

No. 2:20-cv-3098

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

IN RE: ASTRIA HEALTH, et al.

*Debtors.*¹

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

Appellants,

v.

ASTRIA HEALTH, et al.,

Appellees.

On Appeal from the United States Bankruptcy Court
for the Eastern District of Washington, Adv. No. 20-80016-WLH

BRIEF FOR APPELLANTS

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September 28, 2020

¹ The Debtors 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 (19-01202-11).



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STATEMENT ON ORAL ARGUMENT

The United States requests oral argument. This appeal concerns a federal program of national importance and implicates significant issues regarding jurisdiction and sovereign immunity. Lawsuits raising similar issues as this appeal have been filed across the country.

STATEMENT OF APPELLATE JURISDICTION

The United States appeals under 28 U.S.C. § 158(a)(1), which authorizes the district court to hear appeals from a bankruptcy court's final orders. The preliminary injunction in this case is final because it awarded a mandatory injunctive relief, requiring the SBA to guarantee a PPP Loan to Appellees contrary to SBA's stated policy to exclude bankrupt entities. A304.

In the alternative, if the Court believes the preliminary injunction is not a final order or decree appealable as a matter of right, the Court would nevertheless have jurisdiction to hear the appeal under 28 U.S.C. § 158(a)(3). In that case, the United States respectfully requests that the Court either treat the United States' timely-filed notice of appeal as a motion for leave to appeal and grant it, or order the parties to brief the issue. Fed. R. Bankr. P. 8004(d). Permissive review is warranted given the significance of the issues presented, because the issues are legal and may be resolved by this Court, and because there is no compelling reason to await further adjudication below. The Bankruptcy Court itself recognized this by, *sua sponte*, certifying its order for direct appeal to the Court of Appeals. A267–70.

STATEMENT OF ISSUES PRESENTED

1
2 1. Whether the Bankruptcy Court erred in awarding injunctive relief
3 without any waiver of sovereign immunity allowing that relief, and despite an
4 unambiguous statute barring injunctive relief against the SBA.
5

6 2. Whether the Bankruptcy Court erred in adjudicating Administrative
7 Procedure Act (APA) Claims because such claims are non-core.
8

9 3. Whether the Bankruptcy Court erred in concluding that SBA acted
10 arbitrarily and capriciously, within the meaning of the APA, by excluding debtors in
11 bankruptcy from the Paycheck Protection Program.
12

STANDARD OF APPELLATE REVIEW

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14 A district court reviews “final judgments of a bankruptcy court in core
15 proceedings . . . under traditional appellate standards.” *Stern v. Marshall*, 564 U.S.
16 462, 474–75 (2011). Under these standards, the Court “review[s] the bankruptcy
17 court’s conclusions of law *de novo* and its factual findings for clear error.” *Aspen*
18 *Skiing Co. v. Cherrett (In re Cherrett)* 873 F.3d 1060, 1064 (9th Cir. 2017). “The
19 bankruptcy court’s choice of remedies is reviewed for an abuse of discretion.” *Bankr.*
20 *Receivables Mgmt. v. Lopez (In re Lopez)*, 345 F.3d 701 (9th Cir. 2003). When
21 applied to review of an order granting a preliminary injunction, the traditional
22 standard of review requires the Court to review “de novo the legal premises
23 underlying a preliminary injunction. Otherwise, we review for abuse of discretion the
24 [court’s] grant of a preliminary injunction. We will reverse a preliminary injunction
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1 when a [court] based its decision on an erroneous legal standard or on clearly
2 erroneous findings of fact.” *FTC v. Enforma Natural Prods.*, 362 F.3d 1204 (9th Cir.
3 2004).

4
5 The Court reviews the merits of an APA claim *de novo*. *California v. Azar*, 950
6 F.3d 1067, 1083 (9th Cir. 2020) (*en banc*) (“[I]n APA cases, a [lower] court decision
7 is generally accorded no particular deference, and is reviewed *de novo* because the
8 [lower] court is in no better position than this court to review the administrative
9 record.”).

11 STATEMENT OF THE CASE

12
13 In response to “the incredible economic devastation wrought by the COVID-19
14 pandemic,” Congress passed the Coronavirus Aid, Relief, and Economic Stimulus
15 (CARES) Act, signed into law on March 27, 2020. *Tradeways, Ltd. v. U.S. Dep’t of*
16 *the Treasury*, Civ. No. 20-01324, 2020 WL 3447767, at *3 (D. Md. June 24, 2020).

17
18 The CARES Act created the Paycheck Protection Program (PPP), a \$659 billion loan
19 program administered by the SBA that extends loans to small businesses and
20 nonprofits throughout the United States as expeditiously as possible. Section
21 1102(a)(2) of the CARES Act adds a new paragraph (36) to Section 7(a) of the Small
22 Business Act, 15 U.S.C. § 636(a)(36), to extend loans to eligible small businesses for
23 certain covered uses, including payroll costs, mortgage interest payments, and rent. In
24 order to carry out the goals of the CARES Act and comply with existing law under the
25 Small Business Act and section 7(a) loan program, the SBA conditioned eligibility for
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1 a PPP loan guarantee on the borrower’s certification that it is not a debtor in
2 bankruptcy or currently owned by a debtor in bankruptcy. The Appellees PPP
3 borrower application was denied because they are debtors in a chapter 11 bankruptcy.
4
5 A060.

6 I. STATUTORY AND REGULATORY BACKGROUND

7 A. The Small Business Administration

8 Through the Small Business Act, 15 U.S.C. § 631 *et seq.*, Congress created the
9 SBA to “aid, counsel, assist, and protect, insofar as is possible, the interests of small-
10 business concerns,” in order to preserve the system of free competitive enterprise that
11 is “essential” to the economic well-being and security of the Nation. 15 U.S.C. §
12 631(a). To promote that objective, and “to ensure that the SBA could respond swiftly
13 to economic developments,” *Tradeways*, 2020 WL 3447767, at *2, Congress placed
14 the SBA under the management of a single Administrator, *id.*, § 633(a),(b)(1), and
15 gave her “extraordinarily broad powers” under section 7(a) of the Act, 15 U.S.C. §
16 636(a), to provide assistance to small business concerns. *SBA v. McClellan*, 364 U.S.
17 446, 447 (1960); *see generally* 15 U.S.C. § 636(a). Congress also delegated broad
18 authority to the Administrator to “make such rules and regulations as [she] deems
19 necessary to carry out the authority vested in [her],” and to “take any and all actions . .
20 . [that she] determines . . . are necessary or desirable in making . . . loans.” 15 U.S.C.
21 §§ 634(b)(6)–(7). The Administrator additionally has the power to establish general
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1 policies “which shall govern the granting and denial of applications for financial
2 assistance by the Administration.” 15 U.S.C. § 633(d).

3 **B. Section 7(a) Lending**

4 The section 7(a) loan program is the SBA’s primary program for providing
5 financial assistance to small businesses. Assistance under section 7(a) may take the
6 form of loans or loan guarantees. 15 U.S.C. § 636(a); 13 C.F.R. § 120.2(a). In
7 practice, the SBA ordinarily guarantees loans made by private lenders rather than
8 disbursing funds directly to borrowers. 13 C.F.R. § 120.2(a). *See generally* SMALL
9 BUSINESS ASSOCIATION, <https://www.sba.gov/funding-programs/loans> (last visited
10 June 26, 2020).

11 **C. Section 7(a) Loan Underwriting**

12 Ordinarily, to qualify for an SBA general business loan an applicant must be an
13 operating business organized for profit that is located in the United States, 13 C.F.R.
14 § 120.100(a)–(c); meet the size standards for a “small” business set forth under the
15 statute and SBA rules, *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R.
16 Part 121; and demonstrate that the desired credit is not available elsewhere on
17 reasonable terms. 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101. The Small
18 Business Act requires that “[a]ll loans made under this subsection *shall* be of such
19 sound value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6)
20 (emphasis added). Form 1919 serves as the application for section 7(a) loans. It asks
21 whether the SBA applicant, the applicant’s affiliates, and “you, or any business you
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1 controlled,” has “ever filed for bankruptcy protection.” A141; *see also* Standard
2 Operating Procedure 50 10 5(K) A137 (allowing lenders to consider “past
3 bankruptcy”). By regulation, requirements listed on Form 1919 and other official SBA
4 forms comprise part of the “Loan program requirements.” 13 C.F.R. § 120.10.
5 Lenders agree to abide by these requirements when joining the section 7(a) lending
6 program. *Id.*; *see also* SBA Forms 3506 and 3507 (addressing new PPP lenders).
7 Applicants “must be creditworthy” and loans “must be so sound as to reasonably
8 assure repayment.” 13 C.F.R. § 120.150; 15 U.S.C. § 636(a)(6).
9

11 **D. The CARES Act**

12 The CARES Act provides an unprecedented package of emergency economic
13 assistance and other support to assist businesses in the wake of the COVID-19
14 pandemic. *See* SBA, Interim Final Rule, “Business Loan Program Temporary
15 Changes; Paycheck Protection Program” (First Interim Final Rule), 85 Fed. Reg.
16 20,811 (April 15, 2020). Section 1102 of the CARES Act established the PPP to assist
17 eligible small businesses experiencing economic hardship as a result of COVID-19
18 measures. *Id.* Section 1102(a)(2) adds a new paragraph (36) to section 7(a) of the
19 Small Business Act, 15 U.S.C. § 636(a)(36), extending loans to eligible small
20 businesses for certain covered uses, including among other things, payroll costs.
21 CARES Act § 1102(a)(2); 15 U.S.C. § 636(a)(36)(F)(i).
22

23 Otherwise, the existing section 7(a) requirements and limitations remain
24 unaltered and govern PPP lending. The CARES Act provides, “Except as otherwise
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1 provided in this paragraph, the [SBA] may guarantee covered loans under the same
2 terms, conditions, and processes as a loan made under this subsection,” *i.e.*, section
3 7(a). 15 U.S.C. § 636(a)(36)(B) (emphasis added). The CARES Act then sets forth in
4 extensive detail the ways in which PPP covered loans differ from other section 7(a)
5 loans. 15 U.S.C. §§ 636(a)(36)(D)–(R). For instance, it authorizes the SBA to
6 guarantee covered loans to nonprofit organizations, independent contractors, and self-
7 employed individuals, and relaxes size limitations to allow businesses with as many as
8 500 employees—or more, depending on the industry in which they operate—to
9 receive assistance. 15 U.S.C. § 636(a)(36)(D). Yet the CARES Act leaves unaltered
10 the requirement that “[a]ll loans made under this subsection *shall* be of such sound
11 value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6)
12 (emphasis added).
13

14 The CARES Act initially allocated \$349 billion to guarantee PPP loans.
15 CARES Act § 1102(b)(1). On April 16, 2020, the SBA issued a notice that PPP was
16 closed to new applications. Congress then passed the Paycheck Protection Program
17 and Health Care Enhancement Act (CARES Act II) on April 24, 2020 to add \$310
18 billion to the PPP. P.L. 116-139 § 101(a)(1).
19

20 **E. Emergency Rulemaking Authority**

21 The CARES Act authorizes the Administrator of the SBA to issue emergency
22 regulations to implement the PPP without adhering to the notice-and-comment
23 process that typically governs agency rulemaking. *See* 15 U.S.C. § 9012 (“Not later
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1 than 15 days after March 27, 2020, the Administrator shall issue regulations to carry
2 out this title and the amendments made by this title without regard to the notice
3 requirements under [the APA.”). *See generally Tradeways*, 2020 WL 3447767, at *4.
4

5 Pursuant to that congressional delegation, the SBA Administrator posted her
6 First Interim Final Rule on the SBA website on April 3, 2020, which subsequently
7 was published in the Federal Register on April 15, 2020. 85 Fed. Reg. 20,811. The
8 First Interim Final Rule “streamlin[es] the requirements of the regular 7(a) loan
9 program” and eliminates normal section 7(a) underwriting obligations for PPP loans.
10 Under a section titled “What Do Lenders Have to Do in Terms of Loan
11 Underwriting,” the SBA notes each lender’s underwriting obligation is limited to
12 confirming certain receipts and dollar amounts, following applicable Bank Secrecy
13 Act rules, and “reviewing the [PPP] Application Form.” *Id.* at 20,815. The Paycheck
14 Protection Application Form expressly requires the borrower to certify, among other
15 things, that the entity does not have an owner currently involved in a bankruptcy.
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17 A017.
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21 On April 24, 2020, the SBA posted a new interim final rule, which
22 subsequently was published in the Federal Register on April 28, 2020, entitled
23 “Business Loan Program Temporary Changes; Paycheck Protection Program-
24 Requirements-Promissory Notes, Authorizations, Affiliation, and Eligibility” (Fourth
25 Interim Final Rule), 85 Fed. Reg. 23,450. The Fourth Interim Final Rule provides
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1 additional information and clarification, including for applicants with an owner in
2 bankruptcy—

3 *Will I be approved for a PPP loan if my business is in bankruptcy?*

4 No. If the applicant or the owner of the applicant is the debtor in a
5 bankruptcy proceeding, either at the time it submits the application or at
6 any time before the loan is disbursed, the applicant is ineligible to receive
a PPP loan. . . .

7 The Administrator, in consultation with the Secretary, determined that
8 providing PPP loans to debtors in bankruptcy would present an
unacceptably high risk of an unauthorized use of funds or non-repayment
9 of unforgiven loans. In addition, the Bankruptcy Code does not require any
person to make a loan or a financial accommodation to a debtor in
10 bankruptcy. The Borrower Application Form for PPP loans (SBA Form
2483), which reflects this restriction in the form of a borrower certification,
is a loan program requirement.

11 85 Fed. Reg. at 23,451.

12 **F. The PPP Flexibility Act of 2020 and Subsequent PPP Extension**

13 On June 5, 2020, the President signed into law the Paycheck Protection
14 Program Flexibility Act of 2020 (PPP Flexibility Act), P.L. No. 116-142. The PPP
15 Flexibility Act makes a number of amendments, including extending the covered
16 period for loans, § 3(a)–(b), altering certain requirements for loan forgiveness, §
17 3(b)(7)–(8), and revising the deferral period for PPP loans. § 3(c). On July 4, 2020,
18 Congress extended the SBA’s authority to commit funds for new PPP loans through
19 August 8, 2020. PUB. L. NO. 115-147, § 1, 134 Stat. 660, 660 (2020).

20 **G. The Provider Relief Fund**

21 While bankrupt entities were excluded from the PPP by SBA rule, Congress
22 separately appropriated funding specifically for health care facilities in the CARES
23 Act’s Provider Relief Fund. That fund allows qualified health care providers
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1 (including bankrupt providers) to receive payments for healthcare-related expenses or
2 lost revenue due to COVID-19. The Appellee SHC Medical Center – Toppenish has
3 received \$8,981,830.23 from the Provider Relief Fund to date, and Appellee Yakima
4 HMA Home Health, LLC has received \$175,214.01. *See*
5 <https://data.cdc.gov/Administrative/HHS-Provider-Relief-Fund/kh8y-3es6/data>
6 (accessed September 28, 2020).
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8 **II. FACTS & PROCEDURAL HISTORY**

9
10 The Appellees are a consolidated group of Chapter 11 debtors. A003. The
11 Appellees filed their consolidated Chapter 11 bankruptcy case on May 6, 2019, which
12 remains pending. A009. On May 15, 2020, Appellees filed their adversary proceeding
13 against the SBA. A001. The adversary complaint asserts the same claims raised by
14 bankrupt debtors in adversary proceedings and civil actions filed throughout the
15 country. The adversary complaint seeks preliminary and permanent injunctive relief,
16 alleging that the SBA’s exclusion of bankrupt debtors from the PPP exceeded its
17 statutory authority and was arbitrary or capricious, in violation of sections 706(2)(C)
18 and (A) of the APA, and impermissibly discriminated against bankrupt debtors in
19 violation of 11 U.S.C. § 525(a). A038.
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23 On May 15, 2020, Appellees filed a Motion for Temporary Restraining Order,
24 seeking a court order requiring the SBA to consider Appellees’ PPP loan application
25 despite their bankruptcy status. A038, A047. The United States opposed the Motion,
26 arguing, *inter alia*, that 1) the Small Business Act, 15 U.S.C. § 634(b)(1), explicitly
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1 prohibits enjoining the SBA, A061; 2) Appellees' discrimination claim under 11
2 U.S.C. § 525 fails because the statute does not apply to government lending programs
3 like the PPP, A076; 3) bankruptcy courts lack authority to adjudicate the APA claims
4 because those claims are not core, A063; and 4) the APA claims fail on the merits
5 because the SBA had authority to exclude bankrupt entities from the PPP, and this
6 policy decision was not arbitrary nor capricious under the APA, A065.
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9 After oral argument, the Bankruptcy Court issued an oral decision granting
10 Appellees' motion for preliminary injunction. A240. In its decision, the Bankruptcy
11 Court held that all Appellees' claims were core proceedings, A251, and that the
12 United States waived sovereign immunity to claims for injunctive relief. A252. The
13 Bankruptcy Court held that Appellees were likely to succeed on the merits of their
14 APA claim under 5 U.S.C. § 706(2)(A) because the SBA acted in an arbitrary and
15 capricious way in excluding bankrupt entities from the PPP. A253. The Bankruptcy
16 Court held that Appellees were unlikely to succeed on their discrimination claim
17 under 11 U.S.C. § 525 because that statute does not apply to PPP loans. A242. The
18 Court entered its preliminary injunction order on June 10, 2020. A304.
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22 In its oral ruling, the Bankruptcy Court, *sua sponte*, certified its preliminary
23 injunction order for direct appeal to the Ninth Circuit Court of Appeals, under 28
24 U.S.C. 158(d). A267. The United States filed a timely notice of appeal to this Court.
25 A360. Appellees then filed notice of their cross-appeal of the Bankruptcy Court's
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1 conclusion that the section 525 claim lacks legal merit. This Court consolidated the
2 appeal and cross-appeal by order on July 27, 2020. (Dkt. 9.)

3 On June 23, 2020, the United States filed a motion for mandatory withdrawal of
4 the reference to the Bankruptcy Court. The withdrawal motion is fully briefed and was
5 transmitted to the district court on July 20, 2020, where it remains pending. *Astria*
6 *Health v. SBA*, Civ. No. 20-03109-RMP (Dkt. 1).
7

8 On June 26, 2020, the Bankruptcy Court entered the parties' stipulation to stay
9 proceedings in the adversary proceeding pending the outcome of this appeal. A366.
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11 SUMMARY OF THE ARGUMENT

12 Congress passed the CARES Act to address a massive decrease in commercial
13 activity caused by efforts to stem the spread of the pandemic. The PPP is a key part of
14 the CARES Act, providing \$659 billion in loan guarantees for small businesses across
15 the nation. Faced with large but finite resources and acute need, Congress delegated
16 expansive authority to the SBA to administer the PPP and get loans to qualified
17 businesses as quickly as possible. In doing so however, Congress left intact its
18 statutory commandment that the SBA ensure program loans be of "sound value" so as
19 "reasonably to assure repayment." 15 U.S.C. § 636(a)(6).
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22 To meets these Congressional obligations, the SBA transformed its current
23 small business loan program, which requires case-by-case underwriting before a loan
24 can be approved, into an easily administrable loan guarantee system with minimal
25 underwriting. Specifically, the SBA used its existing underwriting factors to draw
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1 bright line rules that lenders could quickly evaluate, such as by excluding debtors in
2 bankruptcy.

3 The Bankruptcy Court ignored these policy decisions and substituted its own
4 judgment for the SBA's judgment about how to allocate finite PPP funds. The
5 Bankruptcy Court erred in doing so. First, the bankruptcy court lacked subject matter
6 jurisdiction to grant injunctive relief because Congress has not waived sovereign
7 immunity to permit injunctive relief against the SBA. Waivers of sovereign immunity
8 must be unequivocal, narrowly interpreted, and strictly construed in favor of the
9 United States. Here, a statute unambiguously *bars* injunctive relief. *See* 15 U.S.C. §
10 634(b)(1). Second, the Bankruptcy Court lacked authority to adjudicate Plaintiffs'
11 arbitrary or capricious claim under the APA, because APA claims are non-core. APA
12 claims do not invoke any rights created by bankruptcy law. To the contrary,
13 invalidating agency rulemaking under the APA is about as far removed from the type
14 of claims bankruptcy courts were intended to adjudicate as could be imagined. Third,
15 the Bankruptcy Court erred in considering the merits of the arbitrary or capricious
16 claim under the APA. The Bankruptcy Court applied the wrong standard to the claim,
17 confusing the *Chevron* standard used to review "exceeds authority" claims under
18 section 706(2)(C) of the APA, with the deference required for the arbitrary or
19 capricious claim at issue under section 706(2)(A). The Bankruptcy Court then
20 compounded this error by further diminishing deference due to the SBA, relying on
21 the *Skidmore* deference standard which in no way applies to the claims at issue here.

1 Analyzed under the appropriate standard, public records demonstrate that the SBA's
2 rulemaking relied on appropriate factors and was in no way arbitrary or capricious.

