

So Ordered.

Docket #0022 Date Filed: 6/10/2020



Whitman L. Holt
Bankruptcy Judge

Dated: June 10th, 2020

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
Possession.¹

Astria Health, *et al.*,

Plaintiffs,

v.

UNITED STATES SMALL
BUSINESS ADMINISTRATION and
JOVITA CARRANZA, in her capacity
as Administrator for the United States
Small Business Administration,

Defendants.

Chapter 11

Lead Case No. 19-01189-11

Jointly Administered

Adv. Proc. Case No. 20-20016-WLH

**ORDER GRANTING
PRELIMINARY INJUNCTION,
DENYING STAY PENDING
APPEAL, AND CERTIFYING
ISSUES TO THE NINTH CIRCUIT
COURT OF APPEALS**

¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

**ORDER GRANTING
PRELIMINARY INJUNCTION**



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1 THIS MATTER came before the Court at a telephonic hearing held on
2 Wednesday June 3, 2020 (the “Hearing”), on the Debtors’ *Motion For Temporary*
3 *Restraining Order And Request For Hearing And Briefing Schedule With Respect To*
4 *The Debtors’ Request For A Preliminary Injunction; Declaration Of John M.*
5 *Gallagher In Support Thereof* [Docket No. 2] (the “Motion for Preliminary
6 Injunction”). At the Hearing, counsel for both sides presented legal argument in
7 support of their respective positions. In addition to the arguments of the parties at
8 the Hearing, the Court considered the following submissions: the *Verified Complaint*
9 [Docket No. 1]; the Motion for Preliminary Injunction; the *Defendants Brief in*
10 *Opposition to Plaintiffs’ Motion for Temporary Restraining Order (ECF No. 2) and*
11 *Request for Preliminary Injunction (ECF No. 1)* [Docket No. 14]; and the Debtors’
12 *Reply to Defendants Brief in Opposition to Plaintiffs’ Motion for Temporary*
13 *Restraining Order (ECF No. 2) and Request for Preliminary Injunction (ECF No. 1);*
14 *Declaration of John M. Gallagher in Support Thereof* [Docket No. 16].

15 At the conclusion of the Hearing, the Court issued an oral ruling in which the
16 Court found that the Defendants, the United States Small Business Administration
17 (the “SBA”) and Jovita Carranza, in her capacity as Administrator for the SBA, do
18 not have sovereign immunity from injunctive relief, and that Plaintiffs meet the four
19 prerequisites considered when determining whether a preliminary injunction should
20 be issued. For the reasons stated on the record in open court at the Hearing, which

21 **ORDER GRANTING
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1 constitutes the Court's findings of fact and conclusions of law (the "Oral Ruling"),
2 and which are incorporated into this order by reference, the Court enters this
3 preliminary injunction pursuant to Rule 7065 of the Federal Rules of Bankruptcy
4 Procedure (the "Bankruptcy Rules"). A transcript of the Oral Ruling is attached as
5 **Exhibit A** hereto and is incorporated herein by this reference pursuant to Bankruptcy
6 Rule 7052 and Rule 52(a)(1) of the Federal Rules of Civil Procedure.

7 The Court deems itself fully advised and now finds and concludes as follows:

- 8 1. The Court has jurisdiction over the parties and the subject matter hereof,
9 and has authority to enter a final judgment on the matters joined herein.
- 10 2. Notice hereof was reasonable and appropriate under the circumstances
11 of this case. This matter is properly before the Court for determination
12 at this time.
- 13 3. The Court finds that the Debtors have demonstrated a likelihood of
14 success on the merits of their complaint against the SBA.
- 15 4. The Court finds that the Debtors have demonstrated they would suffer
16 irreparable harm without issuance of a preliminary injunction.
- 17 5. The Court finds the Debtors have demonstrated that the risk of harm to
18 the Debtors if a preliminary injunction is not granted outweighs the
19 harm to the SBA and other Restrained Parties (as defined below).
- 20 6. The Court finds the Debtors have demonstrated that issuance of this

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preliminary injunction is in the public interest.

THEREFORE, IT IS HEREBY **ORDERED**:

1. Plaintiffs' Motion for Preliminary Injunction is **GRANTED** as set forth herein.

2. A preliminary injunction order is issued, with notice, and directed to Jovita Carranza in her capacity as Administrator for the United States Small Business Administration, and all agents, servants, employees, and any parties acting in concert with any of the foregoing parties, including Banner Bank, (collectively the "Restrained Parties").

3. The preliminary injunction order is as follows:

a. Each Plaintiff is hereby authorized to submit a Paycheck Protection Program ("PPP") loan application pursuant to the CARES Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281 (2020); *see also* Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); to any lender with the words "or presently involved in any bankruptcy" stricken from any requisite form.

b. If each Plaintiff satisfies all the other conditions in Question 1 to the loan application form and each Plaintiff still must mark a box indicating they are in bankruptcy, each Plaintiff may mark the box

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1 “no.”

- 2 c. The Restrained Parties are enjoined from refusing to guaranty a
3 PPP loan sought by the Debtors on the basis that the applicant is
4 a debtor in bankruptcy or because of a “yes” in response to
5 Question 1 on the official form of application for PPP; and
- 6 d. The Restrained Parties are enjoined from authorizing,
7 guaranteeing, or disbursing funds appropriated for loans under
8 PPP without reserving sufficient funds or guaranty authority to
9 provide the Debtors with access to PPP funds if the Debtors are
10 eligible once the words “presently involved in any bankruptcy”
11 are stricken from Debtors’ PPP applications.
- 12 e. To the extent any bank requires each Plaintiff to execute any other
13 forms, applications, or other documents for a PPP loan that
14 include any language about whether each Plaintiff is involved in
15 any bankruptcy proceedings, Plaintiff is authorized to strike the
16 portion of such language about involvement in any bankruptcy
17 proceedings and the Restrained Parties shall process the each
18 Plaintiff’s forms, applications, or other documents without any
19 consideration of the involvement of each Plaintiff in any
20 bankruptcy proceedings.

