendants' prior unlawful iterations of the Criminal History Rule.

ARGUMENT

There is still an ongoing controversy between the parties as to the lawfulness of the prior iterations of the Criminal History Rule.[2] That rule injured the Plaintiffs' businesses by unlawfully and

[2] Plaintiffs agree that their counts for injunctive relief no longer present a live controversy. This Court's June 29 Order granting injunctive relief in the Plaintiffs' favor ensured that the Plaintiffs secured PPP loans, thereby fully satisfying their claims for injunctive relief. *See Int'l Bd. of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 885 F.3d 230, 235-36 (4th Cir. 2018) (explaining that claims for

arbitrarily depriving the Plaintiffs of their ability to secure PPP loans as expeditiously as Congress intended. For nearly three months during the pandemic and economic collapse, the Defendants unlawfully withheld the lifeline of a PPP loan from the Plaintiffs. SBA's belated amendments to the Criminal History Rule do not change the fact that Plaintiffs' businesses suffered concrete harm because of the Defendants' administrative overreach. Nor did those belated amendments—blatant attempts by the Defendants to evade judicial review—deprive this Court of Article III jurisdiction. This Court remains empowered to resolve this ongoing controversy by declaring unlawful the Criminal History Rule that deprived the Plaintiffs of access to PPP loans for most of the program's existence. *See Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

I. THIS COURT STILL HAS JURISDICTION TO GRANT PLAINTIFFS A DECLARATORY JUDGMENT

Defendants' attempts to moot the controversy between the parties were unsuccessful. Mootness is "a relatively weak constraint on judicial power: 'A case becomes moot *only* when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party.'" *United States v. Springer*, 715 F.3d 535, 540 (4th Cir. 2013) (quoting *Knox v. Serv. Empls. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)) (emphasis in *Springer*). Applied too rigorously, mootness "would prevent judicial review of all controversies that are inherently short-lived." *Kennedy v. Block*, 784 F.2d 1220, 1222 (4th Cir. 1986). Accordingly, courts have created several exceptions to the mootness doctrine to avoid the dismissal of proper cases, such as cases that are capable of repetition, yet evading review, and cases in which the defendant has attempted to voluntarily cease allegedly unlawful behavior. *See, e.g.*, *id.* (citing

injunctive relief become moot once the period of time for the injunction has "come and gone"); *see also Williams v. Ozmint*, 716 F.3d 801, 809 (4th Cir. 2013) (holding that a "claim for injunctive relief" becomes moot "'when the claimant receives the relief he or she sought to obtain through the claim'") (citation omitted).

S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911)); *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).

A. Defendants' Voluntary Cessation Did 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)); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal activity … does not moot the case."). Otherwise, the Defendants would be "free to return to [their] old ways." *Laidlaw*, 528 U.S. at 189 (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).

This mootness exception "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). "Accordingly, the exception seeks to prevent 'a manipulative litigant immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after.'" *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (citation omitted).

Defendants bear the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* The Supreme Court has stressed that this is a "*formidable* burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190 (emphasis added). One way a defendant may "satisf[y] this heavy burden" is "when, for example, it enters into an 'unconditional and irrevocable' agreement

that prohibits it from returning to the challenged conduct." *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013)).

The Fourth Circuit's decision in *Porter* illustrates this point nicely. Porter, a death-row inmate, sought both injunctive relief and a declaration that certain conditions of confinement in his prison violated the Eighth Amendment. *Id.* at 361-62. Almost a year after he sued, the warden approved interim rules and regulations that relaxed those conditions of confinement, and the Department of Corrections constructed a $2-million outdoor recreation yard that would allow for more outdoor group recreation among death-row inmates. *Id.* at 361. The parties, however, remained unable to reach a consent decree because the Department of Corrections did not want to be bound to the changes in the future, even though it purported to have "[no] intent whatsoever to go back to the way things were." *Id.* at 362. Despite the lack of assurances that the defendants would not revert to prior practices, and despite the defendants' refusal to explicitly acknowledge that the prior conditions were unlawful, the district court concluded that the prior conditions "could not reasonably be expected to recur" and dismissed the complaint as moot. *Id.* at 362-63.

