UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CARMEN'S CORNER STORE, *et al.*, *Plaintiffs*, v. UNITED STATES SMALL BUSINESS ADMINISTRATION, *et al.*, *Defendants*.	Civil Action No. CCB-20-1736

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Events subsequent to the filing of this action have mooted both the question the Complaint presented about the validity of the then-existing version of the criminal history restriction on PPP loans, and this action as a whole.[1] There is no dispute that Plaintiffs have received loans under the restriction as modified, and the PPP has closed, following an unexpected statutory reauthorization signed into law by the President on July 4, extending the program until August 8, 2020. Under binding precedent, including decisions from the Supreme Court and the Fourth Circuit earlier this year, the events subsequent to the Complaint have fully addressed Plaintiffs' alleged injuries from the now-superseded rule. There thus is no Article III "case" or "controversy" between Plaintiffs and SBA. Dismissal under Rule 12(b)(1) is the only disposition consistent with precedent.

Plaintiffs do not cite the controlling precedents, let alone attempt to distinguish them. Plaintiffs thus effectively concede that those precedents dispose of this action. Indeed, Plaintiffs explicitly "agree that their counts for injunctive relief *no longer present a live controversy*." Opp. 3 n.2 (emphasis added). But they insist they "are still *entitled* to a declaratory judgment" regarding the now-superseded criminal history rule. Opp. 1 (emphasis added). That is incorrect. The mootness of this action is just as fatal to the Declaratory Judgment Act claim as it concededly is to the injunctive relief claim. Tellingly, Plaintiffs can identify no practical benefit they would receive from the requested declaration, because they have already received PPP loans. Plaintiffs have thus conceded that this action no longer matters in the real world.

Neither of the two exceptions to the mootness doctrine invoked by Plaintiffs applies here. The "voluntary cessation" doctrine, under which an agency cannot moot a case merely through an

[1] Terms defined in the Memorandum supporting SBA's Rule 12(b)(1) motion (filed Aug. 26, 2020) (Doc. 24-1) ("Mem.") have the same meaning herein. Citations to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss & in Support of Plaintiffs' Motion for Summary Judgment (filed Sept. 9, 2020) (Doc. 25-1) are of the form "Opp. __."

announcement that it will no longer engage in a challenged practice, is inapplicable, because SBA did not merely announce a policy change, but instead backed up its words with legal change. SBA superseded the challenged rule with a new rule, under which Plaintiffs obtained PPP loans. There is no reasonable likelihood that SBA would simply return to prior policy in a manner injurious to Plaintiffs, who have already received PPP loans.

Plaintiffs' reliance on the "capable of repetition, yet evading review" doctrine is misplaced for similar reasons. This Court's June 29 Order granting in part Plaintiffs' preliminary injunction application confirms that this Court could quickly rule, if ever necessary, on a hypothetical future dispute about another SBA-guaranteed loan. More importantly, recurrence of a live dispute between SBA and the instant Plaintiffs would require a chain of hypothetical events to unfold: Congress would not only need to re-authorize the PPP, but it also would need to allow current PPP borrowers to obtain a second PPP loan (that is, Congress would have to amend the current statutory provision limiting each borrower to *only* one PPP loan, 15 U.S.C. § 636(a)(36)(G)(i)(IV)). *Additionally*, SBA would need to reverse course and re-issue the challenged rule. But Plaintiffs offer nothing (apart from uninformative news media reports, and a social media posting by a single legislator), to support the conjecture that all of those events would ever come to pass. Plaintiffs' sheer speculation cannot suffice to save this action from mootness.

