

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

DEFY VENTURES, INC., *et al.*,

Plaintiffs,

v.

**U.S. SMALL BUSINESS
ADMINISTRATION, *et al.*,**

Defendants.

CASE NO.: 20-cv-1838

**REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION
FOR PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

On June 24, 2020—that is, yesterday—less than a week before the expiration of the deadline for small businesses to apply for Paycheck Protection Program (“PPP”) funds, the Small Business Administration (“SBA”) issued a new rule that significantly narrowed the scope of its criminal-record exclusions. Apparently issued in response to this litigation, the new rule is a significant step in the right direction and could provide critical relief to many vulnerable businesses during this difficult time. It eliminates unlawful barriers to eligibility that the SBA imposed without justification, excluding countless small businesses and their workers—the SBA admits it cannot count how many—from Congress’s promised lifeline during the COVID-19 pandemic.

Without this Court’s intervention, however, Defendants’ eleventh-hour rule change will be too little, too late for small-business owners and their workers. The SBA’s now-repealed rule unlawfully denied eligibility to those businesses for all but five business days of the months-long application period Congress contemplated. And Defendants offer no basis for the Court to conclude that five business days is enough for this relief to be anything but an empty gesture. Defendants cannot identify (or even count) the many businesses that were improperly denied relief, and they provide no explanation of the steps they are taking to ensure that newly eligible businesses are aware of or can benefit from this correction in the limited time remaining.

In reality, even with the government’s last-minute effort, the new rule is not yet being meaningfully implemented: The Individual Plaintiffs and their businesses

have been unable to benefit from the rule change, and one of Plaintiff Defy Ventures' advisees encountered numerous lenders whose application forms fail to reflect the new rule. Defendants have helpfully offered to reach out to the Individual Plaintiffs' banks to ensure they obtain the SBA's direct endorsement so they might receive PPP funds in the quickly closing window. But the fact that the SBA recognizes its handholding may be necessary to obtain relief is a telling sign that the rule change itself is insufficient. What is really needed is time. This Court's intervention is urgently required to stay the application deadline so that all wrongfully excluded businesses can access the PPP.

Defendants' opposition primarily points to threshold defenses like standing. But Plaintiffs here—including Defy Ventures—continue to suffer ongoing harm as a result of the SBA's criminal-record exclusions, and in particular the last-minute shift. Plaintiffs' concrete injury can be remedied only with an order by this Court. Nor does the SBA's "sue-and-be-sued" clause bar relief here. Defendants' contrary position that no injunction *whatsoever* can be issued against the SBA (a position they have elsewhere disavowed), is not required by statutory text or precedent and would have the perverse result of insulating the agency's regulations from judicial oversight.

Whether under its new rule or as a result of confusion and delay caused by its eleventh-hour revision, Defendants' continued exclusion of small businesses from PPP funds based on their owners' criminal history runs contrary to the text of the Coronavirus Aid, Relief, and Economic Stimulus ("CARES") Act and violates the Administrative Procedure Act's ("APA") most basic requirement of reasoned decision-

making. Indeed, the SBA never explained its now-repealed former rules, and its newly identified rationale (even if accepted) indicates that the old rules were overbroad and unnecessary. Defendants thus flouted Congress’s clear goal of providing emergency relief to small business in a time of crisis. Defendants continue to harm countless, disproportionately Black and Latinx, small-business owners and their workers. This Court must act to ensure that Defendants’ last-minute rule change and Congress’s relief funding are more than empty promises.

ARGUMENT

I. The Court Must Give Effect to the SBA’s Eleventh-Hour Rule Change to Prevent Ongoing and Irreparable Harm to Plaintiffs.

For most of the PPP application period, the SBA, without explanation, barred a huge swath of business owners from receiving PPP funds based on their criminal history or pending charges. *See* Opening Br. at 6–9. Then, on June 24, 2020, the SBA significantly altered the scope of these criminal-record exclusions through a new (their third) Interim Final Rule. *See* Opp. at 13; *Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Revisions to First Interim Final Rule* (posted June 24, 2020) (“Yesterday’s IFR”).

First, Yesterday’s IFR narrowed the category of presumptively innocent individuals excluded from PPP funds from those who have *any* pending charge to those who have only pending *felony* charges. *Id.* at 5–6. Second, Yesterday’s IFR narrowed the category of business owners excluded based on probation or parole status from those under *any* parole or probation to those whose term of probation or parole was for a felony and commenced within the last year (or last five years for

felonies involving fraud, bribery, embezzlement, or false statements in loan or federal-assistance applications). *Id.* Yesterday's IFR also, for the first time, offered some explanation of the basis for the remaining restrictions—purporting to ground the remaining exclusions in risk of future incarceration and “credit risk.” *Id.* at 7. The IFR is scheduled to publish in the Federal Register on June 26, 2020. That is mere days (including a weekend) before the June 30 close of the PPP's three-month application period.

Yesterday's IFR is an unequivocal acknowledgment by Defendants that countless small-business owners and their workers have been wrongfully excluded—without any justification—from the PPP for all but a few days of the period Congress contemplated. Until yesterday, the SBA denied PPP access to any business owner with a pending misdemeanor charge; today, those individuals are newly eligible. So, too, for any business owner placed on misdemeanor probation or parole, or an owner placed on felony probation or parole any time before the last year.

The SBA's last-minute change-of-heart is an important step in the right direction, but without more time many eligible small businesses and their employees will be forever shut out of Congress's promised funds and may even fold as a result. The SBA has left illegally excluded businesses just six calendar days to find a bank, apply for PPP funds, and get approved. But many commercial banks continue to use the SBA's prior application forms and thus continue to deny newly eligible applicants. *See* Glazier Supp. Decl. ¶¶ 7–9; Khan Decl. Ex. 1 (JPMorgan Chase). Many other banks have *already* stopped accepting new applications on account of the impending

June 30 deadline. *See* Khan Decl. Ex. 2 (Citi), Ex. 3 (U.S. Bank), Ex. 4 (PNC), Ex. 5 (TD Bank), Ex. 6 (HSBC). Newly eligible business owners—who Defendants have effectively acknowledged should have been eligible *all along*—may search in vain for funding. Individual Plaintiffs and their businesses have been unable to apply for or secure PPP funding even though they are eligible under Yesterday’s IFR. *See* Merritt Supp. Decl. ¶¶ 9, 21–22; Garland Supp. Decl. ¶¶ 6–9. Plaintiff Defy Ventures, which advises business owners, will be forced to continue diverting resources to help loan applicants determine not only *whether* they are eligible, but also *how* they can surmount the obstacles Defendants have imposed in the limited time remaining. *See* Glazier Supp. Decl. ¶¶ 10–11.

The burden on Plaintiffs is all the greater because Defendants have not done enough to give Yesterday’s IFR any practical effect. As of the time of this filing, they have not published a press release to inform lenders or the public of this rule change.¹ Moreover, the “Frequently Asked Questions for Lenders and Borrowers,” on the SBA’s PPP website (dated May 27, 2020), continues to advise that people like Plaintiffs Merritt and Garland are *not* eligible for PPP funds. The site directs borrowers: “If you wish to begin preparing your application, you can download a copy of the PPP borrower application form (***revised June 12, 2020***) to see the information that will be requested from you when you apply with a lender.”² So the SBA

¹ *See Press Releases & Media Advisories*, SBA <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories> (last visited June 25, 2020).

