IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOVECORP *et al.*,

Plaintiffs,

v.

Civil Action No. 1:20-cv-01739-CKK
ORAL ARGUMENT REQUESTED

SMALL BUSINESS ADMINISTRATION *et al.,*

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Small Business Administration ("SBA") departed from the statutory language of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, 134 Stat. 281 (2020), to promulgate an unlawful rule that for months deprived the Plaintiffs' business of emergency aid they were entitled to by statute. SBA did this during the beginning of the pandemic when economic uncertainty was at its height and small businesses across the nation were shouldering most of that burden, and SBA did it even though the congressional purpose of the Paycheck Protection Program ("PPP") was to direct relief to *all* small businesses as expeditiously 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 none of the relief requested from the Court. Instead, Plaintiffs came to an agreement with the SBA that funds would be preserved for Plaintiffs to resubmit an application for PPP funds in return for their not filing a TRO.

Despite the Plaintiffs' receipt of their PPP loans, the Plaintiffs are still entitled to a declaratory judgment that the prior iterations of SBA's Criminal History Rule were unlawful. At the time he

applied for PPP funding, Plaintiff Michael Loughrey was not convicted of a crime. He was merely accused of one and could not receive a court date because of the COVID-19 emergency, which had closed the local courts. This circumstance however made him answer "yes" to the question required by the SBA asking whether he was under indictment.

Without the court ruling that Plaintiffs seek, SBA remains empowered to do what it has done to Plaintiffs before he filed suit. 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its unlawful behavior, under threat of lawsuit, does not deprive this Court of its jurisdiction to say that SBA's now-superseded Criminal History Rule(s) were unlawful—particularly considering the likelihood that SBA could repeat that conduct absent a court order. Despite the recent deployment of vaccines and development of better therapeutics, the COVID-19 pandemic is not subsiding, and Congress is currently negotiating the next round of relief for small businesses.[1] *See, e.g.*, Naomi Jagoda, *Bipartisan support for new PPP loans gains momentum in Congress*, The Hill (Dec. 8, 2020, 6:00 AM EST) *available at* https://thehill.com/policy/finance/529092-bipartisan-support-for-new-ppp-loans-gains-momentum-in-congress.

SBA has not yet conceded that its prior iterations of the Criminal History Rule were unlawful. Also, would SBA be so keen to avoid a court ruling if the agency had no intention of repeating its past unlawful behavior? Without a court order declaring SBA's past conduct unlawful, the agency is both able and likely to repeat its prior unlawful conduct in the future, to the detriment of the Plaintiffs and similarly situated small businesses. There is still, then, an ongoing controversy between the parties.

[1] The Court can take judicial notice that Congress has reached agreement on another round of PPP loans in its COVID-related relief package. *See* Kristina Peterson and Andrew Duehren, *Covid-19 Aid Package Set for Final Votes in House, Senate,* The Wall Street Journal (Dec. 21, 2020, 11:08 EST) *available at* https://www.wsj.com/articles/covid-19-aid-package-set-for-final-votes-in-house-senate-11608566895?mod=hp_lead_pos3

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[2]

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. *See* 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* Business Loan Program Temporary Changes, 85 Fed. Reg. 20,811 (Apr. 15, 2020) ("April 15 IFR"); *see also 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 7, 2020, Mr. Loughrey submitted MoveCorp's PPP loan to First Citizens ("First Citizens") Bank, Round Rock, Texas, along with a letter explaining why the company had to answer "yes" to question 5 regarding asking whether a more than 20% owner was under indictment. ECF No. 1, ¶ 79. On April 24, 2020, First Citizens denied the loan. *Id.* ¶ 86. After being informed that it was his truthful response "yes" to the question of whether he was under indictment that was the cause of this denial, Plaintiff received a formal confirmation that the denial was based on that response. *Id.* ¶ 88, Exhibit 11.

[2] Plaintiffs' verified complaint contains a fuller recitation of the factual background. (ECF No. 1).