3 In reaching its conclusions, the Bankruptcy Court took comfort in its belief that
4 "few" courts had expressly ruled contrary to its conclusions. A268. If that was ever
5 true, it is no longer. Many courts—the majority by far—have since denied the same
6 claims at issue here. *See In re Hidalgo Cty. Emergency Servs. Found.*, 962 F.3d 838
7 (5th Cir. 2020); *Penobscot Valley Hosp. v. Carranza*, Civ. No. 20-00148 (D. Me. July
8 31, 2020); *Tradeways, Ltd. v. U.S. Dep't of the Treasury*, Civ. No. 20-01324, 2020
9 WL 3447767 (D. Md. June 24, 2020); *Fox Valley Pro Basketball Inc. v. SBA*, Civ. No.
10 20-00793 (E.D. Wis. June 16, 2020); *Diocese of Rochester v. SBA*, Civ. No. 20-
11 06243, 2020 WL 3071603 (W.D.N.Y. June 10, 2020); *Coastal Int'l Inc. v. Carranza*,
12 Adv. No. 20-03027 (Bankr. N.D. Cal. June 29, 2020); *Fishing Vessel Owners Marine*
13 *Ways, Inc. v. Seattle Machine Works*, Adv. No. 20-01040 (Bankr. W.D. Wa. June 24,
14 2020); *Dancor Transit, Inc. v. SBA*, Adv. No. 20-07024 (Bankr. W.D. Ark. June 22,
15 2020); *In re Edison Price Lighting, Inc.*, Bankr. No. 20-22614 (Bankr. S.D.N.Y. June
16 16, 2020); *Eisenga v. SBA*, Adv. No. 20-00048 (Bankr. E.D. Wis. June 9, 2020);
17 *iThrive Health, LLC v. Carranza*, Adv. No. 20-00151 (Bankr. D. Md. June 8, 2020);
18 *Henry Anesthesia Assoc. LLC v. Carranza*, Adv. No. 20-6084, 2020 WL 3002124
19 (Bankr. N.D. Ga. June 4, 2020); *Schuessler v. SBA*, Adv. No. 20-2065, 2020 WL
20 2621186 (Bankr. E.D. Wis. May 21, 2020); *Steffen v. SBA*, Adv. No. 20-2068, 2020
21 WL 2621186 (Bankr. E.D. Wis. May 21, 2020); *Thull Farms, LLC v. SBA*, Adv. No.

20-2069, 2020 WL 2621186 (Bankr. E.D. Wis. May 21, 2020); *Jack Cty. Hosp. Dist.*
v. SBA, Adv. No. 20-04035 (Bankr. N.D. Tex. May 21, 2020); *Starplex Corp. v.*
Carranza, Adv. No. 20-00095 (Bankr. D. Ariz. May 21, 2020); *NAI Cap., Inc. v.*
Carranza, Adv. No. 20-01051 (Bankr. C.D. Cal. May 20, 2020); *PPV, Inc. v.*
Carranza, Adv. No. 20-03054 (Bankr. D. Or. May 20, 2020); *Inland Family Practice*
Ctr., LLC v. SBA, Adv. No. 20-06016 (Bankr. S.D. Miss. May 15, 2020); *Okorie v.*
SBA, Adv. No. 20-06015 (Bankr. S.D. Miss. May 15, 2020); *Abe's Boat Rentals, Inc.*
v. Carranza, Adv. No. 20-01029 (Bankr. E.D. La. May 13, 2020); *J.H.J., Inc. v.*
Carranza, Adv. No. 20-05014 (Bankr. W.D. La. May 12, 2020); *Areway Acquisition,*
Inc. v. SBA, Adv. No. 20-01037 (Bankr. N.D. Ohio May 12, 2020); *Trudy's Texas*
Star, Inc. v. Carranza, Adv. No. 20-01026 (Bankr. W.D. Tex. May 7, 2020); *Asteria*
Educ., Inc. v. Carranza, Adv. No. 20-05024 (Bankr. W.D. Tex. Apr. 30, 2020); *Cosi,*
Inc. v. SBA, Adv. No. 20-50591 (Bankr. D. Del. Apr. 30, 2020).

ARGUMENT

I. THE BANKRUPTCY COURT'S ORDER MUST BE REVERSED BECAUSE CONGRESS HAS NOT WAIVED THE SBA'S SOVEREIGN IMMUNITY TO INJUNCTIVE RELIEF.

The Bankruptcy Court erred in awarding injunctive relief against the SBA because the Small Business Act plainly prohibits that relief. The United States possesses inherent sovereign immunity that only Congress can waive. *See United States v. Sherwood*, 312 U.S. 584, 589 (1941). Statutory waivers of sovereign immunity must be express and unequivocal, *United States v. White Mountain Apache*

1 *Tribe*, 537 U.S. 465, 472 (2003), and any ambiguity must be resolved in the
2 government’s favor. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992).

3 Congress has waived the SBA’s sovereign immunity in part, but expressly
4 limited that waiver. *See* 15 U.S.C. § 634(b). Section 634(b) provides that the SBA
5 may:
6

7 sue and be sued in any court of record of a State having general
8 jurisdiction, or in any United States district court, and
9 jurisdiction is conferred upon such district court to determine
10 such controversies without regard to the amount in controversy;
11 *but no attachment, injunction, garnishment, or other similar*
12 *process, mesne or final, shall be issued against the [agency] or*
13 *[its] property.*

14 *Id.* (Emphasis added). By its plain terms, this statute waives sovereign immunity for
15 suits seeking damages or declaratory relief, but precludes suits seeking injunctive or
16 similar relief against the SBA.

17 Addressing the very claims raised here, the Fifth Circuit recently confirmed that
18 this plain statutory language means what it says—“all injunctive relief directed at the
19 SBA is absolutely prohibited.” *In re Hidalgo Cty. Emergency Servs. Found.*, 962 F.3d
20 838 (5th Cir. 2020) (reversing bankruptcy court’s preliminary injunction order
21 prohibiting SBA from excluding debtor from PPP). In its oral ruling, the Bankruptcy
22 Court explicitly relied on the bankruptcy court’s order in *Hidalgo*. A266. Now that
23 this order was reversed by the Fifth Circuit, the Bankruptcy Courts’ reliance on
24 *Hidalgo* order has been undermined.
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1 In applying the plain language of section 634(b) to prohibit injunctions against
2 the SBA, the Fifth Circuit in *Hildago* followed the approach adopted by most circuit
3 courts that have addressed the issue. *See J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383,
4 386 (4th Cir. 1990) (explaining that “courts have no jurisdiction to award injunctive
5 relief against the SBA”); *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1290 (5th Cir. 1994)
6 (same); *United States v. Mel’s Lockers, Inc.*, 346 F.2d 168, 170 (10th Cir. 1965)
7 (Because the “provisions . . . specifically provide that no injunction shall be issued,”
8 “[t]his language is too clear for misunderstanding that there is no waiver by Congress
9 as to injunction suits,” and waiver of sovereign immunity in the Bankruptcy Act does
10 not override this prohibition); *Mar v. Kleppe*, 520 F.2d 867, 869 (10th Cir. 1975)
11 (“The decisions have uniformly considered that this statute effectively precludes
12 injunctive relief against the Administrator”) (collecting cases).

13 Without addressing the cases identified above, the Bankruptcy Court here relied
14 on an out of circuit decision, *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052 (1st
15 Cir. 1987), to depart from the plain-text of section 634(b). The Bankruptcy Court’s
16 reliance on *Ulstein* is mistaken for two reasons, as explained in detail below. First,
17 *Ulstein* has not been adopted by the Ninth Circuit; rather binding case law in this
18 Circuit precludes adopting *Ulstein*. Second, even under the standard adopted in
19 *Ulstein*, the Bankruptcy Court’s injunction must be reversed because it interferes with
20 the core loan-making purpose of the SBA and effectively attaches SBA funds.
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A. *Ulstein* Contradicts Binding Law in this Circuit Requiring Waivers Be Unequivocally Expressed by Congress.

Ulstein is an out-of-circuit case decided thirty-three years ago. Since then, the Supreme Court has repeatedly reminded lower courts that they are bound by a waiver’s plain terms; legislative history cannot be used to imply a waiver that is unequivocally expressed in the statute. *See FAA v. Cooper*, 566 U.S. 284, 290 (2012); *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992).

In *Lane v. Pena*, the Supreme Court rejected *Ulstein*’s approach of looking beyond the statute’s plain terms, however reasonable it may seem to do so. The Supreme Court explained that “[w]hile [plaintiff]’s analysis has superficial appeal, it overlooks one critical requirement firmly grounded in our precedents: A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text . . . *and will not be implied.*” 518 U.S. at 192 (emphasis added). *Lane* further repeated that sovereign immunity waivers must be “strictly construed, in terms of its scope, in favor of the sovereign” and “legislative history cannot supply a waiver that does not appear clearly in any statutory text; the ‘unequivocal expression’ of elimination of sovereign immunity that we insist upon is an expression in statutory text.” *Id.*

Here, the plain language of section 634(b) does not “unequivocally” waive immunity; it does the opposite. In plain terms, section 634(b) *prohibits* injunctive relief. *Ulstein* was wrong to go beyond the unambiguous text. *Ulstein*’s also “founders

1 on the principle that a waiver of sovereign immunity must be strictly construed in
2 favor of the sovereign.” *Orff v. United States*, 545 U.S. 596, 601–02 (2005; *see also*
3 *Levin v. United States*, 568 U.S. 503, 514 (2013) (explaining that “[t]he choice
4 between . . . alternative readings . . . is not difficult to make” where the waiver clause
5 is stated “in no uncertain terms”).

7 The Ninth Circuit follows the Supreme Court’s strict approach, requiring that
8 “waivers of sovereign immunity must be unequivocally expressed and construed
9 strictly in favor of the sovereign,” *McNabb v. U.S. Dep’t of the Army*, 623 F. App’x
10 870, 872 (9th Cir. 2015); *see also, e.g., E.V. v. Robinson*, 906 F.3d 1082, 1098 (9th
11 Cir. 2018); *Dep’t of Treasury-I.R.S. v. Fed. Labor Relations Auth.*, 521 F.3d 1148,
12 1153 (9th Cir. 2008). Because waivers must be “unequivocally expressed,” the Ninth
13 Circuit refuses to imply waivers that do not appear in the text of the statute. *See Hajro*
14 *v. U.S. Citizenship and Immigration Servs.*, 811 F.3d 1086, 1101 (9th Cir. 2016) (“The
15 Supreme Court has frequently cautioned against finding implied waivers of sovereign
16 immunity.”); *McGuire v. United States*, 550 F.3d 903, 914 (9th Cir. 2008) (“It is not
17 our right to extend the waiver of sovereign immunity more broadly than has been
18 directed” and immunity must be “unequivocally waived,” even where “a number of
19 practical considerations” support waiver.).²

26 ² Just this past term, the Supreme Court reiterated that “[j]udges are not free to overlook plain
27 statutory commands,” and that “when the meaning of the statute’s terms is plain, [the court’s] job is
28 at an end,” since “people are entitled to rely on the law as written.” *Bostock v. Clayton Cty.*, 140 S.
Ct. 1731, 1749, 54 (2020).

1 The Ninth Circuit instead requires an unequivocal expression of waiver in the
2 text of a statute, even when plaintiffs argue that implying a waiver would be sensible.
3 For example, in *Ordonez v. United States*, 680 F.3d 1135 (9th Cir. 2012), the Ninth
4 Circuit refused to imply a waiver of immunity. The Ninth Circuit first recognized
5 there may be “many valid reasons why one should in fairness be able to pursue a
6 claim,” including the “injustice” that may result where there is no “remedy to cure
7 even a flagrant” government violation. *Id.* at 1140. But the Ninth Circuit nevertheless
8 held that equitable considerations “cannot waive the government’s immunity from
9 suit.” *Ordonez*, 680 F.3d at 1140. Quoting *Lane*, the Ninth Circuit concluded that,
10 “where a cause of action is authorized . . . the available remedies are *not those that are*
11 *appropriate*, but only those for which sovereign immunity has been expressly
12 waived.” *Id.* at 1138 (emphasis added).

13
14 If the Ninth Circuit refused to consider the “injustice” described in *Ordonez*,
15 then the less extreme consequences described in *Ulstein* provide even less reason to
16 depart from the text of 634(b). In *Ulstein*, the First Circuit feared merely that denying
17 injunctive relief would encourage litigants to file suit in the Federal Court of Claims
18 under the Tucker Act. *Ulstein*, 833 F.2d at 1058.

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20 Rather than speculating about whether a waiver would be wise or reasonable,
21 litigants must instead demonstrate an unequivocal expression of congressional intent
22 to waive immunity. *Blue Fox*, 525 U.S. at 261. Here, the text of section 634(b)(1),
23 when “strictly construed . . . in favor of the sovereign,” plainly *forbids* injunctive
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1 relief—which is the opposite of an “unequivocal expression” of congressional intent
2 to waive immunity required in Ninth Circuit. *See E.V. v. Robinson*, 906 F.3d at 1098.

3 **B. Even Under *Ulstein*’s Incorrect Standard, the SBA is Immune to the**
4 **Bankruptcy Court’s Injunction.**

5 In *Ulstein*, the First Circuit incorrectly departed from the plain-text reading of
6 section 634(b). *See above*. But, even in doing so, the First Circuit made clear that the
7 core functions of the SBA should remain immune to injunction. *Ulstein* concluded
8 that section 634(b)’s prohibition on injunctive relief “was intended to keep creditors or
9 others suing the government from hindering and obstructing agency operations
10 through mechanisms such as attachment of funds. . . . The no-injunction language
11 protects the agency from interference with its internal workings by judicial orders
12 attaching agency funds, etc.” 833 F.2d at 1056-57 (emphasis added). Here, the
13 Bankruptcy Court’s injunction does exactly what *Ulstein* says section 634(b)
14 prohibits. The injunction interferes with the core function of the SBA—loan making.
15 In doing so, it purports to describe how the SBA must process PPP loan applications.
16 If this does not “hinder[] and obstruct[] agency operations,” then nothing would.
17 Moreover, the Bankruptcy Court’s injunction effectively attached agency funds by
18 prohibiting the SBA from “disbursing funds appropriated” by Congress for the PPP.
19 A308. But, according to *Ulstein*, this is precisely what section 634(b)(1) was designed
20 to stop. 833 F.2d at 1056–57.
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C. The Bankruptcy Court’s Alternative Theory of Waiver Lacks Any Merit.

The Bankruptcy Court concludes its analysis of sovereign immunity by speculating that section 634(b)’s prohibition against injunction “is limited to the property of the SBA administrator in her personal capacity.” A253. The Bankruptcy Court candidly admits that it has no support for this hypothesis, but nevertheless concludes that it provides an alternative basis to find a waiver allowing its injunction. This theory is false, and demonstrates a fundamental misunderstanding of administrative law.

Like many agencies, the management of the SBA is vested in a single official, the Administrator. *See* 15 U.S.C. §§ 633(a), (b)(1). The Administrator may then delegate tasks to subordinate officials. *Id.* at § 633(b)(1). For this reason, the waiver of immunity in the Small Business Act is directed to “the Administrator,” authorizing her to “sue and be sued . . .” but not be enjoined. *Id.* at § 634(b)(1).³ This power and limitation applies to the Administrator in her *official* capacity. If there could be any doubt, the sentence preceding the waiver makes this point clear. *Id.* at § 634(b) (“In the performance of, and with respect to, the functions, powers, and duties vested in [her] by this Act the Administrator may—.”).

³ The CARES Act is similarly directed to the Administrator. *See, e.g.*, 15 U.S.C. § 636(a)(36)(B) (“[T]he *Administrator* may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection.”) (emphasis added).

II. THE BANKRUPTCY COURT LACKED JURISDICTION TO AWARD INJUNCTIVE RELIEF BECAUSE APA CLAIMS ARE NON-CORE PROCEEDINGS.

Bankruptcy courts are courts of limited jurisdiction. They have jurisdiction pursuant to 28 U.S.C. § 1334(b) to hear “core” proceedings, but possess authority only to issue reports and recommendations—akin to a magistrate judge—on non-core matters. *See* 28 U.S.C. § 157(c)(1).

APA claims are not a core proceeding. Core matters are defined in 28 USC § 157(b)(2). And the Ninth Circuit has defined non-core matters. Non-core proceedings are those that “do not depend on the Bankruptcy Code for their existence and they could proceed in another court. . . . [A] core proceeding is one that invokes a substantive right provided by title 11 or . . . a proceeding that, by its nature, could arise only in the context of a bankruptcy case.” *Battle Ground Plaza, LLC v. Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010).

The Appellees’ APA claims fall squarely within the Ninth Circuit’s definition of non-core. These APA claims do not arise in or under Title 11; they arise under the APA and CARES Act. Nor are APA claims the type of claims that can only arise in a bankruptcy case. Appellees contend that the SBA, a federal agency, acted arbitrarily and in a manner contrary to law when it promulgated its rule. Non-bankruptcy courts adjudicate such claims every day. The APA claims thus are not claims that “could arise only in the context of a bankruptcy case.” Indeed, Appellees could have filed

1 their APA claims directly in district court. *See, e.g., Diocese of Rochester v. SBA*, __
2 F.Supp.3d __, 2020 WL 3071603 (W.D.N.Y. Jun. 10, 2020) (one such suit).

3 The Bankruptcy Court held that the APA claims are core because the agency
4 rule challenged by Appellees involves the “exclusion of bankrupt entities” and thus,
5 the Bankruptcy Court concluded, “could never exist outside of the bankruptcy
6 context.” A252. But adopting this logic would expand bankruptcy court jurisdiction to
7 include any type of claim whatsoever so long as the facts of the claim arose because of
8 the bankruptcy. That is not the approach the law requires. As Collier explained, cases
9 do not “arise in” a bankruptcy case for the purposes of core jurisdiction merely
10 because the claim would not exist “but for” a bankruptcy:

14 There is no “but for” test for arising in jurisdiction; that is, the
15 fact that a matter would not have arisen had there not been a
16 bankruptcy case does not ipso facto mean that the proceeding
17 qualifies as an “arising in” proceeding. Thus, a suit charging
18 defamation filed by a debtor’s “chief restructuring officer”
19 against the debtor’s CEO for remarks made by the latter
20 regarding the former’s conduct during a chapter 11 case was not
within the jurisdiction of the bankruptcy court under the “arising
in” language. Any other result would surely expand bankruptcy
jurisdiction well beyond that which is constitutional.

21 1 Collier on Bankruptcy P 3.01(3)(e)(iv) (16th ed. 2020) (citing *Stern v Marshall*, 564
22 U.S. 462 (2011)).

24 The Eleventh Circuit addressed an analogous situation to the APA claims here
25 in *Wortley v. Bakst*, 844 F.3d 1313, 1317-18 (11th Cir. 2017). In *Wortley*, the
26 Eleventh Circuit considered a suit contending that a federal bankruptcy judge had
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1 committed fraud and misconduct on the bench. *Id.* at 1315-17. While the facts of that
2 claim could obviously only occur in the context of a bankruptcy, in a literal, but-for
3 manner, the court of appeals nevertheless held that the suit was non-core. *Id.* The
4 court explained “[b]ecause . . . corruption or improper conduct of a judge can occur in
5 any type of legal proceeding,” the tort suit “was not the sort of case that would arise
6 only in bankruptcy.” *Id.* The same is true here. APA claims are not claims that
7 inherently arise only in bankruptcy cases. The opposite is true. APA claims almost
8 never arise in a bankruptcy case and are instead filed in district court.
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11 **III. THE BANKRUPTCY COURT ERRED IN HOLDING THAT THE SBA RULEMAKING**
12 **WAS ARBITRARY OR CAPRICIOUS UNDER THE APA.**

13 The Bankruptcy Court erred in holding that Appellees were “highly likely” to
14 succeed on their arbitrary or capricious claim because the Bankruptcy Court applied
15 the wrong standard to analyze the claim, and its analysis is otherwise contradicted by
16 the record.
17

18 **A. The Bankruptcy Court Failed to Adequately Defer to the SBA’s**
19 **Rulemaking.**

20 Under section 706(2)(A) of the APA, reviewing courts may “hold unlawful and
21 set aside agency action, findings, and conclusions found to be . . . arbitrary,
22 capricious, an abuse of discretion, or otherwise not in accordance law.” But the
23 arbitrary or capricious standard is “narrow and deferential.” *California v. Azar*, 950
24 F.3d 1067, 1096 (9th Cir. 2020); *San Luis & Delta Mendota Water Auth. v. Locke*,
25 776 F.3d 971, 994 (9th Cir. 2014) (“The arbitrary or capricious standard is a
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1 deferential standard of review under which the agency’s action carries a presumption
2 of regularity.”). Under this “narrow and deferential” standard, a court must determine
3 whether an agency rule is arbitrary or capricious by considering whether: (1) “the
4 agency has relied on factors which Congress has not intended it to consider”; (2)
5 “entirely failed to consider an important aspect of the problem”; (3) “offered an
6 explanation for its decision that runs counter to the evidence before the agency”; or (4)
7 “is so implausible that it could not be ascribed to a difference in view or the product of
8 agency expertise.” *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463
9 U.S. 29, 43 (1983) (the so-called *State Farm* factors).