² *Paycheck Protection Program*, SBA (emphasis added) <https://www.sba.gov/funding->

apparently expects newly eligible small business owners to be following in real-time its veritable Twitter feed of IFR updates (though not its actual Twitter feed, which has not mentioned the rule change despite a tweet today emphasizing the June 30 PPP deadline).³ The result is more people who are confused or misinformed, and thus more time and effort that Defy Ventures will need to expend to advise entrepreneurs around the country to *disregard* contrary messaging on the *agency's own website*.

To the extent Defendants have made any attempt to ease the difficulty of obtaining funds for Plaintiffs Merritt and Garland, those efforts only underscore the substantial barriers in the real world. Defendants state that “to ensure that the individual Plaintiffs and Plaintiff businesses encounter no further difficulties on account of the criminal justice restriction, the SBA has offered to contact their lenders and advise them that the Plaintiff businesses should not be denied PPP loans on the basis of the restriction.” Opp. at 38. Plaintiffs greatly appreciate the SBA’s offer and are working with Defendants so that Mr. Merritt and Mr. Garland can obtain approval of their applications. But the SBA’s individualized offer to the Plaintiffs appears to recognize that there remain many “further difficulties” for newly eligible applicants seeking to access PPP funds in the fast-closing window. *Id.* As Defendants have all but admitted, leaving just six calendar days of a three-month application period to allow previously excluded small-business owners to apply for PPP funds is

programs/loans/coronavirus-relief-options/paycheck-protection-program (last visited June 25, 2020).

³ See @SBAgov, Twitter (June 25, 2020, 7:30 AM), <https://twitter.com/SBAgov/status/1276115423419752450>.

itself arbitrary and capricious. *See Am. Acad. of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 486 (D. Md. 2019) (“Pursuant to the APA, a federal district court may ‘compel agency action unlawfully withheld or unreasonably delayed...’” (citation omitted)), *appeal dismissed sub nom. In re Cigar Ass’n of Am.*, 2020 WL 2116554 (4th Cir. May 4, 2020).

This Court accordingly should grant a preliminary injunction to stay the PPP application deadline. Plaintiffs Merritt and Garland, their businesses, and their workers have not yet been able to secure PPP funds. Plaintiff Defy Ventures continues to work with business owners who report that they continue to be refused by banks using the SBA’s forms that, until yesterday, were current. An extension of the application window is needed to mitigate Defendants’ prior arbitrary exclusions that they never even tried to defend and prevent this ongoing and irreparable harm. Intervention from this Court is the only way to give those whom Defendants have wrongfully excluded from relief—as well as the banks that stopped accepting applications solely because of the impending deadline—an interval even remotely close to the three-month window Congress promised *all* eligible applicants.⁴

⁴ Given that over \$125 billion in PPP funds remain available, there is a less urgent need for the Court to enjoin the agency to set aside funds for these wrongfully excluded applicants, as the Defendants explained at the scheduling hearing in this matter on June 18, 2020. *See Paycheck Protection Program (PPP) Report*, at 9 (June 20, 2020) (showing \$128.4 billion in funding remaining), https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200620-508.pdf.

II. Defendants Fail To Show Any Genuine Barriers To This Court Awarding The Requested Relief.

Rather than argue the merits, much of the Opposition attempts to persuade this Court that it simply lacks authority to provide any relief—including striking the remaining criminal-record exclusions. None of Defendants’ arguments is right.

A. Plaintiffs Have Standing To Seek The Requested Relief And This Court Has The Authority To Award It.

Defendants’ contentions that Plaintiffs lack standing and that this Court cannot enjoin the exclusions because it would “restructure” the PPP and “sweep beyond [this] particular dispute” are contrary to fundamental principles of law and equity. Opp. at 20. In fashioning preliminary injunctive relief, the Court must “provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And in so doing, the Court “mold[s] its decree to meet the exigencies of the particular case.” *Roe v. Dep’t of Defense*, 947 F.3d 207, 231 (4th Cir. 2020) (citation omitted).

As just described, all of the Plaintiffs continue to suffer injury as a result of the SBA’s actions. As to the Individual Plaintiffs and their businesses, none has yet received (or even been able to apply for) the PPP funds for which they are now eligible. Merritt Supp. Decl. ¶¶ 9, 21–22; Garland Supp. Decl. ¶¶ 6–8. For the reasons discussed—especially in light of Defendants’ tacit acknowledgment that the agency’s direct intervention may be needed to help Plaintiffs secure that relief, see Opp. at 38—Plaintiffs may continue to be unable to do so before the application period ends. (Mr. Merritt and Mr. Garland are working diligently to ensure they are able to apply and obtain the funds before the time expires, but that has not happened yet.)

Defy Ventures' mission has been and continues to be harmed and its resources diverted as a result of the challenged policies. *See, e.g., League of Women Voters v. Newby*, 838 F.3d 1, 9 (DC Cir. 2016) (holding that an FEC decision impeding voter registration “provide[s] injury for purposes of both standing and irreparable harm”). Contrary to Defendants' characterization, Defy Ventures does not raise “general complaints” about the functioning of the government. Rather, it seeks to prevent ongoing harm *to the organization itself*. Glazier Supp. Decl. ¶¶ 6, 11.

This form of organizational standing is well recognized. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.”); *Nat'l Fair Hous. All. v. Bank of Am., N.A.*, 401 F. Supp. 3d 619, 625 (D. Md. 2019) (“An organization can establish standing ... on its own behalf.”). Where an organization “contend[s] that [it has] direct standing in [its] own right ... the test to be applied is ‘the same inquiry as in the case of an individual,’” requiring the organizational to present “(1) an injury-in-fact, (2) causation ..., and (3) the likelihood of redress in federal court.” *Id.*

Defy Ventures satisfies this standard. As explained above, the SBA's criminal-record exclusions continue to frustrate its mission and force it to divert resources to advising individuals and businesses with criminal history how to fund their businesses in the absence of PPP funds. Because of Defy Ventures' mission to use entrepreneurship to empower formerly incarcerated individuals, the SBA's criminal-record exclusions require Defy Ventures to spend time and energy communicating

with program graduates and other formerly incarcerated business owners—including the 5,200 entrepreneurs-in-training who Defy Ventures has helped to launch over 140 small businesses through offices and affiliates in seven states—to advise them on the PPP and help them locate alternative funding sources. Glazier Decl. ¶¶ 3, 4, 16–17, 20–32. Simply put, “[t]he PPP’s criminal-history related exclusions have impeded the ability of Defy Ventures to accomplish its mission.” *Id.* ¶ 33. Confusion following Yesterday’s IFR—and the SBA’s conflicting messaging—has added to Defy’s workload given the impending application deadline. Glazier Supp. Dec. ¶ 10–11. The continuing harm to each of the Plaintiffs belies Defendants’ argument that Yesterday’s IFR might have mooted this case. *See* Opp. at 18.

