UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a Federally-recognized Indian tribe,

Plaintiff,

v.

JOVITA CARRANZA, in her official capacity as Administrator of the United States Small Business Administration; and STEVEN MNUCHIN, in his official capacity as Secretary of the United States Department of the Treasury,

Defendants.

Case No. 4:20-cv-4070

FLANDREAU SANTEE SIOUX TRIBE'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

(Fed. R. Civ. P. 65(a) & (b))

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This action concerns the Defendant federal officials' rules implementing the Paycheck Protection Program, or "PPP." Congress created the PPP last month in section 1102 of the massive $2 trillion economic relief legislation known as the CARES Act, to authorize fully forgivable federal loans for small businesses to pay their employees, landlords, lenders, health insurance, and utility providers. The PPP provides emergency financial assistance for workers and other people affected by the widespread closures and sharply reduced revenues of small businesses as a result of the Covid-19 pandemic.

Congress charged the Small Business Administration ("SBA"), which has worked in consultation with the Department of the Treasury, to develop rules for the federal government to supply the relief authorized in the PPP. The executive agencies, however, implemented unduly restrictive rules under which the employees of businesses that are expressly eligible for assistance under the statute Congress wrote are instead deemed ineligible based on criteria that should never have been applied. These are the "no casino rule" and the "no lender rule." Because these arbitrary, unwarranted ineligibility rules contravene the unambiguous intent of Congress, they are unlawful and exceed the agencies' statutory authority.

Plaintiff Flandreau Santee Sioux Tribe ("Tribe"), which owns and operates three small businesses – a casino and two lending companies – that are eligible for federal assistance under the statute, but are made ineligible by the agencies' rules, therefore moves the Court for an order setting aside the unlawful rules under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The Tribe asks for emergency injunctive relief because funding for the PPP is limited while demand is extraordinarily strong, and in the absence of immediate judicial relief, the Tribe and its small businesses will lose forever their statutory right to apply for the economic assistance Congress directed the agencies to provide.

BACKGROUND

I. The CARES Act

The novel coronavirus that began to infect and kill people in November 2019 spread to a large and increasing number of people in the United States by March 2020. Local governments, tribal governments, and soon most state governments directed their residents to stay at home to avoid acquiring or spreading the virus and the disease it causes, Covid-19. As people stayed home, much of the national economy shut down. Businesses were forced to suddenly close, and most of those that did not close saw significant revenue disruptions. Many small businesses furloughed or laid off employees. From mid-March to mid-April, more than 22 million claims for unemployment assistance were filed. Property owners could not collect rent from businesses without revenues, mortgages went unpaid and companies could not keep their lights on.

With the aim of providing a modicum of economic relief to those whose lives and livelihoods rely on small businesses, Congress created the Paycheck Protection Program ("PPP"), established by section 1102 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. 116-136, 134 Stat. 281, signed into law on March 27, 2020. The CARES Act situated the PPP provisions as a new paragraph 36 within section 7(a) of the Small Business Act, 15 U.S.C. § 636(a).

The CARES Act states, "Except as otherwise provided in [paragraph 36], the [SBA] Administrator may guarantee [PPP] loans under the same terms, conditions, and processes as a loan made under [§7(a)]." CARES Act § 1102(a)(2)(36)(B). In light of the extraordinary need for economic relief that the PPP seeks to address, paragraph 36 provides numerous exceptions to the general terms, conditions, and processes that generally apply to §7(a) loans. The PPP features expanded eligibility criteria compared with the SBA's existing §7(a) loan programs (§1102(a)(2)(36)(D)) and authorizes banks to loan applicants up to $10 million of federal funds

(§1102(a)(2)(36)(E)). Lender and borrower fees are waived (§1102(a)(2)(36)(H)), the requirement that the borrower is unable to obtain credit elsewhere is waived (§1102(a)(2)(36)(I)), and no personal guarantee or collateral shall be required (§1102(a)(2)(36)(J)). Interest is capped at four percent. §1102(a)(2)(36)(L). The Act also forgives up to the full amount of the loan for eligible payments the borrower makes during the eight weeks after the loan origination date. §1106.