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13 So long as an agency’s explanation “may reasonably be discerned,” the
14 standard is met, even if its explanation is one “of less than ideal clarity.” *Azar*, 950
15 F.3d at 1096. Courts “cannot ask whether a regulatory decision is the best one
16 possible or even whether it is better than the alternatives.” *Azar*, 950 F.3d at 1096. Nor
17 may courts “substitute [their] judgment for that of the [agency.]” *Id.* Courts also are
18 “prohibited from second-guessing the [agency]’s weighing of risks and benefits and
19 penalizing [it] for departing from the . . . inferences and assumptions of others.” *Id.*
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21 Where the agency is making “predictive judgments about areas that are within [its]
22 field of discretion and expertise,” such judgments “are entitled to particularly
23 deferential review, so long as they are reasonable.” *Id.*

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26 The Bankruptcy Court failed to follow this deferential standard of
27 administrative review. It simply applied the wrong standard. The Bankruptcy Court
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1 begins its analysis with the deference articulated in *Chevron, U.S.A., Inc. v. Natural*
2 *Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A253. But *Chevron* is used to determine
3 whether an agency’s interpretation of a statute exceeds its delegated authority under
4 section 706(2)(C) of the APA. The *State Farm* standard applies when considering
5 whether an agency’s rulemaking process was arbitrary or capricious under section
6 706(2)(A). See *Catskill Mounts. Chapter of Trout Unlim., Inc. v. E.P.A.*, 846 F.3d 492,
7 522 (2d Cir. 2017) (“*State Farm* is used to evaluate whether a rule is procedurally
8 defective as a result of flaws in the agency’s decisionmaking process. *Chevron*, by
9 contrast, is generally used to evaluate whether the conclusion reached as a result of
10 that process—an agency’s interpretation of a statutory provision it administers—is
11 reasonable.”); *Diocese of Rochester*, 2020 WL 3071603 at *8 (discussing distinction
12 between *Chevron* and *State Farm* analysis).
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17 While Appellees’ adversary complaint raised an “exceeds authority” claim
18 under 706(2)(C), A031, the Bankruptcy Court did not address it. The Bankruptcy
19 Court instead based its ruling entirely on its conclusion that the SBA’s rulemaking
20 process was arbitrary and capricious under 706(2)(A). A261 (concluding that the SBA
21 had failed to “show the work”). Despite this, the Bankruptcy Court applied the
22 *Chevron* standard and then conflated it with its analysis of the *State Farm* factors.
23 A255.
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26 The Bankruptcy Court then goes further afield with an incorrect conclusion that
27 the deference owed to the SBA must be “reduced” because it was “not subject to
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1 formal process,” citing *Reno v. Koray*, 515 U.S. 50 (1995). A254. But *Reno v. Koray*
2 addressed a different question under a different standard that does not apply here.

3 In *Reno v. Koray*, the Supreme Court applied a lesser form of deference called
4 *Skidmore* deference, which is used to adjudicate agency action that does not qualify
5 for treatment under *Chevron. Id.*; see *MacClarence v. United States EPA*, 596 F.3d
6 1123, 1130 (9th Cir. 2010) (“When *Chevron* deference does not apply, we are guided
7 by the principles of *Skidmore v. Swift*, 323 U.S. 134 (1944).”).
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10 But here, because the Bankruptcy Court addressed the SBA’s decisionmaking
11 process, its analysis should have been governed by *State Farm*, not *Chevron* or
12 *Skidmore*. At any rate, the SBA rule here would clearly meet the standard for full
13 *Chevron* deference. The reduced standard in *Reno v. Koray* is thus doubly
14 inapplicable.
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17 In *Reno v. Koray*, the Supreme Court addressed an agency’s internal guideline.
18 515 U.S. at 61. Because the agency was not exercising delegated authority to speak
19 with the force of law, *Chevron* did not apply. See *Id.*; *MacClarence v. EPA*, 596 F.3d
20 1123, 1130 (9th Cir. 2010) (“*Chevron* deference applies, when it appears that
21 Congress delegated authority to the agency generally to make rules carrying the force
22 of law, and that the agency interpretation claiming deference was promulgated in the
23 exercise of that authority.”) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-
24 27 (2001)).
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1 In this case, Congress explicitly commanded the SBA to speak with the force of
2 law, and do so promptly, dispensing with the usual notice and comment requirement.
3 15 U.S.C. § 9012 (“Not later than 15 days after the date of enactment of this Act, the
4 Administrator shall issue regulations to carry out this title and the amendments made
5 by this title without regard to the notice requirements under section 553(b) of title 5,
6 United States Code.”). This explicit delegation is built on top of the SBA’s existing
7 broad authority to regulate its lending programs. 15 U.S.C. § 634(b)(6),(7). Because
8 Congress gave the SBA the power and obligation to issue regulations implementing
9 the PPP with the force of law, full *Chevron* deference would apply.
10
11

12
13 **B. The Record Does Not Support the Bankruptcy Court’s Erroneous**
14 **Conclusion that the SBA’s Rulemaking Was Arbitrary and**
15 **Capricious.**

16 The SBA’s published rules show it considered relevant factors and articulated a
17 satisfactory explanation for its bankruptcy exclusion. The First Interim Final Rule
18 explains the SBA “streamlin[ed] the requirements of the regular 7(a) program” after
19 determining that Congress required the SBA to “provide relief to America’s small
20 businesses expeditiously.” 85 Fed. Reg. at 20,811–12. As an example, the SBA
21 highlighted that lenders may “rely on certifications of the borrower in order to
22 determine eligibility of the borrower and use of loan proceeds,” *id.*, including the
23 certification that the entity is not in bankruptcy. As such, the SBA’s First Interim Rule
24 explains that the SBA abbreviated its § 7(a) underwriting requirements as a means of
25 promptly determining whether the loan would be of “sound value,” as required by 15
26
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1 U.S.C. § 636(a)(6), in order to provide PPP loan guarantees expeditiously and
2 consistent with congressional intent. In the Fourth Interim Rule, the SBA further
3 explained that in first implementing the bright-line bankruptcy exclusion rule, “[t]he
4 Administrator, in consultation with the Secretary [of the Treasury], determined that
5 providing PPP loans to debtors in bankruptcy would present an unacceptably high risk
6 of an unauthorized use of funds or non-repayment of unforgiven loans.” 85 Fed. Reg.
7 at 23,451.
8
9

10 The interim final rules demonstrate that the SBA examined the relevant
11 considerations—including (1) the risks debtors in bankruptcy pose to the PPP, (2) the
12 certifications necessary for the agency to ensure its loan guarantees complied with
13 existing law, and (3) an appropriate application form to streamline the loan process—
14 and rationally concluded that the bankruptcy exclusion on the PPP borrower
15 application allowed the SBA to provide relief to America’s small businesses
16 expeditiously and in compliance with section 7(a) statutory requirements and
17 congressional intent.
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21 The SBA’s rule, although blunt, is rational. *See Schuessler*, 2020 WL 2621186,
22 at *12 (“That the SBA chose to use a broad and blunt instrument—flatly excluding
23 bankrupt debtors from PPP participation—does not make the SBA’s rule arbitrary and
24 capricious. The law does not require precision or perfection, particularly at the
25 expense of other valid and competing Congressional goals.”). By excluding bankrupt
26 applicants, the SBA streamlined the otherwise nuanced Section 7(a) lending process,
27
28

1 and allowed the SBA to swiftly address the economic fallout of the COVID-19
2 pandemic. This streamlining is wholly within the SBA’s delegated discretion. The
3 bankruptcy exclusion rule reasonably reconciles the “sound value” mandate under 15
4 U.S.C. § 636(a)(6) with the obligation to expeditiously process CARES Act PPP loans
5 by replacing the case-by-case consideration of bankruptcy history with a bright line
6 rule on the application form.
7

8 The SBA’s rulemaking meets the deferential *State Farm* standard. First, the
9 factors the SBA considered are those Congress intended the SBA to consider. *See*
10 *State Farm*, 463 U.S. at 43. The CARES Act required the SBA to process PPP loans
11 expeditiously. *See* 15 U.S.C. § 9012 (requiring the Administrator to implement rules
12 to implement the PPP within 15 days, without notice or comment). Congress also
13 required the SBA to attend to the “sound value” of its loans. *See* 15 U.S.C. 636(a)(6).
14 The record affirmatively demonstrates that the SBA had these precise factors in mind
15 in making its decision to exclude bankrupt entities from the PPP. *See* First Interim
16 Rule 85 FR at 20,812 (addressing “streamlining [of] the requirements of the regular
17 7(a) loan program”); Fourth Interim Rule, 85 Fed. Reg. at 23451 (addressing “risk of
18 non-repayment of unforgiven loans”). The SBA also considered the risk that funds
19 might be used for purposes not intended by the CARES Act, which directly supports
20 the intent of the PPP to support certain covered uses. Fourth Interim Rule, 85 Fed.
21 Reg. 23,451 (addressing risk of “unauthorized use of funds”).
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1 Second, the SBA did not “entirely fail[] to consider an important aspect of the
2 problem.” *State Farm*, 463 U.S. at 43. The Bankruptcy Court raises two related
3 aspects it thought the SBA failed to consider: 1) that Chapter 11 Debtors are “most in
4 need of . . . relief” and 2) that the requirement that applicants certify that the PPP loan
5 is “necessary” is at odds with the excluding bankrupt debtors. A257–58. But the
6 Bankruptcy Court identifies no source for these “important aspects,” outside its own
7 judgment. This is exactly the kind of judicial second-guessing the law forbids. *Azar*,
8 950 F.3d at 1096 (Courts also are “prohibited from . . . penalizing [the agency] for
9 departing from the . . . inferences and assumptions of others.”). Even still, the SBA
10 clearly considered these aspects of the problem. The SBA must have understood that
11 debtors had “need” for PPP loans (and would be able to certify that a loan was
12 “necessary”). This is exactly why the SBA needed a rule to exclude debtors to avoid
13 the risk associated with loans to bankruptcy entities that it specifically identified in its
14 Fourth Interim Rule. Moreover, debtors “need” for money is far from the only
15 relevant consideration. As explained above, Congress required the SBA to consider
16 expeditious loan processing, the “sound value” of its loans, and potential misuse of
17 PPP funds. The record makes clear that the SBA considered those factors, which
18 rationally led to the bankruptcy exclusion. The Court must defer to that reasoned
19 conclusion.
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26 The Bankruptcy Court does not address the remaining *State Farm* factors. And
27 there is nothing otherwise demonstrating that the SBA “offered an explanation for its
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1 decision that runs counter to the evidence before the agency”; or that “is so
2 implausible that it could not be ascribed to a difference in view or the product of
3 agency expertise.” *State Farm*, 463 U.S. at 43. The Bankruptcy Court instead faulted
4 the SBA for failing to “show your work” by, for instance, citing “academic . . .
5 studies.” A260. While the record here is not voluminous, it is reasonable under the
6 circumstances. The law requires no more. Carrying out Congress’s clear intent that the
7 billions it appropriated be distributed expeditiously, the SBA implemented the PPP
8 less than a week after the CARES Act was passed; the bankruptcy exclusion was just
9 one decision among many the SBA had to make in that period, *see e.g.* First Interim
10 Rule 85 Fed. Reg. at 20,811 (addressing agency decisions about, *inter alia*, payroll
11 calculations, interest rate, maturity date, and loan forgiveness conditions); Second
12 Interim Rule, 85 Fed. Reg. 20,817 (extending PPP to religious organizations); and
13 Congress had dispensed with typical notice and comment requirements – all in an
14 effort to provide PPP loan assistance as expeditiously as possible. Under the
15 Bankruptcy Court’s invented standard—requiring citation to “academic” studies and
16 to show additional “work”—the SBA’s entire emergency rulemaking would be subject
17 to invalidation. This Court, unlike the Bankruptcy Court, must consider Congress’s
18 explicit demand for emergency rulemaking and the unprecedented speed by which
19 SBA was required to stand-up a multi-hundred-billion dollar program in just days.
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26 Based on the SBA’s published rules, this Court can reasonably discern why the
27 SBA did what it did and conclude as a matter of substance that the decision was not
28

1 arbitrary or capricious. For this reason, most courts have concluded that the SBA's
2 rulemaking was reasonable under the circumstances. For instance, in *Diocese of*
3 *Rochester*, the district court concluded:

4
5 The SBA has offered a reasoned explanation for the bankruptcy
6 exclusion. ... [I]n order to ensure that PPP loans are processed
7 expeditiously, as the CARES Act clearly intended, the SBA
8 decided to streamline processing by imposing a bright line
9 exclusion of debtors in bankruptcy. The SBA explained in the
10 Fourth Interim Rule that it had adopted this bright line rule
11 because it had determined that "providing PPP loans to debtors
12 in bankruptcy would present an unacceptably high risk of an
unauthorized use of funds or non-repayment of unforgiven
loans." 85 Fed. Reg. at 23451. Regardless of the Court's view of
the soundness of this determination as a matter of policy, it is
sufficiently reasoned that the Court must defer thereto.

13 2020 WL 3071603 at *8. And in *Tradeways*, the district court explained:

14
15 [T]he CARES Act was passed in the midst of an unprecedented
16 global pandemic in order to stop the nation's economic tailspin.
17 Time was of the essence. And, Congress clearly communicated
18 the urgency of the crisis to the SBA, giving it just 15 days to
19 promulgate regulations to implement the PPP. 15 U.S.C. § 9012.
20 In response, the SBA chose to adopt a bright-line rule in order to
21 expedite the underwriting process and facilitate the hasty
22 distribution of PPP funds, instead of issuing a flexible standard
23 that would require lenders to scrutinize each PPP application on
24 a case-by-case basis. The SBA could have prioritized
25 accessibility over efficiency and thus decided to adopt a totality-
of-the-circumstances approach, instead of a bright line rule. Or,
the agency could have decided to exclude some bankruptcy
debtors but not others from the PPP. But, the Court cannot
conclude that the SBA's rule is an unreasonable interpretation of
the priorities evinced in the CARES Act.

26 Similarly, *Schuessler* held:

27 The denial of PPP participation to entities that have already
28 resorted to bankruptcy, while reserving PPP loans to those whose

1 financial troubles has not yet gotten to the point (and perhaps
2 never will) is a rational policy choice. . . . Using the bankruptcy
3 exclusion question on the PPP application has the obvious
4 benefit of being easy to administer. That is not a small matter,
given the speed with which Congress and the President directed
the SBA to implement the CARES Act and PPP.

5 2020 WL 2621186, at *12; *see also Henry Anesthesia Assoc. LLC v. Carranza*, 2020
6 WL 3002124, *10 (Bankr. D. Ga. June 4, 2020).

7
8 Consequently, Appellees' claim that the SBA acted arbitrarily or capriciously
9 fails as a matter of law. The Bankruptcy Court wrongly engaged in judicial second-
10 guessing. This Court should vacate the Bankruptcy Court's holding that the SBA
11 violated 5 U.S.C. § 706(2)(A).
12

13 CONCLUSION

14 In light of the foregoing, this Court should:

15 (1) vacate the Bankruptcy Court's preliminary injunction because
16

17 a. the Bankruptcy Court lacked jurisdiction to issue such an
18 injunction under 15 U.S.C. § 634(b)(1);
19

20 b. the Bankruptcy Court lacked subject matter jurisdiction to issue
21 an injunction in a non-core proceeding; and
22

23 (2) vacate the Bankruptcy Court's holdings that the SBA violated 5
24 U.S.C. §§ 706(2)(A) because it did not have authority under 28 U.S.C. § 157(b)
25 to adjudicate the claim;

26 (3) vacate the Bankruptcy Court's holding that the SBA violated 5 U.S.C.
27 § 706(2)(A) on the merits.
28

September 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. Bankr. R. 8015(a)(7)(B) because, excluding the parts of the document exempted by the Rule 8015(g), this document contains 9,010 words.

September 28, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, I electronically filed the United States' BRIEF FOR APPELLANTS with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Kevin P. VanLandingham
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No. 2:20-cv-3098

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

IN RE: ASTRIA HEALTH, et al.

Debtors.

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

Appellants,

v.

ASTRIA HEALTH, et al.,

Appellees.

On Appeal from the United States Bankruptcy Court
for the Eastern District of Washington, Adv. No. 20-80016-WLH

APPENDIX TO APPELLANTS' OPENING BRIEF

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APPENDIX TO APPELLANTS' OPENING BRIEF**

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 In Possession*

**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,

Chapter 11
 Lead Case No. 19-01189-11
 Jointly Administered

**Adv. Proc. Case No. 20-_____ -
 WLH**

VERIFIED COMPLAINT

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).

**COMPLAINT AGAINST SBA AND
 ADMINISTRATOR re PPP Funds**

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v.

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

Defendants.

Debtor Astria Health ("Astria"), Debtor SHC Medical Center - Toppenish,
doing business as Astria Toppenish Hospital ("Toppenish"), both Washington
nonprofit corporations under § 501(c)(3) of title 26 of the United States Code, and
Debtor Yakima HMA Home Health LLC doing business as Astria Home Health &
Hospice-Yakima ("Astria Home Health"), also a Washington corporation, along with
the above-referenced affiliated debtors (collectively, the "Debtors"), the debtors and
debtors in possession in the above-captioned chapter 11 bankruptcy cases
(collectively, the "Chapter 11 Cases"), hereby file this complaint (the "Complaint")
against Defendant United States Small Business Administration (the "SBA") acting
through Defendant Jovita Carranza in her capacity as the Administrator of the SBA
(the "Administrator", and together with the SBA, the "Defendants"), as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this adversary proceeding pursuant to 28
U.S.C. §§ 157, 1331, 1334, 1361, and 2201, and 15 U.S.C. § 634(b). Jurisdiction is

1 also proper under the judicial review provisions of the Administrative Procedure Act
2 (the “APA”), 5 U.S.C. § 702.

3 2. Declaratory and injunctive relief is sought consistent with 5 U.S.C. § 706
4 and as authorized by 28 U.S.C. § 2201 and 2202. The award of costs and attorneys’
5 fees against the United States (“U.S.”) generally or against the SBA specifically is
6 sought pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

7 3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

8 4. The venue is proper pursuant to 28 U.S.C. §§ 1391, 1408, and 1409.

9 5. The Court has the power to grant the relief requested based on §§ 105,
10 106, and 525 of title 11 of the United States Code, §§ 101 *et seq.* (the “Bankruptcy
11 Code”).

12 6. The Debtors consent to entry of final orders by this Court in this
13 adversary proceeding.

14 II. PARTIES

15 7. Debtor Astria, a Washington nonprofit corporation, is the direct or
16 indirect corporate member of several entities that make it the largest non-profit
17 healthcare system based in Eastern Washington. The Astria system is headquartered
18 in the heart of Yakima Valley, Washington. The Debtors continue to operate
19 Sunnyside Community Hospital Association (“Sunnyside”), a 38-bed critical access
20 hospital in Sunnyside, Washington, and Toppenish, a 63-bed hospital in Toppenish,

1 Washington, as well as several related clinics and related healthcare businesses such
2 as Astria Home Health.

3 8. The SBA is an agency of the United States of America whose central
4 office is located at 409 Third Street, SE Washington, D.C. 20416. The SBA can sue
5 and be sued in a court of competent jurisdiction, including for declaratory relief and
6 damages. *Mar v. Kleppe*, 520 F.2d 867, 869 (10th Cir. 1975).

7 9. The Administrator can sue and be sued on behalf of the SBA in any court
8 of general jurisdiction under § 106(a)² of the Bankruptcy Code and 15 U.S.C.
9 § 634(b),³ and can be served with process pursuant to Rule 7004(b)(4) and (5) of the
10 Federal Rules of Bankruptcy Procedure by United States First Class Mail as follows:

11
12
13 ² As explained in the legislative history of § 106, although “an order against a
14 governmental unit will not be enforceable by attachment or seizure of government
15 assets[,]” the court “retains ample authority to enforce nonmonetary orders and
16 judgments.” 140 Cong. Rec. H10752-01, at H10766, 1994 WL 545773 (Oct. 4, 1994).

17 ³ Courts have expressly found that the SBA Administrator can be enjoined when she
18 acts beyond the scope of her authority. *Ulstein Mar., Ltd. v. United States*, 833 F.2d
19 1052, 1057 (1st Cir. 1987) (“The no injunction language protects the agency from
20 interference with its internal workings . . . but . . . should not be interpreted as a bar

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22 Additionally, a copy can be served by e-mail to the following individuals:

23 Ruth Harvey
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29 _____
30 to judicial review of agency actions that exceed agency authority where the remedies
31 would not interfere with internal agency operations.”).

32 **COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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6 **III. SUMMARY OF RELIEF REQUESTED**

7
 8 10. This adversary proceeding arises out of Banner Bank's denial, at the
 9 direction of the SBA acting through the Administrator, of two of the Debtors'
 10 applications for loans under the Paycheck Protection Program ("PPP") because the
 11 applicants are debtors in bankruptcy. The Debtors seek to have the SBA and the
 12 Administrator enjoined from their improper and unlawful administration of PPP,
 13 which Congress enacted and the President signed as part of the Coronavirus Aid,
 14 Relief, and Economic Security Act (the "CARES Act"), Public Law 116-136.⁴ The
 15 CARES Act included stimulus funds designed to assist businesses, including for-
 16 profits and 501(c)(3) nonprofits, and to ensure that American workers continue to be

17
 18 ⁴ A full text of the CARES Act can be found at
 19 <https://www.govtrack.us/congress/bills/116/hr748/text> (last visited on May 14,
 20 2020).

1 paid despite the economic impact of the Novel Coronavirus (“Covid-19”) and social
 2 distancing measures. Section 1102 of the CARES Act establishes PPP as a
 3 convertible loan program under § 7(a) of the Small Business Act, codified in 15 U.S.C
 4 § 636. While nominally called a “loan,”⁵ PPP disbursements are treated as grants—
 5 and there are no repayment obligations—if, among other things, a certain percentage
 6 of PPP funds are used for payroll and wage expenses, interest on mortgages, rent, or
 7 utilities. Importantly, neither the CARES Act, the Small Business Act, nor any other
 8 applicable law or regulation prohibits the granting of PPP funds to bankruptcy
 9 debtors, with the exception of an SBA rule issued and published after the Debtors
 10 submitted their PPP Applications (defined herein). Nevertheless, the Defendants
 11 denied the Debtors access to PPP disbursements on the sole basis that the Debtors are
 12 in bankruptcy, and in so doing have exceeded their statutory authority and improperly,
 13 unfairly, arbitrarily, capriciously, and unlawfully discriminated against the Debtors.

