UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOVECORP, *et al.*, *Plaintiffs,* v. SMALL BUSINESS ADMINISTRATION, *et al.*, *Defendants*.	Civil Action No. 20-1739 (CKK)

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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By and through undersigned counsel, Defendants: (i) the United States Small Business Administration ("SBA"); (ii) Tami Perriello, in her official capacity as Acting Administrator of the SBA;[1] (iii) Andy Baukol, in his official capacity as Acting Secretary of the Treasury;[2] and (iv) the United States of America (collectively "Defendants"), respectfully submit this reply in further support of their motion to dismiss Plaintiffs MoveCorp and Michael Loughrey's Verified Complaint (ECF No. 1 ("Compl")). For the reasons discussed in Defendants' opening motion, the Court lacks subject-matter jurisdiction over Plaintiffs' claims against Defendants as the matter is moot and there is no justiciable Article III "case" or "controversy" between the parties. The Complaint should therefore be dismissed.

INTRODUCTION

Plaintiffs commenced this action on June 25, 2020, seeking "declaratory and injunctive relief invalidating enforcement of the Criminal History Rule" exclusion in the SBA's April 2020 and June 18 Interim Final Rules that deemed Plaintiffs ineligible for a loan under the Paycheck Protection Program ("PPP"). *See* Compl. ¶ 124. But SBA superseded the challenged criminal history exclusion with a subsequent Interim Final Rule, on June 24, 2020, the day *before* Plaintiffs filed their Complaint in this matter.[3] Under that June 24 Interim Final Rule, Plaintiffs became

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Perriello is automatically substituted for her predecessor.

[2] Pursuant to Federal Rule of Civil Procedure 25(d), Mr. Baukol is automatically substituted for his predecessor.

[3] Plaintiffs' Complaint makes passing reference to the June 24, 2020, Interim Final Rule, stating "[o]n the afternoon of June 24, 2020, as undersigned counsel was preparing this Verified Complaint for filing, SBA announced that it was once again amending the Criminal History Rules, although the link to SBA's website does not yet work. Counsel did obtain a copy of the new regulations from the SBA which purports to remove misdemeanors from prohibited catagories [*sic*], but nothing stops the SBA from again changing the rules tomorrow nor can it be discerned if banks, the SBA's delgatees [*sic*] will be aware of them in time. Given the urgent need to file

eligible for PPP loans and in fact received a PPP loan in the amount of $350,300 on June 26, 2020. *See* ECF No. 19-1 ("Def's Mot.") at 6-7.

Defendants therefore argue in their opening motion to dismiss that there is no further relief for this Court to award on the allegations in the Verified Complaint and that in similar cases, where statutory or regulatory changes have occurred during litigation, the D.C. Circuit, applying Supreme Court precedent, has concluded that claims for prospective relief become moot, meaning there is no justiciable Article III "case" or "controversy" between the parties. *Id*. at 19-25. Because this action likewise is moot, those D.C. Circuit and Supreme Court precedents necessitate dismissal of the Verified Complaint for lack of subject-matter jurisdiction under Rule 12(b)(1). *Id*.

In their opposition, Plaintiffs now concede that "their counts for injunctive relief to obtain funds no longer present a live controversy," ECF No. 20 ("Pls.' Opp.") at 5 n.4, but contend: (1) that the mootness of the action is limited to their injunctive relief claim without affecting their Declaratory Judgment Act claim; and (2) their Declaratory Judgment Act claim fits within an exception to the mootness doctrine. Pls.' Opp. at 5-12. Neither of those arguments is correct.

ARGUMENT

I. The Mootness of This Action Forecloses Declaratory Relief, Just as It Concededly Forecloses Injunctive Relief

In an effort to salvage this action, Plaintiffs argue that their injunctive relief claim should be partitioned from their declaratory relief claim. They say they "agree" that "their counts for *injunctive* relief no longer present a live controversy. Pls.' Opp. at 5 n.4 (emphasis added). Yet they insist that they "deserve a judgment *declaring* the Defendants' initial rulemaking unlawful,"

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this case in advance of the looming expiration of the PPP on June 30, 2020, this Verified Complaint does not reflect any pending changes to the Criminal History Rule." *See* Compl. ¶ 76 fn 1.