Should this Court reach the merits of this hypothetical dispute, it should deny summary judgment to Plaintiffs, and reject their contentions that prior iterations of the criminal history restriction (namely, those in the April IFR and the June 18 IFR, before SBA issued the June 24 IFR under which Plaintiffs have received loans) were unauthorized by the CARES Act or were arbitrary and capricious. *First*, as to statutory authority: As this Court concluded at the preliminary injunction stage, the CARES Act does not foreclose SBA from crafting a criminal history restriction for the PPP, consistent with the longstanding statutory requirement that agency-guaranteed loans be of "sound

value," as well as the agency's pre-existing regulations setting standards of creditworthiness and limiting loans to individuals with certain criminal convictions or their related entities. At a minimum, the agency's interpretation is a permissible one, and is therefore entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *Second*, as to the sufficiency of the agency's explanation for the criminal history restriction: Although this Court at the preliminary injunction stage reasoned (after a highly expedited briefing process) that it could not "rely on" SBA's declaration, which explained the basis for the criminal history restriction, that reasoning should be revisited at summary judgment. The agency's use of the declaration to explain the basis for the rules was consistent with settled practice in administrative law cases. The declaration did not supply a "post hoc rationalization" by counsel, but rather an explanation of the contemporaneous views of the agency.

Fundamentally, however, the Court should reject Plaintiffs' bid to obtain an advisory opinion about the meaning of superseded rules. The criminal history restriction, as formulated in the April IFR and the June 18 IFR, is no longer in force, and those IFRs are inapplicable to Plaintiffs (who cannot dispute that they have obtained PPP loans under the June 24 IFR). The proper course is instead to dismiss this action, which has now been overtaken by events, under Rule 12(b)(1).

ARGUMENT

I. THE CASE IS MOOT BECAUSE SBA RESCINDED THE CHALLENGED REGULATION AND PLAINTIFFS RECEIVED THE ONLY PPP LOANS THEY CAN RECEIVE BY STATUTE

Events since Plaintiffs filed their Complaint for injunctive and declaratory relief have mooted this action in its entirety by eliminating the Plaintiffs' "personal stake in the outcome of the lawsuit." *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). In particular, SBA rescinded the challenged criminal history restriction (first set forth in the April IFR and then revised in the June 18 IFR), and replaced it with a new rule, the June 24 IFR. Each Plaintiff then received one PPP loan, and each is

allowed only one PPP loan by statute. *See* 15 U.S.C. § 636(a)(36)(G)(i)(IV) (requiring certification that "during" specified period borrower "has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan"). And, after a subsequent enactment extended the authority to guarantee PPP loans until August 8, the program closed to new applications on that date.

As explained (Mem. 14-20), the Supreme Court and the Fourth Circuit have repeatedly held that a challenge to a statute or regulation seeking prospective relief is mooted by rescission of the statute or regulation. Consistent with these decisions, this action is moot because Plaintiffs have received the loans they seek and there is no justiciable case. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (*per curiam*); *Diffenderfer v. Cent. Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 414-15 (1972) (*per curiam*); *In re Cigar Ass'n of Am.*, 812 F. App'x 128, 136 (4th Cir. 2020); *Catawba Riverkeeper Found'n v. N.C. Dep't of Transp.*, 843 F.3d 583, 586-89 (4th Cir. 2016); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000); *Phillips v. McLaughlin*, 854 F.2d 673, 677-78 (4th Cir. 1988).

Plaintiffs do not even attempt to distinguish those binding precedents. Indeed, Plaintiffs fail to identify *any* practical benefit they would receive from a decision by this Court regarding the superseded criminal history restriction, now that Plaintiffs have received PPP loans. Instead, Plaintiffs 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. Neither of those arguments is correct.

A. 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." Opp. 3 n.2. Yet they insist that they "deserve a judgment *declaring* the Defendants' initial rulemaking unlawful" (Opp. 8 (emphasis added)), and say they "are . . . *entitled* to a declaratory judgment" (Opp. 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.

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 Life 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"); *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 Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 ("Petitioners' claim for declaratory

and injunctive relief with respect to the City's old rule is . . . moot."); *Diffenderfer*, 404 U.S. at 414-15 ("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); *see also Catawba Riverkeeper*, 843 F.3d at 587, 589 (citing precedents on declaratory relief *and* injunction in holding entire "case is moot"); *Phillips*, 854 F.2d at 677 (rejecting contention that "declaratory relief as to the validity of DOL's interpretation of its previous regulation will affect any future litigation between the parties concerning the new regulation," because "[a] request for prospective relief alone, founded on a challenge to a regulation which no longer applies to plaintiffs, does not present an actual case or controversy").