The only way to fully redress Plaintiffs’ ongoing injury is to ensure that wrongfully excluded individuals can benefit from the PPP. Merely granting relief to Plaintiffs Merritt and Garland and their businesses will not relieve Defy Ventures of the need to invest resources in advising its graduates and others of possible alternative funding sources to compensate for their inability to receive PPP funds (not to mention advising those who are eligible yet confused by the SBA’s unclear and constantly changing mandate). To the contrary, it would serve only to further frustrate Defy Ventures’ mission and force continued diversion of its resources. As set forth in Mr. Glazier’s Supplemental Declaration, injury continues, as the organization attempts to guide its graduates with the latest changes to SBA eligibility rules. To fully remedy the harm caused by the SBA’s exclusions to the parties before it, the Court must block any application of the unlawful exclusions and allow wrongly

excluded individuals time to avail themselves of Congress's promised benefit.

Defendants' arguments to the contrary lack merit. First, Defendants contend that the harm to Defy Ventures was a result of its own budgetary choices. Opp. at 19. But that argument is "undercut by the Fourth Circuit and several district courts within the Fourth Circuit ... that an institutional plaintiff has direct standing to sue if the challenged policies or practices both frustrated its purpose and caused a drain on its resources." *Harrison v. Spencer*, No. 118-CV-641, 2020 WL 1493557, at *6–7 (E.D. Va. Mar. 27, 2020) (collecting cases); *see also Nat'l Fair Hous. All.*, 401 F. Supp. 3d at 627 (rejecting the argument "that the plaintiffs were not conscripted" to perform their activities responding to the defendant's unlawful conduct).

Second, Defendants suggest that Plaintiffs seek to "restructure the apparatus established by the Executive Branch to fulfill its legal duties." Opp. at 20 (quotation omitted). That is hardly the case, as Plaintiffs seek a remedy well within the Court's equitable powers and contemplated by the APA. *See, e.g., J.O.P. v. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 376 (D. Md. 2019) ("[T]he remedy Congress provides for unlawful agency action is setting aside that agency action, not simply prohibiting the application of that action to individuals."). Defy Ventures is a multi-state organization advising entrepreneurs with varied criminal records. Denying those small-business owners PPP funds—then hamstringing them from receiving PPP funds through confusion or delay—costs Defy Ventures time and money and compromises its mission. Only by giving Defy Ventures' advisees a full and fair opportunity to access PPP funds can that harm be remedied this late in the day.

At bottom, the “exigencies of [this] particular case” require this Court to “fashion appropriate injunctive relief” to prevent the wrongful exclusion of all businesses owned by individuals with criminal records from the PPP. *Roe*, 947 F.3d at 231 (citation omitted). If this Court does not grant preliminary relief and, at a minimum, extend the application deadline, many small businesses and their workers will *never* see a penny of the emergency relief Congress promised, as the program’s application deadline is less than a week away.

Without an order from this Court staying the deadline, many small businesses will suffer and some may fail. While Defendants concede their inability to determine how many businesses are affected by the exclusions, Opp. at 44, research has shown that at least 250,000 business owners were denied relief under one of the SBA’s various iterations of the exclusions in just seven states for which data was available. *See* Keith Finlay et al., *Criminal Disqualifications in the Paycheck Protection Program*, at 2 (June 2020).⁵ As already explained, the harm of the exclusions disproportionately harms Black and Latinx business owners. *See* Opening Br. at 22.

Accordingly, this Court has the authority and the basis to grant the relief Plaintiffs seek. The Court should enjoin Defendants from enforcing any criminal-record exclusions on PPP eligibility and, at a minimum, should stay the application deadline for 21 days.

⁵ https://cjars.isr.umich.edu/wp-content/uploads/CJARS_PPP_Statistical_Brief.pdf

B. The SBA’s “Sue-Or-Be-Sued” Clause Does Not Insulate the Agency from Judicial Review of Its Policymaking.

Defendants also attempt to totally insulate the SBA from judicial review of its policies by arguing that the SBA’s sue-and-be-sued clause, 15 U.S.C. § 634(b)(1), prevents any injunction whatsoever against the agency. *See Opp.* at 41–42.

As a threshold matter, Defendants here include not just the SBA and its Administrator but also the Department of the Treasury and its Secretary. Other courts confronting Defendants’ same argument have recently explained that “those Defendants ‘do not claim to be immune from injunctive relief; nor do they claim that they could not grant the plaintiffs access to the PPP unless the SBA were also enjoined.’” *DV Diamond Club of Flint v. U.S. Small Bus. Admin.*, No. 20-CV-10899, 2020 WL 2315880, at *8 (E.D. Mich. May 11, 2020) (quoting *Camelot Banquet Rooms v. U.S. Small Bus. Admin.*, No. 20-C-0601, 2020 WL 2088637, at *3 (E.D. Wisc. May 1, 2020)), *aff’d*, 2020 WL 2988528 (6th Cir. May 15, 2020). That alone disposes of Defendants’ argument.

But even taking Defendants’ argument on its own terms, Defendants provide no sound basis for concluding that injunctive relief is never available against the SBA acting in its policymaking capacity. Defendants have elsewhere taken a conflicting position, conceding that “courts ‘have held that [section 634(b)(1)] does not necessarily bar injunctions against the SBA in all circumstances.’” *Id.* (quoting Defendants’ brief in that case). And none of the Fourth Circuit cases Defendants cite discusses whether an injunction is available against the SBA in its policymaking capacity; they address only the very different context where a party seeks to attach, foreclose on, or

otherwise restrain SBA property. *See J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990) (“section 634(b)(1) precludes the imposition of an equitable lien”); *see also Duncan v. Furrow Auction Co.*, 564 F.2d 1107, 1109 (4th Cir. 1977) (dissolving an injunction restraining the SBA’s sale of collateral); *Vincent v. Small Bus. Admin.*, 402 F.2d 769, 770 (4th Cir. 1968) (dissolving an injunction restraining the foreclosure of real property).⁶ As a Court in this District explained just yesterday: “Significantly, none of these cases concerns the scope of § 634(b)(1),” and “these decisions are materially distinguishable from the one *sub judice*,” which “concerns the SBA in its capacity as a regulatory agency.” *Tradeways, Ltd. v. Dep’t of Treasury*, No. ELH 20-1324, 2020 WL 3447767, at *10 (D. Md. June 24, 2020).

Accordingly, courts have recognized that section 634(b)(1) “protects the agency from interference with its internal workings by judicial orders attaching agency funds, etc., but ... it should not be interpreted as a bar to judicial review of agency actions that exceed agency authority where the remedies would not interfere with internal agency operations.” *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987); *see* Opening Br. 33–35. This interpretation is consistent with the presumption that “[s]ue-and-be-sued clauses ... ‘should be liberally construed.’” *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1441 (2019) (quoting *Fed. Housing*

⁶ Defendants also cite a more recent Fifth Circuit case, *In re Hidalgo County Emergency Service Foundation*, No. 20-40368, 2020 WL 3411190 (5th Cir. June 22, 2020). But the question was not presented because the plaintiff conceded that “all injunctive relief directed at the SBA is *absolutely prohibited*” and sought only “an exception to that absolute prohibition under [the case’s] extreme facts and highly compressed time frame.” *Id.* at *1 (citation omitted).