Pls.' Opp. at 8 (emphasis added), and say they "are . . . *entitled* to a declaratory judgment." Pls.' Opp. at 1 (emphasis added). But Plaintiffs are unable to explain how this action could be "live" for purposes of declaratory relief despite being moot for purposes of injunctive relief and ignore the fact that the Declaratory Judgment Act is not an independent source of federal jurisdiction.

Indeed, the text of the Declaratory Judgment Act, 28 U.S.C. § 2201, requires an "actual controversy," and so "a declaratory judgment cannot be given, if a matter has become moot." Mary Kay Kane, 10B *Fed. Practice & Procedure* § 2757 (4th ed. Apr. 2020 update); *see, e.g.*, *Aetna Live Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937) ("A 'controversy'" under the statute "must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic *or moot*.") (citation omitted; emphasis added); *see also Green v. Mansour*, 474 U.S. 64, 74 (1985) (where any possible violation of federal law ended when relevant federal statute was amended, that mooted both the injunctive and declaratory relief claims; a "declaratory judgment that respondent violated federal law in the past" cannot "stand on its own feet as an appropriate exercise of federal jurisdiction"); *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 350 (D.C. Cir. 1997) ("declaratory and injunctive relief would no longer be appropriate" as a result of new legislation that "eradicated the effects of the alleged violation"); *LaFaut v. Smith*, 834 F.2d 389, 390, 394-95 (4th Cir. 1987) (former federal inmate's release from incarceration mooted claim for declaration that prison officials' *past* conduct violated federal law, even though plaintiff "may have derived some satisfaction from the entry of the declaratory judgment" in his favor); *cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 50-51, 67 (1997) (when plaintiff left public employment, challenged restraint on public employee speech no

longer applied to her, so "it became plain that she lacked a still vital claim for prospective relief"—namely, injunctive *and* declaratory relief).

Plaintiffs' contention would imply that declaratory relief could exist outside Article III limitations, a notion that unsurprisingly finds no support in the binding precedents on mootness that Plaintiffs have ignored. *See N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (*per curiam*) ("Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule is . . . moot."); *Diffenderfer v. Cent. Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 414-15 (1972) (*per curiam*) ("The only relief sought in the complaint was a declaratory judgment that the now repealed [Florida statute] is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. *This relief* is, of course, inappropriate now that the statute has been repealed.") (emphasis added). Tellingly, Plaintiffs have not only failed to address any precedents supporting their approach to obtaining a declaration when the injunctive relief claim is concededly no longer "live," but they have not pointed to any *practical* reason why a declaration would provide them with a tangible benefit that a (concededly moot) injunction would not. Rather, *neither* of those forms of prospective relief will give Plaintiffs here any "real world" advantage they do not already have, now that they hold PPP funds from their banks.[4] *See Maydak v. U.S.*, 98 Fed. App'x 1, 4 (D.C. Cir. 2004) (federal courts lack subject matter jurisdiction over claims for equitable relief where a plaintiff "cannot show . . . how his purported past injury could be redressed by a declaratory

[4] If, by pointing to the Complaint's prayer for "costs, attorneys' fees, and any other relief the Court deems just and proper," Pls' Opp. at 1, Plaintiffs mean to argue that an *attorney fee* award could provide a practical benefit saving the action from mootness, that is wrong. The potential impact on a defendant's fee liability "is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

judgment."); *Conyers v. Reagan*, 765 F.2d 1124, 1127-28 (D.C. Cir. 1985) ("In determining whether a request for declaratory relief has become moot, the question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment*.") (internal quotation marks and citations omitted).

Plaintiffs' concession that their claims are moot for purposes of injunctive relief should independently suffice to dismiss this case, because Plaintiffs simply provide no justification for partitioning the injunctive relief from the declaratory relief. Moreover, the Declaratory Judgement Act is not an independent source of federal jurisdiction. *Ali v. Rumsfeld*, 649 F3d 762, 778 (D.C. Cir. 2011). "Rather, 'the availability of [declaratory] relief presupposes the existence of a judicially remediable right.'" *Id*. (quoting *C & E Servs., Inc. of Washington v. D.C. Water & Sewer Auth*., 310 F.3d 197, 201 (D.C. Cir. 2002) (citations omitted)). In the Declaratory Judgment Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Without a valid Administrative Procedure Act claim, the Court lacks subject matter jurisdiction to hear Plaintiffs' Declaratory Judgment Act claim.