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1 f. The Restrained Parties shall not make or condition the approval
2 of any PPP loan guaranty to each Plaintiff contingent on each
3 Plaintiff not being “presently involved in any bankruptcy.”

4 4. No bond is required.

5 5. The SBA’s oral motion for stay pending appeal under Bankruptcy Rule
6 8007 is DENIED.

7 6. Pursuant to 28 U.S.C. § 158(d)(2)(A) and Bankruptcy Rule 8006, and
8 for the reasons stated on the record at the Hearing, which are
9 incorporated into this order by reference, the Court certifies this
10 Preliminary Injunction Order for direct appeal to the Ninth Circuit under
11 28 U.S.C. §§ 158(d)(2)(A)(i), 158(d)(2)(A)(ii), and 158(d)(2)(A)(iii).

12 ///End of Order///

13 PRESENTED BY:

14 /s/ Samuel R. Maizel
15 SAMUEL R. MAIZEL (Admitted *Pro Hac Vice*)
16 SAM J. ALBERTS (WSBA #22255)
17 SARAH M. SCHRAG (Admitted *Pro Hac Vice*)
18 DENTONS US LLP

19 JAMES L. DAY (WSBA #20474)
20 THOMAS A. BUFORD (WSBA #52969)
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Debtors and Debtors In Possession*

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Exhibit A
[Oral Ruling]

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1 IN RE:
2 ASTRIA HEALTH, et al.
3 Debtors. 1
4 Lead Case No. 19-01189-11
5 Adv. Pro. Case No. 20-80016 - WLH
6 AGREED ORDER REGARDING
7 SCHEDULING AND
8 RESERVATION OF PPP FUNDS
9 ASTRIA HEALTH, et al.,
10 Plaintiffs,
11 V.
12 UNITED STATES SMALL
13 BUSINESS ADMINISTRATION and
14 JOVITA CARRANZA, in her capacity
15 As Administrator for the United States
16 Small Business Administration,
17 Defendants.

18 THE COURT: I appreciate it. I appreciate
19 both you and Mr. Sachs arguments and counsel today
20 and your advocacy. I understand both sides. If
21 you give me a two or three minutes, I just want to
22 dot my I's and cross my T's, then I'll come back
23 with a ruling for everyone. Give me just a couple
24 minutes.

25 (Whereupon a recess was taken)

1 THE COURT: All right. Mr. Maizel, are
2 you still on?

3 MR. MAIZEL: Yes, Your Honor.

4 THE COURT: Mr. Sachs?

5 MR. SACHS: Yes, Your Honor.

6 THE COURT: Okay. I guess it's now
7 afternoon; we started in the morning and I'll say
8 good afternoon to both of you.

9 All right, so we're here today on the
10 debtor's motion for preliminary injunction on
11 an -- in an adversary proceeding commenced against
12 the Small Business Association relating to the
13 debtors' request and the denial of their requests
14 for paycheck protection program or PPP funding
15 under the recently passed Cares Act. The Court's
16 reviewed the debtor's motion, the supporting
17 declaration, the government's brief in opposition,
18 along with the request for judicial notice and
19 attachments thereto, and the Court has also
20 reviewed the debtor's reply.

21 During the break, the Court read the
22 recent decision issued today by bankruptcy judge
23 (inaudible) in the district of Maine, so the
24 Court's reviewed that decision as well.

25 The Court's now prepared to rule on the



1 debtors' request. In doing so, the Court utilizes
2 the familiar four factors, which largely collapsed
3 to three in this context, regarding whether a
4 preliminary injunction should issue. Although the
5 debtors contested to some extent, I agree with the
6 articulation of the legal standard as set forth on
7 pages 14 to 15 of the government's brief and am
8 applying that heightened standard today. Turning
9 to the factors: Factor one is whether the moving
10 parties or the debtors will probably, or very
11 likely, prevail on the merits. I'm going to break
12 this into two parts and discuss, first, section
13 525, and then second, the Administrative
14 Procedures Act issue.

15 Regarding section 525, the debtors contend
16 that the exclusion of entities in bankruptcy from
17 PPP funding violates bankruptcy code section
18 225(a). Section 225(a) bars bankruptcy-related
19 discrimination involving, "A license, permit,
20 charter, franchise, or other similar grant." The
21 parties disagree about whether PPP funding fits
22 within this phrase. In answering this question,
23 the Court is bound by the text of the statute.
24 The statutory text of the bankruptcy code reflects
25 an area of issues considered by Congress and the



1 code is not for you to ignore the plain meaning of
2 the text even if the policy outcome is
3 unfavorable. Many recent Supreme court opinions
4 make this crystal clear. See, for example, Puerto
5 Rico versus Franklin, California, Tax Free Trust
6 136 Supreme Court Reporter in 1938 at pages 1946
7 to 49, a 2016 decision in which the Court held
8 that Puerto Rican municipalities were
9 categorically precluded from any form of
10 bankruptcy relief because of the plain text
11 section 903 of the bankruptcy code, a decision
12 that Congress subsequently addressed by passing
13 the (inaudible) litigation. Baker Box LLP versus
14 (inaudible) LLP 135 Supreme Court Reporter 2158 at
15 page 2169, 2015, in which the Court held that the
16 plain text of the bankruptcy code prevents fees on
17 fees in defending professional fee applications
18 and noted that perhaps that's a bad policy
19 decision, but policy decisions are left to
20 Congress. Rabax (phonetic) Gateway Hotel, LLC
21 versus Amalgamated Bank 566, U.S. Reporter, 639 at
22 page 649, a 2012 decision authored by Justice
23 Scalia, noting that the pros and cons of credit
24 bidding in bankruptcy are left strictly to
25 Congress. Pole versus United States, 566, U.S.



