



INSTITUTE FOR JUSTICE
CLINIC ON ENTREPRENEURSHIP

May 15, 2020

Ms. Jovita Carranza
United States Small Business Administration
409 3rd St., SW
Washington, DC 20416

Re: U.S. Small Business Administration Business Loan Program; Paycheck Protection Program Interim Final Rule, No. SBA-2020-0019, RIN 3245-AH35

Dear Ms. Carranza:

I write to you today on behalf of the Institute for Justice Clinic on Entrepreneurship at the University of Chicago Law School (“IJ Clinic”). The IJ Clinic is a legal clinic that provides free legal assistance, support, and advocacy for low-income entrepreneurs. We are an arm of the Institute for Justice—the national law firm for liberty. Since 1991, IJ has come to the aid of individuals who want to do the simple things every American has the right to do—including owning property, starting and growing a business, speaking freely about commerce or politics, and providing their children with a good education—but can’t because they find the government in their way. Every day at the IJ Clinic, we advocate for Americans who have big dreams and small budgets, people who are starting businesses so they can direct their own destinies, support their families, create jobs, and transform neighborhoods. We are thankful to have the opportunity to share our perspective on the Small Business Association’s (“SBA”) Payroll Protection Program (“PPP”) Interim Final Rule (85 Fed. Reg. 20811) with this comment letter.

Congress created the PPP within the CARES Act¹ to make capital accessible to small businesses that are hemorrhaging money and jobs during the current pandemic. Governmental orders have shut down small businesses, and revenues have evaporated. Yet, the SBA’s Interim Final Rule arbitrarily cuts some American businesses off from emergency funding, leaving them to fail despite their importance to the economy. The Rule thwarts the intent and text of the PPP by (1) excluding businesses with an owner who has interacted with the criminal justice system and (2) limiting loan forgiveness based on an arbitrary requirement to use 75% of the loan amount on payroll. We urge the SBA to reverse these exclusionary provisions.

¹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020).

1. The Exclusion of Businesses with Owners Who Interacted with the Criminal Justice System Hurts Entrepreneurs, Contravenes the CARES Act, and Defies Criminal Justice Reform Policies.

Section 2(b)(iii) of the Interim Final Rule makes a business ineligible for PPP loans if an individual who owns 20% or more of the company is currently indicted on any criminal charges—felony or misdemeanor—or has been convicted of a felony in the last five years. These exclusions run contrary to the intent and text of the CARES Act, and they have a devastating effect on businesses, communities, and criminal justice reform efforts.

- A. *Real-world impact of excluding businesses based on an owner's interaction with the criminal justice system*

At the IJ Clinic, we have had the honor to work with entrepreneurs with criminal histories, who started businesses to turn their lives around. We have seen close-up that these entrepreneurs strive to build healthy businesses from scratch, so they can build opportunities in their own communities. Jimmie Williams is a terrific example. Jimmie had been in and out of jail since he was a kid. The last time he got out, he determined he had to set a new course for his life, for the sake of his family. He applied to hundreds of jobs but could not get a foothold on an opportunity. When he found out about a used pickup truck for sale in the neighborhood, Jimmie decided that was his chance to make his own job.² “It was easier to start a company than to get a job,” he says. Jimmie and his wife Tiffany have been running Urban Roots Inc., providing snow removal and lawn care, for 12 years now. Their family dinner table became a board room where their kids learned business skills. Their neighbors, in a neighborhood with a high population of returning citizens, took notice and took pride in the growing business. Jimmie made it his mission to tell his old friends, neighborhood schoolchildren, and his employees that it is possible to become an entrepreneur, even if you made mistakes in the past. He hires and mentors other formerly incarcerated people. He also recently became a mentor in the Cook County Department of Corrections. Chicago needs Urban Roots, and other businesses like it, to survive this pandemic. So do the people who work there and the neighbors who utilize Urban Roots’ services and take inspiration from the story. The PPP should not leave businesses like Urban Roots behind.

Yohance Lacour is another admirable client of the IJ Clinic—one of our newest. Yohance learned leatherworking in a prison workshop. He started making leather greeting cards and handbags so that his fellow inmates could send something special to loved ones. When he got home, he was determined to start a new life and use his passion for leatherworking to build something that was entirely his own. He found the Chicago School of Shoemaking and started trading his labor for classes. Soon he became a teacher, and now he is starting his own business selling leather sneakers of his own design.³ He is currently researching the best practices for making masks so that he can provide something essential to his customers during the pandemic.