In subparagraph (36)(D), captioned "Increased Eligibility for Certain Small Businesses and Organizations," the CARES Act provides PPP eligibility requirements as follows:

> (i) In General.—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, veteran's 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, veterans organization, or Tribal business concern operates.

§1102(a)(2)(36)(D) (emphasis added). The "covered period" is the period beginning on February 15, 2020 and ending on June 30, 2020. §1102(a)(2)(36)(A)(iii).

A "Tribal business concern described in [Small Business Act] section 31(b)(2)(C)" is, in relevant part, a "small business concern . . . that is wholly owned by one or more Indian tribal governments." 15 U.S.C. § 657a(b)(2)(C).

The CARES Act singles out the "accommodation and food services" industry – identified in the Act by reference to the "North American Industry Classification System ["NAICS"] code beginning with 72" – for special treatment to ensure the PPP covers businesses in this industry as fully as possible. For businesses in this industry, the Act waives affiliation rules and counts each

location separately for purposes of counting 500 employees. §1102(a)(2)(36)(D)(iii), (iv). The industry includes "casino hotels," NAICS code 721120, such as the Tribe's Royal River Casino and Hotel.

The CARES Act also requires eligible borrowers applying for a PPP loan to make a "good faith certification" stating:

> (I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;
>
> (II) acknowledging that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
>
> (III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and
>
> (IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

§1102(a)(2)(36)(G). The Act also directs lenders "evaluating the eligibility of a borrower for a covered loan within the terms of this paragraph" to "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 (BB) paid independent contractors, as reported on a Form 1099-MISC." §1102(a)(2)(36)(F)(ii)(II).

PPP loans are to be used for payroll and salaries, group health insurance premiums, payments for mortgages, rent and utilities, and interest payments on existing debts. §§ 1102(a)(2)(36)(F), (G)(i)(II), 1106(b). In short, the policy of Congress and the purpose of the statute is to keep small business personnel on payrolls until businesses can return to normal operation.

Congress initially authorized commitments of $349 billion for the PPP and other §7(a) loans for the period from February 15, 2020 through June 30, 2020. §1102(b). Lenders began to accept PPP loan applications on Friday, April 3, 2020, one week after the CARES Act became law. Less than two weeks later, on Thursday, April 16, 2020, the SBA publicly announced that the $349 billion authorized for the PPP was completely exhausted. Congress is expected to authorize an additional commitment of $310 billion on April 23, 2020.

Section 1114 of the CARES Act gives the SBA Administrator emergency rulemaking authority to "carry out" Title I of the CARES Act, which includes the PPP. §1114.

II. The Interim Final Rule

On or about April 2, 2020, the SBA issued an Interim Final Rule, "Business Loan Program Temporary Changes; Paycheck Protection Program." The Interim Final Rule was published in the Federal Register on April 15, 2020. 85 Fed. Reg. 20811.

Under the heading, "How do I determine if I am ineligible?", the Interim Final Rule states: "Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 … except that nonprofit organizations authorized under the Act are eligible." 85 Fed. Reg. at 20812.

Under the previously adopted 13 C.F.R. § 120.110, certain types of businesses are generally ineligible for SBA business loans. The list of ineligible businesses includes "Businesses deriving more than one-third of gross annual revenue from legal gambling activities," 13 C.F.R. § 120.110(g), and "Financial businesses primarily engaged in the business of lending," 13 C.F.R. § 120.110(b). Thus, the Interim Final Rule for implementing the PPP incorporated the SBA's pre-existing general "no-casino rule" and "no-lender rule."