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. Even if some hypothetical third-party may desire a level of certainty that is not already provided by the rule currently in place, "the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether" the plaintiff before the Court "has a stake in that relief." *Lewis*, 494 U.S. at 479. Mootness hinges on the harms purportedly suffered by the parties to *this* suit (namely, the Plaintiffs, who now hold PPP loans), *not* the interests of hypothetical third parties or the public at large.[2]

[2] If by pointing to the Complaint's prayer for "costs, attorneys' fees, and any other relief the Court deems just and proper" (Opp. 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

Plaintiffs' concession that their claims are moot for purposes of injunctive relief should be sufficient alone to dismiss this case, because they simply provide no explanation for partitioning the injunctive relief from the declaratory relief.[3]

B. This Case Is Not Saved From Mootness By Either The "Voluntary Cessation" Or "Capable Of Repetition" Doctrines.

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

First, Plaintiffs err in contending that this action fits within the "voluntary cessation" doctrine. 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*, 211 F.3d at 116 (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. More recently, in *Cigar Association*, the mootness stemmed from the Food and Drug Administration's replacement of challenged agency guidance. 812 F. App'x at 135-36. Under *Valero Terrestrial*, the absence of any "open[] announce[ment]" by SBA of an "intention to reenact" the challenged iterations

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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*, 494 U.S. at 480.

[3] Plaintiffs' characterization of a declaration as an "entitle[ment]" (Opp. 1) is incorrect in another respect. The statute provides that this Court, in "a case of actual controversy within its jurisdiction . . . *may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). Federal "courts should exercise their discretionary jurisdiction with caution," the Fourth Circuit has explained, "when doing so would raise serious questions about Article III jurisdiction, as this case does." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 202 (4th Cir. 2019) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The Court of Appeals went on to conclude that the issuance of a declaratory judgment in *Trustgard* was an abuse of discretion, because "without addressing the decision to exercise its discretionary jurisdiction, the court reached the merits despite a thin and ambiguous record," and, thereby "created . . . a substantial question about whether Article III jurisdiction existed." 942 F.3d at 204.

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 'there is no reasonable expectation that the wrong will be repeated.'" *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)).

As explained, there is no possibility, let alone reasonable expectation, that Plaintiffs will again face the wrong alleged in their Complaint. To begin with, Plaintiffs' banks have extended PPP loans to Plaintiffs under SBA's June 24 IFR. Even if that new rule somehow turned out to be only a "temporar[y] alter[ation]" of "questionable behavior," and SBA decided to revise the rule again, any further change would be of no consequence to Plaintiffs, because their banks have *already* given them PPP loans. *Cf. City News & Novelty*, 531 U.S. at 284 n.1. Each Plaintiff can only receive one PPP loan. *See* 15 U.S.C. § 636(a)(36)(G)(i)(IV) (requiring certification that "during" specified period borrower "has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan"). And the PPP closed to new applications on August 8, 2020.

Indeed—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 IFR, under which Plaintiffs became eligible for PPP loans. 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 (Opp. 6-7) 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. But here the SBA has not merely altered policies. Rather, SBA has rescinded the challenged rule and replaced it with a new rule, Plaintiffs have obtained PPP loans under that new rule, and the program has closed. 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*, 507 F.3d at 288.

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. *If* (as Plaintiffs hypothesize) SBA were to rescind the June 24 IFR, and reinstall the old, challenged rule, and *if* Congress were to pass and the President were to sign into law a statute that reauthorizes the PPP and that also deletes the current single-PPP-loan limitation in 15 U.S.C. § 636(a)(36)(G)(i)(IV), Plaintiffs would be able to challenge that rule in federal court, under *Kennedy v. Block*, 784 F.2d 1220 (4th Cir. 1986) (a decision cited by Plaintiffs (Opp. 4) that does not favor them). If this Court were to deny immediate relief on a request for an injunction, Plaintiffs could appeal to the Fourth Circuit. 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 Fourth Circuit "a stay or injunction pending appeal." *See Kennedy*, 784 F.2d at 1223-24 (mootness exception did *not* apply because future claim by tenant of federally subsidized housing complex against subsidizing agency would not "evade review should they again arise" where, among other things, tenant could seek relief through federal court suit). Plaintiffs offer no reason for assuming that this Court could not rule as quickly on a future dispute between Plaintiffs and the SBA as the Court did on Plaintiffs' application for a preliminary injunction in this action, which resulted in the June 29 Order.