1 506 at pages 522 to 23, a 2012 decision, authored
2 by Justice (inaudible) finding that Chapter 12
3 debtors cannot protect tax on the sale of a family
4 farm in the context that's attracted to Chapter 12
5 case from administrative priority, a decision that
6 Congress subsequently overruled through
7 legislation. Moreover, as Justice Keegan recently
8 explained all of the bankruptcy code generally,
9 "names to make reorganizations possible, it does
10 not commit to anything and everything that might
11 accomplish that goal." And Mission Products
12 Holding, Inc., versus Technology 139 Supreme Court
13 Reporter 1652 at page 1665. That's the decision
14 from last year, 2019.

15 This court is also duty-bound to apply the
16 statute Congress has provided and simply cannot
17 rewrite the text or advance a desirable result in
18 a particular case. Keeping those foundational
19 principles in mind, the Court cannot conclude that
20 the debtors are likely to prevail on the theory
21 that section 525 is violated here.

22 First, the Court agrees with the
23 government that PPP loans are properly classified
24 as just that, loans. To be (inaudible) these are
25 highly unusual loans that may openly and



1 functionally provide free money, but that doesn't
2 matter. They're not loans in the first instance.
3 There's a borrower, a lender, a promissory note, a
4 promise to repay, and the like.

5 As other -- as many other courts have
6 noted, we certainly are not quote unquote market
7 terms, but there can be many loans in society that
8 are not done on market terms or even economically
9 rational terms. But nevertheless, are loans. For
10 example, private equity sponsors sometimes lend
11 troubled portfolio companies money on highly
12 favorable terms, terms no (inaudible) lender would
13 ever offer. Sometimes this leads to bankruptcy
14 fights about re-characterization, but the equity
15 sponsors win most of those fights. Why? Because
16 there was a loan, even if it is an off-market or
17 friendly loan. (Inaudible), I might loan money to
18 my brother or a good friend on off-market terms,
19 perhaps even on terms that will result in total
20 forgiveness of the loan, such as performing
21 charitable work or donating the money to a worthy
22 cause. The point is that in these contexts, there
23 is still some sort of extension of credit with a
24 corresponding obligation.

25 I ultimately agree with the various other



1 bankruptcy judges who have concluded that's the
2 better way to classify PPP loans. Moreover, even
3 if I could conclude the PPP loans -- or I could
4 construe PPP loans as a form of financial grant,
5 I still not -- I still do not think the debtors
6 are likely to succeed on their section 525
7 argument. I agree with bankruptcy Judge Brendan
8 Shannon from Delaware, that section 525 (a) does
9 not apply to, "money grants." The statute's use
10 of the word similar to modify the word grant has
11 to be given meaning and it plainly functions to
12 limit grants to those that are in the permits
13 licenses and the like. To be sure, many things
14 could fall with (inaudible) increase. The ability
15 to use the FCC spectrum, specified real property
16 (inaudible) and the (inaudible) real property as
17 in the Stoltz case, perhaps patents or trademarks.
18 But an affirmative money grant is different in
19 kind from what are essentially forms of permission
20 or access that are uniquely granted by the
21 government. Access to money, even free money, is
22 not subject to governmental controls or
23 unattainable elsewhere. For example, private
24 parties also give money grants. Every time I turn
25 on and listen to NPR, there's a long list of



1 different foundations that have issued free money
2 grants to -- to NPR, demonstrating that free money
3 is, at least in some instances, is available from
4 parties other than the government.

5 The limited reach of section 525 (a) is
6 illustrated perhaps most clearly by contrasting
7 section 525 (a) with section 525 (c). Section
8 525 (c) prevents discriminatory treatment
9 involving, among other things, "a student grant."
10 A student grant being a Pell grant or University
11 grant is, of course, free money. But it's section
12 525 (a) already encompassed an economic grant,
13 then there would be no need to include student
14 grants in section 525. The Court must interpret
15 the statute as a whole and avoid a reading that
16 would render any provisions superfluous. The
17 interpretation that best does that as Judge
18 Shannon's exclusion of "money grants" from the
19 scope of 525 (a). So even if it is not truly a
20 loan, and is some variety of grant, section 525
21 (a) just doesn't stretch far enough to encompass
22 PPP funding.

23 To the extent there's any ambiguity in
24 section 525, itself. I agree with the SBA's
25 point, that the legislative history plainly states



1 that the purpose of the provision is to codify the
2 result of Perez versus Candle 402 U.S. 637, a 1971
3 Supreme Court decision. The Perez case about
4 denial of the driver's license due to nonpayment
5 of a debt owed the State in a bankruptcy case.
6 The Supreme Court held it improperly limited the
7 debtor's fresh start because of the basic need for
8 driver's licenses and the exclusive control of the
9 state over such licensing. This is consistent
10 with section 525 (a) applying to permit the grants
11 of access or privileges controlled by the
12 government, but not consistent with expanding into
13 affirmative economics payments.

14 As I said, I'm ultimately constrained by
15 the statute that Congress gave me and I don't
16 think that statute gets the debtors where they
17 need to go in order to ultimately prevail on this
18 issue.

19 Since I'm not sure where this litigation
20 is going after my ruling today, I do note that if
21 section 525 were applicable, there's zero doubt
22 that the SBA cannot claim sovereign immunity
23 protection. Bankruptcy code section 106 (a) very
24 plainly waives sovereign immunity regarding the
25 entirety of section 525 and section 106 (a) is



1 consistently interpreted and applied in a
2 comprehensive fashion by the Ninth Circuit Court
3 of Appeals, perhaps more so than in any other
4 circuit. See, for example, Huntsinger (phonetic)
5 versus United States 902 F 3rd, 963, Ninth Circuit
6 from 2018, the Valley (phonetic) versus United
7 States in re DBSI, Inc., 1869 F 3rd 1004, a Ninth
8 Circuit decision from 2017.