The list of ineligible businesses under 13 C.F.R. § 120.110 also includes "Non-profit businesses." 13 C.F.R. § 120.110(a). However, the Interim Final Rule specifies that despite

their general ineligibility under § 120.110, "nonprofit organizations authorized under the Act are eligible." 85 Fed. Reg. at 20812.

The list of ineligible businesses under 13 C.F.R. § 120.110 does not apply to the SBA's "HUBZone" program, established by 15 U.S.C. § 657a – the section referenced in the CARES Act to define "Tribal business concerns." Thus, a "Tribal business concern" under the CARES Act is not inherently, by reference, or otherwise, limited to non-gambling and non-lending businesses.

The SBA's no-casino rule and no-lender rule originate with the SBA's Loan Policy Statement issued in 1953. *See* Loan Policy Statement § 101.4(d)(8) & (9), 19 Fed. Reg. 5440, 5441 (Aug. 26, 1954). The no-casino rule and no-lender rule have remained in place, with some modifications, ever since. The SBA Loan Policy Board enacted the rules pursuant to 15 U.S.C. § 633(d), which authorizes the Board to establish general policies regarding "the public interest involved in the granting and denial of applications for financial assistance."

On or about April 14, 2020, the SBA issued an amended Interim Final Rule, "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans." *See* Complaint Ex. A. The amended Interim Final Rule, in part, amended the no-casino rule as applied to the PPP. In the amended Interim Final Rule, the SBA opened PPP eligibility to businesses with small, secondary gambling operations – those whose gambling revenue in 2019 was not more than $1 million and comprised less than half the business's total revenue for the year. Amended Interim Final Rule § 2.b. The amended Interim Final Rule states, "The Administrator, in consultation with the Secretary, believes this test appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity with the policy aim

of making the PPP Loan available to a broad segment of U.S. businesses and their employees." *Id.*

III. The Tribal Businesses

The Flandreau Santee Sioux Tribe is located on the Flandreau Indian Reservation in Moody County, South Dakota. Complaint ¶ 8. The Tribe owns and operates the Royal River Casino and Hotel ("Casino"). Complaint ¶¶ 8, 41. The Tribe conducts legal gambling at the Casino in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the 2016 gaming compact between the Tribe and the State of South Dakota. Complaint ¶ 41. The Casino has been in operation since 1990. Complaint ¶ 45. It employs 250 people. Complaint § 46. Approximately 75% of the Casino's revenues derive from gambling; the Casino's other revenues derive from its non-gaming departments including the convenience store, food and beverage, hotel, and gift shop. Complaint ¶ 47.

The Tribe also owns and operates FSST Financial Services, LLC, and FSST Management Services, LLC (together, the "Tribal Lending Businesses"). Complaint ¶ 48. The Tribal Lending Businesses are financial businesses primarily engaged in the business of lending. *Id.* They have been in operation since 2014. Complaint ¶¶ 49, 50. FSST Financial Services employs one person and FSST Management Services employs nine people. *Id.*

The Tribe temporarily closed the Casino on March 31, 2020 in compliance with Tribal and federal law to protect the health and safety of guests, employees, the community, and the wider public. The Casino has remained closed since then. The Casino furloughed 225 employees, and approximately 25 employees remain employed. Furloughed employees were given two weeks of pay during the furlough, and the Tribe continues to pay for their healthcare benefits. The Tribe has a limited amount of cash reserves which will be completely depleted if

the Casino does not reopen. Complaint ¶¶ 52-53. The Casino has debt obligations for a recently completed renovation which remain outstanding during closure. Complaint ¶ 54.

The Tribal Lending Businesses remain open, however staffing has been an issue because of the Covid-19 pandemic, and several employees have been laid off. Additional recruitment efforts for employees will be necessary to sustain the business, including hiring bonuses and hazard pay. Some employees at the Lending Businesses are eligible for healthcare, and continue to receive benefits through the Covid-19 pandemic. Complaint ¶ 55.