14 11. If the goal of the PPP is to help small businesses survive economic
 15 hardships caused by the Covid-19 pandemic through funding payroll costs, rent,
 16 interest and utilities during the initial shelter-in-place period, then it is illogical to
 17 require those businesses—particularly hospitals on the “front lines” of treating

18 _____
 19 ⁵ The Debtors’ use of the term “loan” or “loans” herein is not intended to waive or
 20 diminish its contention that PPP is in reality a support/grant program.

1 patients—to be excluded because they are in bankruptcy. In the words of Bankruptcy
 2 Judge Jones from the United States Bankruptcy Court for the Southern District of
 3 Texas on April 24, 2020: “But this can’t be what Congress intended. This can’t be
 4 the way we are supposed to treat our fellow man in this time. It’s inconceivable to
 5 me that this distinction [between a borrower in bankruptcy and one not in bankruptcy]
 6 could be drawn.” *See Hildago Country Emergency Service Foundation v. Carranza*,
 7 hearing transcript, attached hereto as **Exhibit 1**, at p. 32, lines 14-17.

8 12. Therefore, the Debtors seek, among other relief more fully described
 9 herein, an order requiring the Defendants and all agents, servants, employees, and any
 10 parties acting in concert with any of the foregoing (the “Restrained Parties”) to
 11 consider the Debtors’ Applications (defined herein) and any related forms,
 12 applications, or other documents⁶ without any consideration of the involvement of the
 13 Debtors or any owner of the Debtors in any bankruptcy. The Debtors also seek an
 14 order requiring the Restrained Parties to refrain from making or conditioning the
 15 approval of any PPP funds to the Debtors contingent on the Debtors or any owner of
 16 the Debtors not being “presently involved in any bankruptcy.” In addition, the
 17 Debtors seek declaratory relief relating to the Defendants’ violations of the APA and
 18 § 525(a) of the Bankruptcy Code. The Debtors also seek damages and an award of

19 _____
 20 ⁶ This includes the Lender Application (defined below).

1 their costs and attorneys' fees against the United States generally, or against the
 2 Defendants specifically, pursuant to the Equal Access to Justice Act, 28 U.S.C.
 3 § 2412, among other things.

4 **IV. BACKGROUND**

5 **A. General Background.**

6 13. The Debtors filed voluntary petitions for relief under chapter 11 of the
 7 Bankruptcy Code on May 6, 2019 (the "Petition Date"). These Chapter 11 Cases are
 8 currently being jointly administered before the Court. [Lead Docket No. 10]. Since
 9 the Petition Date, the Debtors have been operating their businesses as debtors in
 10 possession pursuant to §§1107 and 1108.

11 14. On May 24, 2019, the Office of the United States Trustee (the "U.S.
 12 Trustee") appointed an Official Committee of Unsecured Creditors (the
 13 "Committee") in these Chapter 11 Cases. [Lead Docket No. 135]. No trustee or
 14 examiner has been appointed.

15 15. Additional background facts on the Debtors, including an overview of
 16 the Debtors' business, information on the Debtors' capital structure, and events
 17 leading up to these Chapter 11 Cases, are contained in the Declaration of John M.
 18 Gallagher [Lead Docket No. 21] (the "Gallagher Declaration") and the Declaration of
 19 Michael Lane [Lead Docket No. 16] (the "Lane Declaration," and together with the
 20 Gallagher Declaration, the "First Day Declarations").

1 **B. Impact of the Novel Coronavirus on the Debtors' Operations.**

2 16. The world is currently experiencing a global pandemic brought on by
 3 widespread transmission of the Covid-19. Since early 2020, the U.S., including the
 4 State of Washington, has been taking steps to mitigate Covid-19's impact on the
 5 health of U.S. citizens and to "flatten the curve." Specifically, governments and local
 6 communities are working to employ strategies of quarantine and social distancing
 7 among residents in an attempt to slow the spread of the virus and give health care
 8 providers time to prepare resources for acute patients suffering from the disease. *See*,
 9 e.g., Washington State, "*Coronavirus Response*," [https://coronavirus.wa.gov/what-](https://coronavirus.wa.gov/what-you-need-know/whats-open-and-closed)
 10 [you-need-know/whats-open-and-closed](https://coronavirus.wa.gov/what-you-need-know/whats-open-and-closed) (last visited on May 12, 2020).

11 17. Flattening the curve will allow volumes of patient care to be more
 12 manageable for the healthcare system. A spike in patient volume could overwhelm
 13 the healthcare system. The Debtors, as providers with acute care facilities, are among
 14 the providers being called on to serve and treat patients during the crisis.

15 18. A significant portion of the Debtors' revenue is derived from outpatient
 16 procedures offering a wide range of medical services to patients.

17 19. Nevertheless, based on recommendations from the federal Centers for
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1 Disease Control (the “CDC”)⁷ and an order by the Governor of the State of
 2 Washington,⁸ the Debtors have postponed nonessential elective medical procedures.
 3 Only essential urgent and emergency procedures that if delayed would cause harm are
 4 still being provided. At this time, the Debtors continue to implement procedures in
 5 response to Covid-19 and state and federal directives such as: restricting staff and
 6 visitor access to the hospital; screening all patients, visitors, and staff before entry into
 7 the facility; and providing both in person and telehealth visits to patients. This has
 8

9 ⁷See, e.g., CDC, “Coronavirus Disease 2019 (COVID-19) Healthcare Facility
 10 Guidance,” available at [https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-
 11 hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2
 12 019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html) (last visited May 14, 2020.)

13 ⁸ See Proclamation by the Governor of the State of Washington 20-24 entitled
 14 Restrictions on Non Urgent Medical Proceedings, available at
 15 [https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-
 16 19%20non-urgent%20medical%20procedures%20\(tmp\).pdf](https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-19%20non-urgent%20medical%20procedures%20(tmp).pdf), (last visited on May 14,
 17 2020) (prohibiting all hospitals from “providing health care services, procedures and
 18 surgeries that, if delayed, are not anticipated to cause harm to the patient within the
 19 next three months”).
 20

1 and continues to have a significant negative impact on the Debtors' cash position.⁹ A
 2 true and correct copy of the Debtors' most current weekly cash flow budget is attached
 3 hereto as Exhibit A.

4 **C. The CARES Act and the SBA's Denial of the Debtors' PPP Applications.**

5 20. Prior to the enactment of the CARES Act, the "SBA 7(a) Loan" was the
 6 SBA's primary loan program for providing financial assistance to small businesses.
 7 Under typical circumstances, the SBA 7(a) Loan (under the pre-CARES Act
 8 requirement) required that the applicant meet, among other things, the credit
 9

10 _____
 11 ⁹ The Debtors are not alone in suffering significant financial impact from foregoing
 12 elective surgeries and other repercussions of the pandemic. "Hospitals across the U.S.
 13 are losing more than \$1 billion in daily revenue as they experience significant declines
 14 in patient volume during the COVID-19 pandemic, according to a report from Crowe,
 15 a public accounting, consulting and technology company." Ayla Ellison, *US hospitals*
 16 *losing \$1.4B in revenue per day, Becker's Hospital CFO Report*, (May 4, 2020),
 17 available at [https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G)
 18 [4b-in-revenue-per-](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G)
 19 [day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=200](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G)
 20 [4C5404478F9G](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G).

1 requirements detailed in 13 CFR § 120.150. In that regard, 13 CFR § 120.150 lists
2 the following criterion:

3 The applicant (including an Operating Company) must be creditworthy.
4 Loans must be so sound as to reasonably assure repayment. SBA will consider:

- 5 (a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors;
- 6 (b) Experience and depth of management;
- 7 (c) Strength of the business;
- 8 (d) Past earnings, projected cash flow, and future prospects;
- 9 (e) Ability to repay the loan with earnings from the business;
- 10 (f) Sufficient invested equity to operate on a sound financial basis;
- 11 (g) Potential for long-term success;
- 12 (h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and
- 13 (i) The effect any affiliates (as defined in part 121 of this chapter) may have on the ultimate repayment ability of the applicant.

14 21. While there is no *per se* listed exclusion of a bankruptcy debtor
15 participating in the prior SBA 7(a) Loan program, when these criteria are coupled
16 with the requirements that the associated lending institution practice appropriate
17 diligence and credit assessment, the effect was *de facto* exclusion of any bankruptcy
18 debtors from securing an SBA 7(a) Loan.

19 22. On or about March 27, 2020, Congress enacted and the President signed
20 the CARES Act.

21 23. The CARES Act included stimulus funds designed to assist businesses,
including 501(c)(3) nonprofits, and to ensure that American workers continue to be

1 paid despite the economic impact of Covid-19 and social distancing measures.

2 24. Section 1102 of the CARES Act establishes PPP as a convertible loan
3 program under § 7(a) of the Small Business Act, codified at 15 U.S.C § 636. While
4 nominally called a “loan,” PPP disbursements are treated as grants—and there are no
5 repayment obligations—if, among other things, seventy-five percent (75%) of PPP
6 funds are used for payroll and wage expenses, interest on mortgages, rent, or
7 utilities.¹⁰

8 25. A qualified borrower may receive PPP funds equal to two and a half (2.5)
9 times its average monthly payroll, up to a limit of \$10 million. A borrower need not
10 exhaust its other credit options prior to receiving PPP funds.

11 26. A borrower can obtain funds under PPP by applying with any federally
12 insured participating lender using an application form created by the SBA, and the
13 SBA guarantees the loan.

14 27. The entire purpose of the program is to provide grants to companies in
15 order to ensure that workers can be paid. The CARES Act specifically waives all
16 underwriting considerations under § 7(a) of the Small Business Act, including but not

17 _____
18 ¹⁰ Funds not used in conformity with this ratio would be required to be repaid, but at
19 a low, fixed interest rate, with payments deferred for up to a year. *See* § 1102(g) of
20 the CARES Act.

1 limited to, underwriting requirements, collateral review, or loan covenants. There is
 2 no evaluation of risk because there is no expectation of repayment, provided funds
 3 are used for permitted purposes. All small businesses have a right to apply for PPP
 4 funds.

5 28. Section 1114 of the CARES Act grants the SBA emergency rule making
 6 authority and charges the SBA to issue regulations to carry out certain of the programs
 7 contemplated in the CARES Act, including PPP.

8 29. On April 2, 2020, the SBA and the Administrator issued an interim final
 9 rule (the “First Interim Rule”) providing guidance on, *inter alia*, the eligibility
 10 requirements to receive funds under PPP. The First Interim Rule adopts the eligibility
 11 standards contained in 13 CFR § 120.110, as further described in the SBA’s Standard
 12 Operating Procedure 50-10, subpart B, Chapter 2 (the “SOP 50-10”). *See* First
 13 Interim Rule, 2(c) (“Businesses that are not eligible for PPP loans are identified in 13
 14 CFR 120.110 and described further in SBA’s Standard Operating Procedure”).

15 30. The SOP 50-10 provides that in order to be eligible for a small business
 16 loan, an applicant must: “be an operating business;” “be organized for profit;”¹¹ “be
 17 located in the United States (including its territories and possessions);” “be small
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20 ¹¹ The CARES Act has been extended to 501(c)(3) nonprofits.

1 under SBA size requirements;” and “demonstrate the need for desired credit.” *See*
 2 SOP 50-10, pp. 91-104.

3 31. The SOP-50-10 expressly states that the types of businesses listed as
 4 ineligible in 13 CFR § 120-110 are not eligible for an SBA loan. Importantly,
 5 bankruptcy debtors are not listed as ineligible businesses in 13 CFR § CFR 120-110
 6 and the SOP 50-10. *See* SOP 50-10, pp. 104-117.

7 32. The First Interim Rule also states that “[t]he program requirements of
 8 PPP identified in this rule temporarily supersede any conflicting Loan Program
 9 Requirement (as defined in 13 CFR 120.10).”

10 33. The First Interim Rule contains no explicit or implicit exclusion for
 11 debtors. The SBA and the Administrator published the First Interim Rule on April
 12 15, 2020. A true and correct copy of the First Interim Rule is attached here to as
 13 **Exhibit B.**

14 34. On April 2, 2020, in conjunction with issuing the First Interim Rule, the
 15 SBA and the Administrator released Official SBA Form 2483, titled “Paycheck
 16 Protection Program Borrower Application Form,” which is the SBA’s official form
 17 that borrowers must submit in connection with a PPP funds request. Other than filling
 18 out the official form of application, there is no underwriting, and the Administrator is
 19 relying upon assistance of commercial lenders acting in concert with the SBA to
 20 administer PPP.

35. Even though no law, regulation, or rule of any kind (including § 1102 of the CARES Act or the First Interim Rule) disqualified or authorized the SBA or the Administrator to disqualify bankruptcy debtors from participating in PPP, Official SBA Form 2483 asks whether “the Applicant . . . [is] presently involved in any bankruptcy” and then goes on to state that answering “yes” to that question means a request for PPP funds will not be approved.¹²

36. In addition, the SBA and the Administrator released Official SBA Form 2484, titled “Lender Application Form–Paycheck Protection Program Loan Guaranty,” which is the SBA’s official form that lenders must submit to the SBA in connection with a PPP funds request (the “Lender Application” and, together with the PPP application, the “PPP Applications”). A copy of the Lender Application is attached to this Complaint as **Exhibit D**.

¹² Notably, Senator Susan Collins, who drafted PPP, sent a letter to the Administrator stating her disagreement with the Administrator’s position that hospital-debtors cannot participate in PPP. Senators Angus King, Patrick Leahy, and Bernard Sanders, along with Congressman Peter Welch, have also submitted letters to the Administrator echoing the Debtor’s position. A copy of these letters are attached as **Exhibit C**. The Collins letter refers to a possible waiver by the SBA of certain requirements. Upon information and belief, this is unavailable.

1 37. The Lender Application asks the lender whether “[t]he Applicant has
2 certified to the Lender that neither the Applicant nor any owner (as defined in the
3 Applicant’s SBA Form 2483) is . . . presently involved in any bankruptcy.” The
4 Lender Application states that if the lender answers “no” to this question, “the loan
5 cannot be approved.”

6 38. On or about April 4, 2020, the SBA and the Administrator issued a
7 supplemental interim final rule (the “Second Interim Rule”) providing further
8 guidance on PPP. Like the First Interim Rule, the Second Interim Rule does not state
9 that bankruptcy debtors are ineligible for PPP funds. On April 15, 2020, the SBA and
10 the Administrator published the Second Interim Rule. A true and correct copy of the
11 Second Interim Rule is attached here to as Exhibit E.

12 39. On April 14, 2020, the SBA issued a third interim final rule (the “Third
13 Interim Rule”). Not only does the Third Interim Rule make no mention of bankruptcy
14 debtors, but it specifically states, “The Administrator recognizes that, unlike other
15 SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers,
16 and the standard underwriting process does not apply because no creditworthiness
17 assessment is required for PPP Loans.” This disavowal by the SBA and the
18 Administrator of any concern for creditworthiness cuts directly against any argument
19 they might make that their exclusion of bankruptcy debtors is motivated by this
20 concern. On April 20, 2020, the SBA and the Administrator published the Third

1 Interim Rule. A true and correct copy of the Third Interim Rule is attached here to as
 2 **Exhibit F.**

3 40. The Debtors are precisely the sort of business PPP was enacted to
 4 protect—they are a small business (as defined by the SBA) in one of the industries
 5 hardest hit by the pandemic and are attempting to obtain funding to meet payroll for
 6 their employees, among other permitted uses. PPP funds would allow the Debtors to
 7 endure the pandemic without having to make further layoffs. However, due to what
 8 appears to be a completely arbitrary, baseless, and discriminatory requirement
 9 imposed by the SBA and the Administrator, the Debtors are ineligible to participate
 10 based solely on their status as a debtor under the Bankruptcy Code. The Debtors
 11 otherwise meet the criteria for eligibility to participate in PPP.

12 41. As early as April 3, 2020, the Debtors considered submitting an
 13 application for PPP funds; however, they were informed such application would be
 14 denied because of their status as debtors in bankruptcy.

15 42. PPP funds are available on a first come, first served basis. The first
 16 tranche of PPP funding was completely exhausted on April 16, 2020. Congress
 17 subsequently provided more funds, but PPP ends June 30, 2020 or when PPP funds
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1 are exhausted, whichever comes first.¹³

2 43. In anticipation of additional PPP funding, on April 17, 2020, Debtors
3 Toppenish and Astria Home Health submitted PPP applications (the “Toppenish
4 Application” and the “Astria Home Health Application”, respectively, and together
5 the “Applications”) to their commercial lender, Banner Bank. A copy of the
6 Applications are attached as **Exhibits G and H**.

7 44. Based on an average monthly payroll of \$1,130,622.00 for its 318
8 employees, the Toppenish Application requests a total of \$2,826,556.00, to be used
9 for solely for payroll, lease and/or mortgage interest, and utilities. **Exhibit G.**

10 45. Based on an average monthly payroll of \$188,790.00 for its twenty-four
11 (24) employees, the Astria Home Health Application requests a total of \$471,975.00,
12 to be used solely for payroll purposes. **Exhibit H.**

13 46. The Debtors sized their request for PPP funds to ensure that the funds
14 would be treated as a grant and be forgivable. To the extent any portion of the funds
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16 _____
17 ¹³ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill. What’s*
18 *In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), available at
19 [https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-](https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a)
20 [coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a](https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a).

1 requested by the Debtors would exceed the amount to be forgiven, the Debtors intend
 2 to immediately repay that amount. The Debtors also intend to use the PPP funds in
 3 such a manner that they would be eligible for forgiveness under the PPP.

4 47. The Debtors truthfully answered “yes” to question 1 on the Applications.

5 48. Upon information and belief, the SBA directed Banner Bank not to
 6 process the Applications because the Debtors answered “yes” to question 1 on the
 7 Applications.

8 49. On April 21, 2020, Banner Bank’s Vice President and Sunnyside Branch
 9 Manager, Cece Ibarra (“Ms. Ibarra”), contacted the Debtors’ Controller, Sandra
 10 Cortez, via electronic mail regarding the Applications. A true and correct copy of
 11 Ms. Ibarra’s correspondence is attached hereto as **Exhibit I**. In this e-mail, Ms. Ibarra,
 12 explaining that the Debtors are not eligible for PPP funds, informs the Debtors that it
 13 is “an SBA rule” that “the bankruptcy is going to prevent you [the Debtors’] from
 14 qualify[ing] for the loans” and that this rule “appl[ies] to any entity that was included
 15 in the bankruptcy.” Ms. Ibarra further writes, “Sorry[,] I personally think that if
 16 someone deserves this loan [it] is the Hospitals. But that’s an SBA rule.”

17 50. On or about April 23, 2020, Congress enacted legislation making
 18 additional funds available for PPP. This second tranche of funding has not yet been
 19 exhausted.

20 51. On April 24, 2020, the SBA and the Administrator proposed another
 21

interim final rule (the “Fourth Interim Rule”) with respect to PPP that states “[i]f the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.” The stated basis for this rule is that the Administrator “determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans.” A copy of this Fourth Interim Rule is attached hereto as **Exhibit**

J. The SBA and the Administrator published the Fourth Interim Rule on April 28, 2020.

52. After receiving no official denial from Banner Bank or the SBA, on or about April 30, 2020, the Debtors’ President and Chief Executive Officer, John Gallagher (“Mr. Gallagher”), spoke to Ms. Ibarra, who again stated that it was the SBA’s rule that entities like the Debtors who were in bankruptcy were ineligible for PPP funds. Ms. Ibarra also informed Mr. Gallagher that denial letters were not being sent because the focus was on processing eligible applications.

53. On May 6, 2020, the Debtors received official notice (the “May 6, 2020 Notice”) that Banner Bank was unable to approve the Debtors Applications because

1 the Debtors “do[] not meet SBA eligibility criteria.”¹⁴ A true and correct copy of the
 2 May 6, 2020 Notice is attached hereto as **Exhibit K**.

3 54. The Debtors understand that Banner Bank is willing to advance funds
 4 through PPP if the Applications (or a subsequently amended applications) can be
 5 processed and approved as meeting the SBA’s criteria.

6 55. The Fourth Interim Rule had not been proposed at the time the Debtors
 7 submitted their Applications or when the SBA and the Administrator directed Banner
 8 Bank not to process the Applications. One of the interim final rules in effect at the
 9 time the Debtors submitted their Applications, the First Interim Rule, states that “[t]he
 10 program requirements of PPP identified in this rule temporarily supersede any
 11 conflicting Loan Program Requirement (as defined in 13 CFR 120.10).” The CARES

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 14 ¹⁴ The Debtors actually received two identical notices, both for Toppenish. The
 15 Debtors believe this was in error and that Banner Bank intended that one of the notices
 16 be in regards to Astria Home Health. The Debtors have asked for confirmation from
 17 Banner Bank that the second notice was intended for Astria Home Health, but as of
 18 the date of filing have received no answer. Nevertheless, the Debtors were informed
 19 orally that the Astria Home Health Application was denied. The Debtors will
 20 supplement this filing with an exhibit of the notice as soon as they receive it.

1 Act, the Small Business Act, the First Interim Rule, the Second Interim Rule, and the
 2 Third Interim Rule contained no exclusion against debtors receiving PPP funds.

3 56. The PPP funds are critical to the Debtors' ability to continue to operate
 4 their businesses. These funds are vital to maintaining healthcare offerings to the
 5 surrounding community. Lack of funding under this program would impair the
 6 Debtors' ability to reorganize in the anticipated timeframe.