9 The Court now turns to address the
10 Administrative Procedures Act issue. The debtors
11 argue that the SBA's bankruptcy exclusion can be
12 classified under the Administrative Procedures
13 Act, which allows judicial nullification of agency
14 action when that action is, among other things,
15 arbitrary, capricious an abusive discretion, or
16 otherwise not in accordance with law -- with law 5
17 USC section 7062A. Before turning to the
18 substance of this APA argument, the Court first
19 addresses threshold issues raised by the
20 government; I first talk about bankruptcy
21 jurisdiction and power. There's federal subject
22 matter jurisdiction under 28, USC 1334 (b). This
23 is a civil proceeding, "Arising under Title 11,"
24 in part the last, including the APA claims or
25 claims, "Arising in a bankruptcy case. And then



1 the question, (inaudible) related to the Chapter
2 11 cases." To the extent that there's any doubt,
3 although I don't believe there is, I note that the
4 Court can exercise supplemental jurisdiction under
5 28 USC section 1367, over any ancillary issues
6 related to bankruptcy. See Montana versus Golden
7 in re Pegasus Gold Corp, 394, F 3rd 1189 at pages
8 1194 to 95, Ninth Circuit, 2005.

9 Bankruptcy jurisdiction in the Ninth
10 Circuit is exceptionally broad. All matters
11 within the broad scope of federal bankruptcy
12 jurisdiction have been referred to me by the
13 United States district court for the Eastern
14 District of Washington pursuant to 28 United
15 States code section 157 (a). See the Eastern
16 District's, local civil rule, 83 spot 5 a. That
17 is the end of the jurisdictional analysis.

18 The next question relates to the
19 allocation of decisional power between this court
20 and the district court. This is the article three
21 issue discussing Stern versus Marshall. To be
22 clear, this has nothing to do with jurisdiction,
23 but rather only relates to whether I can enter a
24 final judgment or need to do a report and
25 recommendation to the district court. Stern



1 itself makes this point, C 564, U.S. 462 at page
2 480. And the Ninth Circuit Court of Appeals just
3 recently underscored the exact same point in a
4 case called Hanky versus Grubstiene (phonetic) in
5 re Point Center Financial, Inc., 2020 US app Lexis
6 13743 at pages star 15 to 16; that's a Ninth
7 Circuit opinion from April 29th of this year
8 that's been designated for publication.

9 The APA claim is statutorily "core" under
10 28 USC section 157 B 2 B A, because it's a matter
11 concerning the administration of this bankruptcy
12 estate. Thus, as a statutory matter, I have both
13 subject matter jurisdiction and the power to
14 finally resolve the claim. That now turns to the
15 Stern question. Does this create a constitutional
16 issue? The Court's, the answer to that is no.
17 This is a dispute within the final adjudicatory
18 power of this court. The entire dispute "at issue
19 stems from the bankruptcy itself," which means
20 this court can properly exercise the judicial
21 power needed to resolve it. See Stern at page
22 499. To be sure that the claim at issue in Stern
23 was quoting the state tort action that exists
24 without regard to any bankruptcy proceedings. The
25 same is not true here. It's not sensible to say



1 that a claim challenging the SBA's exclusion of
2 bankrupt entities for PPP loans could ever exist
3 "without regard to any bankruptcy proceeding" is
4 contemplated and Stern. Such an action couldn't
5 ever be brought in any other context or court
6 because the plaintiff wouldn't have standing and
7 wouldn't have suffered any harm. This dispute
8 exists only because of the bankruptcy filing and
9 the fact that we're in a bankruptcy case. It
10 depends on and flows entirely from a bankruptcy
11 and could never exist outside of the bankruptcy
12 context. The analysis in Stern versus Marshall
13 makes clear that any claims in stemming from the
14 bankruptcy itself are properly within the
15 adjudicatory powers of the bankruptcy judge. And
16 that's what we have before me today.

17 The Court next addresses the
18 anti-injunctive provisions cited by the SBA as a
19 defense. The Court agrees with the distinction
20 drawn by several other bankruptcy and district
21 judges about why section 634 B 1 of the Small
22 Business Act is not violated in this context.
23 Those courts cogently frame a distinction based on
24 the decision in Olstein (phonetic) Marine limited
25 versus United States, 833 F 2nd 1052, a first



1 circuit decision from 1987. And the Court has not
2 been pointed to any contrary Ninth Circuit Court
3 of Appeals case law. The debtors here seek to
4 enforce the law against the SBA. They seek no
5 relief that would interfere with the SBA's
6 internal workings and therefore do not run afoul
7 of the statute. As such, the Court now has
8 (inaudible) incorporates by reference the analysis
9 contained in Diamond DB Diamond Club of
10 (inaudible) LLC versus United States SBA 2020 U.S.
11 district Lexus 82213 at pages star 19 to 23, a May
12 11th, 2020 decision by the Eastern District of
13 Michigan. Also Springfield Medical Care Systems
14 versus Kuranda (phontic) in re Springfield Medical
15 Care Systems, 2020 bankruptcy Lexus 11238 at pages
16 star 1669, a bankruptcy court for the District of
17 Vermont decision from May, 2020.

18 I think the analysis in these decisions is
19 sufficient to resolve this issue, but to the
20 extent there's some lingering doubts, the Court
21 does believe that the debtors have a compelling
22 plain textual argument that the scope of the
23 statutory bar is limited to the property of the
24 SBA administrator in her personal capacity, not
25 against the government more generally, although it



1 doesn't appear any court had directly endorsed
2 this conclusion. Even so, that plain textual
3 statutory interpretation is an alternative basis
4 supporting the Court's ruling today.

