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July 6, 2020

Via Electronic Mail

The Honorable Bill Lee
Governor, State of Tennessee
1st Floor, State Capitol
Nashville, Tennessee 37243
bill.lee@tn.gov

Re: Tennessee Business Relief Program

Dear Governor Lee:

The NAACP Legal Defense and Educational Fund, Inc. (LDF) writes to urge you to amend the funding formula for the Business Relief Program, which will distribute federal funds that Tennessee has received from the Coronavirus Aid, Relief, and Economic Security (CARES) Act to assist small businesses impacted by the COVID-19 pandemic. As presently structured, the program will base payment amounts on annual gross sales. This is likely to disproportionately benefit white-owned businesses in the state with higher annual gross receipts, while having an adverse impact on Black-owned small businesses that are the most vulnerable to the effects of the pandemic. Given the vital role of Black businesses in their community and in the economy as a whole, and the disproportionate impact of the COVID-19 pandemic on Black people, it is critical that funding assistance be distributed in a manner that is fair and equitable for all small businesses facing challenges as a result of the health crisis.

LDF was founded in 1940 by Thurgood Marshall.¹ Through litigation, advocacy, and public education, we work to increase fairness and equal opportunity for Black people in all aspects of the economy. Our economic justice portfolio includes successful litigation against the U.S. Department of Housing and Urban Development (HUD) and the State of Louisiana challenging the disbursement formula for federal recovery funds following Hurricanes Katrina and Rita, which we alleged discriminated against Black Louisiana homeowners.² Following the lawsuit, HUD and Louisiana amended the disbursement formula to ensure that all affected homeowners were able to rebuild.³

¹ It has been an entirely separate organization from the NAACP since 1957.

² NAACP Legal Def. & Educ. Fund, Inc., *Case: Road Home* (Nov. 12, 2008), <https://www.naacpldf.org/case-issue/road-home/>.

³ *Id.*

Small businesses are critical to the nation’s economy and are an important source of wealth-building for Black communities.⁴ Businesses owned by people of color account for more than 8.9 million jobs, at an total annual payroll of \$295 billion and \$1.4 trillion in revenue.⁵ While the COVID-19 pandemic has had a devastating effect on small businesses nationwide, Black businesses have been disproportionately impacted. Up to 40% of Black-owned small businesses are likely to face permanent closure due to the health crisis, due to factors including discrimination in access to credit systemic credit discrimination, thinner profit margins, and the lack significant financial savings.⁶ By mid-April, more than twice as many Black owned businesses had closed throughout the U.S. compared to white-owned businesses.⁷ Further, Black business owners have been less likely to receive federal funding for pandemic-related losses from the Small Business Administration’s Paycheck Protection Program,⁸ underscoring the importance of state funding programs like Tennessee’s Business Relief Program.

Overview of Business Relief Program

On June 2, you announced the creation of the Business Relief Program to aid small businesses within the state that have been affected by COVID-19.⁹ The program will utilize \$200 million in federal funds distributed to Tennessee by the CARES Act. The program was developed by the state’s Stimulus Financial Accountability Group, which you created to determine how to allocate CARES Act funds. According to a June 8, 2020 presentation by the group, funds from the Business Relief Program are intended to provide assistance to businesses “required to close” or that “saw significant reduction in taxable sales” due to the COVID-19 pandemic.¹⁰

⁴ Ass’n for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* 8 (2017), https://www.aeoworks.org/images/uploads/fact_sheets/AEO_Black_Owned_Business_Report_02_16_17_FOR_WEB.pdf (finding that the median net wealth for Black business owners is 12 times that of Black nonbusiness owners).

⁵ U.S. House Committee on Small Business, Testimony of Ashley C. Harrington, Ctr. for Responsible Lending, *Paycheck Protection Program: Loan Forgiveness and Other Challenges* (June 17, 2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-testimony-harrington-house-smallbusiness-17jun2020.pdf> (citing U.S. Census Bureau, 2018 Annual Business Survey).

⁶ Kristopher J. Brooks, *40% of black-owned businesses not expected to survive coronavirus*, CBS News (updated June 22, 2020), <https://www.cbsnews.com/news/black-owned-businesses-close-thousands-coronavirus-pandemic/>.

⁷ *Id.*

⁸ *See, e.g.*, Harrington Testimony, *supra* note 5.

⁹ Cassandra Stephenson & Natalie Allison, *Tennessee governor announces \$200M relief program for small businesses affected by COVID-19 shutdown*, Nashville Tennessean (June 2, 2020), <https://www.tennessean.com/story/money/2020/06/02/tennessee-program-reimburse-covid-19-costs-small-businesses/3123017001/>.

¹⁰ TN Dep’t of Finance & Admin., *Financial Stimulus Accountability Group* 7 (June 8, 2020), <https://www.tn.gov/content/dam/tn/finance/documents/06082020FSAG.pdf>.