The Tribe also applied to the First National Bank in Sioux Falls for PPP loans for the Tribal Lending Businesses. On April 23, 2020, the SBA notified the Bank of its determination that FSST Financial Services, LLC is not eligible for a PPP loan. On information and belief, the determination was based on the SBA's no-lender rule. The Tribe anticipates a similar determination will be forthcoming for FSST Management Services, LLC. Complaint ¶ 58.

ARGUMENT

To obtain a preliminary injunction or temporary restraining order the moving party must show that the consideration of these four factors weighs in its favor: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on [the nonmovant]; (3) the probability that [the] movant will succeed on the merits; and (4) the public interest." *Management Registry, Inc. v. A.W. Cos., Inc.*, 920 F.3d 1181, 1183 (8th Cir. 2019), quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *see also S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989) (applying *Dataphase* factors to motion for temporary restraining order). "Success on the merits has been referred to as the most important of the four factors." *Roudachevski v. All-American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). However, it is a flexible analysis, in which "no single factor in itself is dispositive." *United*

Industries Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998). Rather, the court weighs on a sliding scale the case's particular circumstances to determine "whether the balance of equities so favors the movant that justice requires the court to intervene." *Dataphase* at 113. Here, all four factors strongly favor the issuance of injunctive relief.

I. The Tribe has a strong likelihood of success on the merits.

The APA authorizes judicial review of federal agency action. 5 U.S.C. § 702. It directs that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Agency action, findings, and conclusions are unlawful and shall be set aside if the reviewing court finds them "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

Here, the agency's no-casino rule and no-lender rule unlawfully conflict with the unambiguous language and intent of the CARES Act, which provides that "any . . . Tribal business concern . . . shall be eligible to receive a covered loan" if the business meets the statutory criteria. CARES Act § 1102(a)(2)(36)(D). Congress did not permit the SBA to add extra criteria, like the no-casino and no-lender rules, making statutorily eligible Tribal casinos and lending businesses ineligible. The SBA's rules exceed its authority under the CARES Act.

The SBA rules are entitled to no deference. Under the two-step framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court first examines "whether the intent of Congress is clear as to the precise question at issue. If, by employing traditional tools of statutory construction, [the Court determines] that Congress' intent is clear, that is the end of the matter." *Hawkins v. Community Bank of Raymore*, 761 F.3d 937, 940 (8th Cir. 2014) (quoting *North Dakota v. E.P.A.*, 730 F.3d 750, 763 (8th Cir. 2013)). Only if

"the statute is silent or ambiguous with respect to the specific issue" is it necessary to proceed to *Chevron*'s step two, which requires the Court "to consider whether 'the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design.'" *Id.* at 940-41 (quoting *Baptist Health v. Thompson*, 458 F.3d 768, 773 (8th Cir. 2006)).

When interpreting a statute, the court starts with the plain language. *United States v. I.L.*, 614 F.3d 817, 820 (8th Cir. 2010). "The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (internal citations and quotations omitted).

Congress used the word "any" to identify initially the entities eligible for the PPP: "*any* . . . Tribal business concern." §1102(a)(2)(36)(D)(i) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 31 (2004) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Because "Congress did not add any language limiting the breadth of that word," the phrase must be read as referring to *all* Tribal business concerns. *Gonzales* at 5; *see North Dakota v. E.P.A.*, 730 F.3d at 764.

Next, Congress provided that all Tribal business concerns meeting the size criteria "*shall* be eligible to receive a [PPP] loan." §1102(a)(2)(36)(D)(i) (emphasis added). Congress' use of the word "shall" demonstrates that §1102 *mandates* PPP eligibility for all small Tribal business concerns. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Technologies v. United States*, 136 S.Ct. 1969, 1977 (2016); *accord CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 140 S.Ct. 1081, 1088 n.3

(2020). "Congress could not have chosen stronger words to express its intent" that eligibility be mandatory for Tribal business concerns of a certain size, "or broader words to define the scope" of the businesses to be eligible. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989). Accordingly, the court must "give effect to this plain command." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Nothing in the all-inclusive and mandatory terms of the CARES Act hints that eligible Tribal business concerns can be made ineligible for the PPP because they are in the business of gambling or lending.