5 The Court now turns to the substance of
6 the APA claim. Under the Administrative
7 Procedures Act and the Supreme Court's Chevron
8 decision, which I note is subject to some serious
9 questions, but at least as of today remains
10 binding, courts adopt a deferential standard of
11 review regarding decisions in rulemaking by
12 administrative agencies. The level of Chevron
13 deference, however, is reduced when, as is the
14 case here, at the agency action was not subject to
15 formal process see *Reno versus Corey* 515 U.S. 50
16 at page 61. That's a Supreme Court decision from
17 1995. I'd say see, also, a case called *Crozlick*
18 (phonetic) versus *Republic Title Co.* 314, F 3rd
19 875 at page 8 -- 881. This is the Seventh Circuit
20 decision by 2002, written by then circuit Judge
21 Richard Posner. And his decision explains that
22 Chevron deference requires, "something more than a
23 formal -- something more formal, more deliberate
24 than a simple announcement," because, "a simple
25 announcement is too far removed from the process



1 by which courts interpret statutes to earn
2 deference." The decision further ultimately
3 provides no difference when, "the simple
4 announcement is all we have here. One fine day,
5 the policy statement simply appeared in the
6 federal register." Regardless, courts will find
7 an action to be arbitrary and capricious, "if an
8 agency has relied on factors, which Congress has
9 not intended to consider entirely failed to
10 consider an important aspect of the problem,
11 offered an explanation for its decision that runs
12 counter to the evidence before the agency, or
13 (inaudible) possible that it could not be ascribed
14 to a difference in view or the product of agency
15 expertise." That's from Motor Vehicle
16 Manufacturer Association v. United States versus
17 State Farm Mutual Auto Insurance Company, 463 U.S.
18 29 at page 43, 1983 Supreme Court decision.
19 Moreover, the agency must articulate a rational
20 connection between the facts found and the
21 conclusions made. See, for example, Latino Issues
22 Forum versus United States, EPA 558 at 3rd, 936 at
23 page 941, Ninth Circuit 20 -- 2009. Although a
24 court is not entitled to substitute its own
25 judgment for the agency's judgment, the court must



1 the ultimately act as a rubber stamp and is
2 obligated to, "ensure that agency decisions are
3 founded on a reasoned devaluation of relevant
4 facts and circumstances. See, for example,
5 Arizona Cattle Growers Association versus United
6 States Fish and Wildlife Bureau of Land Management
7 273 F 3rd, 1229 at page 1236, a 2001 decision from
8 the Ninth Circuit.

9 The Court should not go beyond the
10 agency's administrative record, which means, "the
11 basis for the decision must come from the agency.
12 The reviewing court may not substitute regions for
13 agency action that are not contained in the
14 record." That's also Arizona Cattle Growers
15 Association, the same page.

16 Here, the SBA's decision to categorically
17 exclude all bankrupt debtors from PPP loan
18 eligibility falls far short of the standards.
19 Among other problems, first, there essentially is
20 no administrative record supporting the ultimate
21 conclusion whatsoever. The entirety of the SBA's
22 discussion regarding this matter is encapsulated
23 in paragraph four of the SBA's interim final --
24 fourth interim final rule, which flatly states
25 that, "the administrator determined that providing



1 PPP loans to debtors in bankruptcy would prevent
2 -- present an unacceptably high risk of an
3 unauthorized use of funds or non repayment of
4 unforgiven loans." That's it. A nonexistent
5 record, by definition, cannot be sufficient to
6 support any conclusion. This is the problem I
7 described at the last hearing as a failure to,
8 "show your work." There's basically nothing
9 explaining or developing how the SBA's conclusion
10 was reached, let alone anything supporting it is a
11 substantive policy matter. Second, there,
12 likewise, there's nothing indicating a, "reasoned
13 evaluation," of anything. There was no material
14 suggesting the SBA considered the relative pros
15 and cons of excluding bankrupt debtors or
16 evaluated whether anything less than a categorical
17 ban might accomplish whatever goals the SBA did
18 have in mind. It's the show your work problem yet
19 again. The Court see nothing indicating a process
20 of analysis, reasoning, deliberation, debate,
21 study, or consideration. There's just nothing
22 here other than an insignificant conclusion.
23 Third, the Court further believes the SBA has
24 entirely failed to consider important aspects of
25 this problem. The Cares Act was intended to



1 provide rapid funding to businesses in difficulty.
2 The PPP loans are forgivable if used to pay
3 employees or utilities. Some of the very
4 businesses that are most in need of such relief
5 are going to be operating Chapter 11 debtors.
6 Providing financial support for those debtors so
7 they can, in turn, pay innocent employees,
8 landlords and utilities, is completely consistent
9 with the legislative goal behind the Cares Act,
10 yet nothing indicates the SBA even considered this
11 important aspect of the legislation. Rather, the
12 SBA appears to have unilaterally imposed a
13 categorical ban in the clumsiest way possible.

14 Furthermore, the SBA appears to have
15 (inaudible) an important aspect of the problem in
16 so far as the Cares Act can make certification
17 that, "the uncertainty of economic conditions
18 makes necessary the loan request to support the
19 ongoing operations of the eligible recipient." No
20 healthy business is likely to certify under
21 penalties, penalties of perjury or corporate
22 criminal action, that the loan is, "necessary if
23 it's otherwise able to operate without it: Thus,
24 it's the debtor's note Congress created a
25 framework under which every PPP applicant must



1 certify that it is concerned that it is going to
2 go out of business under the current economic
3 conditions. The SBA blunderbuss exclusion some of
4 these troubled businesses simply disregards that
5 entire backdrop assumption, that there is a
6 business that's in trouble, which is the "problem"
7 that motivated enactment of the Cares Act. The
8 court sees absolutely no consideration of this
9 important aspect of the -- of the problem
10 whatsoever.