7 57. The Debtors already missed out on the first tranche of PPP funding, and
 8 the second tranche is expected to be depleted quickly.¹⁵

12 ¹⁵ See, e.g., Robin Saks Frankel, *The Paycheck Protection Program Ran Out Of*
 13 *Funding. What's Next For Small Business Owners?*, FORBES, (April 16, 2020, 5:44
 14 PM) (noting that the first tranche of PPP funding ran out in 14 days), *available at*
 15 [https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-](https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440)
 16 [ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440](https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440); Stephen
 17 Gandel, *Round 2 Of Paycheck Protection Program Starts. Better Hurry*, CBS News
 18 (April 28, 2020, 6:43 AM), *available at* [https://www.cbsnews.com/news/paycheck-](https://www.cbsnews.com/news/paycheck-protection-program-small-business-lending-round-2/)
 19 [protection-program-small-business-lending-round-2/](https://www.cbsnews.com/news/paycheck-protection-program-small-business-lending-round-2/).

1 58. The Debtors are eligible borrowers under PPP and seek to ensure
 2 adequate funds are available under this second tranche of PPP funding once their
 3 discrimination claims are resolved.

4 COUNT I

5 (Preliminary and Permanent Injunction)

6 59. The Debtors incorporate the allegations of Paragraphs 1 through 58 as if
 7 set forth fully herein.

8 60. The Debtors are entitled to seek relief against the SBA, the
 9 Administrator, and the Restrained Parties acting in concert with the Defendants under
 10 Rule 65 of the Federal Rules of Civil Procedure, which is applicable to this action
 11 pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure.

12 61. There is no prohibition in the CARES Act or under § 7(a) of the Small
 13 Business Act prohibiting lending to debtors.

14 62. Moreover, the CARES Act specifically waives all underwriting
 15 considerations under § 7(a) of the Small Business Act.

16 63. The Debtors are likely to prevail on the merits of their claim for an
 17 injunction as well as for declaratory relief.

18 64. The balance of hardships favors issuance of preliminary injunctive relief.
 19 The inability to obtain PPP funds would cause the Debtors to suffer immediate and
 20 irreparable harm. In this case, the Debtors Toppenish and Astria Home Health have

1 had their cash flow negatively impacted by the Covid-19 pandemic and, therefore,
 2 access to the PPP funds will allow the Debtors to continue in operation providing
 3 medical care to the community in general and COVID-19 patients in particular. The
 4 current PPP funds are part of a second tranche of funds that is expected to be
 5 exhausted quickly (the first tranche lasted less than two weeks) and may not be
 6 replenished once exhausted. Thus, if the Court does not grant the Debtors a temporary
 7 restraining order pending resolution of the adversary proceeding, the PPP funds most
 8 likely will no longer available to the Debtors. Absent a temporary restraining order,
 9 there are no monetary damages that will be available, because the second tranche of
 10 PPP funds will be exhausted. Hence, the injury is real, imminent and incapable of
 11 being remedied by monetary damages. Moreover, preliminary and permanent
 12 injunctive relief while this matter is pending will not harm the SBA, the
 13 Administrator, or the Restrained Parties.

14 65. The Debtors seek an order enjoining the SBA, the Administrator, the
 15 Restrained Parties, including any commercial lender provided notice of the Court's
 16 order, *see* Fed. R. Civ. P. 65(d)(2)(C), from denying any application under PPP on the
 17 basis that the applicant is a debtor in bankruptcy and requiring that any application of
 18 the Debtors to participate in PPP be considered without the words "presently involved
 19 in any bankruptcy" being considered.

20 66. Due to the "first come, first served" nature of PPP appropriations, the

Debtors further seek an order enjoining the SBA, the Administrator, and the Restrained Parties from issuing loan guaranties or approving PPP Applications in an amount that would leave insufficient funds for the Debtors' funding pursuant to the Applications (or any subsequent applications filed shortly hereafter) until the Debtors' claims in this Complaint are resolved.

COUNT II

(Declaratory Relief)

67. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

68. The Debtors are entitled to seek declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 7001(9) of the Federal Rules of Bankruptcy Procedure.

69. Neither the CARES Act nor the Small Business Act prohibit disbursements under PPP to the Debtors based on their status as debtors under chapter 11 of the Bankruptcy Code.

70. The Debtors have a legal right to apply for funds under PPP and to have their Applications (or any amended applications) considered on the same terms as other applicants without regard to their status as debtors under chapter 11 of the Bankruptcy Code.

71. By prohibiting Banner Bank from processing the Applications, and by prohibiting disbursements to debtors under PPP, the SBA and the Administrator have

1 exceeded their statutory authority.

2 72. The Debtors are entitled to a declaratory judgment that the CARES Act
3 requires their Applications to be considered on the same terms as other qualified
4 businesses that are not presently debtors in cases arising under the Bankruptcy Code.

5 COUNT III

6 (Violation of 11 U.S.C. § 525(a) – Discriminatory Treatment)

7 73. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth
8 fully herein.

9 74. Section 525(a) of the Bankruptcy Code prohibits the federal government
10 from discriminating against a person based on that person’s status as a debtor with
11 respect to a “license, permit, charter, franchise, or other similar grant[.]” Section
12 525(a)’s list is illustrative, and not exhaustive. Courts have applied § 525(a) to
13 matters involving government contracts, student loan applications, public housing,
14 insurance, public mortgage financing, utility service, building permits, employment
15 termination, and agricultural subsidies. *See generally Rees v. Employment Security*
16 *Commission of Wyoming (In re Rees)*, 61 B.R. 114, 120 (Bankr. D. Utah
17 1986)(collecting cases).

18 75. The Debtors are debtors under chapter 11 of the Bankruptcy Code.

19 76. PPP constitutes a federal program within the meaning of § 525(a) of the
20 Bankruptcy Code in that the program is designed to provide forgivable loans to

1 qualified businesses that are akin to grants.

2 77. The Debtors are each a small business within the meaning of the CARES
3 Act and are eligible to participate in the funding of forgivable loans, which are
4 functionally grants, under PPP.

5 78. The Debtors have, in fact, sized their PPP funding request to be
6 forgivable and, to the extent any funds would not qualify for forgiveness, intend to
7 immediately repay (and there is no prepayment penalty under PPP).

8 79. The April 21, 2020 e-mail from Ms. Ibarra, the bankruptcy-related
9 question on the PPP Applications, the communication between Mr. Gallagher and Ms.
10 Ibarra, the May 6, 2020 Notice, and the Fourth Interim Rule demonstrate that the SBA
11 and the Administrator have violated § 525(a) of the Bankruptcy Code with respect to
12 the Debtors.

13 80. Importantly, the Debtors are not being denied access to PPP because of
14 their creditworthiness. In fact, PPP was enacted precisely to provide relief to
15 struggling small businesses such as the Debtors in industries hard hit by the pandemic,
16 without regard to their creditworthiness. The Third Interim Rule states as much, “The
17 Administrator recognizes that, unlike other SBA loan programs, the financial terms
18 for PPP Loans are uniform for all borrowers, and the standard underwriting process
19 does not apply because no creditworthiness assessment is required for PPP Loans.”

20 81. This disavowal by the SBA and the Administrator of any concern for
21

1 creditworthiness cuts directly against any argument they might make that their
 2 exclusion of bankruptcy debtors is motivated by a concern regarding
 3 creditworthiness.

4 82. But for their status as debtors in bankruptcy, the Debtors are otherwise
 5 qualified for PPP funds. Having disclaimed any concern for creditworthiness, the
 6 SBA's sole basis for denying the Debtors the ability to participate in PPP appears to
 7 be simply the Debtors' label as "bankruptcy debtors." The SBA, therefore, has clearly
 8 violated, and continues to violate, § 525(a) of the Bankruptcy Code by discriminating
 9 against debtors in bankruptcy.

10 83. Any argument in the Fourth Interim Rule regarding risk are not based on
 11 any facts and arbitrarily presumes all debtors either mismanage estate funds or are
 12 fraudsters. Moreover, this argument is belied by that fact that the Debtors, like all
 13 Chapter 11 debtors, are subjected to substantial reporting requirements and are under
 14 significant oversight from this Court; the U.S. Trustee; the Committee; the general
 15 creditor body; and even the press.

16 84. Accordingly, the "bankruptcy disqualification" provisions of PPP
 17 Applications are denying the Debtors an opportunity to reorganize and to retain their
 18 employees, many of whom are crucial to the Debtors' ability to maintain business
 19 operations.

20 85. The SBA's violation of § 525(a) is causing ongoing harm to the Debtors.

COUNT IV

(Administrative Procedure Act – Exceeding Statutory Authority)

86. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

87. Under the APA, courts must “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(c)(2).

88. The SBA and the Administrator may only exercise the authority conferred upon them by statute.

89. No law, regulation, or rule of any kind disqualifies, or authorizes the SBA or the Administrator to disqualify, bankruptcy debtors from participating in PPP.

90. However, the SBA and the Administrator issued PPP Applications, which state that PPP funds will not be approved if the applicant is “presently involved in any bankruptcy.” The SBA and the Administrator’s implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be automatically ineligible is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” in violation of the APA. 5 U.S.C. §706(2)(C).

91. The SBA and the Administrator have made a final determination with respect to the issuance of PPP Applications and the arbitrary exclusion of bankruptcy debtors from the benefits and protections of PPP.

92. No administrative appeals or remedies are available to the Debtors to seek review of the SBA and the Administrator's determination to issue PPP Applications and their exclusion of bankruptcy debtors.

93. The SBA and the Administrator's violation of the APA is causing ongoing harm to the Debtors.

94. The Debtors are entitled to a declaratory judgment that the SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," in violation of the APA.

95. The Debtors have no adequate remedy at law.

COUNT V

(Administrative Procedure Act – Arbitrary and Capricious)

96. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

97. The APA provides that courts must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A).

98. The SBA has adopted a policy of automatically disqualifying bankruptcy debtors from participating in PPP, and has designed PPP Applications to carry out this policy.

1 99. As described above, no law, regulation, or rule of any kind disqualifies,
2 or authorizes the SBA or the Administrator to disqualify, bankruptcy debtors from
3 participating in PPP.

4 100. Moreover, the Debtors are precisely the sort of business targeted by
5 PPP—a small business in a hard hit area of the economy struggling to meet their payroll
6 obligations and remain operational. The SBA and the Administrator’s automatic
7 disqualification of the Debtors runs completely counter to the mandate of PPP.

8 101. The SBA and the Administrator’s implementation of PPP in a manner
9 that causes debtors in bankruptcy, including the Debtors, to be ineligible is therefore
10 “arbitrary, capricious, [or] an abuse of discretion” in violation of the APA. 5 U.S.C.
11 §706(2)(A).

12 102. The SBA and the Administrator have made a final determination with
13 respect to the issuance of PPP Applications and their arbitrary and unjustifiable
14 exclusion of bankruptcy debtors from participating in PPP.

15 103. No administrative appeals or remedies are available to the Debtors to
16 seek review of the SBA and the Administrator’s determination to issue PPP
17 Applications and their arbitrary exclusion of bankruptcy debtors.

18 104. The SBA and the Administrator’s violation of the APA is causing
19 ongoing harm to the Debtors.

105. The Debtors are entitled to a declaratory judgment that the SBA and the Administrator's implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious, [or] an abuse of discretion" in violation of the APA.

106. The Debtors have no adequate remedy at law.

COUNT VI

(Mandamus – 28 U.S.C. § 1361)

107. The Debtor incorporates each of Paragraphs 1 through 58 as if set forth fully herein.

108. The SBA and the Administrator have a duty to implement the laws enacted by Congress. The SBA and the Administrator have a non-discretionary duty to comply with the CARES Act and the provisions of PPP, to apply criteria to PPP that are substantively and procedurally valid, to avoid imposing criteria to PPP that are substantively and procedurally *ultra vires*, and to implement PPP in a manner that does not violate § 525(a) of the Bankruptcy Code

109. The SBA and the Administrator breached this duty.

110. The Debtors have the right to have an application for funds pursuant to PPP considered without discrimination based on the Debtors' status as bankruptcy debtors.

111. The SBA and the Administrator have no discretion to discriminate

1 against the Debtors based on their status as debtors in bankruptcy.

2 112. Upon information and belief, there are no administrative remedies
3 available to the Debtors at this time. The Debtors have based this belief upon
4 communications by staff for certain members of Congress who advised that the SBA
5 and the Administrator have taken the position that there is no administrative waiver
6 process with respect to PPP.

7 113. The Debtors are entitled to a writ of mandamus under 28 U.S.C. § 1361
8 to compel the SBA and the Administrator to remove from all PPP Applications all
9 prohibitions against debtors in bankruptcy participating in PPP, because the SBA and
10 the Administrator acted illegally and beyond their statutory authority in instituting
11 this disqualifying factor.

12 114. Accordingly, the Debtors respectfully request: a writ of mandamus
13 under 28 U.S.C. § 1361 to compel the SBA and the Administrator to remove from all
14 PPP Applications all purported prohibitions against debtors in bankruptcy
15 participating in PPP.

16 COUNT VII

17 (Declaration Regarding Interpretation of Ambiguous Language)

18 115. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth
19 fully herein.

20 116. PPP Applications state that any applicant “presently involved in any
21

1 bankruptcy” is ineligible to participate in PPP.

2 117. The phrase “involved in any bankruptcy” is overly broad, vague, and
 3 difficult to apply. If given its plain meaning, this phrase would disqualify any
 4 applicant who is a creditor or vendor to a debtor in a bankruptcy case, or even just a
 5 party in interest of any kind. This interpretation would be nonsensical, and should be
 6 avoided. *See, e.g., In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006)
 7 (“A basic tenet of statutory construction is that courts should interpret a law to avoid
 8 absurd or bizarre results.”).

9 118. The phrase “involved in any bankruptcy” is therefore ambiguous, as its
 10 intended scope is unclear. *See, e.g., In re Idleaire Technologies Corp.*, No. 08-10960,
 11 2009 WL 4131117, *8 (Bankr. D. Del. Feb. 18, 2009) (stating that language can be
 12 considered ambiguous when applying plain meaning would lead to absurd result).

13 119. Where language in a statute is ambiguous, a court may look to legislative
 14 intent to determine the meaning. *See, e.g., Kaiser Aluminum*, 456 F.3d at 338 (“It is
 15 true that interpretations of a statute which would produce absurd results are to be
 16 avoided if alternative interpretations consistent with the legislative purpose are
 17 available.”) (quoting *Griffin v. Oceanic Contractors, Inc.*, 548 U.S. 564, 575, 102
 18 S.Ct. 3245, 3252 (1982)).

19 120. In a press release accompanying the unveiling of PPP, the SBA itself
 20 described the purpose of the program:

1 These loans will bring immediate economic relief and eight
 2 weeks of financial certainty to millions of small businesses and
 3 their employees,” SBA Administrator Carranza said. “We urge
 4 every struggling small business to take advantage of this
 unprecedented federal resource – their viability is critically
 important to their employees, their community, and the
 country.¹⁶

5 121. The goal of making PPP funds available to “every struggling small
 6 business” would best be achieved by applying as narrow an interpretation as possible
 7 of the phrase “involved in any bankruptcy.” Interpreting this phrase as an across-the-
 8 board disqualification of struggling-but-potentially-viable-businesses such as
 9 debtors in possession under the Bankruptcy Code would be demonstrably at odds with
 10 the intent of PPP as expressed by the Administrator.

11 122. Instead, the Debtors submit that of the possible interpretations of the
 12 phrase “involved in any bankruptcy,” the one most consistent with the purpose of PPP
 13 would apply the phrase only to *chapter 7* debtors. These businesses, by definition,
 14 have already ceased operations, are in the process of liquidation, and are beyond

15
 16 ¹⁶ SBA, “*SBA’s Paycheck Protection Program for Small Businesses Affected by the*
 17 *Coronavirus Pandemic Launches*,” (April 3, 2020) available at
 18 [https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-](https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches)
 19 [paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-](https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches)
 20 [launches](https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches).

1 rescue.

2 123. On the other hand, no principled distinction can be made between a
3 chapter 11 debtor in possession and any other “struggling small business.” In fact,
4 businesses having the characteristics of most debtors in possession are among the core
5 targets of PPP.

6 124. Accordingly, the best-fit interpretation of the phrase “involved in any
7 bankruptcy,” should not disqualify chapter 11 debtors in possession from PPP.

8 **V. NO BOND IS REQUIRED**

9 125. Due to the nature of this request, no bond is required for the enforcement
10 of an injunction, and under these circumstances, no bond should be required for the
11 temporary emergency relief sought by way of Rule 7065 of the Federal Rules of
12 Bankruptcy Procedure. *See, e.g., Mississippi Power & Light Co. v. United Gas Pipe*
13 *Line Co.*, 760 F.2d 618 (5th Cir 1985); 7 MOORE'S FEDERAL PRACTICE ¶ 65.04[1] at
14 65-38.

15 **VI. RELIEF REQUESTED**

16 With respect to **Count I**, the Debtors seek the following relief:

17 (A) That the Court enter a preliminary injunction enjoining the SBA, the
18 Administrator, the Restrained Parties, or any commercial lender from
19 denying an application under PPP funds on the basis that the applicant is
20 a debtor in bankruptcy or because of the words “presently involved in

any bankruptcy” on the PPP Application. The Debtors request that this relief be granted until such time as a final judgment is entered on their claims in **Count II, Count III, Count IV, Count V, Count VI, and Count VII;**

(B) That the Court enter a preliminary injunction enjoining the SBA and the Administrator from issuing loan guaranties or approving PPP Applications in an amount that would leave insufficient funds for the Debtors’ funding pursuant to the Applications (or any amended applications) until entry of final judgment on the Debtors’ claims in **Count II, Count III, Count IV, Count V, Count VI, and Count VII;** and

(C) That the Court enter permanent injunctive relief with respect to the relief in the two immediately preceding sub-paragraphs.

With respect to **Count II**, the Debtors seek the following relief:

(A) That the Court enter a declaratory judgment that the CARES Act does not prohibit the Applications (or any amended applications) from being considered on the same terms as other qualified businesses that are not debtors in cases arising under the Bankruptcy Code and which are also seeking PPP funding.

With respect to **Count III**, the Debtor seeks the following relief:

1 (A) That the Court make a determination that the SBA and the Administrator
 2 have violated § 525(a) of the Bankruptcy Code with respect to the
 3 Debtors' Applications;

4 (B) That the Court make a determination that the SBA and the Administrator
 5 have violated § 525(a) of the Bankruptcy Code by issuing its Fourth
 6 Interim Rule and promulgating PPP Applications excluding debtors; and

7 (C) That the Court award damages in an amount not less than \$3,298,531.00
 8 in the event that the Court does not grant the relief requested in **Count I**
 9 on a temporary or preliminary basis and it is later determined that the
 10 Debtors were eligible for PPP funds but none remain available.

11 With respect to **Count IV**, the Debtors seek the following relief:

12 (A) That the Court enter a declaratory judgment that the SBA and the
 13 Administrator's implementation of PPP in a manner that causes debtors
 14 in bankruptcy, including the Debtors, to be ineligible is "in excess of
 15 statutory jurisdiction, authority, or limitations, or short of statutory
 16 right," in violation of the APA.

17 With respect to **Count V**, the Debtors seek the following relief:

18 (A) That the Court enter a declaratory judgment that the SBA and the
 19 Administrator's implementation of PPP in a manner that causes debtors in
 20 bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious,

VERIFICATION OF JOHN M. GALLAGHER

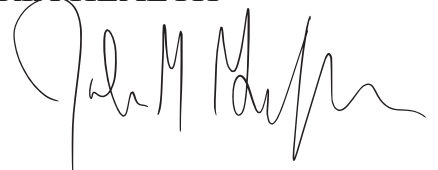
I, John M. Gallagher, submit this Verification in support of the complaint (the "Complaint") the Debtors file against Defendant United States Small Business Administration (the "SBA") acting through Defendant Jovita Carranza in her capacity as the Administrator of the SBA (the "Administrator", and together with the SBA, the "Defendants"), and hereby state and declare as follows:

1. I am the President and Chief Executive Officer for Astria Health ("CEO").

2. I declare under penalty of perjury under the laws of the United States of America that the allegations in the foregoing Verified Complaint are true and accurate, to the best of my knowledge and belief, and, if not based on my own personal knowledge, that I believe such allegations to be true and correct.

Dated: May 15, 2020

ASTRIA HEALTH

By: 

John M. Gallagher

President and Chief Executive
Officer

**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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A041

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

IN RE:

ASTRIA HEALTH, *et al.*

Debtors.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.

Lead Case No. 19-01189-11

Adv. Pro. Case No. 20-80016 – WLH

**AGREED ORDER REGARDING
SCHEDULING AND
RESERVATION OF PPP FUNDS**

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).