The surrounding context confirms that Congress intended PPP eligibility to be established according to the criteria set forth in the CARES Act, and not to be limited by additional eligibility barriers supplied by the SBA. The PPP's critical feature is that it expands eligibility for federal assistance beyond the other small business loan programs under section 7(a) of the Small Business Act. Paragraph 36(D), which Congress captioned "Increased Eligibility for Certain Small Businesses and Organizations," provides that so long as the entity meets the size requirement, "any business concern, nonprofit organization, veterans organization, or Tribal business concern . . . shall be eligible to receive a covered loan." §1102(a)(2)(36)(D)(i). These eligible loan recipients are all "in addition to small business concerns," *Id.*, which are the focus of many of the preexisting paragraphs under section 7(a) *E.g.*, 15 U.S.C. § 636(a)(8), (10), (11), (12), (14), (15), (16), (20), (21).[1]

Numerous provisions in paragraph 36 provide waivers and exceptions to the restrictions that generally apply to small business loan programs, including: eligibility for sole proprietors, independent contractors and self-employed individuals (36(D)(ii)); a more lenient method for

[1] For purposes of the Small Business Act, a "small business concern" is an enterprise "which is independently owned and operated and which is not dominant in its field of operation," subject to size standards specified by the SBA. 15 U.S.C. § 632(a).

counting the number of employees for businesses in the accommodation and food services industry (NAICS codes beginning with 72) – which includes the Tribe's Casino (36(D)(iii); waiver of certain affiliation rules for the accommodation and food services industry, among others (36(D)(iv); a delegation of authority to lending institutions to "make and approve" PPP loans, based on the lender's consideration of rudimentary borrower characteristics (36(F)(ii)); waiver of borrower and lender fees (36(H)); waiver of the ordinary "credit elsewhere" requirement (36(I)); waiver of requirements for a personal guarantee or collateral (36(J)); and waiver of prepayment penalties (36(R)). In short, the congressional purpose was to disburse funds widely, quickly, and virtually indiscriminately, subject only to the criteria set by statute.

Notably, Congress expressly listed "any . . .Tribal business concern described in section 31(b)(2)(C)" among the eligible recipients, even though any Tribal business concern would have been included as a generic "business concern." The express eligibility of "Tribal business concerns" eliminates any ambiguity as to their inclusion, ensures that Indian tribes' dual roles as governments and business proprietors do not affect their eligibility for federal assistance available to governments or to businesses, and ought to ensure that the PPP reaches all tribally owned businesses that meet the statutory criteria.

Further, the term "Tribal business concern" incorporates the definition of that term from section 31(b)(2)(C) of the Small Business Act, 15 U.S.C. § 657a(b)(2)(C). Neither the statute nor applicable regulations exclude the gambling or lending industries from the definition of a "Tribal business concern" incorporated into the CARES Act.

The mandatory and inclusive PPP provisions of the CARES Act stand in contrast to other provisions of section 7(a) of the Small Business Act, which generally authorize the SBA to make discretionary determinations about granting small business loans, based on broad congressional

statements of purpose. E.g., 15 U.S.C. § 636(a)(11), (12), (14), (16), (20), (21). Still other Small Business Act programs, such as section 8(a) for government contracting, reflect "a background principle of *exclusion*," with federal assistance "available only to certain Section 8(a) program applicants, and only when the agency determines that certain conditions have been met." *Cognitive Professional Services Inc. v. U.S. Small Business Administration*, 254 F.Supp.3d 22, 36 (D.D.C. 2017) (discussing 15 U.S.C. § 637(a)(7)(A), which states in part, "No small business concern shall be deemed eligible for any assistance pursuant to this subsection unless the Administration determines . . ."). And other Acts of Congress demonstrate that when lawmakers want to exclude casinos or other types of business from relief programs, they know how to expressly do so, as in the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (Feb. 17, 2009) § 1604, 123 Stat. 115, 303, which made funds available for economic relief but expressly barred using the funds for "any casino or other gambling establishment."