The Tennessee Department of Revenue oversees the Business Relief Program and has projected that 28,000 businesses will be eligible for funding.¹¹ While program details were not made public until June 29, we understand that eligible businesses are those in certain designated industries with gross sales of \$10 million or less that were forced to close, and other companies if their sales were reduced by at least 25% as shown in their April sales tax returns (filed in May).¹² The types of small businesses eligible for relief under the program include, but are not limited to, restaurants, bars, gyms, barber shops, museums, zoos, and hotels.¹³ The Department of Revenue projects that more than 73% of the businesses that will receive payment under the program have gross sales under \$500,000.¹⁴

The Department of Revenue is determining eligibility for the program based on information in its tax system.¹⁵ While no application is required, businesses must complete a pre-award certification letter and agree to the program’s payment guidelines after they are notified of their eligibility by email or mail.¹⁶ Once the certification form is complete and the business’s eligibility is confirmed, the Department will issue a business relief payment.¹⁷ Funds granted under the program do not have to be repaid.¹⁸

Payments under the program will be based on the annual gross sales of the business.¹⁹ As shown by the table below, payments will range from \$2,500 to \$30,000:

Table 1: Size of Relief Payments Based on Annual Gross Sales²⁰

Annual Gross Sales	Payment Amounts
\$1 to \$100,000	\$2,500
\$100,001 to \$500,000	\$5,000
\$500,001 to \$1 million	\$10,000
\$1,000,001 to \$5 million	\$20,000
\$5,000,001 to \$10 million	\$30,000

¹¹ TN Dep’t of Revenue, *Tennessee Business Relief Program: Program Overview FAQs*, <https://www.tn.gov/revenue/tennessee-business-relief-program/tn-bus-relief-overview.html> (last visited July 5, 2020).

¹² TN Dep’t of Revenue, *Tennessee Business Relief Program: Eligibility FAQs*, <https://www.tn.gov/revenue/tennessee-business-relief-program/tn-bus-relief-eligibility.html> (last visited July 5, 2020).

¹³ *Id.*

¹⁴ *Program Overview FAQs*, *supra* note 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ TN Dep’t of Revenue, *Tennessee Business Relief Program: Payments FAQs*, <https://www.tn.gov/revenue/tennessee-business-relief-program/tn-bus-relief-payments.html> (last visited July 5, 2020).

²⁰ *Id.*

LDF's Concerns with the Business Relief Program's Funding Formula

LDF is concerned that the Business Relief Program's funding formula, using annual gross sales to determine the payment amount, will disburse CARES Act funds in a manner that will disadvantage Black-owned small businesses throughout Tennessee. Black businesses in the state have significantly lower annual gross sales than white-owned businesses. For example, Prosperity Now has estimated that Tennessee businesses with white owners have an average value (based on gross sales, receipts, or revenue) of \$525,493 compared to an average of \$47,178 for Black-owned businesses.²¹ Further, in 2012, the U.S. Census Survey of Business Owners revealed that less than one percent (0.86%) of Black-owned Tennessee small businesses earned more than \$500,000 in sales and receipts, while 8.62% of white-owned small businesses earned \$500,000 or more.²²

The disparities between Black- and white-owned small business are the result of a long history of discrimination faced by Black owners in seeking access to capital, as well as other factors rooted systemic discrimination, such as the racial wealth gap and differences in income.²³ As a result, Black business owners often have less of a cushion to fuel growth or withstand a financial shock.²⁴ For example, 94% of small businesses in Black communities have less than two weeks of cash on hand, compared with 35% in white communities.²⁵

The pandemic has only exacerbated the harm to Black small businesses caused by these disparities. As stated above, by mid-April, more than twice as many Black-owned businesses had closed compared to white businesses.²⁶ Federal relief to Black small businesses has been practically non-existent: a report from the Center for Responsible Lending found that businesses of color were more likely to be denied relief from the federal Paycheck Protection Program.²⁷ In examining the effects of the crisis on small businesses during COVID-19, a report by JP Morgan Chase & Co. concluded, "Black- and Asian-owned businesses have experienced particularly severe shocks to cash balances and revenues, requiring more assistance to recover. Targeted interventions may be necessary for the small businesses that were hardest hit."²⁸

²¹ Prosperity Now Scorecard, *Data by Issue: Businesses and Jobs, State Data: Business Value by Race*, <https://scorecard.prosperitynow.org/data-by-issue#jobs/outcome/business-value-by-race> (last visited July 5, 2020).

²² U.S. Census Survey of Business Owners, 2012 Table SB1200CSA07 for Tennessee.

²³ See, e.g., Brooks, *supra* note 6.

²⁴ *Id.*

²⁵ Diana Farrell et al., JP Morgan Chase & Co. Institute, *Place Matters: Small Business Financial Health in Urban Communities* 5 (2019), <https://institute.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-place-matters.pdf>.