SCHEDULING ORDER

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1 The Court, having read and considered the *Motion For Temporary*
 2 *Restraining Order And Request For Hearing And Briefing Schedule With Respect*
 3 *To The Debtors' Request For A Preliminary Injunction; Declaration Of John M.*
 4 *Gallagher In Support Thereof* [Docket No. 2] (the "TRO") and the request for
 5 preliminary injunction set forth in the *Verified Complaint* [Docket No. 1] (the
 6 "Complaint") filed by Debtor Astria Health ("Astria"), Debtor SHC Medical Center
 7 - Toppenish, doing business as Astria Toppenish Hospital ("Toppenish"), both
 8 Washington nonprofit corporations, and Debtor Yakima HMA Home Health LLC,
 9 doing business as Astria Home Health & Hospice-Yakima ("Astria Home Health"),
 10 also a Washington corporation, along with the above-referenced affiliated debtors
 11 (collectively, the "Debtors"), the debtors and debtors in possession in the above-
 12 captioned chapter 11 bankruptcy cases (collectively, the "Chapter 11 Cases"),

13 **WHEREFORE**, it appearing the Debtors and Jovita Carrzanza, in her
 14 capacity as administrator for the United States Small Business Administration
 15 (together, the "SBA") have agreed that, until the Court rules on the Debtors' request
 16 for a preliminary injunction or the expiration of the covered period (as defined in 15
 17 U.S.C. § 636(a)(36)(A)(iii)), whichever is earlier, the SBA will reserve sufficient
 18 funds for (i) one Paycheck Protection Program ("PPP") loan in the amount of
 19 \$471,975.00 for Astria Home Health, and (ii) one PPP loan in the amount of
 20 \$2,826,556.00 for Toppenish from funds allocated to PPP pursuant to PPP and the
 21

SCHEDULING ORDER

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1 Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Public
 2 Law 116-136 (signed into law March 27, 2020), as augmented by the PPP and Health
 3 Care Enhancement Act, Pub. L. 116-139 (signed into law April 24, 2020),

4 **IT IS THEREFORE ORDERED THAT:**

5 Any opposition to the TRO or the Debtors’ request for a preliminary
 6 injunction (an “Opposition”) shall be filed by 5 p.m. prevailing Pacific time on May
 7 26, 2020.

8 Any reply (a “Reply”) to any Opposition shall be filed by 5 p.m. prevailing
 9 Pacific time on June 1, 2020.

10 The Court shall hear argument on the TRO and the Debtors’ request for a
 11 preliminary injunction on June 3, 2020 at 11 a.m. prevailing Pacific time on June 3,
 12 2020.

13 The terms and conditions of this Order shall be effective and enforceable
 14 immediately upon its entry.

15 The Court shall retain jurisdiction with respect to all matters arising from or
 16 related to the implementation of this Order.

17
 18
 19 **///End of Order///**
 20
 21

SCHEDULING ORDER

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10 *Debtors and Debtors In Possession*

11 AND

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16 /s/ Brian M. Donovan
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SCHEDULING ORDER

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18 UNITED STATES BANKRUPTCY COURT
 19 EASTERN DISTRICT OF WASHINGTON

20 In Re:

21 ASTRIA HEALTH, et al.¹

22 Debtors and Debtors in Possession,

23 ASTRIA HEALTH, et al.,

24 Plaintiffs,

25 v.

26 Lead Case No. 19-01189-11

27 Adv. Proc. Case No. 20-80016-WLH

28 DEFENDANTS BRIEF IN
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR TEMPORARY
 RESTRAINING ORDER (ECF No. 2)

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).

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

6 Defendants.

AND REQUEST FOR
PRELIMINARY INJUNCTION (ECF
No. 1)

7
8 The United States of America (“United States”), on behalf of the U.S. Small
9 Business Administration (“SBA”) and Jovita Carranza, solely in her capacity as
10 Administrator of the SBA (“Administrator”) (collectively, the “United States” or
11 “Defendant”), files this opposition to Plaintiffs’ Motion for Temporary Restraining
12 Order (ECF No. 2) and request for preliminary injunction (ECF No. 1).² *See also* ECF
13 No. 13 (Agreed Order Regarding Scheduling and Reservation of PPP Funds).
14
15

16 I. INTRODUCTION

17 Plaintiffs’ motion for temporary restraining order and request for preliminary
18 injunctive relief raises broad challenges to the SBA’s implementation and
19 administration of the CARES Act Paycheck Protection Program (“PPP”), a \$659
20 billion loan guarantee program that must extend hundreds of thousands of loans to
21 small businesses and non-profits across the nation in a matter of days. Plaintiff’s
22
23

24
25 ² Plaintiffs’ Complaint includes additional claims for relief not sought in the Motion.
26 These additional claims are without merit and are not addressed herein. However,
27 Defendant reserves the right to address the claims in subsequent briefing if the Court so
requires.

1 Motion is a request that this Court set aside foundational legal principles of property
2 and commercial law so as to grant plaintiffs' desire for an unsecured and federally
3 guaranteed DIP loan. With non-binding precedent, plaintiffs ask this Court to make
4 near-immediate findings that the legal nature of the PPP funds is not a loan. Moreover,
5 plaintiffs seek to have this Court address an incorrect and non-core Administrative
6 Procedure Act (APA) claim that the SBA exceeded its authority and acted arbitrarily
7 and capriciously – an assertion that is wholly unsupported by long-standing case law
8 interpreting the APA.
9

11 Specifically, plaintiffs ask the Court to overturn the SBA's stated, explicit
12 policy of excluding bankrupt entities from the PPP. Granting plaintiffs the injunctive
13 relief they seek risks disrupting the administration of the PPP in the middle of loan
14 distribution during a global pandemic. Such a drastic result would only be justified by
15 a strong showing that plaintiffs' claims are likely to succeed on the merits, that
16 plaintiffs will be irreparably harmed absent relief and that the requested injunction is
17 in the public interest. Plaintiffs cannot meet the high bar required for the extraordinary
18 relief they seek.
19

22 Plaintiff cannot demonstrate that it is likely to succeed on its claims because its
23 claims are facially invalid. First, the injunctive relief plaintiffs seeks against the SBA
24 is barred by sovereign immunity. Second, plaintiffs' anti-discrimination claim under
25 11 U.S.C. § 525 fails because, by its plain terms, Section 525 does not apply to loans
26
27

1 or loan guarantees. Third, plaintiffs cannot obtain a preliminary injunction through its
2 APA claims because those claims are not “core” for bankruptcy court jurisdiction, and
3 thus the bankruptcy court lacks jurisdiction to order relief on those claims.

4
5 Additionally, plaintiffs’ APA claims fail on their merits because the SBA acted
6 wholly within its delegated authority in implementing the PPP. The bankruptcy
7 exclusion was addressed in two separate agency rules. Congress, through the CARES
8 Act and the Small Business Act, explicitly delegated authority to the Administrator to
9 issue those rules. Accordingly, the agency is clearly entitled to deference and its
10 regulatory implementation of PPP should not be overridden by plaintiffs’ preferred
11 operation of PPP.
12
13

14 Plaintiffs also fail to proffer all but the barest conclusory assertions – a single
15 statement that the COVID-19 pandemic has negatively impacted their cash flow – to
16 support their claim for irreparable harm, which is far from sufficient to support its
17 claim for injunctive relief. Further, although the impact of COVID-19 in the Yakima,
18 Washington region and the need for available healthcare resources is incontestable,
19 awarding an injunction here would be against the broader public interest. In
20 implementing the PPP, the SBA made a policy decision to limit PPP loans to those
21 who had not filed for bankruptcy; in essence indicating a preference for what is a
22 limited source of funding. Plaintiff asks the Court to *replace* the SBA’s stated policy
23 with plaintiffs’ policy preference. Doing so would eviscerate Congress’ choice to vest
24
25
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27

1 the SBA with the authority to implement the PPP and oversee its own lending
2 program.

3 This Court should, consistent with rulings in thirteen other cases decided by
4 courts presented with a similar issue, including all three bankruptcy courts in the
5 Ninth Circuit to consider these type of motions, deny plaintiffs' TRO and preliminary
6 injunction request. *See NAI Capital, Inc. v. Carranza*; Adv. No.: 1:20-ap-01051-DS
7 (Bankr. C.D. Cal. May 20, 2020) (J. Saltzman); *PPV, Inc. and Bravo Environmental*
8 *NW, Inc. v. SBA*, Adv. No. 20-03054-dwh (Bankr. D. Or. May 20, 2020) (J. Hercher);
9 *Starplex v. Carranza*, Adv. No. 20-ap-00095 (Bankr. D. Arizona May 21, 2020) (J.
10 Collins); *Asteria Education, Inc. v. SBA*, Adv. No. 20-05024-cag (Bankr. W.D. Tex.);
11 *Cosi, Inc. v. SBA*, Adv. No. 20-50591 (BLS) (Bankr. D. Del.); *Trudy's Texas Star,*
12 *Inc. v. Carranza*, Adv. No. 20-1026-hmc (Bankr. W.D. Tex.); *Breda v. Carranza,*
13 Adv. No. 20-1008 (Bankr. D. Maine); *J-H-J, Inc. v. Carranza*, Adv. No. 20-05014
14 (Bankr. W.D. La.); *Areway Acquisition, Inc. v. SBA*, Adv. No. 11065-jps (Bankr. N.D.
15 Ohio); *Abe's Boat Rentals, Inc. v. Carranza*, Adv. No. 20-1029 (Bankr. E.D. La.);
16 *Schuessler et al. v. SBA*, Adv. No. 20-02065-bhl, *Steffen et al. v. SBA*, Adv. No. 20-
17 02068-bhl, and *Thull Farms, LLC v. SBA*, Adv. No. 20-02069-bhl (Bankr. E.D. Wisc.
18 May 22, 2020) (consolidated cases); *Okorie v. SBA*, Adv. No. 20-06015 (Bankr. S.D.

1 Miss.); *Inland Family Practice Ctr., LLC v SBA*; Adv. No. 20-06016 (Bankr. S.D.

2 Miss.).³

3 Finally, plaintiffs' reliance on *Hidalgo County Emergency Service Foundation*
 4 *v. Carranza*, Adv. No. 20-02006 (Bankr. S.D. Tex. April 24, 2020) (ECF No. 2-1) and
 5 *Roman Catholic Church of the Archdiocese of Santa Fe v. SBA*, Adv. No. 20-1026
 6 (Bankr. D. N.M. May 1, 2020) is misplaced. The *Hidalgo* decision granting the
 7 temporary restraining order, which was relied upon by the court in *Archdiocese of*
 8 *Santa Fe*, has been stayed by the District Court for the Southern District of Texas. *See*
 9 *Carranza v. Hidalgo County Emergency Service Foundation*, Case No. 20-cv-108
 10 (S.D. Tex. May 11, 2020).⁴ In addition, the *Hidalgo* decision was entered prior to the
 11 SBA's issuance of the Fourth Interim Final Rule, which specifically addresses PPP
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18 ³ Defendants attach the transcripts from (1) the May 19, 2020 and May 20, 2020
 19 hearings in *NAI Capital, Inc.* (J. Saltzman) (oral ruling at Exhibit 5, pp. 4-16); (2) the
 20 April 30, 2020 hearing in *Cosi, Inc.* (J. Shannon) (oral ruling at pp. 53-63), (3) the
 21 April 30, 2020 hearing in *Asteria* (J. Gargotta) (oral ruling at pp. 76-88); (4) the May
 22 7, 2020 hearing in *Trudy's* (J. Mott) (oral ruling at pp. 32-50); and (5) the May 20,
 2020 hearing in *PPV, Inc.* (J. Hercher) (oral ruling at pp. 54-69) as RJN Exhibits 4, 5,
 23 6, 7, 8, and 12. The opinions from *Breda*, *Abe's Boat Rentals*, and *Schuessler* are
 24 attached as RJN Exhibits 9, 10, and 11. *J-H-J* and *Areway* were decided after
 25 argument on May 12, 2020. *Okorie* and *Inland Family Practice* were decided after
 26 argument on May 15, 2020. *Starplex* was decided after argument on May 21, 2020.

27 ⁴ The Order staying the preliminary injunction entered in *Hidalgo* is attached as RJN,
 28 Exhibit 13. On May 15, 2020, SBA appealed the decision in *Archdiocese of Santa Fe*
 to the District Court for the District of New Mexico.

1 applicants in bankruptcy. Finally, *Hidalgo* and *Archdiocese of Santa Fe* are contrary
2 to every decision rendered by a Ninth Circuit court faced with the same issues.

3 II. BACKGROUND

4 A. The Small Business Administration

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6 Through the Small Business Act, 15 U.S.C. § 631, *et seq.*, Congress created the
7 SBA to “aid, counsel, assist, and protect, insofar as is possible, the interests of small-
8 business concerns,” in order to preserve the system of free competitive enterprise that
9 is “essential” to the economic well-being and security of the Nation. 15 U.S.C. §
10 631(a). To promote that objective, Congress placed the SBA under the management of
11 a single Administrator, *id.*, § 633(a), (b)(1), who is given “extraordinarily broad
12 powers” under Section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety
13 of technical, managerial, and financial assistance to small-business concerns. *See SBA*
14 *v. McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing
15 numerous varieties of general small-business loans the Administrator is “authorized”
16 and “empowered” to make); 13 C.F.R. § 120.1. In the performance of these authorized
17 functions, the Administrator is further empowered to “make such rules and regulations
18 as [she] deems necessary to carry out the authority vested in [her],” and in addition to
19 “take any and all actions . . . [that] [she] determines . . . are necessary or desirable in
20 making . . . loans.” 15 U.S.C. § 634(b)(6), (7).

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B. Section 7(a) Lending

The Section 7(a) loan program is the SBA’s primary program for providing financial assistance to small businesses. Under the terms of the Small Business Act, SBA financial assistance to a small business under Section 7(a) may take the form of a direct loan, an immediate participation (joint) loan with a lender, or a deferred participation (guaranteed) loan initiated by a lender, but a portion of which the SBA will purchase from the lender in the event of a borrower default. 13 C.F.R. § 120.2(a); *see Valley Nat’l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *California Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, however, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979), thus “reduc[ing] risk for lenders . . . mak[ing] it easier for them to access capital,” and thereby “mak[ing] it easier for small business to get loans.” *See* <https://www.sba.gov/funding-programs/loans>.

C. Section 7(a) Loan Underwriting

The Small Business Act requires that “[a]ll loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6) (emphasis added). For regular 7(a) loans, the factors to reasonably assure repayment are described in general terms in 13 C.F.R. § 120.150. Ordinarily, to qualify for an SBA general business loan, an applicant must be an operating business

1 organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c);
2 meet the size standards for a “small” business set forth under the statute and SBA
3 rules (usually stated in terms of number of employees, or average annual receipts), *see*
4 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate
5 that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. §
6 632(h); 13 C.F.R. §§ 120.100(e), 120.101.
7

8
9 Further factors are described in greater detail in SBA Standard Operating
10 Procedures (“SOP”) and on the official application form for 7(a) loans. *See* SOP 10-
11 50-05 (*see* Request for Judicial Notice (“RJN”) filed contemporaneously with this
12 opposition, Exhibit 1); SBA Form 1919 (*see* RJN, Exhibit 2). Among other
13 considerations, SOP 50-10-05 specifies that lenders may consider “bankruptcy
14 history.” (*See* RJN, Exhibit 1 at 37.) Official Form 1919 also considers whether the
15 applicant has “ever filed for bankruptcy protection.” (*See* RJN, Exhibit 2.) By
16 regulation, requirements listed on this form, and other official SBA forms, comprise
17 part of the “Loan program requirements.” 13 C.F.R. § 120.10. Third-party lenders, in
18 turn, agree to abide by these Loan program requirements when joining the Section
19 7(a) lending program. 13 C.F.R. § 120.10; *see also* SBA Forms 3506 and 3507
20 (addressing new PPP lenders).
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28 DEFENDANTS BRIEF IN OPPOSITION TO PLAINTIFFS’
MOTION FOR TRO AND REQUEST FOR PRELIMINARY INJUNCTION - 9

D. The CARES Act.

On March 27, 2020, President Trump signed into law the Coronavirus Aid Relief and Economic Stimulus (“CARES”) Act, Pub. L. 116-136, 134 Stat. 281, passed by Congress to provide an unprecedented package of emergency economic assistance and other support to help individuals, families, businesses, and healthcare providers cope with the enormous economic and public health crises—unlike any experienced in the lifetime of the Nation—triggered by the worldwide coronavirus (“COVID-19”) pandemic. *See* SBA, Interim Final Rule, “Business Loan Program Temporary Changes; Paycheck Protection Program” (the “First Interim Final Rule”), 85 Fed. Reg. 20811 (April 15, 2020).

Among the numerous measures taken by the CARES Act to address the COVID-19 crisis, is the PPP (CARES Act. § 1102), enacted to extend relief to small businesses experiencing economic hardship as a result of the public-health measures being taken to minimize the public’s exposure to the COVID-19 virus. *See* First Interim Final Rule, 85 Fed. Reg. 20811. Specifically, Section 1102(a)(2) of the CARES Act adds a new paragraph (36) to Section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)(36), to extend loans to eligible small businesses for certain covered uses, including “payroll costs,” the “payment of interest on any mortgage obligation,” and “rent,” among other approved uses. CARES Act § 1102(a)(2); 15 U.S.C. § 636(a)(36)(F)(i).

1 Otherwise, the existing Section 7(a) requirements and limitations remain
2 unaltered and govern PPP lending. The CARES Act provides that “[e]xcept as
3 otherwise provided in this paragraph, the [SBA] may guarantee [PPP] covered
4 loans”—not make loans directly, however—“under the same terms, conditions, and
5 processes as a loan made under this subsection,” *i.e.*, Section 7(a). 15 U.S.C. §
6 636(a)(36)(B) (emphasis added).
7

8
9 The PPP then sets forth in extensive detail the precise ways in which PPP
10 covered loans differ from other Section 7(a) loans. *Id.* § 636(a)(36)(D)-(R). Among
11 these differences, the PPP (i) authorizes the SBA to guarantee covered loans to
12 various non-profit organizations, independent contractors, and self-employed
13 individuals, as well as to small business concerns, *id.* § 636(a)(36)(D)(i); (ii) relaxes
14 size limitations to allow businesses with as many as 500 employees (or more,
15 depending on the industry in which they operate) to receive assistance, *id.* §
16 636(a)(36)(D)(i)(I); and (iii) selectively waives certain of the SBA’s affiliation rules
17 used to determine small business “size.”
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21 The CARES Act leaves unaltered the requirement that “[a]ll loans made under
22 this subsection *shall* be of such sound value or so secured as reasonably to assure
23 repayment.” 15 U.S.C. § 636(a)(6) (emphasis added).
24

25 The CARES Act initially allocated \$349 billion to guarantee PPP loans.
26 CARES Act § 1102(b)(1). On April 16, 2020, the SBA issued a notice stating that the
27

1 PPP was closed to new applications. Congress then passed the Paycheck Protection
 2 Program and Health Care Enhancement Act (“CARES Act II”) on April 24, 2020 to
 3 add an additional \$310 billion to the PPP. PL 116-139 § 101(a)(1). The SBA posted
 4 notice on its website that it would begin accepting new PPP applications from
 5 participating lenders on Monday, April 27, 2020 at 10:30 a.m. *See* “Notice: PPP
 6 Resumes April 27, 2020,” available at
 7 [https://www.sba.gov/fundingprograms/loans/coronavirus-relief-options/paycheck-](https://www.sba.gov/fundingprograms/loans/coronavirus-relief-options/paycheck-protection-program#section-header-0)
 8 [protection-program#section-header-0.](https://www.sba.gov/fundingprograms/loans/coronavirus-relief-options/paycheck-protection-program#section-header-0)
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11 **E. Emergency Rulemaking Authority**

12 The CARES Act authorizes the Administrator of the SBA to issue emergency
 13 regulations to implement the PPP without complying with typical notice and comment
 14 requirements. CARES Act § 1114. The Administrator of the SBA posted her First
 15 Interim Final Rule on the SBA website on April 3, 2020. The First Interim Final Rule
 16 was subsequently published in the Federal Register on April 15, 2020. 85 Fed. Reg.
 17 20811. The First Interim Final Rule “streamlin[es] the requirements of the regular 7(a)
 18 loan program.” *Id.* at 20,812. For instance, the rule states that lenders need not comply
 19 with case-by-case underwriting requirements of 13 C.F.R. § 120.150. *Id.* at 20,812.
 20 Instead, under a section titled “What Do Lenders Have to Do in Terms of Loan
 21 Underwriting,” the rule states that “Each lender’s underwriting obligation under the
 22 PPP is limited to [the enumerated] items above and reviewing the ‘Paycheck
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1 Protection Application Form.” The Paycheck Protection Application Form itself
 2 requires the borrower to certify, among other things, that it is “not presently involved
 3 in a bankruptcy.” SBA Form 2483.

4
 5 On April 24, 2020, concurrent with Congress’ extension of additional funding
 6 for the PPP, SBA posted a new interim final rule, which was subsequently published
 7 in the Federal Register on April 28, 2020. “Business Loan Program Temporary
 8 Changes; Paycheck Protection Program –Requirements Promissory Notes,
 9 Authorizations, Affiliation, and Eligibility” (the “Fourth Interim Final Rule”⁵ (*See*
 10 RJN, Exhibit 3.) 85 Fed. Reg. 23450. The Fourth Interim Final Rule provides
 11 additional information regarding a number of eligibility requirements. Section III(4)
 12 of the Fourth Interim Final Rule specifically addresses applicants in bankruptcy. It
 13 provides:
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16
 17 *4. Eligibility of Businesses Presently Involved in Bankruptcy*
 18 *Proceeding. Will I be approved for a PPP loan if my business is in*
 19 *bankruptcy?*

20 No. If the applicant or the owner of the applicant is the debtor in a
 21 bankruptcy proceeding, either at the time it submits the application
 22 or at any time before the loan is disbursed, the applicant is ineligible
 23 to receive a PPP loan. If the applicant or the owner of the applicant
 24 becomes the debtor in a bankruptcy proceeding after submitting a
 25 PPP application but before the loan is disbursed, it is the applicant’s
 obligation to notify the lender and request cancellation of the
 application. Failure by the applicant to do so will be regarded as a
 use of PPP funds for unauthorized purposes.

26 ⁵ The SBA also issued a second interim final rule addressing affiliation rules, 85 Fed.
 27 Reg. 20817, and a third interim final rule addressing additional eligibility criteria and
 certain pledges of loans. 85 Fed. Reg. 21747.