² Maudlyne Ihejirika, “Entrepreneur of Color Fund Grows to \$9.1 Million, Will Create Jobs on South, West Sides,” Chicago Sun Times, September 29, 2019, <https://chicago.suntimes.com/2019/9/25/20880875/entrepreneurs-of-color-fund-grows-9-1-million-create-jobs-south-west-sides>.

³ Angel Idowu, “Passion for Design Leads to Career in Handmade Leather Goods,” WTTW, January 15, 2020, <https://news.wttw.com/2019/11/25/passion-design-leads-career-handmade-leather-goods>.

As a new business owner, he is starting to discuss possible partnerships with investors who admire his designs and his early success. But the current SBA rules tell those potential investors that SBA loans may not be available to the business and their investment might fail, for reasons completely unrelated to the prospects of the business or Yohance's entrepreneurial potential.

The PPP loans are not just about the owners of small businesses. They are also about the employees, customers, neighborhoods, and business partners of each small business. If a company closes for good because a four-year old conviction for possession of marijuana or a current indictment for driving on a suspended license prevents a business from getting a PPP loan, what do we say to the employees who are left unemployed as a result? Or the customers that lost a favorite local business? Or business partners who invested in a great business, unconcerned about an irrelevant criminal history? Entire networks of people will feel the harm.

So many Americans have a story like Jimmie's and Yohance's.⁴ They are entrepreneurs who are employing workers, creating wealth, and providing goods and services to their communities. PPP loan exclusion could arbitrarily wipe out all that these entrepreneurs have built. The exclusion and its effects are contrary to what Congress intended when it enacted the CARES Act. It will hurt many small businesses that Congress intended to help.

B. Cutting businesses off from PPP loans based on an owner's criminal background contravenes the CARES Act.

The CARES Act expanded eligibility for 7(a) loans and does not allow consideration of a business owner's interaction with the criminal justice system. In a section called "Increased Eligibility for Certain Small Businesses and Organizations", the Act says, "During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—(I) 500 employees; or (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veteran's organization, or Tribal business concern operates."⁵

The law continues to say that a lender is deemed to have been delegated the authority of the SBA to make loans "subject to the provisions of this paragraph". The provisions limiting the delegated authority are as follows: "In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, a lender shall consider whether the borrower—

- (aa) was in operation on February 15, 2020; and
- (bb) (AA) had employees for whom the borrower paid salaries and payroll taxes; or

⁴ A large segment of the U.S. population interacts with the criminal justice system. About one in three Americans had a criminal record as of 2012. See U.S. Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2012 (Jan. 2014) at Table 1, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. 8.1% of Americans had a felony conviction in 2010. Sarah Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948 to 2010*, 54 *Demography* 1795, 1808 (2017).

⁵ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 1102(a)(36)(D)(i)(2020).

(BB) paid independent contractors, as reported on a Form 1099–MISC.”⁶

The CARES Act thus distinguishes PPP eligibility from other federal loan programs. Although the SBA has explicit authority to review criminal background history when considering making a typical 7(a) loan, the law does not include consideration of criminal background history in the delegation of authority to lenders making PPP loans. The law is also meant to provide relief to a greater array of small businesses than other programs. Yet, instead of hewing to the text of the CARES Act and expanding eligibility for PPP loans accordingly, the Interim Rule restricted eligibility even more than the SBA does in other loan programs.⁷

The Interim Final Rule not only requires banks to consider a factor that is not allowed by the CARES Act; it *requires* them to deny loans based on the impermissible consideration. It outright denies crucial funding for businesses to meet payroll based on (i) a single 20% owner’s felony conviction (regardless of relevance) or (ii) even a pending indictment on any criminal charges—felony or misdemeanor (regardless of a presumption of innocence).⁸ This is a blanket denial and is done without any consideration of the relevancy of the transgression (or alleged transgression) to receipt of funds.

Our system presumes a person is innocent until proven guilty, but the Interim Final Rule eviscerates that notion by barring people from loans based on unproven charges. The CARES Act forecloses consideration of either convictions or indictments and expands eligibility beyond eligibility for other federal loan programs. The SBA should remove harsh restrictions based on criminal background from the PPP rules, to keep faith with the text of the CARES Act.