Congress unambiguously established mandatory eligibility criteria for the PPP. The agency charged with implementing the PPP cannot evade the statutory mandate by erecting additional barriers to the program, blocking assistance to Tribal businesses that are statutorily eligible for aid. Nor do the agency's no-casino and no-lender rules fill any statutory gap. The Act's inclusive eligibility provision plainly brings within the program "any" of the listed businesses – that is, *all* of them – if they meet the size requirement. It leaves no room for an implicit invitation for the agency to determine that some of the eligible businesses are, in fact, ineligible.

Furthermore, even if the provision that "any . . . Tribal business concern . . . shall be eligible" for the PPP could be read to admit more than one meaning, or to be silent on the question of eligibility, the SBA's no-casino rule and no-lender rule are not based on a

permissible construction of the statute. The rules are arbitrary and capricious in substance and manifestly contrary to the statute. *See Mayo Foundation for Medical Educ. and Research v. United States*, 562 U.S. 44, 53 (2011).

If ambiguities are found in the statute, they must be interpreted in favor of the Tribe. *Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1062 (D.S.D. 2016) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit")); *see Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976) ("'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians'" (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)). As noted above, Congress specifically added Tribal business concerns to its list of eligible entities with the evident intention of ensuring that PPP assistance would reach all tribally owned businesses that meet the size standard. The agency's interpretation that Congress intended administrative officials to exclude otherwise-eligible tribal businesses from the employee relief program based on the agency's general policy determinations contravenes this canon of construction and the federal government's obligation toward Indian tribes, and it is therefore not entitled to deference. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988).

In addition, there is no reasoned basis to import the SBA's exclusionary rules from its pre-existing general section 7(a) lending regulation into the emergency relief program of the PPP. The no-casino and no-lender rules apparently reflect the SBA's judgment since the 1950s that it would be contrary to public policy to provide federal financial assistance to casino and lending businesses. *See* Loan Policy Statement § 101.4(d)(8) & (9), 19 Fed. Reg. 5440, 5441

(Aug. 26, 1954); 13 C.F.R. § 120.110(b) & (g). The SBA Loan Policy Board first enacted the rules pursuant to 15 U.S.C. § 633(d), which authorizes the Board to establish general policies regarding "the public interest involved in the granting and denial of applications for financial assistance."

The SBA understandably may not wish to loan public money to businesses that will just re-lend or gamble the funds, i.e., to make such loans for "working capital," as section 7(a) generally "empower[s]" the agency to do, or even for "the acquisition of land, material, supplies [and] equipment" for the operation of a gambling business or lending institution. 15 U.S.C. § 636(a). PPP loans, however, are not designed to be used for such purposes. The loan amount is tied directly to the recipient's payroll – typically two and one-half times its average monthly payroll. CARES Act §1102(a)(2)(36)(E). The recipient is required to certify that the "funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments." §1102(a)(2)(36)(G). The program's critically important loan forgiveness provision applies only to loan proceeds used during the eight weeks after origination for payroll costs and pre-existing mortgage, rent and utility obligations. §1106(b). The aim of the PPP, therefore, is not to capitalize the borrower's business activities or allow the borrower to acquire property, but rather to provide money to other people – employees, landlords, mortgage lenders, and utility providers – while the borrower's business is temporarily closed or otherwise short of revenue because of the Covid-19 pandemic. The SBA has not identified any reasoned basis for excluding from such relief the employees who depend on paychecks from casinos or lending businesses, or the landlords, mortgage lenders and utility providers that rely on payments from such businesses.