Admin. v. Burr, 309 U.S. 242, 245 (1940)). And it is consistent with the text of section 634(b)(1), whose prohibition on injunctions must be read in context with the terms that surround it—“attachment, injunction, garnishment, or other similar process”—making clear that the provision is not intended to be a blanket ban on any injunction, but only on injunctions in the nature of attachment or garnishment, *i.e.*, those that attach agency funds or otherwise interfere with the agency’s internal workings. *See Burr*, 309 U.S. at 245–46 (“Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts.”); *see also Tradeways*, 2020 WL 3447767, at *11 (finding it reasonable that “the term ‘injunction’ in § 634(b)(1) should be read to prohibit courts from interfering with the SBA’s commercial operations or property, but not to bar all relief”). To hold otherwise would mean that “a court could not enjoin” a “policy stating that [the SBA] will extend small business loans only to companies owned by white men ... even though it would be blatantly unconstitutional.” *Camelot Banquet Rooms, Inc.*, 2020 WL 2088637, at *4. Put another way, the SBA is not immune from the APA.

C. The Separation of Powers Is No Bar To Staying the PPP Application Deadline.

Finally, Defendants claim that extending the PPP application deadline by a few weeks would violate the CARES Act and somehow erode the separation of powers by commandeering Congress’s appropriation authority. *Opp.* at 42–43. But staying the PPP application deadline is well within this Court’s established equitable powers. *See Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982) (“This court has repeatedly ‘reaffirmed the power of the courts to order that funds be held

available beyond their statutory lapse date if equity so requires’ ... [T]he power to prevent the statutory lapse or reversion of an agency’s budget authority does not conflict with Congress’ exclusive power to appropriate funds.” (citation omitted)).

More still, there is no need to force any appropriation from Congress, as Congress already appropriated \$650 million to fund the SBA’s obligations under the PPP, \$128 billion of which remains unclaimed. And Congress expressly provided a multiple-month application window to ensure this relief was meaningfully available. The SBA, however, unjustifiably kept that window closed for almost the entire application period. Merely giving wrongfully excluded applicants additional time to apply would thus advance, not thwart, Congress’s will. *See* Opp. at 43.

III. The Remaining Criminal-Record Exclusions Still Fail To Pass Muster Under The CARES Act Or The APA.

A. The CARES Act Forbids SBA-imposed Barriers to PPP Access.

Defendants fail to show why the criminal-record exclusions that continue to apply after Yesterday’s IFR do not run afoul of the CARES Act’s plain text. That statute’s text provides that “*any* business concern ... *shall* be eligible” for PPP funds provided it satisfies the enumerated size requirements. 15 U.S.C. § 636(a)(36)(D)(i) (emphasis added). It does not allow the SBA to impose its own invented limitations on eligibility and thereby flout Congress’s mandate to provide broad emergency relief to the *entire* American small-business workforce. *See* Opening Br. at 13–22.

Defendants’ argument proceeds from the assumption that the PPP is intended to be just like the SBA’s existing 7(a) loan program, subject only to several minor tweaks. Opp. at 21–25. Defendants’ argument closely follows the analysis in a recent

district court opinion, which concluded that the CARES Act does not unambiguously bar the SBA from imposing bankruptcy-related PPP eligibility restrictions. *Id.* at 23–25 (citing *Diocese of Rochester v. Small Bus. Admin.*, No. 20-CV-6243, 2020 WL 3071603 (W.D.N.Y. June 10, 2020)).⁷ That argument relies on an inference from provisions in the CARES Act “expressly lift[ing] particular Section 7(a) limitations for PPP purposes” to argue that limitations not so lifted may still apply. *Opp.* at 22; *see, e.g.*, 15 U.S.C. § 636(a)(36)(I) (lifting “credit elsewhere” requirement). As to the statute’s “shall” “any” language, Defendants claim that the provision, read in context, serves only to relax “certain size restrictions.” *Opp.* at 24.

But Defendants start from a faulty premise that leads to a wrong result. Congress has given every indication that the PPP serves an entirely *different* purpose so is subject to *different* rules than the SBA’s ordinary 7(a) loan program. *See* Opening Br. at 19–22. (For starters, PPP funds function as grants, not loans. *Id.*) While the SBA “may guarantee covered loans under the same terms, conditions, and processes” as non-PPP loans, it may do so “[e]xcept as otherwise provided.” 15 U.S.C. § 636(a)(36)(B). And section 636(a)(36)(D)(i) otherwise provides by mandatorily (“shall”) expanding eligibility to all (“any”) businesses that satisfy the stated size requirement. True, as Defendants note, this has the effect of lifting SBA’s ordinary size restriction, but it also—unambiguously—makes its newly announced size

⁷ A decision issued in this District yesterday reached the same result for similar reasons. *See Tradeways, Ltd.*, 2020 WL 347767, at *14 (citing *Diocese of Rochester* to conclude that “nothing in the CARES Act unambiguously addresses whether the bankruptcy debtors are eligible to participate in the PPP”).

restriction the *only* eligibility restriction the SBA may apply. Opening Br. at 13–18.

Defendants read statutory provisions isolated from context when they claim that Congress’s stated abrogation of certain SBA restrictions means that all restrictions not so enumerated are preserved.⁸ As another court rejecting this argument explained, this “stretch[es] the *expression unius* canon too far.” *DV Diamond Club*, 2020 WL 2315880, at *12. “Congress’s statement in one provision that [certain requirements] do not apply to PPP loan guarantees does not—by virtue of the *expression unius* canon—overcome Congress’s unambiguous statement in another provision that the sole requirements for PPP loan guarantee eligibility are that (1) during the covered period (2) a business concern has less than the specified number of employees.” *Id.* at *13.

Finally, Defendants worry that Plaintiffs are looking for an elephant in a mousehole. Opp. at 26. But as the Supreme Court explained in interpreting Title VII, in language that applies no less to the CARES Act: “[W]here’s the mousehole? [The CARES Act] is a major piece of federal [funding] legislation. It is written in starkly broad terms. ... This elephant has never hidden in a mousehole; it has been standing before us all along.” *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686, at *17 (U.S. June 15, 2020). It is unremarkable that Congress, when enacting unprecedented emergency stimulus legislation, would draft language broad

⁸ Defendants’ reference to the waiver of a regulation relating to determining affiliate relationships is a non sequitur. See Opp. at 22. That requirement would otherwise still apply notwithstanding the CARES Act’s broadening of eligibility, as it relates to how to determine whether a business meets the Act’s size requirement.

enough to guarantee pay through a pandemic to Americans who work for businesses that might not ordinarily be eligible for certain other SBA-guaranteed loans.