C. The SBA’s rule cuts off people who are trying to earn an honest living, undermining the goals of the PPP and bi-partisan criminal justice reforms advanced by this administration.

Section 2(b)(iii)’s blanket prohibition on lending to businesses with owners who have a past felony conviction is unfair to entrepreneurs who have served their time and started a new life, and it is counterproductive to the justice system’s goal of limiting recidivism.⁹ It also contravenes the work of this Administration to address problematic collateral consequences and recidivism issues by breaking down barriers to economic liberty.

⁶ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 1102(a)(36)(F)(ii)(I) – (II) (2020).

⁷ For example, the 7(m) microloan program looks at whether an applicant has engaged in a crime linked to fraud, directly relevant to a potential loan. In considering the rules and requirements for 7(m) loans, the SBA stated that lowering barriers to loans boosts “successful reentry of formerly incarcerated individuals, who often have difficulty finding steady employment.” 80 Fed. Reg. 34043.

⁸ 85 Fed. Reg. 20812.

⁹ Moreover, because of existing racial disparities within the criminal justice system, these prohibitions could well fall heavier on black and Latino populations. For example, black and Latino men are more likely to face arrest, and 6 times and 3 times more likely to be incarcerated than white men. Gase, Lauren Nichol et al. “Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics,” 8 Race Soc Probl. 296 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345/>; The Sentencing Project, Fact Sheet: The Trends in US Corrections, p. 5, <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

Entrepreneurship is often the only or best chance someone has to earn an honest living after interacting with the justice system. People with felony records often face stigma with employers and find it difficult to obtain work, as Jimmie Williams experienced.¹⁰ Moreover, a myriad of occupational licensing laws unnecessarily prohibit Americans with criminal records from pursuing a variety of occupations.¹¹ Given the barriers to working for companies or joining a trade, many people with criminal records turn to entrepreneurship as a way to earn a living and get their lives on track.¹² By denying PPP loans to businesses owned by people with criminal records, the Interim Final Rule risks decimating companies built by people who have, in the process of building their companies, also rebuilt their own lives.

Entrepreneurship enables those with criminal records to engage in honest enterprise and pursue their dreams as free, law-abiding members of society instead of turning back to criminal enterprises. Indeed, employment and entrepreneurship are key to reducing the risk of recidivism.¹³ It is irresponsible to cut off avenues for success for those who worked hard to create their own jobs. This is especially important in the current economic crisis.¹⁴ We should be doing all we can during this time to increase economic freedom so people can sustain lawful employment for themselves and others.

President Trump's administration, Congress, and most state governments have recognized that formerly incarcerated people's freedom to find or create employment is critical to the nation's economic and social well-being. President Trump created the Federal Interagency Council on Crime Prevention and Improving Reentry and ordered that it is the policy of the United States to prioritize efforts to reduce recidivism.¹⁵ The 2020 budget dedicated resources to programs for occupational training, ease of re-entry, and connection with employment for

¹⁰ See Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*, NCJRC (October 2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>.

¹¹ See Michelle N. Rodriguez & Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, NELP (April 2016), <https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>.

¹² See, for example, Kevin Davis, "Formerly incarcerated people are building their own businesses and giving others second chances," ABA Journal, July 1, 2019, <https://www.abajournal.com/magazine/article/resolved-to-rebuild-formerly-incarcerated>; Michael Zakaras, "Why Ex-Cons Make Great Entrepreneurs," Forbes, November 5, 2012, <https://www.forbes.com/sites/ashoka/2012/11/05/why-ex-cons-make-great-entrepreneurs/#59acac9f60b6>.

¹³ See, for example, *Impact Analysis of the Prison Entrepreneurship Program*, Initiative for a Competitive Inner City (July 2018); John M. Nally et al., *Post-Release Recidivism and Employment among Different Types of Released Offenders: A 5-Year follow-up Study in the United States*, 9 Int'l J. of Crim. Just. Sci. 16 (2014), <http://www.sascv.org/ijcjs/pdfs/nallyetalijcjs2014vol9issue1.pdf>.

¹⁴ A rigorous 2017 study by Professor Crystal S. Yang found that during times of economic instability recidivism rates are significantly higher. See generally Crystal S. Yang, *Local Labor Markets and Criminal Recidivism*, 147 J Public Econ 16 (2017).