Moreover, to the extent the no-casino and no-lender rules reflect the SBA's traditional view that casinos and lending institutions are high risk borrowers, the PPP is not a traditional section 7(a) loan, and does not hold borrowers to the same standards. Because the loans are fully forgivable if the proceeds are used for the purposes for which the borrower certifies they will be used, a PPP loan operates like a grant. The statute waives risk-related provisions – no personal guarantee or collateral may be required (§1102(a)(2)(36)(J)) – and delegates approval authority to banks (§1102(a)(2)(36)(F)(ii)). *See also* Amended Interim Final Rule § 2.a ("The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans.").

Furthermore, federal law now expressly favors "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). These objectives are "a principal goal of Federal Indian policy." 25 U.S.C. § 2701(2). The Indian Gaming Regulatory Act "provide[s] a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702(2). Federal and tribal laws limit the use of tribal gaming revenues to tribal and local government funding, tribal economic development, the welfare of tribal members, and charity. 25 U.S.C. § 2710(b)(2)(B), (b)(3). Mandatory annual outside audits of the Tribe's gaming, for instance, allow both tribal and federal regulators to scrutinize a tribal casino's adherence to legal, ethical and accounting standards. 25 U.S.C. § 2710(b)(2)(C). Therefore, the SBA's traditional view that federal support for gambling

businesses contravenes public policy, perhaps borne of the notion that casinos harbor corruption or enrich organized crime (which may have been the case in 1953, when the rule was promulgated), can no longer be justified as a reason to deny assistance to tribal casinos. In fact, applying the no-casino rule to tribally owned casinos directly contradicts the express congressional policies regarding Indian gaming quoted above.

The SBA's revised no-casino rule in the amended Interim Final Rule of April 14 relaxes somewhat the bar against giving assistance to gambling businesses, and now allows PPP loans if: "(a) the business's legal gaming revenue (net of payouts but not other expenses) did not exceed $1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business's total revenue in 2019." Amended Interim Final Rule § 2.b. It opens the program to businesses with small, secondary gaming operations. The revision and the SBA's explanation acknowledge that the PPP calls for different rules than the ones that ordinarily apply to the SBA's business loan programs, because the "policy aim" of the PPP is different from other section 7(a) programs – the congressional goal is "making the PPP Loan available to a broad segment of U.S. businesses and their employees." *Id.* The SBA states that the amended rule "appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity" with that policy aim, *id.*, but the agency does not divulge exactly what those "longstanding policy reasons" are. As discussed above, the longstanding no-casino policy conflicts with current federal policy favoring tribal casinos and with the specific mandate of the CARES Act that all tribal businesses shall be eligible for PPP loans.

Notably, the SBA's first Interim Final Rule recognized that the CARES Act required the agency to alter its standard ineligibility rule for "nonprofit organizations authorized under the

Act." Interim Final Rule § 2.c, 85 Fed. Reg. at 20812. Although they are ordinarily absolutely ineligible for section 7(a) loans under 13 C.F.R. § 120.110(a), the SBA lifted that ineligibility for the PPP – as it must, because Congress specified that "any . . . nonprofit organization . . . shall be eligible." CARES Act § 1102(a)(2)(36)(D)(i). The CARES Act requires the SBA to provide the same treatment to all Tribal business concerns.

The foregoing demonstrates the strong likelihood of the Tribe's success on the merits. The CARES Act unambiguously mandates PPP eligibility for all statutorily-qualified Tribal business concerns, and the SBA therefore cannot create additional barriers that deny eligibility to tribal casinos and tribal lending businesses. To the extent the Court may detect a relevant ambiguity or statutory gap in the CARES Act, the SBA's rules do not comport with a permissible construction of the statute, and they contravene congressional intent and exceed the authority delegated to the SBA to implement the CARES Act and the PPP.