B. The Remaining Exclusions Still Run Afoul of the APA.

Just last week, the Supreme Court very clearly stated the fundamental standard of reasoned decision-making an agency must meet:

Justice Holmes famously wrote that men must turn square corners when they deal with the Government. But it is also true, particularly when so much is at stake, that the Government should turn square corners in dealing with the people. The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted.

Dep't of Homeland Sec. v. Regents of the Univ. of California, 2020 WL 3271746, at *11 (U.S. June 18, 2020) (citations and alterations omitted). Yet here, where so much is at stake, the SBA violated this “foundational principle of administrative law.” *Id.* at *9 (internal quotation omitted). When the SBA announced the criminal-record exclusions on the PPP, it did so without *any* explanation, much less the reasoned explanation that the APA requires. *See* Opening Br. at 25–29.

Nor does Yesterday’s IFR change any of that. Not only do the reasons given fail to address the exclusions’ impact, the SBA expressly acknowledges it cannot even measure the reach of its actions. *See* Opp. at 44. But the SBA’s stated concern for PPP applicants’ creditworthiness and risk of future incarceration—which purportedly justified the wholesale importation of the SBA’s existing criteria to PPP loans, *see id.* at 30–34—cannot be squared with the PPP’s entirely unique purpose and funding structure.⁹ By importing existing restrictions onto a new program

⁹ Nor can this Court even consider those reasons, as they are offered only in the

without accounting for the differences between the two, the SBA “failed to consider ... important aspect[s] of the problem.” *Regents*, 2020 WL 3271746, at *11 (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The haste with which Yesterday’s IFR was announced only illustrates the SBA’s haphazard approach to this issue of tremendous importance to the lives and livelihoods of the countless small-business owners with criminal records and those who work for them. With mere days to go before the June 30 application deadline, the SBA changed the scope of the criminal-record exclusions—this after inconsistent pronouncements across rules and forms over the past two-and-a-half months. As discussed above, the confusion and uncertainty this creates virtually guarantees that any increased eligibility will be rendered meaningless. The agency’s “[il]logical and [ir]rational” process is alone disqualifying and this Court must step in to ensure that all small business owners and their workers may benefit from Congress’s promised relief. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2706 (2015) (citation omitted).

CONCLUSION

For the reasons set forth above, the Court should grant the motion. It should stay the PPP application deadline for 21 days, up to and including July 21, 2020. And it should strike the remaining criminal-record exclusions.

form of impermissible post-hoc rationalization by way of a declaration attached to Defendants’ opposition. *See Opp.* at 33. They find no purchase in the original record before the SBA when it acted. *Roe*, 947 F.2d at 221 (“[P]ost-hoc materials must ... be merely explanatory of the original record and ... contain no new rationalizations” (quotation omitted)).

Dated: June 25, 2020

Respectfully submitted,

/s/ Kali N. Bracey

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of June 2020, Plaintiffs' Reply Memorandum in Support of Emergency Motion for Preliminary Injunction (including exhibits) was served via the Court's CM/ECF system on all counsel of record in accordance with the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Maryland.

/s/ Kali Bracey

Kali Bracey (Bar No. 20752)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DEFY VENTURES, INC., *et al.*,

Plaintiffs,

v.

U.S. SMALL BUSINESS
ADMINISTRATION, *et al.*

Defendants.

CASE NO.: 20-cv-01838-CCB

**DECLARATION OF AFRAZ KHAN IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Afraz Khan, declare:

1. I submit this declaration in support of Plaintiffs' Motion for a Preliminary Injunction.
2. I am a Legal Assistant with the American Civil Liberties Union Foundation Racial Justice Program, and counsel to Plaintiffs in the above-captioned case. I submit this declaration in support of Plaintiff's Reply Brief. Based upon my work in this case, I have become familiar with and obtained knowledge of the documents attached to this affidavit. The following facts are within my personal knowledge, and, if called and sworn as a witness, I could and would testify competently to them.
3. **Exhibit 1** is a true and correct copy of JPMorgan Chase Bank's Paycheck Protection Program (PPP) loan application.
4. **Exhibit 2** is a true and correct copy of Citibank's PPP information webpage.
5. **Exhibit 3** is a true and correct copy of U.S. Bank's PPP information webpage.
6. **Exhibit 4** is a true and correct copy of PNC Bank's PPP information webpage.
7. **Exhibit 5** is a true and correct copy of TD Bank's PPP information webpage.
8. **Exhibit 6** is a true and correct copy of HSBC Bank USA's PPP information webpage.

I, Afraz Khan, pursuant to 28 U.S.C § 1746 and subject to the penalties of perjury, declare the
Foregoing is true and correct.

Dated: June 25, 2020

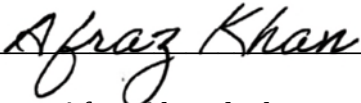

Afraz Ahmed Khan

EXHIBIT 1

Your business

Tell us about your business.

Please answer the SBA questions below:

1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy? If the answer to this question is "yes" the loan will not be approved.

☐ Yes ☐ No

2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government? If the answer to this question is "yes" the loan will not be approved.

☐ Yes ☐ No

3. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? If the answer to this question is "yes" the loan will not be approved.

☐ Yes ☐ No

☐ Please attest

4. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, or within the last year, for any other felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) been placed on any form of parole or probation (including probation before judgment)?

☐ Yes ☐ No

☐ Please attest

EXHIBIT 2



🔍 How can we help?

Menu ▾

Sign On



CORONAVIRUS (COVID-19)

Supporting Small Business When It Matters Most

The Small Business Administration (SBA) will only approve Paycheck Protection Program (PPP) loans through June 30, 2020. To allow sufficient time to process applications and present them for approval to the SBA by that date, Citi is no longer accepting new PPP loan applications.

If you previously submitted an application to us, we are reaching out as quickly as possible to notify you of any changes in your application status. There can be no assurance that you will be approved for a PPP loan or that your application will be processed and presented for SBA approval before the program ends.

We recognize the importance of your PPP loan to you and your employees, and our goal is to keep you informed every step of the way. We are providing this overview based on current information from the SBA. Find the full details and information on loan forgiveness at [sba.gov](https://www.sba.gov) and [treasury.gov/cares](https://www.treasury.gov/cares).

EXHIBIT 3

 Read about our [COVID-19 financial relief efforts](#), including the [Paycheck Protection Program](#) for businesses. 



Log In

Business banking / Business Lending / SBA loans / **Paycheck Protection Program**

SBA PAYCHECK PROTECTION PROGRAM

An update on the Paycheck Protection Program

On June 5, the President signed the Paycheck Protection Program (PPP) Flexibility Act into law, which affords significant changes to the PPP. When we receive final Small Business Administration (SBA) guidance, we will make any necessary updates to our loan agreement, and forgiveness application process. For customers with a PPP loan, we will not be accepting digital applications for loan forgiveness until we have made the necessary changes.

In an effort to process applications by the June 30 SBA application deadline, our online application is now closed. We are also requiring that all [in-process applications](#) have completed documentation and verification needed for SBA submittal by June 24. Note that a complete application with full documentation by June 24 does not guarantee that U.S. Bank will be able to complete our review successfully to submit to the SBA by their deadline nor that the SBA will approve the loan.