Porter appealed, and the Fourth Circuit reversed. The Court reasoned that "a defendant fails to meet its heavy burden to establish that its allegedly wrongful behavior will not recur when the defendant 'retains the authority and capacity to repeat an alleged harm.'" *Id.* at 364 (citation omitted). "And courts have been particularly unwilling to find that a defendant has met its heavy burden to establish that its wrongful conduct will not recur when the defendant expressly states that, notwithstanding its abandonment of a challenged policy, it could return to the contested policy in the future or when the defendant's 'reluctant' decision to change a policy reflects 'a desire to return to the old ways[.]'" *Id.* at 365 (internal citations omitted). Applying this standard, the Court reasoned that it was "more than a 'mere possibility'" that the Department would revert to the challenged policies because nothing barred it from doing so and its internal operating procedures permitted the

Department to rewrite the policies within three years. *Id.* And even more significant to the Court's analysis was the fact that the defendants had refused to acknowledge the prior conditions as unlawful or explicitly guarantee that they would not return to those conditions. *Id.* (noting that at oral argument counsel for the defendants "could not foreswear a return to the challenged policies because [the Department] 'doesn't have a crystal ball that will enable [it] to know what might happen on death row ten years from now'").

Importantly, the Court's mootness analysis "d[id] not question the Corrections Department's penological rationale for refusing to guarantee that it w[ould] not revert to the challenged policies if conditions so require[d]." *Id.* That the defendants might have reverted to their challenged practices was enough to defeat the suggestion of mootness. *Id.* at 365-66. *See also Deal v. Mercer Cty. Bd. of Ed.*, 911 F.3d 183, 191-92 (4th Cir. 2018) (rejecting the government's mootness argument because the government "retain[ed] authority to 'reassess' the challenged policy 'at any time'); *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 220 (4th Cir. 2017) (holding that a claim was not moot based on "a 'bald assertion' of future compliance") (cleaned up); *Wall v. Wade*, 741 F.3d 492, 497-98 (4th Cir. 2014) (rejecting the government's suggestion of mootness based on a change in policy because "[n]othing in the [agency's] memo suggests that [the agency] is actually barred—or even considers itself barred—from reinstating the 2010 Ramadan policy should it so choose"); *Pashby v. Delia*, 709 F.3d 307, 316-17 (4th Cir. 2013) (holding that a change in governmental policy does not moot a case if the government retains authority to "reassess" its change "at any time").

So too here. Defendants' ability and willingness to change the Criminal History Rule again, and again, and again was on full display during this Court's expedited consideration of the Plaintiffs' motion for preliminary injunction. Within just 16 days of the Plaintiffs' lawsuit, Defendants amended the challenged rule *twice*. *See 6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 407 (4th Cir. 2019) (rejecting the government could not carry its "heavy burden" because "[i]t has a history of frequently

revising the relevant election forms," which left the court with "little confidence that the forms w[ould] not revert back"). Those amendments seemed purposefully designed to moot this litigation. It is telling that SBA has characterized these changes as a "good deed," rather than required by law. (ECF Dkt. 10, at 34). The quality of the Defendants' better-late-than-never amendments to the rule remains transient unless this Court holds the Defendants accountable for the prior unlawful iterations of the Criminal History Rule. Plaintiffs were forced to go to court to obtain relief to which they were legally entitled. They deserve a judgment declaring the Defendants' initial rulemaking unlawful.

Like the government-defendants in *Porter*, the Defendants here have not yet admitted that the prior iterations of the Criminal History Rule were unlawful. Nor have they promised not to repeat their unlawful behavior when Congress authorizes more relief for small businesses to combat the ongoing economic crisis.[3] Instead, SBA still quite literally considers Mr. Wilks to be unworthy of receiving SBA-backed loans. (ECF Dkt. 24, at 4 & n.2) (claiming that the Criminal History Rule ensures that borrowers are creditworthy and "of good character").

It is far from "absolutely clear" that the Defendants' unlawful behavior will not recur. *See Laidlaw*, 528 U.S. at 189. The Criminal History Rule was unlawful before the Defendants voluntarily amended it to evade judicial review, and Article III empowers this Court to say so.

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[3] Reporting and statements by congressional leaders suggest that Congress is likely to extend PPP by its same terms. *See*, *e.g.*, Jake Sherman, *POLITICO Playbook PM: 2020 is following its script*, Politico.com. (Sept. 8, 2020) (reporting that Senate Majority Leader Mitch McConnell announced a COVID-19 relief bill that includes "an extension of PPP"); Andrew Solender, *Rubio Says Congress 'Certainly Closer' to PPP Extension Than Stimulus Deal*, Forbes.com (Aug. 2, 2020), *available at* https://www.forbes.com/sites/andrewsolender/2020/08/02/rubio-says-congress-certainly-closer-to-ppp-extension-than-stimulus-deal/#678026275ba2; @ChrisCoons, Twitter.com (July 15, 2020), *available at* https://twitter.com/ChrisCoons/status/1283411931555127296 (expressing Senator Chris Coons's focus on extending PPP).; Kelly Ann Smith, *Congress Continues to Negotiate Second Stimulus Package*, Forbes.com (Aug. 5, 2020), *available at* https://www.forbes.com/sites/advisor/2020/08/05/congress-continues-to-negotiate-second-stimulus-package/#63d8788f2a06 (reporting that Congress is negotiating a second major relief package that would "offer more [PPP] funding").