11 As I noted earlier, under the APA is the
12 SBA's burden to articulate the basis for its
13 decision. Ninth Circuit case law makes clear,
14 here are the articulation is flimsy at best. It
15 is an implausible and insufficient justification
16 for the conclusion. There was no explanation
17 about why the administrator determined debtors in
18 bankruptcy have an "unacceptably high risk of an
19 unauthorized use of funds," and this conclusion
20 flies in the face of the expansive and persistent
21 supervision of such debtors by the bankruptcy
22 court, the United States Trustee Program via the
23 Department of Justice, creditors. And in a case
24 like the Astria case, the entire public and
25 (inaudible). Chapter 11 debtors need to be more



1 transparent about what they're doing with cash
2 than virtually any other debtors. This
3 perfunctory SBA explanation is wholly conclusory
4 and falls to anyone with even a passing
5 familiarity with the bankruptcy process. It is
6 simply impossible for me to call this a reasoned
7 premise. Likewise, there is no explanation of why
8 Chapter 11 debtors pose a high risk of, "non
9 repayment of unforgiven loans." The bankruptcy
10 code contains an array of tools that can make
11 repayment more likely, including finding liens or
12 lanes or administrative priority claims. These
13 tools are part of the law that every person in the
14 country, including the SBA and everyone who works
15 there, is presumed to know, but there was nothing
16 indicating any consideration of these tools by the
17 SBA. There, similarly, is not discussion or even
18 citation of any academic SBA studies of empirical
19 rates of non repayment of DIP loans versus other
20 kinds of loans. Instead, there's just a blanket
21 unsupported and unsightly uncited statement that
22 is dubious -- that is of dubious veracity, if not
23 wholly implausible. Nothing anywhere in the SBA's
24 published rule, or any other record before me,
25 which is scant at best, provides any reasoned



1 explanation for this conclusion.

2 I understand and appreciate there's a
3 massive burden that was placed on the SBA by
4 Congress. Congress, for whatever reason, chose to
5 use the SBA as the funnel to convey this
6 particular allocated money for the public and the
7 businesses that needed it. At the same time
8 however, the Court cannot act as a rubber stamp
9 for something as weak as the analysis and
10 justification offered by the SBA for this
11 categorical PPP bankruptcy exclusion. Members of
12 the public, including the Astria debtors, are
13 entitled to ensure that their government agencies
14 proceed a careful, considered, and a reasoned way.
15 To use the same phrase yet again, the agencies
16 have to both do the work and show the work to the
17 public. Here, there is nothing indicating the SBA
18 actually did any work to show, and they certainly
19 don't show them work. As a result, the apparent
20 knee-jerk conclusion that was reached is not the
21 product of any reasoned agency decision-making,
22 cannot sustain any judicial inquiry whatsoever,
23 and must be nullified as arbitrary and capricious.

24 The Court notes that other judges have
25 reached the same conclusion. The Court now adopts



1 and incorporates by reference the further
2 discussion contained in Roman Catholic Church of
3 the Archdiocese of Santa Fe versus United States
4 SBA in re Roman Catholic Church of the Archdiocese
5 of Santa Fe 2020 Bankruptcy Lexis 1211 and pages
6 star 12 through 16 by the decision by the
7 Bankruptcy Court District of New Mexico, May 1st,
8 2020. In sum, I conclude that the debtors are
9 highly likely to succeed on their administrative
10 procedure act claim that the SBA's bankruptcy
11 exclusion from PPP loan eligibility is subject to
12 invalidation as arbitrary and capricious. As
13 such, this first factor weighed strongly in the
14 debtor.

15 The second factor that the Court
16 considered is whether the moving parties will
17 suffer immediate and irreparable injury if the
18 relief is denied. Here, the record has
19 established a irreparable harm sufficient to
20 support a preliminary injunction. As set forth in
21 Mr. Gallagher's declaration and discussed in the
22 briefing, the COVID-19 situation is having an
23 adverse impact on the debtors business and
24 financial affairs, which, as we all know, is not
25 in the greatest shape to begin with. I had to



1 close the hospital in January that I didn't want
2 to do because of the debtors financial affairs.
3 To continue to provide healthcare services and pay
4 frontline nurses for the benefit of community
5 access, money is essential. Without PPP funding
6 there's a threat to the viability of the debtors
7 trader business. Moreover, why this is -- this is
8 ultimately a dispute about money, there's a
9 significant risk that all PPP money will be gone
10 as a result of the pressing June 30th deadline and
11 at the SBA will then assert that it cannot be
12 liable for damages, leaving the debtors with no
13 remedy whatsoever at the end of this litigation,
14 even if their rights have been violated. Several
15 other courts have noted that this prospect of no
16 adequate remedy against the government constitutes
17 irreparable harm for purposes of an injunctive
18 relief analysis. See, for example, DB Diamond
19 Club of Flint, LLC versus United States SBA 2020
20 U.S. District Lexus 82213 pages, star 43 to 45,
21 May 11th, 2020 decision by the Eastern District of
22 Michigan. I note that a subsequent SBA request
23 for a state pending appeal was denied by the Sixth
24 Circuit Court of Appeals, including based on the
25 Sixth Circuit finding that, and agreeing with the



1 district court, that there was a prospect of a
2 reputable harm to the plaintiffs. I also cite
3 Camelot Banquet Rooms, Inc., versus United States
4 SBA 2020 U.S. District Lexus 76713 t pages star 34
5 to 36. That's a decision from the Eastern
6 District of Washington. Again, a district judge
7 May 1st, 2020. See, also, General United States
8 versus Cal Allman, Inc. 102 F 3rd 999 at pages
9 1002 to 2003. It's a Ninth Circuit decision from
10 1996.