II. The Tribe will suffer irreparable harm in the absence of emergency injunctive relief.

Funding for PPP loans is limited and in high demand. The first round of funding was $349 billion, and it was exhausted in thirteen days. The second appropriation of $310 billion is less than the first round, and is likely to be exhausted just as quickly, if not more so. There is no certainty that the government will make any further appropriations for the program. Therefore, if the Tribe is to participate, time is essential. Immediate relief is needed, or the funds will be gone.

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). The Tribe does not perceive any way it may obtain an award of damages from the government for the exclusion of its businesses and

their employees from the PPP. The federal government is generally immune from such suits for damages, and it is not apparent that any business has an enforceable right to receive PPP relief funds, particularly after funding for the program dries up. Here, the Tribe seeks to enforce its statutory right to be *eligible* for such funds.

III. The balance of harms and the public interest favor the Tribe.

When the federal government or agency is the defendant, the final two *Dataphase* factors, the balance of harms and the public interest, can "merge" into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

If the preliminary injunction is issued, the harm faced by the Defendants is insignificant compared to the harm caused to the Tribe if the injunction is denied. Without emergency injunctive relief, the Tribal businesses will be forced to face the financial crisis caused by the Covid-19 pandemic without the emergency assistance authorized by Congress. Over 200 employees of the Tribal Businesses are now suddenly unemployed and struggling to provide for their families. The Tribal government will be hard pressed to provide economic relief, as it relies on the Tribal Businesses, which are shuttered, to fund government services. The depletion of funds available for tribal government programs and government services for Tribal members and the concomitant denigration of the Tribe's capacity to exercise its sovereignty is an irreparable harm to the Tribe that "cannot be measured in dollars." *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1233 (D. Kan. 2002).

In any case, shifting the burden of the crisis to tribal, local or state governments is exactly the outcome the PPP was intended to avoid, as the federal government recognized the need to spend federal dollars to cope with the enormity of the problem. The public interest, as expressed through the passage of the CARES Act, therefore aligns with the Tribe's interest in using PPP funds to pay employees while their employers are unable, permitting the Tribal government, the

state unemployment program, and other sources of public assistance to use their finite funds to address other aspects of the damages wrought by the pandemic.

The Tribal also faces the loss of its Casino employees absent PPP assistance, as they are forced to seek other employment. Casino employees are highly trained and regulated, and licensed by the Tribe's gaming regulatory authority. The loss of these skilled employees constitutes an irreparable harm to the Tribe. *See First Premier Bank v. U.S. Consumer Financial Protection Bureau*, 819 F.Supp.2d 906, 921-22 (D.S.D. 2011).

No cognizable harm will befall the SBA. At most, the agency will need to alert the public and the lending banks of changes to the rules for PPP eligibility. Such changes are required by the statute, so their implementation cannot be characterized as harmful to the agency. The public interest is served by ensuring that the SBA's administration of the CARES Act and the PPP is accomplished in accordance with the statute that Congress wrote and the president signed.

CONCLUSION

For the reasons stated herein, the Tribe respectfully requests entry of an order enjoining the Defendants to set aside the no-casino rule and the no-lender rule for Tribal business concerns otherwise eligible for PPP loans under the CARES Act, and directing Defendants and their delegees to accept, process, and approve the PPP loan applications of Tribal business concerns without regard to such ineligibility rules, giving priority to such applications previously rejected on the basis of such rules.

In the alternative, the Tribe requests an order, pending further disposition of the merits, freezing the distribution of PPP funds sufficient to fund PPP loans for the Tribal Businesses.

Dated: April 23, 2020

Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

By: /s/ Seth Pearman

Seth Pearman
Flandreau Santee Sioux Tribe
603 West Broad Avenue
Flandreau, South Dakota 57028
Telephone: (605) 997-3891
Facsimile: (605) 997-5041
spearman@fsst.org

John M. Peebles, *Pro hac vice pending*
Tim Hennessy, *Pro hac vice pending*
Fredericks Peebles & Patterson LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Facsimile: (916) 441-2067
jpeebles@ndnlaw.com
thennessy@ndnlaw.com