EXHIBIT 4



Paycheck Protection Program

We're committed to helping you

APPLY

CHECK APPLICATION STATUS

LOAN FORGIVENESS

PROGRAM OVERVIEW

Apply for a Paycheck Protection Program Loan

The Small Business Administration has registered more than 74,000 Paycheck Protection Program loans submitted by PNC, totaling over \$14 billion, for our small business customers with a collective estimate of more than one million employees.

We are currently not accepting new applications as we focus on processing and funding the high volume of loans registered with the SBA and new applications received. We will continue to reassess our ability to accept new applications based on current volume and allocated PPP funding.

These uncertain times do not alter our steadfast commitment to all of our customers. We continue to work with those experiencing financial hardship by making loans, waiving and refunding fees, postponing payments and doing what we can to support our customers and communities during this challenging time.

EXHIBIT 5



👤 Log In

Paycheck Protection Program (PPP) Application

With the PPP coming to an end on June 30, 2020 (or earlier if program funds are exhausted), **we're no longer accepting new applications for PPP loans.**

If you've already submitted a PPP loan application, we'll continue to review and process it until the program ends. Be on the lookout for email updates. **Remember, there's no guarantee that funds will be available for all qualified loan applicants or that loans will be reviewed, processed and approved prior to the end of the program.**

For more PPP resources and program information, you can check the [SBA](#) and the [Department of the Treasury](#) sites. These materials are frequently updated, and it's your obligation to stay informed of the program changes and latest guidance.

PPP Loan
Forgiveness

TD Customer
Assistance
Programs

SBA Loans

Additional
Relief Options

Paycheck Protection Program changes.

The **PPP Flexibility Act** was signed into law on June 5. This legislation makes certain material changes to the Paycheck Protection Program (PPP), including to the terms of loan forgiveness. As we await new guidance from the SBA that reflects these changes, we'll continue to build our online PPP loan forgiveness application and keep you updated with the latest developments.

PPP loan forgiveness is not automatic. If you plan to seek forgiveness, you'll need to submit an application through our online portal. The SBA has recently updated the Forgiveness Application, Form 3508, to reflect the changes made under the PPP Flexibility Act. They have also released a second simplified version, **SBA Form 3508 EZ**, which is available to borrowers who meet certain criteria. To see

EXHIBIT 6



Home > Coronavirus > **HSBC Business Banking support**

HSBC Business Banking support

If you've been impacted by coronavirus and are worried about fees associated with your business accounts, we can help.

What is included?

For business deposit accounts we are offering fee waivers to cover ATM, overdraft or unavailable funds, and monthly maintenance fees

For business credit cards, lines of credit and term loans, we can defer or reduce your payments during the hardship, and waive late fees.

How do you request support?

For relief help with your business banking, please contact your relationship manager or call 833.722.4722, Monday - Friday: 8am-9pm ET and Saturday: 8am - 4:30pm ET.

CARES Act – Paycheck Protection Program through HSBC

On Friday, April 24th, the federal government approved additional funding for the Paycheck Protection Program (PPP). The Small Business Administration (SBA) will begin accepting additional applications for the PPP on Monday, April 27th.

After careful consideration, HSBC will not be accepting new PPP applications. Due to the high demand for the program, we are focusing on processing the significant number of applications we have already received in order to submit as many applications as we can for SBA approval and funding allocation.

We appreciate your patience as we navigate this challenging time together.

Need Help?

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

DEFY VENTURES Inc. *et al*,

Plaintiffs,

v.

UNITED STATES SMALL
BUSINESS ADMINISTRATION, *et al.*,

Defendants.

No. 20-cv-01838-CCB

**SUPPLEMENTAL DECLARATION OF ANDREW GLAZIER IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Andrew Glazier, declare:

1. I am over the age of eighteen. I have personal knowledge of the facts stated herein and am competent to testify to them.
2. I am the President and CEO of Defy Ventures ("Defy").
3. I learned on June 24, 2020, that the Small Business Administration ("SBA") had issued a new rule narrowing the categories of small business owners who were excluded from eligibility for Paycheck Protection Program ("PPP") loans based on their criminal history.
4. Since I learned of the June 24 rule, I have made efforts to make newly eligible business owners, including Defy graduates, aware of it. This is a very urgent situation because I understand that the current application deadline for PPP loans is June 30, 2020.
5. I and my team have begun the process of contacting all of the graduates of Defy's programs who were previously ineligible to apply for PPP loans, but who are eligible under the new rule, to let them know of the change.

6. We are also in the process of posting links to the new rule and application form on the Defy website, and drafted a message sharing information and encouraging other organizations to spread the word as well. Defy has also drafted an alert sharing details of the new rule, which we intend to send to our contacts today. Due to the urgency of this situation, I have been forced to focus on these outreach efforts instead of working on Defy's other, regularly-scheduled programming.

7. It is my understanding that, despite the issuance of the new rule, newly-eligible business owners are still encountering problems in the PPP application process — sometimes preventing their ability to apply altogether — due to the fact that the rule was only very recently changed.

8. For example, I learned from a Defy graduate that, when he sought to apply for a PPP loan on June 24, 2020 and June 25, 2020, he found that the online application forms of various lenders still contained the same questions about criminal record (Questions 5 and 6) that were operative under the previous version of SBA's rule. The websites of other lenders had only partially updated their application forms to conform to the June 24 rule.

9. That graduate tried numerous lender websites to apply for the PPP in light of the rule change—including [fundingcircle.com](https://www.fundingcircle.com); [bluevine.com](https://www.bluevine.com); [paypal.com](https://www.paypal.com); [mbecp.com](https://www.mbecp.com); and [loanbuilder.com](https://www.loanbuilder.com). For all of these sites, the criminal history questions were either not updated to reflect the rule change or had been only partially updated. A screen shot for one of these sites, [fundingcircle.com](https://www.fundingcircle.com), which I obtained from this Defy graduate via email, is attached hereto as Exhibit 1.

10. This latest, last-minute change leaves newly-eligible business owners in a quandary and leaves me unsure as to how I should advise Defy's graduates. I have discussed a few theoretical options, including an instruction that graduates call lenders and ask to speak with the loan officers to inform them of SBA's new rule; or that graduates should use lenders' online portals and simply answer "no" to the now-defunct, but still-listed, Questions 5 and 6. I have also spent

time brainstorming whether there is another method by which Defy graduates could apply for PPP loans.

11. It is clear that, although SBA has changed its rule to narrow the categories of exclusions, SBA must do much more to implement the new rule so that newly-eligible business owners can actually apply for PPP loans. My staff and I are continuing to devote time and resources to guiding our graduates in response to the SBA's latest rule change, at the expense of our ongoing work. Further, we are being contacted by affected individuals who are not part of our program but seeking guidance from us.

I declare under penalty of perjury of the laws of the United States and the state of California that the foregoing is true and correct.

This Declaration was signed by me on June 25, 2020, at Los Angeles, CA.