Nor is there any evidence to support an expectation, let alone a reasonable one, that Plaintiffs "would be subjected to the same action again" to the now-superseded iterations of the criminal history restriction in the April IFR and June 18 IFR. *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 IFR and replace it with the *same* rule Plaintiffs challenge here. Moreover, Congress and the President would have to enact a new law that not only *reauthorizes* the PPP but also *amends* the CARES Act so that current PPP borrowers can obtain additional PPP loans (contrary to 15 U.S.C. § 636(a)(36)(G)(i)(IV)). Other than mere conjecture and speculation, Plaintiffs present no ground for concluding that those significant legislative and agency actions will actually come to pass. Plaintiffs instead urge the Court to speculate about the possibility of future events based on uninformative news media accounts or, at most, the vague statements of an individual legislator on a social media platform. *See* Opp. 8 & n.3 (citing a report on the *Politico* website, two articles on *Forbes.com*, and one Senator's Tweet). But at most these isolated statements suggest *possible* legislative action as to the PPP, without saying anything about the likelihood (let alone the reasonable likelihood) that SBA would somehow rescind the June 24 IFR and reinstall the old criminal history rule.

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.

II. IN ANY EVENT, PLAINTIFFS' MERITS CONTENTIONS ARE INCORRECT BECAUSE SBA'S CRIMINAL HISTORY RULE IS CONSISTENT WITH THE STATUTORY TEXT AND WAS NOT ARBITRARY OR CAPRICIOUS

Although the Court should not reach the merits of Plaintiffs' summary judgment motion in light of the jurisdictional limitations described above, Plaintiffs' arguments about the now-superseded iterations of the criminal history restriction lack merit under the Administrative Procedure Act ("APA"). *See* Opp. 11 (seeking declaration that "prior iterations of the Criminal History Rule violated" APA).

Plaintiffs renew their arguments about the superseded versions of the criminal history restriction. First, Plaintiffs renew their contention (Opp. 13-18) that the iterations of the restriction in the April IFR and the June 18 IFR exceeded SBA's statutory authority. Second, Plaintiffs again contend (Opp. 18-26) that those iterations (predating the June 24 IFR under which Plaintiffs have obtained loans) were "arbitrary" or "capricious" because they lacked a sufficient explanation. As shown in SBA's opposition brief at the preliminary injunction stage—a brief the SBA hereby incorporates by reference—Plaintiffs are wrong. On the first point, they largely ignore this Court's pertinent reasoning in its June 29 Order. On the second point, although Plaintiffs' arguments roughly track and add rhetorical emphasis to this Court's reasoning in the June 29 Order, Defendants respectfully suggest that this Court re-assess its reasoning, because reliance on the agency's declaration is consistent with settled principles of administrative law.

A. The Challenged Requirements Are Consistent With The CARES Act And The Small Business Act

First, the criminal history restriction is consistent with the CARES Act, as SBA explained at in its preliminary injunction Opposition (Defs.' Prelim. Inj. Opp. 21-28, Doc. 10). The plain text of the CARES Act supports the agency's application of its longstanding regulations to the new PPP; and even if the plain statutory text does not compel the agency's interpretation, that interpretation is at least reasonable. When this Court at the Preliminary Injunction stage rejected Plaintiffs' statutory authorization argument, it said it was addressing the validity of the June 24 IFR only. June 29 Order, at 16 & 19 n.16, Doc. 18. But the same analysis governs SBA's prior iterations of the criminal history rule (that is, the rule as issued first in the April IFR and then in the June 18 IFR).