1 The Administrator, in consultation with the Secretary, determined
 2 that providing PPP loans to debtors in bankruptcy would present an
 3 unacceptably high risk of an unauthorized use of funds or non-
 4 repayment of unforgiven loans. In addition, the Bankruptcy Code
 5 does not require any person to make a loan or a financial
 6 accommodation to a debtor in bankruptcy. The Borrower
 7 Application Form for PPP loans (SBA Form 2483), which reflects
 8 this restriction in the form of a borrower certification, is a loan
 9 program requirement. Lenders may rely on an applicant's
 10 representation concerning the applicant's or an owner of the
 11 applicant's involvement in a bankruptcy proceeding.

12 Fourth Interim Final Rule. 85 Fed. Reg. at 23451.

13 III. ARGUMENT

14 A. LEGAL STANDARD

15 A preliminary injunction is an “extraordinary and drastic remedy” that is “never
 16 awarded as of right,” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)(citation omitted),
 17 and “may only be awarded upon a clear showing that the plaintiff is entitled to such
 18 relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff
 19 seeking a preliminary injunction must show that (1) he is likely to succeed on the
 20 merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief;
 21 (3) the balance of equities tips in his favor; and (4) an injunction is in the public
 22 interest. *Id.* at 20. The last two factors “merge when the Government is the opposing
 23 party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

24 As the Ninth Circuit has explained, “[t]he first factor under *Winter* is the most
 25 important—likely success on the merits. Because it is a threshold inquiry, when ‘a
 26 plaintiff has failed to show the likelihood of success on the merits, we need not
 27 DEFENDANTS BRIEF IN OPPOSITION TO PLAINTIFFS’
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1 consider the remaining three [*Winter* elements].” *Garcia v. Google, Inc.*, 786 F.3d
2 733, 740 (9th Cir. 12015). Plaintiff’s burden is “doubly demanding” when seeking a
3 “mandatory injunction, [plaintiff] must establish that the law and facts clearly favor
4 [its] position, not simply that [plaintiff] is likely to succeed.” *Id.* at 740. This is
5 because an injunction that goes beyond maintaining the “status quo, pendente lite is
6 particularly disfavored.” *Id.* (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320
7 (9th Cir. 1994)). The “court should deny such relief ‘unless the facts and law clearly
8 favor the moving party.’” *Id.* (quoting *Anderson v. United States*, 612 F.2d 1112, 1114
9 (9th Cir.1979)).

10 Here, the status quo is that plaintiffs are excluded from the PPP program
11 because they are in bankruptcy. Plaintiffs have not received a PPP loan and the SBA
12 loan guarantee plaintiffs seek is available for eligible applicants. Thus, plaintiffs are
13 seeking a mandatory injunction and is subject to this heightened standard.

14 For the reasons that follow, plaintiffs have not satisfied the threshold
15 requirements for preliminary injunctive relief because they have no likelihood of
16 success on the merits and have not shown that they will suffer irreparable harm absent
17 preliminary injunctive relief. Thus, it is unnecessary for this Court to reach the issue
18 of whether the balance of harms favors plaintiffs or whether an injunction favors the
19 public interest. However, even if this Court were to reach these factors, they also
20 weigh against issuing preliminary injunctive relief.

B. PLAINTIFF WILL FAIL TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

1. The Small Business Act's Narrow Sovereign Immunity Waiver Precludes the Injunctive Relief Plaintiffs Seeks.

Only Congress can waive sovereign immunity. *United States v. Sherwood*, 312 U.S. 584, 589 (1941). And statutory waivers of sovereign immunity must be express and unequivocal. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *Lane v. Pena*, 518 U.S. 187 (1996); *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992). Because sovereign immunity waivers must be explicit and should be narrowly construed, any ambiguity must be resolved in the government's favor. *Nordic Vill., Inc.*, 503 U.S. at 34; *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999).

In the Complaint and Motion, plaintiffs do not specifically allege that Congress has waived the SBA's sovereign immunity for the relief sought by plaintiffs, nor did plaintiffs present the Court with statutory authority for such a waiver. 15 U.S.C. § 634(b), which includes a limited waiver as for the SBA, provides that the SBA may:

sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; *but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the [agency] or [its] property[.]*

15 U.S.C. § 634(b)(1) (emphasis added).

1 Many courts have interpreted this statute to preclude injunctive or any similar
2 relief against the SBA. *See, e.g., Little v. United States*, 489 F. Supp. 1012, 1016 (C.D.
3 Ill. 1980)(noting that “Plaintiff has withdrawn his claim for injunctive relief in light of
4 the express prohibition of such relief in the Small Business Act. While this provision
5 precludes injunctive relief, it does waive sovereign immunity with respect to other
6 types of relief.”); *see also, e.g., Keita v. U.S. Small Business Admin.*, No. 07-CV-
7 4958 (ENV)(LB), 2010 WL 395980, at *4 (E.D.N.Y. Feb. 3, 2010)(noting that courts
8 have interpreted 15 U.S.C. § 634(b) to “preclude [] injunctive or any similar relief
9 against the SBA itself” and concluding that “[s]ince [plaintiff] seeks only injunctive
10 relief, the Small Business Act expressly denies the Court subject matter jurisdiction to
11 review the SBA loan denial decisions.”); *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1290
12 (5th Cir. 1994); *Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990) (explaining
13 that “courts have no jurisdiction to award injunctive relief against the SBA”). Other
14 courts have adopted a narrower view of § 634(b)’s apparent bar on injunctions against
15 the SBA, albeit in different circumstances from this case. *See, e.g., Camelot Banquet*
16 *Rooms, Inc. v. United States Small Business Administration*, 2020 WL 2088637, at *3
17 (E.D. Wis. May 1, 2020)(concluding that § 634(b) did not preclude injunctive relief
18 against the SBA in a case involving constitutional claims and the PPP, where SBA
19 and its administrator were not the sole defendant).

1 In short, because Congress has removed authority to enjoin the SBA, plaintiffs'
2 request for preliminary injunctive relief must be denied.

3 **C. Plaintiffs' APA Claims Will Fail.**

4
5 In Count IV, plaintiffs ask the Court, under the APA, to "set aside agency
6 action that is in excess of statutory jurisdictionl..." ECF No. 1 at ¶ 87 (quoting 5
7 U.S.C. § 706(2)(C)). In Count V, plaintiffs ask the Court to "set aside agency actions
8 that is arbitrary and capricious or an abuse of discretion." ECF No. 1 at ¶ 97 (quoting
9 5 U.S.C. § 706(2)(A)). As defendants set forth below, this Court cannot enter final
10 orders on plaintiffs' APA claims and the SBA's actions are in accordance with law.
11

12
13 **1. The Bankruptcy Court Lacks Authority to Enter Orders on**
14 **Plaintiffs' APA Claims Because Those Claims Are Not "Core."**

15 Plaintiffs' claims under the APA are not "core" bankruptcy proceedings. "[A]
16 proceeding is non-core if it 'does not invoke a substantive right created by the federal
17 bankruptcy law and is one that could exist outside of bankruptcy.'" *In re Murray*,
18 2011 WL 3862158, at *2 (Bankr. E.D. Wis. Sept. 1, 2011) (quoting *In re U.S. Brass*
19 *Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997)). Although bankruptcy courts have
20 jurisdiction pursuant to 28 U.S.C. § 1334(b) to hear matters that are related to a case
21 arising under Chapter 11, they possess authority only to enter findings of fact and
22 conclusions of law if the matters being heard are non-core proceedings. 28 U.S.C. §
23 157(c)(1).
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1 Plaintiffs' APA claims do not arise in or under Title 11, but rather arise from
2 plaintiffs' assertion that the SBA failed to properly implement the CARES Act. As
3 such, the bankruptcy court may, at most, issues findings of facts and conclusions of
4 law, which must then be reviewed by the district court before any order may be
5 entered. Thus, this Court lacks jurisdiction to award injunctive relief on the APA
6 claims. *Aimtree Co. v. AT & T Corp. (In re Aimtree Co.)*, 202 B.R. 154, 156 (D. Kan.
7 1996) (noting "bankruptcy court lacked statutory authority to enter an injunction in
8 this 'non-core' proceeding").
9

11 Moreover, the United States does not consent to this Court's entry of a final
12 order on plaintiffs' APA claims, which exceeds the Court's constitutional authority as
13 an Article I court. Under the Supreme Court's decision in *Stern v. Marshall*, 564 U.S.
14 462 (2011), this Court lacks the constitutional authority to issue any final order on
15 plaintiffs' APA claims because they seek adjudication of private law claims to
16 augment the estate and, because SBA has not filed a claim in this case, is not a
17 compulsory counterclaim that must be adjudicated in the claims resolution process. *Id.*
18 at 499. The Court's lack of constitutional authority is particularly apparent here where
19 plaintiffs ask the Court to arrogate the congressionally-granted authority of another
20 Article I federal agency, the SBA, to interpret and implement the Section 7(a) loan
21 guarantee program. Accordingly, any request by plaintiffs for a final order on its APA
22 claims should be rejected.
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2. **Plaintiffs’ APA Claims Will Fail Because They Cannot Show that the Challenged Regulation is Arbitrary, Capricious, or Manifestly Contrary to Law.**

Plaintiffs are also unlikely to succeed on their APA claims that the SBA exceeded its statutory authority or acted in a manner that was arbitrary or capricious because the claims lacks merit. Plaintiffs argue that the bankruptcy exclusion must be unlawful because “[n]othing in the CARES Act, SBA Regulations, SOP 50-10, the First Interim Rule, or the Second Interim Rule authorizes or permits the SBA to exclude debtors in bankruptcy from the PPP.” (Compl. ¶ 64.) But the fact that the CARES Act is silent on bankruptcy ineligibility is far from dispositive. The courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program unless that interpretation is “arbitrary, capricious, or manifestly contrary to the statute.” *Big Ridge, Inc. v. Federal Mine Safety and Health Review Com’n*, 715 F.3d 631 (7th Cir. 2013) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984)).

The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. *See Chevron*, 467 U.S. at 843. As the starting point for this analysis, “[t]he judiciary has ‘long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.’” *Bethlehem Steel Corp. v. Bush*, 918

1 F.2d 1323, 1327 (7th Cir. 1990) (quoting *Chevron*, 467 U.S. at 844). If a “statute is
2 silent or ambiguous with respect to the specific issue, the question for the court is
3 whether the agency’s answer is based on a permissible construction of the statute.”
4 *Chevron*, 467 U.S. at 843.
5

6 The SBA was delegated broad authority to implement its lending programs and
7 the bankruptcy exclusion falls within this authority. The SBA Administrator is
8 explicitly empowered to “make such rules and regulations as [she] deems necessary to
9 carry out the authority vested in [her],” and in addition to “take any and all actions ...
10 [that] [she] determines ... are necessary or desirable in making ... loans.” 15 U.S.C.
11 §§ 634(b)(6), (7). The CARES Act did not amend or otherwise limit this authority.
12
13 Instead, Congress explicitly included the PPP in the Section 7(a) lending program,
14 thus vesting the Administrator with broad discretion over the PPP. Indeed, rather than
15 curtailing the Administrator’s discretion over the PPP, the CARES Act expanded it,
16 by giving the Administrator authority to issue new regulations and rules to implement
17 the PPP without complying with typical notice and comment requirements. CARES
18 Act § 1114.
19
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22 The Administrator exercised this explicit delegation of authority by issuing two
23 rules addressing the bankruptcy exclusion. The First Interim Final Rule incorporated
24 the PPP application form and the bankruptcy exclusion provided on that form. *See*
25 First Interim Final Rule, 85 Fed. Reg. at 20815. The Fourth Interim Final Rule further
26
27

1 addresses ineligibility of entities in active bankruptcy and describes the policy reasons
2 animating that agency decision. *See* Fourth Interim Final Rule, 85 Fed. Reg. at 23451.
3 Issuing these rules was well within the authority Congress delegated to the SBA.
4

5 First, nothing in the CARES Act precludes excluding bankrupt entities from the
6 PPP; the law instead gives the Administrator broad discretion. Second, the CARES
7 Act builds upon the Section 7(a) lending program, which explicitly considers the
8 borrower's bankruptcy history to ensure that loans be of "sound value . . . as
9 reasonably to assure repayment." 15 U.S.C. §636(a)(6); (*See* RJN, Exhibit 1, SOP 50-
10 10 at 39 (allowing lenders to consider "bankruptcy history")); ((*See* RJN, Exhibit 2,
11 SBA Form 1919 (Questions 6 and 24, considering whether applicant, its owners,
12 affiliates or any business controlled by applicants principals have "ever" been in
13 bankruptcy)).
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16 This streamlining of the consideration of bankruptcy status through the PPP
17 application form is wholly within the SBA's delegated discretion. The CARES Act
18 did not amend the "shall" requirement in 15 U.S.C. § 636(a)(6) that loans be of
19 "sound value." The CARES Act instead explicitly left that provision unaltered, along
20 with Section 7(a) lending procedures more broadly, unless specifically altered.
21 CARES Act § 1102(a)(2) (providing that "[e]xcept as otherwise provided in this
22 paragraph, the Administrator may guarantee covered loans under the same terms,
23 conditions, and processes as a loan made under this subsection."); 15 U.S.C. §
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1 636(a)(36)(B). The bankruptcy exclusion reasonably reconciles the “shall”
2 requirement concerning the sound value of loan-making under 15 U.S.C. § 636(a)(6)
3 with the obligation to expeditiously process CARES Act PPP loans by replacing the
4 case-by-case consideration of bankruptcy history with a bright line rule on the
5 application form.
6

7 Plaintiffs ask this Court to reject the SBA Administrator’s reasoned
8 implementation of the PPP and instead impose its own preferred solution. But
9 Congress delegated the SBA authority to implement the PPP, and otherwise gave the
10 SBA broad discretion over its lending programs. *See Nat’l Wildlife Fed’n v. Burford*,
11 871 F.2d 849, 855 (9th Cir. 1989) (“Deference is especially due when Congress has
12 explicitly delegated authority to the agency “to elucidate a specific provision of the
13 statute.”) (citing *Chevron*, 542 U.S. at 843-44).
14
15

16 The Court must defer to the discretion granted to the SBA by Congress. *See*
17 *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (“The
18 [APA] standard is deferential”). When an agency has been delegated authority to act,
19 as the SBA has here with a Congressional grant of emergency rulemaking authority,
20 review of the agency’s decision is subject to the very narrow “arbitrary and
21 capricious” standard. 5 U.S.C. § 706(2)(A) (An agency’s decision may be set aside
22 only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in
23 accordance with law.”). “The arbitrary or capricious standard is a deferential standard
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1 of review under which the agency's action carries a presumption of regularity.” *San*
2 *Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). “A
3 reviewing court must ‘consider whether the decision was based on a consideration of
4 the relevant factors and whether there has been a clear error of judgment. . . .
5 Although this inquiry into the facts is to be searching and careful, the ultimate
6 standard of review is a narrow one. The court is not empowered to substitute its
7 judgment for that of the agency.” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.,*
8 *Inc.*, 419 U.S. 281, 285, 95 S. Ct. 438, 442, 42 L. Ed. 2d 447 (1974). “Normally, an
9 agency rule would be arbitrary and capricious if the agency has relied on factors
10 which Congress has not intended it to consider, entirely failed to consider an
11 important aspect of the problem, offered an explanation for its decision that runs
12 counter to the evidence before the agency, or is so implausible that it could not be
13 ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle*
14 *Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct.
15 2856, 2867, 77 L. Ed. 2d 443 (1983).

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18 “The APA does not allow the court to overturn an agency decision because it
19 disagrees with the decision or with the agency's conclusions...”. *River Runners for*
20 *Wilderness, supra*, 593 F.3d at 1070 (citing *Vt. Yankee Nuclear Power Corp. v.*
21 *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460
22 (1978)); *see e.g. Or. Env'tl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir.1987)
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1 (“The court “may not substitute its judgment for that of the agency concerning the
 2 wisdom or prudence of [the agency's] action.”). “Thus, ‘[e]ven when an agency
 3 explains its decision with ‘less than ideal clarity,’ a reviewing court will not upset the
 4 decision on that account ‘if the agency's path may be reasonably discerned.’” *San Luis*
 5 *& Delta-Mendota Water Auth.*, *supra*, 776 F.3d at 994 (quoting *Ala. Dep't of Env't'l*
 6 *Conservation v. E.P.A.*, 540 U.S. 461, 497, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004)).
 7 “The action . . . need be only a reasonable, not the best or most reasonable, decision.”
 8 *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).⁶

11 Here, SBA is entitled to such deference. When confronted with the same facts
 12 and circumstances as plaintiffs’ TRO in this matter, Judge Shannon in *Cosi, Inc.*
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16
 17 ⁶ Judicial review of agency action is generally limited to the administrative record. *See*
 18 5 U.S.C. § 706 (“[T]he court shall review the whole record or those parts of it cited by
 19 a party.”); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir.
 20 2010); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (“[I]t is
 21 black-letter administrative law that in an APA case, a reviewing court should have
 22 before it neither more nor less information than did the agency when it made its
 23 decision.” (internal quotation marks omitted)); *Texas Rural Legal Aid, Inc. v. Legal*
 24 *Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991) (“Ordinarily judicial review of
 25 informal agency rule-making is confined to the administrative record; neither party is
 26 entitled to supplement that record with litigation affidavits or other evidentiary
 27 material that was not before the agency.”). “There is a danger when a reviewing court
 goes beyond the record before the agency. ‘When a reviewing court considers
 evidence that was not before the agency, it inevitably leads the reviewing court to
 substitute its judgment for that of the agency.’” *San Luis & Delta-Mendota Water*
Auth. v. Jewell, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Asarco, Inc. v. EPA*, 616
 F.2d 1153, 1160 (9th Cir. 1980)).

1 acknowledged the deference owed to SBA following its promulgation of the Fourth
2 Final Interim Rule under longstanding APA precedent:

3 But the recent rule is abundantly clear that the administrator has,
4 in fact, determined to exclude debtors from participation in the
5 PPP. As noted, I do not agree with that decision. I am dismayed
6 by the consequences of that decision here, but it is entitled -- but
7 the SBA is entitled to a measure of deference and, again, I'm not
8 authorized to substitute my preference or judgment for those of
9 the SBA, nor can I find that the decision is arbitrary and
10 capricious.

11 *See* RJN, Exhibit 6; *Cosi, Inc.* Tr. at 58:11-18.

12 Likewise, Judge Saltzman in *NAI Capital, Inc.* recognized that although she
13 personally disagreed with the SBA's determination, it is nonetheless entitled to
14 deference under *Chevron*:

15 But under the authority of the SBA administrator, she issued a
16 number of rules including the fourth interim final rule that we
17 discussed at some length yesterday which set out certain
18 requirements for obtaining a PPP loan. And specifically, in the
19 fourth interim final rules there is this statement: 'The
20 administrator in consultation with the secretary determined that
21 providing PPP loans to debtors in bankruptcy would present an
22 unacceptably high risk of unauthorized use of funds for non-
23 repayment of unforgiven loans.'

24 ...

25 I also think that the administrator's determination is likely to
26 have a negative impact broadly because it excluded a number of
27 small businesses in financial distress, the type of entity that the
28 CARES Act is meant to assist from obtaining assistance. I think
these are bad results. But do I think this determination is arbitrary
and capricious? No. I can't make that determination. It is true
that there are risks in maintaining loans to bankruptcy debtors

1 that are real and that don't come into play when making loans to
2 non-debtors and that the administrator could have had in mind.

3 ...

4 *Chevron* and the line of cases following require that I give
5 deference to the agency's determination. Even if I don't like it
6 and even if I -- had I had that job I would have made a different
7 choice. But the law doesn't allow me to substitute my judgment
8 for that of the SBA's (indiscernible). So in terms of likelihood of
9 success on the merits, I don't believe that the debtor has met its
10 burden.

11 *See* RJN, Exhibit 5, *NAI Capital, Inc.*, Tr. at 11:7-16, 12:4-14, 12:24-13:6.

12 In *Trudy's*, Judge Mott reached the same conclusion and explained the
13 deference owed to SBA:

14 [W]hether [the bankruptcy exclusion] is fair is not the legal
15 test. A Court must review the actions of an administrative
16 agency, like the SBA, under a very deferential standard, . . .
17 with so-called *Chevron* Deference. . . .

18 Here, the CARES Act does not expressly address whether or
19 not a company the size of *Trudy's* is eligible for a PPP loan if
20 the company is in bankruptcy. . . .

21 The SBA administrator has decided, in her discretion, to
22 exclude bankruptcy debtors from the PPP loan program as a
23 loan program requirement. The SBA administrator has
24 created a bright-line rule excluding debtors from PPP loans
25 and made a policy choice that debtors should be excluded
26 from the limited PPP funds made available by Congress for
27 small businesses nationwide. This is a very harsh result given
28 the severe pandemic restrictions that *Trudy's* and other
Chapter 11 debtors are enduring and is not a result that I
personally like. But Congress delegated that discretion to the
SBA administrator. Congress did not delegate that discretion
to me, as a Bankruptcy Judge. As a result, this Court cannot
find that the SBA administrator's actions and rulemaking

1 excluding bankruptcy debtors from PPP loans to be arbitrary,
2 capricious, or contrary to statute.