A handwritten signature in black ink, appearing to read 'Andrew Glazier', is written over a horizontal line.

Andrew Glazier

Exhibit 1

5:29 7

Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020?

Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?

i If answered "Yes" the loan will not be approved.

Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, or within the last year, for any other felony, has the Applicant (if an individual) or any owner of the Applicant:

- 1) been convicted;
- 2) pleaded guilty;
- 3) pleaded nolo contendere; or
- 4) been placed on any form of parole or probation (including probation before judgment)?

i If answered "Yes" the loan will not be approved.

Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation?

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

DEFY VENTURES Inc. *et al*,

Plaintiffs,

v.

UNITED STATES SMALL
BUSINESS ADMINISTRATION, *et al.*,

Defendants.

No. 20-cv-01838-CCB

**SUPPLEMENTAL DECLARATION OF SEKWAN MERRITT IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Sekwan Merritt, declare:

1. I am over the age of eighteen. I have personal knowledge of the facts stated herein and am competent to testify to them.
2. I am the owner of Prop Prep Properties LLC, d/b/a Lightning Electric, a small electrical contracting business.
3. I learned on June 24, 2020, that the Small Business Administration ("SBA") had issued a new rule narrowing the categories of small business owners who were excluded from eligibility for Paycheck Protection Program ("PPP") loans based on their criminal history.
4. As a result of this new rule, I am now eligible for a PPP loan.
5. Since learning of this rule, I have made efforts to apply for a PPP loan so that Lightning Electric can obtain crucial assistance during the COVID-19 pandemic.
6. On June 24, 2020, I was told to provide the SBA with contact information for my bank lender, so that the SBA could advise them that my business should not be found ineligible for PPP financing on the basis of the old criminal record exclusion.

7. I immediately provided the contact information for my local Wells Fargo branch where I have a business account, 2012 E. Joppa Rd, Parkville, Maryland, 21234, (410) 663-6268.

8. I also called my local branch and left a message for the bank business manager.

9. I then tried to submit a new PPP application through Wells Fargo's online portal, but discovered an alert on the home page that says "We're currently not accepting new Paycheck Protection Program applications." A screenshot of this alert is attached hereto as Exhibit 1.

10. On June 25, 2020, I was told that the SBA needed a specific point of contact at my bank and his or her email address in order to help me apply for a PPP loan.

11. I called my local Wells Fargo branch again and asked the bank representative to transfer me to the bank business manager. I was put on hold for almost 30 minutes. When the bank representative came back to the phone, she told me that PPP loans are only processed online, not through the local branch.

12. When I explained that Wells Fargo's online portal was not accepting new PPP applications, the bank representative provided me with a toll-free number for Wells Fargo customer service, but said that there probably wasn't any point in calling if the online portal said it was closed to new applications.

13. Later the same day, I called my local branch again and specifically explained that I needed to provide the SBA with a point of contact at Wells Fargo so that I could apply for a PPP loan.

14. The bank representative told me there was no one at the branch that could help me and told me to call Wells Fargo's business loan program. He provided me with another toll-free number and told me to press "2".

15. I asked if this would allow me to get the name and email address for a point of contact to give the SBA. The bank representative said that someone in the business loan program would assign me a point of contact.

16. I called the toll-free number for the Wells Fargo business loan program and explained to the phone representative that because of the SBA's rule change, I was now eligible for a PPP loan and needed assistance.

17. The representative told me to call Wells Fargo's PPP line and gave me another toll-free number.

18. I called that number, which led to the "Wells Fargo PPP Assistance Line."

19. I waited on hold for almost 40 minutes.

20. I finally reached a phone representative and explained that because of the SBA's rule change, I was now eligible to apply for a PPP loan and needed assistance.

21. The representative confirmed that Wells Fargo was no longer accepting new PPP applications, because they are "trying to finish out the last batch we have."

22. She also told me there was no way to modify or reopen my declined application, which I submitted on April 15, 2020.

23. She told me that my only option was to go to the SBA's website and find a lender that is still accepting applications.

24. At this time, I am uncertain whether I will be able to obtain the PPP funding for which I am now otherwise eligible.

25. As set forth in my prior Declaration dated June 15, 2020, I need this funding to pay the electricians working for Lightning Electric and to cover the costs necessary for running the business, including general liability insurance. Without this funding, there is a real risk that my business may not survive.

I declare under penalty of perjury of the laws of the United States and the state of Maryland that the foregoing is true and correct.

This Declaration was signed by me on June 25 (month and day), 2020, at
Odenton, Maryland (city, state).

Sekwan Merritt

Sekwan Merritt

Exhibit 1



WELLS FARGO



Our phone, email, and branch wait times may be longer than usual due to COVID-19. [Learn more](#)



We're currently not accepting new Paycheck Protection Program applications. [Need to cancel an application?](#)



Your email address or phone number may be incorrect. Please review and update your contact information now.

Update

Account Summary

3

Business and Personal Accounts



UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

DEFY VENTURES, INC., *et al.*

Plaintiffs,

v.

UNITED STATES SMALL
BUSINESS ADMINISTRATION, *et al.*,

Defendants.

No. 20-cv-01838-CCB

**SUPPLEMENTAL DECLARATION OF JOHN D. GARLAND IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, John D. Garland, declare:

1. I am over the age of eighteen. I have personal knowledge of the facts stated herein and am competent to testify to them.
2. I am the majority owner and President of Sign Me Up Bethpage, Inc. d/b/a Fastsigns 2323 ("Fastsigns Bethpage").
3. I learned on June 24, 2020, that the Small Business Administration ("SBA") had issued a new rule narrowing the categories of small business owners who were excluded from eligibility for Paycheck Protection Program ("PPP") loans based on their criminal history.
4. I am now eligible to apply for a PPP loan for Fastsigns Bethpage because the June 24 rule no longer excludes individuals like myself who have pending misdemeanor charges.
5. Since learning of this rule, I have made efforts to apply for a PPP loan so that Fastsigns Bethpage and its employees can obtain this crucial assistance during the COVID-19 pandemic.

6. On June 25, 2020, I went to my local JPMorgan Chase bank branch, informing them that I was now eligible for PPP and wanted to apply. They informed me that I could only apply through their online portal.

7. I then visited the Chase online portal, and there was no available application to apply for a PPP loan. Attached as **Exhibit 1** is a screenshot of the online portal. I understand that some banks are no longer accepting applications due to the June 30, 2020 deadline.

8. I am attempting to find other lenders through which I can obtain these funds. After being unable to apply through Chase, I attempted to apply online through Square Capital's small business lending program, which also offers PPP loans. But they also no longer had an application available. Attached as **Exhibit 2** is a screenshot of the Square website showing that there are no PPP applications available.

9. I also attempted to apply for a PPP loan through www.lendio.com, which matches borrowers with PPP lenders. That site had an application form, but it was still the previous form, with Question No. 5 asking about any pending charge, and stating that if that question is answered "Yes," the loan will not be approved. Attached as **Exhibit 3** is a screenshot of that application form.