The PPP is a temporary program Congress established under the framework of the SBA's existing general-business loan program, and stated that PPP loans are to be provided "under the same terms, conditions, and processes" as SBA general-business loans unless otherwise specified. CARES

Act, § 1102(a), Pub. L. No. 116-136, 134 Stat. 281, 287 (codified at 15 U.S.C. § 636(a)(36)(B)). One of the longstanding requirements of Section 7(a) is that "[a]ll loans made under this subsection shall be of such sound value . . . as reasonably to assure repayment." *Id.* § 636(a)(6). To give effect to this mandate, SBA requires that applicants meet standards of creditworthiness set forth at 13 C.F.R. § 120.150. SBA also has long implemented a "criminal justice" ineligibility rule codified at 13 C.F.R. § 120.110(n), which, as relevant here, bars loans to "[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." *Id.* § 120.110(n).

The CARES Act enumerated several restrictions that, although they ordinarily apply to SBA loans, shall not apply to PPP loans. For example, "non-profits" are excluded from Section 7(a) loans under the same regulation containing the [restriction at issue here], *see* 13 C.F.R. § 120.110(a); but Congress expressly allowed certain non-profits to receive PPP loans, *see* 15 U.S.C. § 636(a)(36)(D)(i). In addition, the SBA may not offer "financial assistance" under the Section 7(a) program "if the applicant can obtain credit elsewhere," 15 U.S.C. § 636(a)(1)(A)(i); but Congress expressly lifted that restriction for the PPP, *see id.* § 636(a)(36)(I). (The program does, however, require that borrowers certify in good faith that their PPP loan request is necessary to support ongoing operations. 15 U.S.C. § 636(a)(36)(G)(i)(I).) Congress also expressly lifted the application of affiliation rules that ordinarily apply to determine eligibility for Section 7(a) loans, *see id.* § 636(a)(36)(D)(iv); and the collateral and personal guarantee requirements upon which Section 7(a) loan assistance is typically conditioned, *id.* § 636(a)(36)(J).

But Congress did not alter the statutory sound-value requirement in § 636(a)(6), and Congress also did not bar reliance on the criminal justice restriction codified at 13 C.F.R. § 120.110(n). Congress likewise did not prohibit application of the SBA's standards of creditworthiness at 13 C.F.R. § 120.150. So the SBA correctly continued to apply them to the PPP, along with other preexisting and

longstanding restrictions that Congress did not alter. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory provisions, particularly in the same Act).

Plaintiffs' contention that SBA has exceeded its statutory authority hinges on a single CARES Act provision under which, "in addition to small business concerns, any business concern . . . shall be eligible to receive a covered loan" if the business has fewer than 500 employees, or qualifies under industry-specific rules. *See* 15 U.S.C. § 636(a)(36)(D)(i). According to Plaintiffs, that provision means that every business meeting size restrictions is eligible for a PPP loan. But Plaintiffs read that provision out of context.

Ordinarily, the SBA, acting under the Small Business Act, may provide Section 7(a) loans only to "small business concerns." *See* 15 U.S.C. § 636(a) ("The [SBA] is empowered . . . to make loans to any small business concern."). The term "small business concerns" is defined in reference to specific size restrictions. *See* 15 U.S.C. § 632(a)(1)-(2) (defining "small business concerns"); 13 C.F.R. § 121.101(a) ("SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for 'small business' concerns."); 13 C.F.R. Part 122 (establishing size standards). In the CARES Act, Congress sought to ease the size restrictions that ordinarily constrain the SBA from lending to larger businesses, allowing more businesses to qualify for PPP loans. Section 636(a)(36)(D)(i) thus explicitly lifts certain size restrictions that ordinarily constrain the SBA from lending to larger businesses. But the statutory relaxation of size restrictions for PPP loans does not mean that Congress intended for size to be the *only* restriction on eligibility for those loans. To the contrary, § 636(a)(36)(D)(i) is just one of several provisions in the CARES Act that adjust requirements that ordinarily apply to determine eligibility for Section 7(a) loans. *See, e.g.*, *id.* § 636(a)(36)(D)(ii) (permitting sole proprietors and independent contractors to receive PPP loans); *id.* § 636(a)(36)(I) (waiving no "credit elsewhere" requirement); *id.* § 636(a)(36)(J) (waiving

collateral and personal guarantee requirement). If Plaintiffs' reading of § 636(a)(36)(D)(i) were correct, those other provisions would be redundant because Congress would have already made clear that SBA may not impose any eligibility requirements other than § 636(a)(36)(D)(i)'s size requirements. And again, the CARES Act provides that, except for enumerated adjustments, PPP loans are to be guaranteed "under the same terms, conditions, and processes as" ordinary Section 7(a) loans. *See* 15 U.S.C. § 636(a)(36)(B).