¹⁵ Donald J. Trump, Executive Order, "Federal Interagency Council on Crime Prevention and Improving Reentry," March 7, 2018, <https://www.whitehouse.gov/presidential-actions/federal-interagency-council-crime-prevention-improving-reentry/>.

formerly incarcerated people.¹⁶ The First Step Act prioritized programs to lower recidivism.¹⁷ States too have recognized the need to return economic liberty to those who have served their time for mistakes. Since 2015, 30 states have made it easier for those with criminal records to find work in licensed fields.¹⁸ The SBA should not undermine these vital national policies.

The SBA itself has recognized the importance of making loans available to entrepreneurs regardless of their criminal background. One example is the microloan program authorized under 7(m) of the Small Business Administration Act. This program looks at criminal background only to investigate whether an applicant has engaged in a crime linked to fraud that is directly relevant to a potential loan. In fact, during rulemaking for that program, the SBA directly acknowledged that lowering barriers to loans boosts “successful reentry of formerly incarcerated individuals, who often have difficulty finding steady employment.”¹⁹ Given the goals of the PPP and national policies to reduce recidivism, the SBA should echo its 7(m) approach in the PPP rules.

It is not time to reverse course on criminal justice reform. The current administration should maintain its commitment to giving those involved in the criminal justice system a second chance and making it easier for them to transition back into society. The push towards restoring economic liberty is bipartisan, and common sense. Great progress has been made. The SBA should not create rules that run contrary to long-fought advances. The Interim Final Rule risks sweeping that progress and understanding aside for a quick fix that wrongfully excludes thousands of American entrepreneurs.

2. The SBA’s “75% Rule” Harms Very Small Businesses and is Not Authorized by the CARES Act.

As the CARES Act recognized, small businesses have significant monthly expenses that they must meet to survive this pandemic and to preserve jobs—expenses that include rent, utilities, and debt servicing payments. Many of the smallest and most economically vulnerable businesses have to spend a significant percentage of their budget on meeting those monthly expenses to keep the business going. For a small business with a storefront and one location, the aggregate costs of rent and utilities alone can rival what the business spends on payroll. If they cannot spend PPP loan amounts on those expenses *and receive forgiveness*, the businesses might need to close.

Without reference to any statutory requirement, SBA has declared that, to be eligible for forgiveness, 75% of PPP loans under the CARES Act must be used for payroll costs. Section 2(r)

¹⁶ “President Donald J. Trump is Committed to Building on the Successes of the First Step Act,” White House, April 1, 2019, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/>.

¹⁷ See “An Overview of the First Step Act,” Federal Bureau of Prisons, https://www.bop.gov/inmates/fsa/overview.jsp#reduction_in_recidivism.

¹⁸ “State Occupational licensing Reforms for Workers with Criminal Records,” Institute for Justice, <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/>.

¹⁹ 80 Fed. Reg. 34043.

of the Interim Final Rule states that “at least 75 percent of the PPP loan proceeds shall be used for payroll costs.”²⁰ Conversely, Section 2(o) of the Interim Final Rule states that “not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs.”²¹ Together, Sections 2(r) and 2(o) form the so-called “75% Rule.” The 75% Rule is unauthorized by Congress and is therefore *ultra vires*; it extends beyond SBA’s authority under the CARES Act. It is also unduly burdensome to small businesses, like our clients.

A. *Real-World Impact of the 75% Rule*

Back of the Yards Coffeehouse is one of our most inspiring clients. Mayra Hernandez and Jesse Iniguez are longtime friends who grew up in the Back of the Yards neighborhood of Chicago, so named because it abutted the stockyards that once provided a lot of jobs in Chicago. When Mayra and Jesse went away to college, they discovered what an asset a coffee shop is for a close-knit community, and they wanted to bring that asset to their own neighborhood. They tried to convince big-name coffee companies to open a shop, presenting statistics about the coffee culture among Latino populations like that of Back of the Yards—but the big names would not come. Eventually, Jesse and Mayra built it themselves. They have created a coffee shop and roastery that anchors the neighborhood.²² With their shop, they have created six jobs for people in the neighborhood. However, rent and utilities for the coffee shop equal the amount they spend on payroll each month.