11 Finally, I turned to the remaining factors
12 that collapsed together into a balance and the
13 consideration of the public interest and whether
14 there was favor granting the relief requested. As
15 previewed at the prior hearing, the Court now
16 takes judicial notice of the following facts.
17 First, COVID-19 cases are increasing at an
18 inexplicably high rate in Yakima County. For
19 whatever reason we are doing worse than the rest
20 of Washington State at this point in the process.
21 This is a very troubling situation. In fact,
22 things today are even worse than they were at the
23 prior hearing in May. Governor Inslee just last
24 Friday called Yakima County, "the most dangerous
25 place in Washington State," from a COVID-19 virus



1 perspective. Again, I don't know why this is the
2 case, but the problem is not getting better here.
3 Second, the Court takes judicial notice that many
4 of the new cases are in the lower Valley,
5 including around Sunnyside and Toppenish. This
6 also continues to be true today as it was in May.
7 Third, the Court takes judicial notice of the fact
8 that there's limited access to healthcare other
9 than at the Astria hospitals. That was true in
10 May; it's true today. Fourth, the Court takes
11 judicial notice that these PPP funds will be used
12 to pay frontline medical staff, including nurses.
13 The Court further takes judicial notice that the
14 nurses are the people who are being correctly
15 recognized in the local and national press as the
16 heros dealing with this virus in the trenches.
17 That was true in May and it true today. It will
18 be true forever. Perhaps there could be a more
19 compelling public interest case, but, again, it's
20 hard to think of one. As I said at the prior
21 hearing, we're clearly in the 99th percentile of
22 public interest cases here. And this context is
23 -- it (inaudible) weight on the scales as it comes
24 to the third factor. I agree with the government,
25 it doesn't affect the first and second factor, but



1 certainly the third factor is relevant. The
2 balancing here is overwhelming and lopsided and
3 favors the debtors. The government's claim,
4 public interest consideration, simply If we do not
5 have counterbalance. Yes, SBA funds are limited,
6 and this is something of a zero sum exercise where
7 PPP borrowers are competing with each other, but I
8 think we cannot imagine other borrowers, in
9 bankruptcy or out, that would be more deserving of
10 this money than these particular borrowers.
11 Certainly there are many borrowers less deserving.
12 I know there are law firms throughout the country
13 that have received PPP money. Money, as I said a
14 the last hearing, some of my best friends are
15 lawyers, but I don't think law firms need this
16 money while hospitals, particularly critical
17 hospitals in rural areas, are denied the money.
18 So the overwhelming public interest and community
19 interest and the debtors receiving this money is
20 manifests.

21 So to summarize, all of the factors
22 individually, weigh in favor of the debtors here.
23 And collectively, they weighed in favor with great
24 force. Therefore issuance of a preliminary
25 injunction is warranted.



1 The details in the process here should
2 resemble what Judge David Jones described in his
3 Hildago County Emergency Services Foundation oral
4 ruling with the exception that I do want the
5 debtors to provide and pin down the stipulations
6 they described with Lapis and other parties
7 regarding segregation of the money. As framed by
8 the debtors, the Court agrees that the debtors
9 have the right to have their PPP applications
10 submitted without being discriminated against on
11 the basis of their status as Chapter 11 debtors
12 should the debtors otherwise be eligible for PPP
13 loans.

14 I'm not affirmatively ordering the SBA to
15 make any loans that the SBA cannot rely on an
16 eligibility criterion, that must be set aside
17 under the Administrative Procedures Act. I do
18 however, strongly agree with the SBA that any
19 suggestion by the debtors that the Court enter
20 relief beyond this particular cases is
21 inappropriate. So those in question, when
22 "nationwide injunctions" are ever appropriate, but
23 I have a very hard time thinking of when that
24 would be in this bankruptcy court, and certainly
25 this isn't the case for it. My ruling and the



1 relief I'm granting here is solely related to
2 these particular debtors in this particular case.

3 Finally, to the extent this is an
4 appealable decision, the Court now on its own
5 motion invokes 28 USC section 158 D2, to certify
6 this dispute for direct appeal to the Ninth
7 Circuit Court of Appeals.

8 More specifically, the Court now finds and
9 certifies that each of the three alternative
10 connect conditions in section 158 D 2 A are met.
11 More specifically, first, the judgment order
12 decree involves a question of law as to which
13 there's no controlling decision of the Court of
14 Appeals for the Circuit or the Supreme Court of
15 the United States. Although they're controlling
16 decisions about the legal standards, there's
17 certainly nothing involving facts like this.
18 Moreover, for purposes of this first prong, this
19 also involves a matter of public importance. So
20 those are the disruptive factors are satisfied.

21 Second, the order of judgment or decree
22 involves the question of law requiring resolution
23 of conflicting decisions. Bankruptcy judges are
24 all over the map here. There are decisions that
25 have held section 525 applies. There are courts



1 that have held that it doesn't. There are courts
2 that have held that the decision is arbitrary and
3 capricious, including this court today. There are
4 courts that are, apparently, although a few of
5 them expressly, rule the other way. So there's
6 certainly a patchwork and conflicting decisions
7 that weren't resolution at the circuit level.

8 Third and finally, an immediate appeal
9 from the judgment order decree may materially
10 advance the progress of the case of proceeding in
11 which this appeal is taken. The Court's confident
12 in the strength of its decision today. But if the
13 Court's wrong for some reason, it's better to get
14 the final word on that from the Ninth Circuit
15 Court of Appeals than doing a two-tier appeal
16 through the district court of the (inaudible) if
17 the appeal were to go there.