Plaintiffs filed a verified complaint on June 25, 2020, challenging the Criminal History Rule. *See* ECF No. 1. In their Complaint, the Plaintiffs sought both prospective injunctive relief as well as a declaration that the Criminal History Rule was unlawful. On June 18, 2020, in response to another case filed by Plaintiffs' attorneys here, SBA revised the Criminal History Rule to shorten the "look back" period for felony convictions. Paycheck Protection Program—Additional Revisions to First Interim Final Rule, 85 Fed. Reg. 36,717 (June 18, 2020) ("June 18 IFR"). The June 18 IFR was short-lived, however, as SBA revised the rule again, announcing another amendment on June 24. *See* Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule, 85 Fed. Reg. 38,301 (June 26, 2020) ("June 24 IFR"). On June 29, 2020, a TRO and preliminary injunction were issued in that other case. *Defy Ventures, Inc., et al. v. U.S. Small Business Administration, et al.* 469 F. Supp. 3d 459 (D. Md. 2020).[3] SBA had changed its rules and application form late on June 24, 2020, and the attorneys for the Defendants in the *Defy Ventures, Inc.* case informed Plaintiffs' counsel here (who represented the *Carmen's Corner Store* Plaintiffs in Maryland) that they would soon be able to obtain PPP funds on the same basis as the clients in that case, and upon that statement no TRO was filed in this case.

That Court entered its opinion and order on June 29, 2020, granting in part a motion for a preliminary injunction. *Id.* As a direct result of that litigation and the filing in this case requesting the same relief for these Plaintiffs, Plaintiffs here were belatedly able to secure their PPP loans. It is undisputed Plaintiffs were unable to obtain the funds until after this suit was filed. Declaration of John A. Miller in Support of Defendants' Motion to Dismiss ECF 19-3. Consistent with their unvarying strategy to avoid judgment, the Defendants again insist that this Court lacks the

[3] Plaintiffs' Counsel represented the Carmen's Corner Store Plaintiffs in that case, which was consolidated with the Defy Ventures, Inc. case which was, prior thereto, a separately filed case. The case will be referred to as *Defy Ventures, Inc.* as that is how it appears in the reported case.

constitutional authority to declare unlawful the Defendants' prior 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.[4] That rule injured the Plaintiffs' businesses by unlawfully and 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 federal 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

[4] Plaintiffs agree that their counts for injunctive relief to obtain funds no longer present a live controversy. The change in policy by the Defendants and agreement to allow Plaintiffs to obtain funds before the Congressional deadline expired ensured that the Plaintiffs secured PPP loans, thereby satisfying their claims for injunctive relief which is prospective in nature.

U.S. 298, 307 (2012)) (emphasis in *Springer*)). 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 *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 make the case moot.."). 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). *See also Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316, 326 (D.C. Cir. 2009) (ongoing commercial enterprise that suffered delays in licenses to sell produce to Iran was entitled to maintain a case even though the license had issued (and so the challenged behavior had stopped) because the course of conduct was capable of repetition yet evading review).

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). Only when "it is absolutely clear the

allegedly wrongful behavior could not reasonably be expected to recur" may a court dismiss for mootness. *Laidlaw*, 528 U.S. at 190.

Defendants bear the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 189. 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 case of *DL v. District of Columbia*, 187 F. Supp. 3d 1 (D.D.C. 2016), is instructive. In that case, the Court was asked to dismiss as moot a class of injury because the District had voluntarily ceased the wrongful behavior towards children with disabilities. But the Court found that the case easily fell under the "capable of repetition but avoiding review" exception to mootness. Only if the Court could not provide "any effectual relief whatever" could the case be dismissed and that criterion is "expansively defined." *Id.* at 6 (citing *Ctr. For Food Safety v. Salazar*, 900 F. Supp. 2d 1, 5 (D.D.C. 2012)) (further citations omitted). Because the behavior did not change until suit was filed, the Defendant could not show there "could be '*no* reasonable expectation that the alleged violation will recur.'" (citing *Cty. of L.A. v. Davis,* 440 U.S. 625, 631 (1979)) (emphasis added). The Court then delivered the death blow to Defendants' arguments here: "Additionally, the Court finds that a declaratory judgment stating the District had violated the Rehabilitation Act for the period preceding March 22, 2010 is an effective remedy because it could be used to provide the basis for future litigation." *Id.*