B. Plaintiffs' Claim Is Capable of Repetition Yet Evading Review

Another "well-established" exception to mootness exists "for conduct 'capable of repetition, yet evading review.'" *Lux v. Judd*, 651 F.3d 427, 435 (4th Cir. 2011) (quoting *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)). This exception applies to "challenged actions [that] 'do not last long enough for complete judicial review of the controversies they engender.'" *Leonard v. Hammond*, 804 F.2d 838, 843 (4th Cir. 1986) (quoting *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115, 126 (1974)). Courts will reject a suggestion of mootness when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Wisc. Right to Life*, 551 U.S. at 462.

Both conditions are satisfied in this case. By congressional design, the PPP was a short-lived program to address an emergency. The PPP was slated from its inception to expire on June 30, 2020, or when SBA fully administered the $349,000,000,000 in funds that Congress originally allocated. CARES Act, § 1102(b)(1). Even with Congress's eventual increase in the amount of funds and extension of the time for SBA to administer those funds, the PPP's duration remained too short to fully litigate the Defendants' administrative overreach before the program expired. As this Court is well aware, the finite nature of the PPP required courts and litigants to file on expedited schedules just to secure preliminary relief against the Defendants. The lawfulness of the Defendants' Criminal History Rule could not be litigated fully before the program expired. *See Kennedy v. Block*, 784 F.2d 1220, 1222-23 (4th Cir. 1986).

Secondly, there remains a reasonable expectation that the Defendants will once again subject the Plaintiffs to the same unlawful restrictions. There is little doubt that SBA will arbitrarily discriminate against business owners with criminal records if given the opportunity to do so. As the

Defendants pointed out in their briefing, (ECF Dkt. 24, at 4 & n.2), SBA still considers business owners like Mr. Wilks to be unworthy of SBA-backed loans. 13 C.F.R. §§ 120.110(n), 120.150(a).

The expiration of the PPP does not render this dispute incapable of repetition. *See Lux*, 651 F.3d at 401 (holding that an election-law dispute was capable of repetition even though the former candidate no longer resided in the district). The issue is whether there is a reasonable likelihood that Congress will once again task SBA with administering the PPP. Past congressional action answers this question. Twice already, Congress has extended the PPP past the point at which it was set to expire. On the first occasion, the PPP funds were diminishing more quickly than expected, so Congress passed new legislation to increase the original limit on funds, thereby extending the program. *See* Pub. L. 116-139. On the second occasion, the PPP's funding remained at the date the program was scheduled to expire. Again, Congress passed new legislation to extend the program. *See* Pub. L. 116-147.

Importantly, both times Congress extended the PPP, Congress took the expedient route of leaving the structure and terms of the program in place. It is easy to understand why Congress, legislating emergency aid during a pandemic, would take the expedient course. And it stands to reason that Congress will take the expedient course a third time as it negotiates the next round of emergency aid for small businesses. There is a reasonable probability, then, that the next round of small-business aid will be a further extension of the PPP and that the Defendants could once again attempt to exclude the Plaintiffs unlawfully. *See United States v. Springer*, 715 F.3d 535, 541 (4th Cir. 2013) (holding that the government's history of repeating of an action shows that it is likely to do so again).

II. SUMMARY JUDGMENT IS APPROPRIATE ON PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF

As this Court recognized in its June 29 opinion, "[t]he plaintiffs are likely to show that the SBA acted arbitrarily and capriciously in promulgating the April [15] IFR and the first June IFR

because those rules contain no explanation for the criminal history exclusion." June 29 Op. at 12. Plaintiffs ask this Court to enter judgment in the Plaintiffs favor, declaring that those prior iterations of the Criminal History Rule violated the Administrative Procedure Action ("APA") and deprived the Plaintiffs of the benefit of a PPP loan for nearly three months during the global pandemic and economic collapse.

Summary judgment is appropriate when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Allstate Fin. Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir. 1991); *Courtney-Pope v. Bd. of Ed. Of Carroll Cty.*, 304 F. Supp. 3d 480, 489 (D. Md. 2018); Fed. R. Civ. P. 56. The Court should grant judgment when "the record as a whole could not lead a reasonable trier of fact to find for the non-movant." *Allstate*, 934 F.2d at 58.