18 So all three of these -- moreover the
19 policy considerations when Congress added this
20 provision to the judicial code are satisfied here.
21 This is important. It's conflicting. It's time
22 to get a final word. It's time this should go up
23 to the Court of Appeals as I think one of these
24 questions already has to the Fifth Circuit.
25 Counsel for the debtor should include their



1 certification in their proposed form of order and
2 getting clear. And to be clear, I certified the
3 entirety of the issues. So if the debtors intend
4 to cross -- cross appeal me regarding the section
5 525 issue, which you're certainly free to do, I
6 think -- I think that appeal would satisfy the
7 conditions for certification of a direct appeal as
8 much as the Administrative Procedures Act.

9 I ask that the debtor's prepares the form
10 of judgment that they wish me to enter consistent
11 with -- with the hearing today. And I then leave
12 it for the parties where -- where things go from
13 there.

14 MR. MAIZEL: Your Honor, we'll run the
15 proposed form of order by Mr. Sachs and by Mr.
16 Donovan before we send it to.

17 THE COURT: Thank you, Mr. Maizel. Mr.
18 Sachs, anything further today?

19 MR. SACHS: I have two points, Your Honor,
20 if you would allow me for a second. Certainly not
21 challenging the legal basis for the injunction,
22 but actually the relief that you're granting.

23 I think what Mr. Maizel said before,
24 talking about what they're asking for, is he said
25 that he wanted the application to be held in



1 abeyance and the funds escrowed. And so I'd like
2 to propose something for the Court, if the Court
3 would be willing to consider this. I think the
4 relief you just granted essentially allows them to
5 go out this afternoon and get a loan. And if a
6 bank will process it, then the SBA has no
7 authority to -- to not get enter the guarantee. I
8 understand that's the Court's ruling. And it
9 would be very difficult to unscramble that egg if
10 in deed -- I certainly have no idea what might
11 happen if this case will be appealed or if there
12 is an appeal, but an alternative may be this. If
13 I understand the Court's ruling, the Court found
14 for the plaintiffs on the APA issue in part
15 because the agency could not do its work, show its
16 work, and (inaudible) work. So one alternative
17 may be is if the Court were willing to make the
18 relief that the agency continues to set the money
19 aside and that the application is still held in
20 abeyance -- it's not processed -- and the Court
21 says there's short deadline for the government to
22 produce an administrative records. And then if
23 the government doesn't, then the Court can rule on
24 that. And if the government does then the Court
25 could hold a trial on the merits with that record,



1 and then enter relief based on that. Obviously
2 the Court has suggested is it has the ability
3 under the APA claims to enter upon a relief from
4 there. So it will not take the fee (inaudible) a
5 this point but I understand the Court's ruling.
6 That would really keep the status (inaudible) on
7 place. And we understand there's a short
8 deadline. June 30th is the statutory cut off and
9 so we understand there'll be short deadlines from
10 the Court on that, but it might allow us to get a
11 ruling on the APA with a record. And the Court
12 may find the record doesn't show the work or do
13 the work or doesn't address the concerns the Court
14 made, or the Court may feel differently once it's
15 seen the record.

16 The alternative is they go out and get the
17 money today and we have appeal rights, but that
18 money is now within the bankruptcy and what can be
19 done with that question I'm not sure of the answer
20 to. So I'd like the first propose that and see if
21 the Court is willing to entertain that.

22 THE COURT: Mr. Sachs, I appreciate the
23 proposal. I'm going to deny that, I think for two
24 reasons. First, I think the record supports that
25 the debtors that have (inaudible) business needs



1 to access the money. You know, you made the point
2 and I don't think Mr. Maizel contested it, that,
3 you know, the record doesn't indicate that the
4 business dies and the hospital's close tomorrow,
5 so they don't get the money. But I think the
6 record does substantiate a logical continuing harm
7 as a result of the orders that Governor Inslee has
8 entered relating to elective surgeries. I think
9 the debtors have -- have a need for the money.
10 And I think that that's established and supported
11 by the record. And that's the request they
12 entered.

13 Second, I hear you on your point about the
14 administrative record, but, just in all candor and
15 fairness, I -- when we were here in May, I think
16 15 days ago, I did my best to -- you know, I
17 wasn't deciding anything then. I spent a lot of
18 time thinking about this since then, but I think I
19 fairly, even strongly, outlined my concerns about
20 the administrative record. I think I used the
21 phrase, show your work. I don't know, I haven't
22 really read the transcripts that the debtors filed
23 yesterday, but I think I used it three or four
24 times. I think I outlined -- you know, I Mr.
25 Donald, I'm not going to tell the government how



1 to litigate his case, but I don't think there can
2 be any claim of sandbagging since -- you've have
3 15 days to put that together and it's not there.
4 I mean, I gave you that opportunity already.

5 MR. SACHS: I understand, Your Honor.
6 We're not at all disputing that and I understand
7 the Court's ruling on that request.

8 If I could make a second request under
9 rule 8007, if the Court would be willing to
10 entertain an oral motion for a state pending
11 appeal?

12 THE COURT: I will entertain that motion.
13 And as Judge Jones said in Texas, that motion is
14 denied. I think I stayed pending appeal would be
15 inconsistent with my findings on the preliminary
16 injunction factors that stay pending appeal
17 factors are the same. Largely other than a, you
18 know, ground for differences of opinion, but I'm
19 competent in the strength of my decision today.
20 If you want -- if you want to stay, you're going
21 to have to go get it somewhere else.

22 MR. SACHS: Thanks, Your Honor. That's
23 all I have.

24 THE COURT: Okay. All right. Anything
25 further, Mr. Maizel?



1 MR. MAIZEL: No. Thank you, Your Honor.

2 THE COURT: Okay. Thank you, both. I,
3 again, appreciate the time and argument today.
4 We'll look for the judgment and, you know, this
5 will go wherever it goes.

6 (Whereupon, hearing concluded)

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