So too here. Defendants' ability and willingness to change the Criminal History Rule again, and again, and again was on full display in the weeks leading up to the filing of the Complaint. Just

before the suit was filed, and when its companion case had been filed in Maryland, Defendants amended the challenged rule *twice*. *See 6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 407 (4th Cir. 2019) (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. To defend its regulations as to PPP, the Defendants rely on 13 C.F.R. § 120.110(n), which they apply to other regulations routinely. *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss 5, ECF No. 19 ("Defendants' Mem.") (citing the regulation as being correctly applied to PPP). Given that that regulation remains on the books as a sword of Damocles hovering over any future PPP legislation issued by Congress, the Defendants cannot meet their burden. 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.[5] They deserve a judgment declaring the Defendants' initial rulemaking unlawful. As the Defendants relate, Congress subsequently extended the program to August 8, 2020, and then it ceased. However, the program, or one like it, may be revived before the year is out. The regulation SBA relies on is still on the books, and Plaintiffs were still delayed three months in receiving any funds. Movecorp is an ongoing business and, just as in *Del Monte Fresh Produce* and in *DL*, this unlawful conduct would very likely occur again without the relief of Declaratory Judgment that Defendants cannot use the Criminal History Rule or 13 C.F.R. § 120.110(n) in distributing such funds.

[5] When this suit was filed there was no confirmation of any rule change and advance of funds to Plaintiffs, and it was unclear that the funds would remain available as they were scheduled to expire at the last day of June.

Like the government-defendants in *Del Monte Fresh Produce* and *DL*, 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. Instead, in the Defendants' Memorandum, SBA wholly defends and seeks to justify each of its actions. In that posture it can hardly argue mootness. *See Adarand Constructors, Inc. v. Slater,* 528 U.S. 216, 221-222 (2000) (grant of application as "disadvantaged business" did not meet government's "heavy burden" that previous behavior would not be repeated).

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.

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

This is clearly also a case for application of the "well-established" exception to mootness that exists "for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Defendants claim that the entire matter is over and not capable of repetition because the program expired and Plaintiffs received their funds. But as noted, the mootness 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. Here this takes two forms. Both the statutory relief *and the ever-changing regulations* have lasted too briefly for this Court to properly review.

So, both conditions are more than 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). And SBA's regulations on the administration of the PPP were even shorter lived. SBA changed the Criminal History Rule alone at least three times. 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. 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.

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, *see* ECF No. 19-1, at 5, Defendants still consider business owners like Mr. Loughrey 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). A declaratory judgment would aid plaintiffs in the likely event that further small business relief is forthcoming. Nothing in the way Defendants have behaved in administering the PPP should give the Court any comfort the actions would not be repeated with the likely new PPP funding in the offing. *See DL*, 187 F. Supp. 3d at 14-15 ("[I]mportantly, there is nothing inherently durable about the changes the District made to its special education policies that would suggest recurrence is unlikely."). 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. Thrice 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. As related by Defendants it did so again after this suit was filed. Defendants' Mem. at 13. It is poised to do so again the day this brief is filed.

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 an action shows that it is likely to do so again).

The chief cases relied upon by Defendants for the proposition there is no chance of repetition are *National Black Police Ass'n ("NBPA") v. District of Columbia*, 108 F.3d 346 (D.C. Cir., 1997), and *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 901 F.3d 356 (D.C. Cir. 2018). Neither is apposite. In *NBPA*, the Government did not simply stop penalizing campaign donations of a certain amount in its own discretion, which the Plaintiffs had sued to stop. The Defendants worked for four years to pass legislation to raise the limits and overturn the law the Plaintiffs complained of. *See NBPA*, 108 F.3d at 351. Here, it is not legislation but administrative fiat that is complained of, and the Defendants have already demonstrated beyond peradventure that they change rapidly and based on administrative whim. The reliance on *American Freedom Defense Initiative*

is even more baffling. *See American Freedom Defense Initiative*, 901 F.3d at 362. There, Judge Douglas Ginsburg held the case was not moot from a mere change in the regulatory position on what kind of ads could be banned on mass transit. *Id.* The cases cited by Defendants are to the effect that a change in regulatory posture is much less deserving of reliance by the court than a statutory enactment. This case challenges a regulation that SBA only abandoned under litigation pressure, and it took filing suit for Plaintiffs to receive any funds. SBA continues to say it was right in this months-long denial. There is no mootness, and the motion to dismiss should be denied and an answer filed.

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. A Declaratory action remains an efficacious form of relief for Plaintiffs, and the motion to dismiss for mootness should be denied.

Dated: December 21, 2020

Respectfully Submitted,

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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 Columbia by using the CM/ECF system on December 21, 2020.

December 21, 2020

Respectfully,

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