That § 636(a)(36)(D)(i) uses the phrase "*any* business concern" does not compel a decision for Plaintiffs. Although the word "any" in a statute "has an expansive meaning," it does not have a "transformative" one. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012); *accord Small v. United States*, 544 U.S. 385, 388 (2005) ("even though the word 'any' demands a broad interpretation, we must look beyond that word itself" to its context). Taken in context, the phrase "any business concern" cannot be understood to mean that the SBA must lend to all businesses so long as they meet the size requirement, thereby transforming size into the *only* relevant consideration for PPP eligibility.

Congress and the SBA have placed several restrictions on eligibility for Section 7(a) loans, in addition to the particular restriction at issue here. For example, Congress has expressly prohibited SBA loans to businesses that are "engaged in the production or distribution of any product or service that has been determined to be obscene by a court of competent jurisdiction." 15 U.S.C. § 633(e). The SBA has by regulation prohibited its loans to businesses primarily engaged in political and lobbying activities, *see* 13 C.F.R. § 120.200(r), consistent with "Government-wide Federal policy that Federal funds not be used for lobbying or political activities because to do so would not be an appropriate or cost-effective use of Federal tax dollars," 51 Fed. Reg. 37,580, 37,589 (Oct. 23, 1986). The SBA has similarly determined that its funds should not go to private clubs that restrict membership, 13 C.F.R. § 120.110(i); or "[p]yramid sale distribution plans," 13 C.F.R. § 120.110(f).

Under Plaintiffs' argument, those restrictions, and others like them, cannot be applied to PPP loans because Congress intended for size to be the only relevant restriction. Opp. 15. But there is no basis for concluding that Congress intended to make such a dramatic departure from the agency's longstanding regulations. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes."); *Jones v. United States*, 526 U.S. 227, 234 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so.").

Contrary to Plaintiffs' contention (Opp. 14-15), adopting their position is not required by *DV Diamond Club of Flint*, an order from a divided Sixth Circuit panel declining to stay a preliminary injunction that prohibited the SBA from applying its "prurient sexual nature" regulation to deny PPP loans to certain strip clubs. *DV Diamond Club of Flint v. SBA*, 960 F.3d 743, 745 (6th Cir. 2020). The Sixth Circuit issued that order on a compressed scheduled, and Defendants respectfully proffer that the majority's truncated statutory analysis is flawed for the reasons discussed above, as underscored by the dissenting opinion. *See id.* at 747-48 (Siler, J., dissenting). At the preliminary injunction stage, this Court correctly declined to be persuaded by *Diamond Club* in light of the CARES Act as a whole and its surrounding legislative and regulatory context. June 29 Order at 13-14.

Unable to reconcile its contentions with the entirety of the statutory text or the context, Plaintiffs instead assert that the SBA did not make a "reasonable policy choice" in seeking to adhere to the "sound value" requirement of Section 7(a), the SBA's Section 7(a) preexisting criminal justice restriction, or its creditworthiness standards, all of which underpin the criminal justice restriction. Opp. 18. But in establishing the PPP, and making a substantial but nonetheless limited amount of taxpayer dollars available to subsidize small businesses in an expedited fashion during the pandemic, it is reasonable that Congress (and the SBA) would choose to leave many of the existing restrictions on ineligible businesses intact. That reliance on pre-existing terms and requirements permitted the

agency to prioritize the best use of taxpayer funds in light of preexisting government policies and the public interest. As discussed, the statutory text directly supports that interpretation. Congress has also revisited the PPP in subsequent legislation in the Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620, 620 (2020), but has not made any changes to PPP eligibility requirements, despite undoubtedly being aware of SBA's interpretation given the intense scrutiny that the Program has received.