II. This Case is Not Saved from Mootness by Either the "Voluntary Cessation" or the "Capable of Repetition" Doctrines

Plaintiffs next attempt to invoke two exceptions to mootness. Neither applies here.

First, Plaintiffs are incorrect when they contend that this action fits within the "voluntary cessation" doctrine. *See* Pls.' Opp. at 6-9. As the Fourth Circuit has clarified, Supreme Court precedent dictates that when the mootness arises from rescission of the challenged legal provision, the "voluntary cessation" doctrine applies only when "a defendant openly announces its intention to reenact 'precisely the same provision'" challenged as invalid. *See Valero Terrestrial Corp. v.*

Paige, 211 F.3d 112, 116 (4th Cir. 2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982)). In *Valero Terrestrial*, the mootness stemmed from the West Virginia legislature's repeal of challenged statutory provisions. *Id.* at 115-16. Under *Mesquite*, the absence of any "open[] announce[ment]" by SBA of an "intention to reenact" the challenged iterations of its criminal history rule is sufficient to defeat Plaintiffs' effort to invoke the "voluntary cessation" doctrine.

Application of more general formulations of the "voluntary cessation" doctrine, including those cited by Plaintiffs, only reinforces that point. Under that doctrine, a litigant may not evade judicial review, or defeat a judgment, by "temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Thus, a governmental entity cannot moot a case merely through an *announcement* that it will no longer engage in a challenged practice or enforce a challenged policy. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (governor's "announcement" of his direction to state agency "to begin allowing religious organizations to compete for and receive . . . grants on the same terms as secular organizations" insufficient to moot case). But the doctrine does not apply where "'(1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" *Am. Freedom Defense Initiative v. Washington Metro. Area Trans. Auth*, 901 F.3d 356, 362 (D.C. Cir. 2018) (quoting *Nat'l Black Police Ass'n*, 108 F.3d at 349).

Here, there is no reasonable expectation that the alleged violation will recur. SBA has not announced any intention to reenact the previous Interim Final Rule that was challenged as unlawful in the Verified Complaint. In fact, SBA has done the opposite. After Congress recently passed the Consolidated Appropriations Act of 2021 ("CAA") that authorized the SBA to guarantee

"second draw" PPP loans to certain "eligible entities" that received initial loans, *see* CAA, Div. N, § 311(a) (codified at 15 U.S.C. § 636(a)(37), SBA published a new Interim Final Rule in the federal register on January 14, 2021, that refers back to the June 24 Interim Final Rule for eligibility surrounding criminal history issues. *See* 86 FR 3712, 3719, n.35. The prospect that SBA would at any time in the future revive the April on June 18 Interim Final Rules that are challenged in the Verified Complaint ranks, at best, as exceedingly remote, and any such conjecture is insufficient to forestall dismissal because of mootness—as further explained below. *See Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100, 105-06 (D.C. Cir. 2016) ("Although the voluntary repeal of a regulation does not moot a case if there is reason to believe the agency will reinstitute it, 'the mere power to reenact a challenged [rule] is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists' absent 'evidence indicating that the challenged [rule] likely will be reenacted.' No such evidence exists here.") (quoting *Nat'l Black Police Ass'n*, 108 F.3d at 349).

Likewise, interim events have completely eradicated the effects of the alleged violation. There is no reasonable expectation that Plaintiffs will again face the wrong alleged in their Complaint. To begin with, Plaintiffs' bank has extended a PPP loan to Plaintiffs under SBA's June 24, 2020, Interim Final Rule. *See* Supp. Miller Decl. at 1. And, critically for "voluntary cessation" analysis, SBA did not simply make an "announcement" of a change, such as the one held insufficient for mootness in *Trinity Lutheran*. Rather, SBA *effectuated* a change by rescinding and replacing the challenged criminal history rule with the new rule set forth in the June 24 Interim Final Rule, under which Plaintiffs became eligible for PPP loans, and maintained the new rule in its January 14, 2021, Interim Final Rule. When a government has changed the challenged legal provision (a statute or a rule), the presumption is that the responsible officials have acted in good

faith, and that the change is intended to be permanent. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (internal quotation marks omitted); *Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975).