10. At this time, I am uncertain whether I will be able to obtain the PPP funding to which I am now otherwise eligible. As set forth in my prior Declaration dated June 15, 2020, I need this funding to cover payroll and other expenses which I cannot cover as a result of the COVID-19 pandemic. Without this funding, I do not know if my business will survive the pandemic.

I, John Garland, pursuant to 28 U.S.C § 1746 and subject to the penalties of perjury, declare the Foregoing is true and correct.

Dated: June 25, 2020

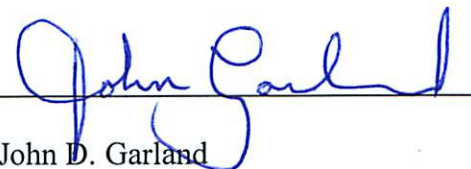
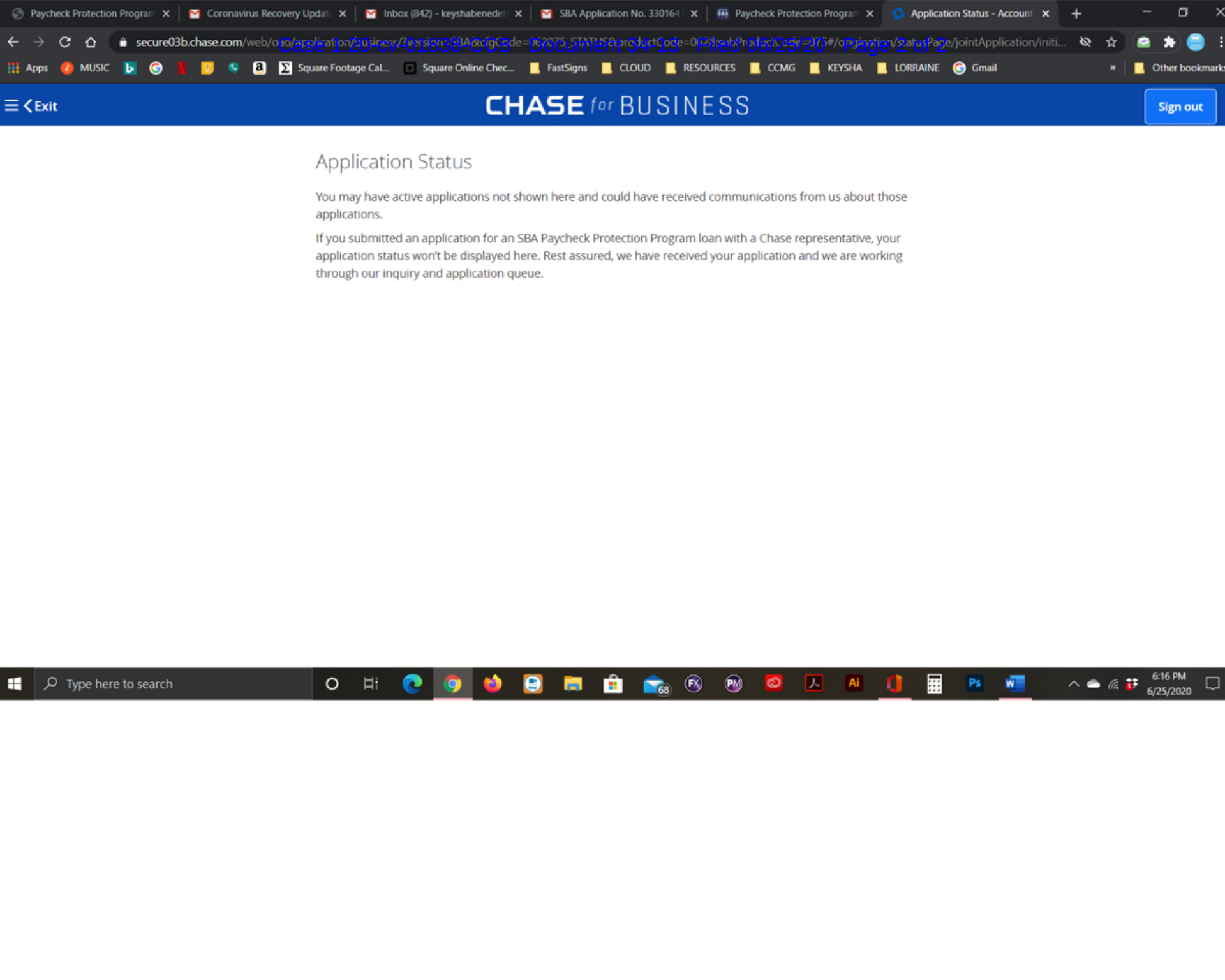

John D. Garland

Exhibit 1



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CHASE for BUSINESS

Sign out

Application Status

You may have active applications not shown here and could have received communications from us about those applications.

If you submitted an application for an SBA Paycheck Protection Program loan with a Chase representative, your application status won't be displayed here. Rest assured, we have received your application and we are working through our inquiry and application queue.

Exhibit 2

The screenshot shows a web browser window with the URL `squareup.com/dashboard/capital/eligibility/C-R5GWG2QYJ6VH7Q`. The browser's address bar and tabs are visible at the top. The page header includes a navigation menu with "Capital" selected, a "Setup Guide" button, and a search icon. The main content area features two white boxes on a light gray background. The first box, titled "We're no longer accepting PPP applications", contains text explaining that the SBA is no longer approving PPP loans as of July 1, 2020, and includes a "Read article" button. The second box, titled "Your business isn't eligible right now", contains text explaining the challenges businesses are facing and the support being provided. Below this, an "Additional resources" section mentions financial relief programs. The Windows taskbar is visible at the bottom of the screen.

squareup.com/dashboard/capital/eligibility/C-R5GWG2QYJ6VH7Q

Apps MUSIC Square Footage Cal... Square Online Chec... FastSigns CLOUD RESOURCES CCMG KEYSHA LORRAINE Gmail Other bookmarks

Capital Setup Guide Sign Me Up Bethp...

We're no longer accepting PPP applications

As of July 1, 2020, the SBA is no longer approving PPP loans. If you're interested in learning about PPP loan forgiveness and other program updates, check out our Support Center article.

[Read article](#)

Your business isn't eligible right now

We understand your business is facing extraordinary challenges. We're working on ways to help as quickly as possible. As soon as your business becomes eligible, we'll let you know here and by email.

Additional resources

Financial relief programs are being rolled out nationwide to support businesses in this time of need. You can find a list of available national and state

Type here to search

6:14 PM 6/25/2020

Exhibit 3

Utilities

Other

Loan Purpose Other Reason

Inventory

General Questions

If questions (1), (2), (5), or (6) below are answered "Yes" or question (7) below is answered "No", the loan will not be approved.

1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?

Yes

☐

No
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?

Yes

☐

No
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business?

Yes

☐

No

List all such businesses and describe the relationships

FASTSIGNS in Babylon

4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020?

Yes

☐

No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?

Yes

☐

No
6. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, or within the last year, for any other felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) been placed on any form of parole or probation (including probation before judgment)?

Yes

☐

No
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?

Yes

☐

No
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?

Yes

☐

No