If they want to be granted loan forgiveness, Mayra and Jesse cannot deploy the PPP funds to cover their full rent and utilities because, if an entrepreneur wants to be eligible for forgiveness, the Interim Final Rule imposes a 25% cap on non-payroll uses of the funds. But, without the PPP funds, they do not have many other options to cover rent and utilities. Their business revenues are tightly constrained by state and city orders regarding restaurants. They also have limited access to other capital sources, as low-income entrepreneurs in a low-income community. If they cannot find the funding to fully cover their shop’s rent and utilities, they may have to close—leaving six people unemployed and another vacant storefront in Back of the Yards. Even though they received the PPP loan, and they are the quintessential business that the CARES Act was designed to help, the 75% rule might make it impossible for them to maintain the continuity of their payroll.

Our client Chicago School of Shoemaking (“CSS”) is another example. CSS is the school where Yohance Lacour refined his skills, and the school’s owner, Sara McIntosh, mentored Yohance as he launched his line of leather sneakers. It is the kind of entrepreneurial gem that makes Chicago a fascinating place to live and work. It creates jobs for artisans and opportunities

²⁰ 85 Fed. Reg. 20814.

²¹ 85 Fed. Reg. 20814.

²² Mary Schmich, “Neighborhood Natives Launch Coffee Shop Where Starbucks Won’t—Back of the Yards,” Chicago Tribune, March 25, 2017, <https://www.chicagotribune.com/columns/mary-schmich/ct-back-of-the-yards-coffee-shop-mary-schmich-0326-20170324-column.html>.

for Chicagoans to learn a craft.²³ Like Back of the Yards Coffeehouse, CSS needs specialized space and equipment to operate. To achieve continuity of payroll, Sara needs to keep the doors open (even when they are closed due to city and state orders) and the lights on by paying rent and utility bills that roughly equal her business's payroll costs.

Many small businesses like Back of the Yards Coffeehouse and the Chicago School of Shoemaking have employees that depend on the business staying afloat, but payroll does not constitute 75% of their core expenses.²⁴ This is especially true for the small neighborhood businesses that occupy storefronts throughout our country—the typical Main Street businesses that are at the heart of our communities. In order for these businesses to survive these very difficult times and stay afloat as employers, they may need to spend more than 25% of their loan on expenses connected to their store, such as rent or a mortgage. This should not preclude them from receiving forgiveness. They are the businesses that are most in need of the forgiveness and capital infusion, and they will also face the greatest detriment if the funding converts to a loan. The imposition of the 75% Rule is detrimental to the Act's goals of keeping workers paid and employed.²⁵

B. The 75% rule is unauthorized by the CARES Act.

The CARES Act does not authorize the SBA's 75% Rule or direct the SBA to create such a rule. The CARES Act permits PPP loans to be made for specific categories of expenses—including payroll costs, mortgage payments, rent, and utilities—but does not impose any requirements regarding what percentage of the loan must be spent on any of these allowed expenses.²⁶ Indeed, the Interim Final Rule acknowledges that the 75% Rule is found nowhere in the CARES Act, and was created out of whole cloth by the SBA: “While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator

²³ Jamie Ramsay, “Sara McIntosh Teaches Shoemaking as a First Step Toward Self-Reliance,” Chicago Reader, July 25, 2018, <https://www.chicagoreader.com/chicago/school-shoemaking-sara-mcintosh-craft-cobbler/Content?oid=53761308>.

²⁴ In fact, 67% of the businesses in Chicago have 1-4 employees, and they account for 10% of the jobs in the city. See Initiative for a Competitive Inner City, Report, “The Big Impact of Small Businesses on Urban Job Creation: Evidence from 10 Cities,” 2019, https://icic.org/wp-content/uploads/2019/08/JPMC_BigImpact_JUL2019_ada1.pdf.

²⁵ See “Here's How The Small Business Loan Program Went Wrong In Just 4 Weeks,” NPR, May 4, 2020, <https://www.npr.org/2020/05/04/848389343/how-did-the-small-business-loan-program-have-so-many-problems-in-just-4-weeks>; “Small Businesses Say Rescue Loans Come With Too Many Strings Attached,” NPR, April 28, 2020, <https://www.npr.org/2020/04/28/845930096/small-businesses-say-rescue-loans-come-with-too-many-strings-attached>.