²⁶ Brooks, *supra* note 6.

²⁷ Ctr. for Responsible Lending, *The Paycheck Protection Program Continues to be Disadvantageous to Smaller Businesses, Especially Businesses Owned by People of Color and the Unemployed* (updated May 27, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cares-act2-smallbusiness-apr2020.pdf?mod=article_inline; see also Harrington Testimony, *supra* note 5.

²⁸ JP Morgan Chase & Co., *Small Business Financial Outcomes during the Onset of COVID-19* (2020), <https://institute.jpmorganchase.com/institute/research/small-business/small-business-financial-outcomes-during-the-onset-of-covid-19#finding-4>.

LDF believes that Tennessee’s funding formula for the Business Relief Program will magnify the existing disparities between Black- and white-owned small businesses. While Black businesses may be most in need of state assistance, as noted above, basing payment amounts on annual gross receipts will prevent these companies from receiving much-needed funds in order to prevent permanent closure. While the Department of Revenue projects that the vast majority (73%) of businesses that will receive funds under the program have annual gross sales below \$500,000, the funding formula will disproportionately benefit small businesses with greater annual sales, which are more likely to have white owners. As noted above, the Department has estimated that 28,000 businesses are eligible for funding under the program. If 73% of these businesses, or 20,440 companies, have less than \$500,000 in annual gross sales, the most these businesses could collectively receive under the program is \$102.2 million (assuming a \$5,000 disbursement per company—even though businesses with less than \$100,000 in annual gross sales will receive only \$2,500). This means that the remaining \$97.8 million under the program—nearly half of available funds—will be disbursed to just over a quarter of the businesses receiving relief under the program, which are more likely to be white-owned. Table 2 below displays this inequity in the funding formula of the Business Relief Program.

Table 2: Estimated Disbursement of Business Relief Program Funds

Estimated Number of Businesses Eligible for Relief Under Business Relief Program	28,000
Estimated Number of Eligible Businesses with Less than \$500K in Annual Gross Sales	20,440
Estimated Number of Eligible Businesses with More than \$500K in Annual Gross Sales	7,560
Total Amount of Program Payments to Businesses with Less than \$500K in Annual Gross Sales, Assuming All Receive \$5,000	\$102,200,000
Total Amount of Funds Remaining for Businesses with More than \$500K in Gross Annual Sales	\$97,800,000

Given the vital role of Black-owned businesses in their community and the economy as whole, it is deeply concerning that Tennessee’s program may be set up to deploy a disproportionate share of funds to white-owned businesses over Black-owned businesses.

Recommended Adjustments to Business Relief Program

We recommend immediate changes to the funding formula of the Business Relief Program to ensure that Black-owned businesses in the state are not further disadvantaged by the COVID-19 pandemic. We recommend that the program be adjusted to:

- Limit program eligibility to businesses with annual gross sales totaling less than \$100,000 (or at most less than \$200,000); and
- Distribute funding equally to all eligible businesses, regardless of annual gross sales.

These two changes alone would ensure that Black small businesses would receive a larger and more equitable share of relief.

We also recommend that payments be automatically distributed to eligible businesses, rather than requiring the pre-award certification letter. For example, the state of Mississippi utilized a system of providing direct, equal payments to eligible small businesses with less than 50 employees.²⁹ Mississippi's program did not require businesses to take any action to "opt-in" in order to receive program funds.³⁰ Extensive research in a variety of fields shows that "opt-in" mechanisms result in lower participation rates.³¹

LDF appreciates that you have utilized your authority as a state governor to ensure that small businesses in Tennessee will receive funds under the CARES Act. However, we are concerned that the funding formula for the Business Relief Program will adversely impact Black small business owners. Federal law, including the Robert T. Stafford Disaster Relief and Emergency Act, requires disaster funds to be distributed in a nondiscriminatory manner.³² We urge you to use the full extent of your powers to ensure that CARES Act funds directed to Tennessee will be disbursed in an impartial and equitable manner. We request an opportunity to speak with you further about this critical issue as soon as possible. You may reach LDF Senior Counsel Coty Montag at cmontag@naacpldf.org or (202) 216-5573 to discuss further.

Very truly yours,



Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.

²⁹ State of Mississippi, Dep't of Revenue, *MS COVID-19 Business Relief Payments*, <https://www.dor.ms.gov/Business/Documents/MS%20COVID-19%20Business%20Relief%20Payments.pdf>.

³⁰ *Id.*

³¹ For example, class action litigation has long utilized the "opt-out" model, requiring class members to affirmatively opt out of participation, for this reason. *See, e.g.,* Scott Dodson, *An Opt-In Option for Class Actions*, 115 Mich. L. Rev. 171, 179 (2016).

³² *See* 42 U.S.C. § 5151.

cc:

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