The SBA thus correctly implemented the CARES Act in accordance with its plain text through each iteration of the criminal justice restriction (including the prior iterations Plaintiffs challenge). At a minimum, the SBA's interpretation is at least permissible, and is therefore entitled to deference under *Chevron*, as this Court concluded in rejecting Plaintiffs' statutory authorization argument at the preliminary injunction stage. *See, e.g.*, *Barahona v. Holder*, 691 F.3d 349, 354 (4th Cir. 2012).

B. The Criminal Justice Restriction Was Reasonably Explained, And Was Not Arbitrary Or Capricious

Second, prior iterations of the criminal history restriction were not "arbitrary" or "capricious," but instead resulted from reasoned decision-making, as properly explained in the Miller Declaration (Doc. 10, at 28-35) (which SBA incorporates by reference herein). In concluding at the Preliminary Injunction stage that Plaintiffs had a likelihood of success on the merits of their "arbitrary, [and] capricious" claim under 5 U.S.C. § 706(2)(A), this Court reasoned that the April IFR and the June 18 IFR "contain no explanation for the criminal history exclusion," and the Court remarked that it could not "rely on" the Miller Declaration's explanation on that point because the explanation was not "contemporaneous" with the rules. June 29 Order at 18-19.

Contrary to Plaintiffs' contention, judicial reliance on the Miller Declaration, rather than on only the agency issuances in the Federal Register, would be proper. Congress vested SBA with "emergency rulemaking authority" to "issue regulations to carry out" the CARES Act. *See* CARES

Act § 1114, 134 Stat. at 312; *see also* 15 U.S.C. §§ 633(d), 634(b)(6)-(7). And Congress directed SBA to use that authority to craft emergency rules *within 15 days* to enable lenders to make $349 billion's worth of loans to millions of small businesses in the span of three months. *See* CARES Act § 1102(b)(1), 134 Stat. at 293; *see also* Paycheck Protection Program and Health Care Enhancement Act, 134 Stat. at 620 (increasing authorization to $659 billion). In light of the severe economic distress the CARES Act sought to address, and the statutory directive that SBA issue rules promptly, it is unsurprising that SBA did not extensively describe the basis for its decision as part of that rulemaking.

The APA does not require the Court to ignore that emergency context, and the APA does not require the Court to set aside the agency's explanation even though the agency filed that explanation with the Court after it issued the April IFR and the June 18 IFR. To understand why the Miller Declaration was appropriate, it is helpful to recall that the ordinary remedy for an insufficiently explained final agency action is for the Court to remand the matter for the agency to provide a better explanation. *See, e.g.*, *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002); *see also Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021, 1023 (D.C. Cir. 1999). Although such an explanation is "*post hoc*" when "measured against an agency decision issued" before the remand order, the reviewing court nevertheless has "authority to consider a supplemental explanation that the [agency] provided in response to" the remand. *See Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6-7 (D.C. Cir. 2006) (adhering to *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)). By contrast, the rule disfavoring "*post hoc* rationalization" is "a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers. Thus the rule applies to rationalizations offered for the first time in litigation affidavits and arguments of counsel." *Id.* at 6 (quoting *Local 814*, 546 F.2d at 992).

Although SBA of course submitted the Miller Declaration for the first time in this litigation, the Miller Declaration did not hinge on a rationale newly constructed by counsel for this litigation.

Instead, the Miller Declaration was from a "proper decisionmaker[,]" "represent[ing] the considered views of the agency itself" at the time that the agency issued the rule. *See id.* at 6-7; *see also Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 218-19 (D.D.C. 2012) (applying *Alpharma* and considering post-remand declaration of agency official). This Court should accordingly consider the Miller Declaration and uphold the sufficiency of SBA's explanation for the challenged iterations of the criminal history restriction, and on that ground deny summary judgment to Plaintiffs.

* * * * *

For the reasons stated in SBA's opening memorandum and those given above, the Court should dismiss the Verified Complaint for lack of subject-matter jurisdiction under Rule 12(b)(1). If the Court nevertheless elects to reach the merits, it should deny summary judgment to Plaintiffs.

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Respectfully submitted,

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