²⁶ Section 1102(a) of the CARES Act amends Section 7(a) of the Small Business Act, 15 U.S.C. 636(a), to permit specified small businesses to receive loans to pay for a variety of expenses, including: payroll costs, mortgage payments, rent, utilities, and interest on any other debt obligations that were incurred before February 15, 2020. Section 1102(a) does not dictate what percentage of the loan may be spent on any particular category of expense, nor does it suggest that any limitation exists. Similarly, Section 1106(a) provides for loan forgiveness of such loans for costs incurred and payments made on payroll costs, mortgage payments, rent, and utilities. Again, Section 1106(a) does not require that a particular percentage of the loan be spent on any particular expense category, and does not provide any discretion to the SBA to impose such a requirement.

believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs. . . .”²⁷

The Interim Final Rule also acknowledges that the imposition of the 75% Rule was a determination made by the SBA and not by Congress: “The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage. . . .”²⁸ But this is not a mere exercise of “gap filling” where Congress leaves a specific requirement to be determined by the agency in its discretion. To the contrary, there is no “gap” in the CARES Act for SBA to “fill,” because the Act does not suggest that there should be any limitation on the percentage of the loan that can be spent on an authorized category of expenses.

The SBA attempts to justify the rule by appealing to the “structure” of the Act, noting that, “the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act” and that the Administrator believes the 75% Rule is “consistent with Congress’ overarching goal of keeping workers paid and employed.”²⁹ But that determination is not the SBA’s to make because Congress never delegated such authority to the SBA.

Absent statutory authorization, SBA may not itself impose a new requirement for PPP loans. After all, “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”³⁰ To do so is to usurp the power of Congress. “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.”³¹ Accordingly, the 75% rule is *ultra vires* of the SBA’s statutory authority under the CARES Act and should be rescinded.

Conclusion

At the IJ Clinic, we work directly with low-income entrepreneurs like Jimmie, Yohance, Mayra, Jesse, and Sara every day. We have seen first-hand what entrepreneurship can do for a person, a community, and the people it touches. Small businesses create jobs and build wealth. They have customers who need goods and services in this crisis and beyond. Sometimes low-income business owners may establish one of the few businesses providing much-needed goods and services in an underserved area.³² Now is not the time to deny aid to businesses that operate in the most distressed parts of our country or disadvantage them.

²⁷ 85 Fed. Reg. 20814.

²⁸ 85 Fed. Reg. 20814.

²⁹ 85 Fed. Reg. 20814.

³⁰ *FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

³¹ *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 357 (1986).

³² Many inner cities are “retail deserts” or “food deserts,” meaning that large populations within cities must travel far distances for access to goods and services that many Americans have right around the corner. See Kimberly Durden, “Food Deserts Continue to Plague the Southside,” *Chicago Defender*, January 7, 2020, <https://chicagodefender.com/food-deserts-continue-to-plague-the-southside/>. See also Lolly Bowean, “I Feel

Entrepreneurs help solve problems for consumers and grow our economy, all while working hard to make their own dreams come true. The right to earn a living is the heart of the American Dream. This is what the CARES Act is focused on protecting. The government should not be in the business of picking winners and losers, but the SBA's Interim Final Rule forces too many struggling entrepreneurs to lose out because they had fewer resources to begin with. Many businesses and jobs will be able to survive government shutdowns thanks to PPP lending. It is not fair that they receive this support while other businesses are forced to fold because of (1) an owner's past crimes (or, in some cases, mere allegations of a crime) that are completely unrelated to the business or (2) the SBA's attempt, contrary to legislative authorization, to limit what PPP funds can be used for. Small businesses around the country have had their liberty and economic freedom taken from them. The PPP is about helping them stay afloat, and saving the jobs and wealth they create for our country.

While many commentators have claimed that the American Dream is a thing of the past, entrepreneurs—especially those who have made mistakes in the past or are building a business with limited resources—are direct proof that it is alive and thriving. Entrepreneurship allows people with past involvement with the criminal justice system and low-income Americans to create prosperous lives for themselves. It gives them access to opportunity that is central to America's commitment to liberty. The federal government should not trample on those dreams by picking winners and losers, arbitrarily doling out assistance to some and leaving others behind. We urge you to address the problems in the Interim Final Rule that we have laid out by eliminating the 75% Rule and Section 2(b)(iii). Now is the time to vindicate and validate the rights of all Americans to pursue an honest living.

Sincerely,

The Institute for Justice Clinic on Entrepreneurship

Cheated': For Some South Side Chicago Residents, Losing 2 Target Stores Isn't Just an Economic Blow," Chicago Tribune, February 7, 2019, <https://www.chicagotribune.com/news/ct-met-chicago-target-stores-close-south-side-20190205-story.html>.