Because there is no factual basis for doubting (let alone for rebutting the presumption) that SBA intends to revert to the prior, challenged rule, any comparison (Pls.' Opp. at 7) between this case and *Porter v. Clarke*, 852 F.3d 358 (4th Cir. 2017) is inapt. There, the Fourth Circuit rejected the state corrections department's contention that its "policy changes" mooted an Eighth Amendment cruel and unusual punishment claim, where the department "could not foreswear a return to the challenged policies." *Id.* at 362, 365. By contrast, here the SBA has not merely altered policies. Rather, SBA has rescinded the challenged rule, replaced it with a new rule, Plaintiff *received funds* under the new rule, and SBA has reaffirmed the new rule in its the most recent January 14, 2021, Interim Final Rule for the second-draw PPP program. Plaintiffs' effort to shoehorn this case within the "voluntary cessation" doctrine thus fails, even under their preferred formulation of the doctrine, because Plaintiffs can have "no reasonable expectation that the wrong will be repeated." *See Incumaa v. Ozmint*, 507 F.3d 281, 288 (4th Cir. 2007) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

Second, Plaintiffs are wrong to attempt to invoke the mootness exception for claims challenging practices "that no longer directly affect" the challenger, "but are 'capable of repetition' while 'evading review.'" *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). That doctrine requires that "(1) the challenged action [i]s in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party would be

subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*) (citation omitted). Plaintiffs meet neither requirement.

The duration of the challenged agency action is not "too short" for review. *See id.* The agency action challenged is SBA's prior rule deeming Plaintiffs ineligible for PPP loans. In the unlikely event that, as Plaintiffs hypothesize, SBA were to rescind the June 24, 2020, Interim Final Rule, as reaffirmed by the January 14, 2021, Interim Final Rule, and reinstall the old, challenged rule, Plaintiffs would be able to challenge that rule in federal court. If this Court were to deny immediate relief on a request for an injunction, Plaintiffs could appeal. And if this Court were to rule against Plaintiffs on the merits, Plaintiffs might seek further review and at the same time attempt to obtain from either this Court or the D.C. Circuit a stay or injunction pending appeal.

Nor is there any evidence to support an expectation, let alone a reasonable one, that Plaintiffs "would be subjected to the same action again" as provided by now-superseded iterations of the criminal history restriction in the April Interim Final Rule and June 18 Interim Final Rule. *See Murphy*, 455 U.S. at 482; *see also Pressley Ridge Schs. v. Shimer*, 134 F.3d 1218, 1221 (4th Cir. 1998) (where state agency "amended its regulations" in pertinent part prior to trial, that "change obviously diminishes the potential for repetition of the dispute that brought about this litigation").

As described above, for the past dispute between Plaintiffs and the SBA to recur, SBA would have to rescind the June 24, 2020, Interim Final Rule and replace it with the *same* rule Plaintiffs challenge here, despite the fact that SBA stood by its June 24, 2020, Interim Final Rule just this month in its January 14, 2021, Interim Final Rule. Other than mere conjecture and speculation, Plaintiffs present no ground for concluding that those agency actions will actually come to pass. Plaintiffs instead urge the Court to speculate about the possibility of future events

based on nothing but conjecture. Plaintiffs thus have not shouldered their burden of proving that the capable-of-repetition "exception applies" by showing "a 'demonstrated probability' that the challenged action will recur again, and to the same complainant." *See Incumaa*, 507 F.3d at 289.

CONCLUSION

For the reasons stated above and discussed in Defendants' opening motion, under Rule 12(b)(1), the Court should dismiss the Verified Complaint for lack of subject-matter jurisdiction.

Dated: January 25, 2021
Washington, DC

Respectfully submitted,

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