Plaintiffs present purely legal questions concerning the scope of SBA's administrative authority to refuse to guarantee PPP loans that Congress made available under the CARES Act. Through the PPP, 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 expedite 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 contended that Congress's placement of the PPP in § 7(a) implicitly activated some inherent authority SBA possesses to exclude small businesses that it deems unworthy of receiving government-backed loans. But the Criminal History Rule—in all its iterations—departs from the restrictions SBA places on typical § 7(a) loans. In some ways the Criminal History Rule is more restrictive than the criminal history exclusions typically applied to § 7(a) loans. For instance, the Criminal History Rule is a bright-line rule as opposed to the more subjective review applied to applicants for other § 7(a) loans. *See* SBA, SOP 50 10 5(K), Lender and Development Company Loan Programs, at 110 (Jan. 1, 2019). And SBA's typical exclusions do not seem to apply to persons who have been convicted of a felony in the past but are no longer imprisoned or on probation or parole. *See* 13 C.F.R. § 120.110(n).

But in other ways, the Criminal History Rule is more lenient. Typically, the criminal history exclusions apply to all "[b]usinesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude." 13 C.F.R. § 120.110(n). The various iterations of the Criminal History Rule allowed some (but not all) business owners on probation or parole to receive loans and eventually exempted certain types of felonies from the exclusions. Whatever practical sense these departures from the § 7(a) program may have made for the PPP, Congress's placement of the PPP in § 7(a) cannot justify SBA's Criminal History Rule.

SBA has only the authority that Congress grants it. And there is no textual basis for SBA's assertion of authority for the Criminal History Rule. Moreover, Defendants offered no explanation for the prior iterations of the Criminal History Rule. This failure to explain its exclusion of businesses like the Plaintiffs was arbitrary and capricious.

A. SBA's Interpretation of the CARES Act Is Contrary to the Statute

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 *Chevron*, 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).

1. The CARES Act Is Unambiguous

The plain text of the PPP section of the CARES Act is unambiguous and does *not* delegate authority to SBA to apply some modified variation of its § 7(a) rules to determine that certain categories of businesses are ineligible for PPP loans despite 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 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 SBA may impose no additional qualifications on an applicant.

Congress reinforced this purpose by including in the CARES Act what the United States Court of Appeals for the Sixth Circuit 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 of Flint v. SBA, 960 F.3d 743, 747 (6th Cir. 2020) . Although Congress may permit SBA to exclude certain businesses from other § 7(a) loans, 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.**

DV Diamond Club of Flint v. SBA, 2020 WL 2315880, at *1 (E.D. Mich. May 11, 2020) (emphasis added).

The plain meaning of the statutory text supports the understanding that "*any* business concern" includes the Plaintiffs' businesses. "[T]he word 'any' naturally carries 'an expansive meaning.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (citation omitted). There is simply no room for interpretation or clarification by SBA. As 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, 960 F.3d at 746-47 (citation omitted). "[O]ne 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).

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, demonstrate 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. This makes even more sense because part of the purpose of the act is to preserve jobs and those employed would have no connection to any incarceration of their employer. Congress evinced no intent to make such employees the innocent victims of a general program to designed to protect their paychecks and maintain their employment.

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 that 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.

2. SBA Is Not Entitled to Deference

This Court should not defer to SBA because the Criminal History Rule was not "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845. Moreover, deference is inappropriate because SBA's Criminal History Rule(s), which excluded 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).

Deference is particularly inappropriate in this case given the massive power that SBA is claiming through implicit delegation of authority. 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, the tax credits for health insurance it created were 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 in 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*, 721 F.3d at 161 ("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).

3. The Criminal History Rule Was Not a Reasonable Policy Choice

As discussed more thoroughly in Plaintiffs' memorandum and reply in support of injunctive relief, SBA's Criminal History Rule is also not entitled to deference under Step 2 of *Chevron* because the rule was not a "reasonable policy choice." *Chevron*, 467 U.S. at 845.

But the Defendants have argued in their brief that Congress implicitly relied on SBA to ensure that PPP loans are of "sound value." (ECF Dkt. 24, at 3-5). 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 factors the SBA considers to ensure that any loan made under § 7(a) is of 'sound value.'" *In re Gateway Radiology Consults., P.A.*, 616 B.R. 833, 851 (Bankr. M.D. Fla. 2020). SBA also seems to insist it was bound by 13 C.F.R. § 120.110(n), but its Criminal History Rule departs from this rule in several ways. So, again, the Defendants' explanation does not withstand scrutiny. The Criminal History Rule was contrary to law, an administrative overreach, and an unreasonable policy choice. *See Chevron*, 467 U.S. at 844.

B. SBA'S 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 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."[4] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 43 (1983).

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 v. Dep't of Interior*, 899 F.3d 260, 270 (4th Cir. 2018)). "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The Supreme Court reiterated recently that the reasons an agency gives to defend its actions must be those "reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) [hereinafter, "*DACA*"]. And when revising an already-existing policy, an agency must consider competing interests. *Id.* at 1915. 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

[4] This case is distinguishable from Judge Hollander's June 24 decision in *Tradeways, Ltd. v. Dep't of Treasury*, No. 20-1324-ELH, 2020 WL 3447767 (D. Md. June 24, 2020). 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.

it charted. *See id.* at 1914. Simply considering "administrative complexities" is not enough. *Id.* (reasoning that it is insufficient for an agency to rely simply on "administrative complexities").

1. This Court Should Reject SBA's *Post Hoc* Rationale in the Miller Declaration

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*, 140 S. Ct. at 1909 (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*, 140 S. Ct. at 1909. "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 in the *DACA* decision earlier this year, 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 during litigation—never explaining the exclusions until they filed their opposition brief in this case. *See generally* Miller Decl., ECF No. 10-1. This Court should see through the Defendants' transparent *post hoc* attempt to justify the Criminal History Rule. *See DACA*, 140 S. Ct. at 1909 (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*, 899 F.3d at 273 (rejecting the agency's argument that it lacked the time necessary to implement a regulation based on a proper basis). SBA offered no support for the proposition that its emergency rulemaking powers under the CARES Act excused the agency of its requirement to explain its rule. *See* June 29 Op. at 19. Moreover, SBA *did* include an explanation when it issued the short-lived iteration of the Criminal History Rule in the June 18 IFR. *See* 85 Fed. Reg. at 36,718. SBA announced that 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.* As this Court recognized, however, the June 18 IFR "still did not explain the initial purpose of the criminal history exclusion, rather offering only a reason to ease it." June 29 Op. at 18. SBA also failed to explain how the remaining restrictions were any less offensive to the First Step Act or any more consistent with the CARES Act. And 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.

2. SBA's *Post Hac* Rationalization Is Still Arbitrary and Capricious

More than merely explaining *what* the agency has done, the "reasoned analysis" must explain *why* the agency has chosen the policy at issue. *State Farm*, 463 U.S. at 43; *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 if the Court were to credit the Miller Declaration—which this Court should not—SBA 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 undeserving 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*, 140 S. Ct. at 1914 (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. Miller failed to explain why SBA drew the line that it did, what alternatives SBA 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. It is not enough that an agency has a lengthy history of administering similar programs; an agency must at least explain what in its history of administration supports its decision-making.

Moving on to the June 18 IFR, 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 the Court 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.

By considering a borrower's criminal history, SBA "considered a factor that Congress did not intend [it] to consider." *Gateway Radiology*, 2020 WL 3048197, at *14. The Criminal History Rule ignored an important consideration of the CARES Act, which was to keep workers paid and employed. *See DACA*, 140 S. Ct. at 1910 (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." *Gateway Radiology*, 2020 WL 3048197, at *14. And 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. Placing its baseless "good character" determination over and above the factors Congress provided for PPP eligibility was 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").

3. The Criminal History Rule Is Arbitrary and Capricious

In promulgating the 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. v. Dep't of Homeland Sec.*, 2020 WL 2932922, at *18 (D. Md. June 3, 2020). Because SBA considered factors beyond the limited scope of its authority and promulgated an IFR 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.

Congress intended the PPP "to give *all* small businesses a lifeline." (ECF No. 1-08, p. 3,) [hereinafter, "April 6 Letter"]. 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." (ECF No. 1-09, p. 1) [hereinafter, "April 30 Letter"]. 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.").

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. 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.

Without any contemporaneous explanation, SBA promulgated a rule that excluded the Plaintiffs' businesses from PPP loans for most of the program's existence. This failure to explain the agency's decision-making was arbitrary and capricious. And even when SBA offered a belated explanation to support its litigation position in this case, the agency's explanation was inadequate. Accordingly, this Court should declare that SBA's Criminal History Rule(s) violated 5 U.S.C. § 706(2)(A).

CONCLUSION

PPP loans serve the specific purpose of saving small businesses and their employees 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 Criminal History Rule is "contrary to law, public policy, and common sense." *See* April 6 Letter, p. 1. This Court should declare that the Criminal History Rules that SBA promulgated in the April 15 IFR and June 18 IFR were unlawful.

Respectfully submitted,

NEW CIVIL LIBERTIES ALLIANCE

Dated: September 9, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I filed this 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 September 9, 2020. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF.

September 9, 2020

Respectfully,

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