3 RJN, Exhibit 8, *Trudy's*, Tr. at 44:1 – 47:21. *See also* RJN, Exhibit 12, *Schuessler* at
4 p. 19-20 (“That the SBA chose to use a broad and blunt instrument – flatly excluding
5 bankrupt debtors from PPP participation – does not make the SBA’s rule arbitrary and
6 capricious. The law does not require precision or perfection, particularly at the
7 expense of other valid and competing Congressional goals... That one could have
8 adopted a different approach or policy – perhaps even a better one – does not make the
9 SBA’s policy choice invalid. It is not this court’s role to order the SBA to replace its
10 own policy judgment with that of the plaintiffs.”); RJN, Exhibit 7, *Asteria*, Tr. at
11 85:17-86-3; RJN, Exhibit 12, *PPV, Inc.* Tr. at 62:13 – 65:9.

12 Plaintiffs rely heavily on the ruling in *Hidalgo* to support their requested relief.
13 However, the *Hidalgo* decision granting a debtor’s request for TRO, which was
14 decided prior to the promulgation of the Fourth Interim Final Rule, has been stayed
15 pending appeal by the District Court for Southern Texas. *See* RJN, Exhibit 13. Most
16 recent decisions, including *NAI Capital, Inc.*, *PPV, Inc.*, and *Starplex* (the three Ninth
17 Circuit bankruptcy courts to consider this issue), have been decided counter to the
18 ruling in *Hidalgo*. *See* RJN, Exhibit 6, *Cosi, Inc.*, Tr. at 61:14-18 (“I now have a
19 further developed record and a request by the SBA for deference to its considered
20 judgment, as articulated in the interim rule, and I believe that I am dealing with a
21 different, or at least, altered landscape than was presented to the Texas Court”). Other

1 decisions, such as the holding in *Archdiocese of Santa Fe*, which relied on the
 2 reasoning of *Hidalgo* are likewise of limited precedential value in light of subsequent
 3 holdings, in particular *NAI Capital, Inc.*, *PPV, Inc.* and *Starplex*.

4 **3. Section 4003 of the CARES Act is Irrelevant to the PPP**

5
 6 Plaintiffs' attempt to compare Section 4003 of the CARES Act to the PPP is a
 7 red herring, which is based on a fundamental misunderstanding of the Act. Plaintiffs
 8 contend that the Court's analysis of the PPP, one component of the CARES Act, must
 9 be influenced by an entirely separate and unrelated component of the CARES Act.
 10 ECF No. 2 at 25. Section 4003 is a narrow component, which requires a mid-size
 11 business seeking a Federal Reserve program or facility from the Secretary of the
 12 Treasury to certify that it "is not a debtor in a bankruptcy proceeding." CARES Act §
 13 4003(c)(3)(D)(i)(V). In attempting to compare the PPP and Section 4003, plaintiffs
 14 completely ignore that Section 4003 creates an entirely *new* and *different* program in
 15 an entirely different department (Treasury, not the SBA). Section 4003 applies to the
 16 Secretary of the Treasury, not the SBA Administrator.

17
 18 As noted above, the PPP is a component of Title 1 of the CARES Act – the
 19 Keeping American Workers Paid and Employed Act. As described above, the PPP
 20 begins with Congress stating: "Section 7(a) of the Small Business Act (15 U.S.C.
 21 636(a)) is amended . . ." CARES Act § 1102(a). Thus, with the CARES Act, Congress
 22 is amending the existing statute 15 U.S.C. § 636. In doing so, the CARES Act
 23

1 provides that “[e]xcept as otherwise provided in this paragraph, the [SBA] may
2 guarantee [PPP] covered loans under the same terms, conditions, and processes as a
3 loan made under this subsection,” *i.e.*, Section 7(a). 15 U.S.C. § 636(a)(36)(B)
4 (emphasis added). As also explained above, the 7(a) loan program has had pre-
5 existing underwriting standards and procedures that specifically reference a potential
6 borrower’s bankruptcy history.
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9 In contrast, Title IV of the CARES Act is Economic Stabilization and
10 Assistance To Severely Distressed Sectors of The United States Economy, and
11 Subtitle A of Title IV is the Coronavirus Economic Stabilization Act of 2020. This
12 portion of the CARES Act is an entirely new law, and is not an amendment to any
13 existing law. This new law authorizes “the Secretary” of the Treasury to make “loans,
14 loan guarantees, and other investments in support of eligible businesses, States, and
15 municipalities that do not, in the aggregate, exceed \$500,000,000,000.” CARES Act §
16 4003(a). Under this program, Congress authorizes available funds for entities that
17 include passenger air carriers, cargo air carriers, and businesses critical to maintaining
18 national security. CARES Act § 4003(a)(1)-(3). Section 4003(c)(3) is entitled “Federal
19 Reserve Programs or Facilities” and subsection (D) is entitled “Assistance for Mid-
20 Sized Businesses.” It is within that narrow subsection that a borrower must certify it
21 “is not a debtor in a bankruptcy proceeding” to be eligible. CARES Act §
22 4003(c)(3)(D)(i)(V).
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Thus, for a separate department (Treasury) in this narrow new loan program, Congress left the Secretary of the Treasury no discretion regarding the eligibility of mid-sized businesses in bankruptcy for Federal Reserve programs. In stark contrast, for the SBA and its pre-existing 7(a) loan program, recognizing the SBA's experience in crafting such a program, Congress provided significant discretion to the SBA to decide how applicants in bankruptcy should be treated. The text in CARES Act § 4003(c)(3)(D)(i)(V) is completely irrelevant to the PPP.

D. Plaintiffs' Anti-Discrimination Claim Fails Because Section 525 of the Bankruptcy Code Does Not Apply to Loans.

Section 525(a) of the Bankruptcy Code prohibits a governmental unit from denying, revoking, suspending, or refusing to renew "a license, permit, charter, franchise, or other similar grant" because of being or having been a debtor in bankruptcy. Plaintiffs' § 525 argument fails for two reasons: (i) the PPP authorizes loans, not "grants"; and (ii) even if the Court construes the PPP as authorizing "grants," such a grant is not a "similar" to "a license, permit, charter, [or] franchise." *See* 11 U.S.C. § 525(a).

1. The PPP Authorizes Loans, Not Grants

By its plain language, the prohibition in 525(a) does not apply to lending or loan guarantees.⁷ Recognizing this, plaintiffs argue that "PPP is a grant or support

⁷ The only mention of lending in Section 525 is found in subsection (c), added in 1994 to address government student loan programs. 103 P.L. 394 § 313. Subsection (c) provides: "[a] governmental unit that operates a student grant or loan program ... may

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1 program, not a loan program.” *See* ECF No. 2 at 27. Plaintiffs are wrong.

2 The contention that the PPP is a “grant” and not a loan is directly contrary to
 3 the conclusions reached by Congress and the Administrator. Congress explicitly
 4 called the PPP a loan program in the CARES Act. *See e.g.*, CARES Act § 1102(a)(2)
 5 (addressing “covered loans”), § 1102(b) (appropriated funding available “for
 6 commitments for general business loans authorized under section 7(a) of the Small
 7 Business Act, including loans made under paragraph (36) of such section [PPP
 8 loans]”). And the Administrator has resolved any ambiguity about whether funds
 9 disbursed under the PPP are loans. For example, Section 1(a) of the Fourth Interim
 10 Final Rule provides guidance on promissory notes and refers back to guidance dated
 11 April 8, 2020 that sets forth that lenders can use the SBA Standard Form 147 for a
 12 promissory note, which the same form that lenders use for a standard non-PPP section
 13 7(a) loan. The First Interim Final Rule further made clear that PPP loans can be sold
 14 into a secondary market. First Interim Final Rule, 85 Fed. Reg. at 20815. Thus, both
 15 Congress and the SBA Administrator have concluded that the PPP program was a loan
 16 and loan guarantee program. This Court should afford deference to the conclusions of
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 24 not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been
 25 a debtor under this title or ... under the Bankruptcy Act” 28 U.S.C. § 525(c). If
 26 Section 525 applied to government guaranteed loans more broadly, Congress would
 27 not have needed to amend the law to include government student loan programs. And
 in amending the law to address government student lending, Congress could have
 addressed other government lending programs, but chose not to.

1 Congress and the SBA rather than adopt the construction of the PPP presumably
2 offered in litigation by Plaintiff.

3 In addition, the PPP is indisputably a lending and loan guarantee program that
4 falls outside of Section 525. *See e.g.*, CARES Act § 1102(a)(2) (addressing “covered
5 loans”), § 1102(b) (appropriated funding available “for commitments for general
6 business loans authorized under section 7(a) of the Small Business Act, including
7 loans made under paragraph(36) of such section [PPP loans].” To qualify for
8 complete or partial loan forgiveness, a recipient of the PPP, must meet certain
9 requirements, such as utilizing 75 percent of the funds for payroll. *See* First Interim
10 Final Rule § 2(o). It is only at a later date that all or part of the loan would become
11 forgivable. Even if some of the loan is forgiven (a fact yet to be determined for any
12 particular loan), it is possible that some portion might not be, and that remaining
13 portion will continue to be payable as a loan. In other words, there is no question that
14 funds provided pursuant to the PPP are currently in the first instance structured as
15 loans and loan guarantees -- and no decision on whether to forgive these loans will be
16 made until there is a subsequent determination that the loan recipient complied with
17 PPP requirements to make all or part of the loan forgivable. The circumstances may
18 make recipients unable or unwilling to meet these requirements for complete or partial
19 loan forgiveness. Plaintiffs simply ignores these aspects of the program and the
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1 Administrator's interpretation and application of the CARES Act as a loan program if
 2 it contends that the PPP is not a loan.

3 **2. The PPP Is Not "Similar" to "a license, permit, charter, [or] franchise"**

4
 5 Even if plaintiffs were correct that the PPP provides "grants" and not loans or
 6 loan guarantees, the PPP still would not fall within the scope of Section 525(a). The
 7 proper question is not whether the PPP is a grant, but whether it is a grant "similar to a
 8 license, permit, charter, [or] franchise." 11. U.S.C. § 525(a).

10 Each other circuit that has addressed this issue has determined that a
 11 government entity conditioning a loan on whether the party receiving the loan is in
 12 bankruptcy *does not* violate Section 525 because a loan is not "grant" that is similar to
 13 a "license, permit, charter, [or] franchise." *See, e.g., Watts v. Pennsylvania Housing*
 14 *Fin. Co.*, 876 F.2d 1090, 1094 (3d Cir. 1989) (holding that an emergency home loan
 15 assistance program in which payments were suspended if an entity filed for
 16 bankruptcy and the automatic stay was not lifted did not violate Section 525); *Ayes v.*
 17 *U.S. Department of Veterans Affairs*, 473 F.3d 104, 110 (4th Cir. 2006) (holding that
 18 veteran loan guarantee was not within the scope of Section 525); *In re Exquisito*
 19 *Services, Inc.*, 823 F.2d 151, 153 (5th Cir. 1987) (interpreting Section 525 narrowly
 20 and only to "situations analogous to those enumerated in the statute."); *Toth v.*
 21 *Michigan State Housing Development Authority*, 136 F.3d 477 (6th Cir. 1998)
 22 (rejecting plaintiff's claim that Michigan's denial of her application for a low income
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1 home improvement loan based upon a recent discharge in bankruptcy was
2 discriminatory under Section 525(a)). In *In re Goldrich*, 771 F.2d 28 (2d Cir. 1985),
3 the Second Circuit reached the same conclusion in a case concerning student loans
4 prior to the amendment of § 525 in 1994 to include § 525(c). It held that omission of
5 post-discharge credit arrangements from language of § 525 was intentional and
6 declined to extend § 525 to student loan guarantees, explaining: “A *credit guarantee is*
7 *not a license, permit, charter or franchise; nor is it in any way similar to those grants.*
8 Had Congress intended to extend this section to cover loans or other forms of credit, it
9 could have included some term that would have supported such an extension.” *Id.* at
10 30 (emphasis added).

14 A number of district and bankruptcy courts have reached the same conclusion.
15 In *In re Elter*, 95 B.R. 618 (Bankr. E.D. Wis. 1989), the court held that the state’s
16 denial of a guaranteed student loan did not violate Section 525. The court explained
17 that it “is not persuaded that the granting of credit is sufficiently similar to licenses,
18 permits, charters and franchises to fall within the aegis of 11 U.S.C. § 525(a). Even
19 with a broad construction, the court cannot, by liberal interpretation, expand the scope
20 of a statute beyond the words contained in it.” *Id.* at 622 (citation omitted). The court
21 relied upon “the principle of *ejusdem generis*, which is that a general term following a
22 specific list can apply only to things similar to the list.” *Id.* (“[t]he specific list in
23 [section] 525(a) refers to privileges of citizens to exercise their livelihood, such as
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1 obtaining building permits, state contracts or liquor licenses, or to the exercise of
2 personal freedom, such as driving a car”). *See also, e.g., United States v. Cleasby*, 139
3 B.R. 897, 900 (Bankr. WD. Wis. 1992) (holding a loan is not a “similar grant” within
4 the meaning of § 525 and declining to extend § 525 protection to applications for debt
5 restructuring); *In re Jasper*, 325 B.R. 50, 55 (Bankr. D. Me. 2005) (revoking credit
6 union privileges on the basis of filing for bankruptcy did not violate Section 525);
7 *United States v. Cleasby*, 139 B.R. 897, 900 (Bankr. WD. Wis. 1992) (holding a loan
8 is not a “similar grant” within the meaning of § 525 and declining to extend § 525
9 protection to applications for debt restructuring); *Lee v. Yuetter*, 106 B.R. 588, 592
10 (Bankr. D. Minn. 1989) (declining to extend § 525 protection to applications for debt
11 restructuring program and analogizing program to extensions of credit), *aff’d*, 917
12 F.2d 1104 (8th Cir. 1990).

13
14 A bankruptcy court in the District of Utah, after examining the statute,
15 explained that 11 U.S.C. § 525 “intended to codify the rule of *Perez v. Campbell*, 402
16 U.S. 637 (1971), which held that a state could not frustrate the Congressional policy
17 of a fresh start for a bankrupt by refusing to renew a driver's license based on a
18 discharged judgment resulting from an automobile accident.” *In re Rees*, 61 B.R. 114,
19 116-17 (Bankr. D. Utah 1986). An early proposal for the provision contained broad
20 language prohibiting “discriminatory treatment because he, or any person with whom
21 he is or has been associated, is or has been a debtor or has failed to pay a debt
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1 discharged in a case under the Act. *Id.* “The credit industry was extremely concerned
2 about the wording . . . , and urged that it be redrafted to limit its application to *Perez*
3 type situations and prevent its application in the field of credit granting.” *Id.* at 118.
4 The provision was subsequently redrafted to hue more closely to the *Perez* decision,
5 prohibiting discrimination in the issuance of “a license, permit, charter, franchise, or
6 other similar grant.” *Id.*
7

8
9 The PPP is in no way like the archetypal driver’s license in *Perez*, nor the other
10 items enumerated in Section 525(a). The PPP does not provide a right to engage in a
11 specific activity or profession, like a license, permit, charter or franchise. 11 U.S.C. §
12 525(a); *see Ayes*, 473 F.3d at 109 (the enumerated items in 525(a) “implicate
13 ‘government’s role as a gatekeeper in determining who may pursue certain
14 livelihoods’ . . . and show that Congress intended § 525(a)’s protections to be limited
15 to situations sufficiently similar to *Perez*”) (quoting *Toth*, 136 F.3d at 480). The PPP
16 operates to provide emergency funding to certain eligible small businesses.
17
18

19 Business that are excluded from funding are not prohibited from operating, as
20 with a refusal to provide a license, permit, charter or franchise. And, unlike a driver’s
21 license, where the state is the sole entity to provide licensing, the PPP is not the sole
22 source of funding. Indeed, entities in active bankruptcy may be eligible for other relief
23 under the CARES Act itself, including Emergency EIDL grants. *See* CARES Act §
24 1110.
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1 Several bankruptcy courts have already held that the PPP program does not run
2 afoul of Section 525. In *Cosi, Inc.*, Judge Shannon of the Bankruptcy Court for the
3 District of Delaware, held:

4
5 I am not satisfied that eligibility to participate in a loan program
6 or a financial grant program, such as the PPP, is, in fact, a
7 covered condition or act under Section 525 or, more directly, that
8 a government entity cannot consider bankruptcy as a dispositive
9 condition in evaluating whom to offer loans or grants. The case
10 law regarding 525 focuses typically on permits, licenses,
11 necessary government authorizations to conduct business or
perform acts. Neither the case law, nor Section 525 precludes the
SBA from imposing a bankruptcy-related condition or criteria
within the context of the PPP. . . .

12 In reading Section 525, I don't read the word "grant" as being an
13 economic grant, consistent with the concepts offered by the
14 debtor. It is conditioned or qualified by the prior words and it's
15 referred to as permits, franchises, licenses, or other similar grant.
This is not about a money-grant program.

16 (See RJN, Exhibit 4); *Cosi, Inc.* Tr. at 55:17 – 57:5.

17 In *Trudy's*, Judge Mott, Bankruptcy Judge for the Western District of Texas,
18 reached the same conclusion:

19
20 The PPP program, under the CARES Act is a loan. It is called a
21 loan under the CARES Act. Yes, it is a forgivable loan if certain
22 requirements are ultimately met by the borrower. But that does
23 not mean it is not a loan. There is a promissory note and an
24 obligation to pay, and loans are simply not covered by the
25 Section 525(a) anti-discrimination requirement. . . . Section
26 525(a) requires that the grant be, quote, similar, end quote, to a
27 license, permit, charter, or franchise to even fall within the scope
of the anti-discrimination provision. And the PPP loan program
is not similar to a license, permit, charter, or franchise.

1 (See RJN, Exhibit 6); *Trudy's, Inc.* Tr. at 36:20 – 37:15.

2 In a written decision in *Schuessler*, Judge Ludwig, Bankruptcy Judge for the
3 Eastern District of Wisconsin, also declined to follow *Hidalgo* and explained why the
4 PPP is clearly not in conflict with Section 525:
5

6 As *Watts*, *Ayers*, and *Toth* explain, Congress limited the scope of
7 Section 525(a) to denials of certain types of government
8 authorizations or permissions – denials of a “license, permit,
9 charter, franchise, or other similar grant.” The PPP is a heavily
10 subsidized loan guarantee program; it is not a license, permit,
11 charter, franchise or other similar grant. Accordingly, the SBA’s
denial of PPP participation based on the plaintiffs’ bankruptcies
does not run afoul of Section 525(a).

12 The court will not adopt the *Hidalgo County* court’s approach in
13 recharacterizing the PPP loan payments. The record is clear that
14 Congress created the PPP as an amendment to the SBA’s pre-
15 existing *loan* program and both the statute and agency
16 regulations refer to the funds distributed as “loans.” The PPP
17 loans are made through private lenders and participants sign
18 promissory notes, subject to SBA guarantees. While it is
19 certainly true that Congress created the program to make the
20 funds readily available, even where market loans would not be,
21 and the SBA has adopted regulations allowing the loans to be
22 made with little-to-no underwriting, these attributes do not alter
23 the fact that the program results in an actual loan. It is also true
that Congress provided for loan forgiveness if the funds are used
in certain ways, but the loan forgiveness is just that – it is a *loan*
forgiveness. Moreover, forgiveness is conditioned on future
events; if a recipient fails to use the funds in one of the delineated
ways, the recipient must pay back the loan.

24 In sum, Section 525(a) does not preclude the SBA from denying
25 government-subsidized PPP loans to bankrupt debtors.

26 RJN, Exhibit 11, *Schuessler*, Order at 15.

Beyond that, the HEROES Act (H.R. 6800)⁸, introduced on May 12, 2020 and passed by the House on May 15, 2020, further supports the United States' position. Despite weeks of argument by bankrupt debtors nationwide that the PPP is a "grant" program that is protected from discrimination by Section 525(a), the House, in the HEROES Act, unequivocally confirms that the PPP is a loan program. *See* § 90001(c) ("loan"); § 90001(e)(1)(C) (same); § 90001(e)(2)(C) (same); § 90001(e)(3) (same); § 90001(f) (same); § 90001(g) (same); § 90001(i)(1) (same); § 90001(i)(2) (same); § 90001(i)(3) (same); § 90001(j)(1) (same); § 90001(k) (same); § 90002 (same).

Section 90001(k) specifically demonstrates that Congress (or, at least, the House) knows how to distinguish between grant and loan programs, including when the PPP loan program is involved. Subsection (k) appends the PPP to provide technical assistance for community financial institutions in which Treasury "shall use \$1,000,000,000 . . . to provide *grants* to [certain] financial institutions . . . to ensure such institutions can update their systems . . . and efficiently provide *loans* that are guaranteed under" the PPP. (Emphasis added).

For all of these reasons, plaintiffs have not established a likelihood of success on their claims under Section 525(a).

//

⁸ Available at <https://docs.house.gov/billsthisweek/20200511/BILLS-116hr6800ih.pdf>.

E. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM

Plaintiffs fail to allege facts demonstrating that it would be irreparably injured in the absence of injunctive relief. Instead, plaintiffs allege only the barest conclusory statements. This does not suffice.

“To establish a likelihood of irreparable harm, conclusory or speculative allegations are not enough.” *Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 Fed. Appx. 390, 391 (9th Cir. 2014); *Am. Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (finding irreparable harm not established by statements that “are conclusory and without sufficient support in facts”). “It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm.” Wright, Miller & Kane, *Federal Practice & Procedure* §2948.1, at 152–53 (2d ed.1995). At best, plaintiffs have alleged a speculative, “possible” injury, which is not enough to demonstrate an entitlement to preliminary injunctive relief. *Winter v. NRDC*, 555 U.S. 7, 22 (2008); *GEFT Outdoors v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019).

No one disputes that a PPP loan, with a low interest rate and potential for forgiveness, is beneficial to businesses. But that does not demonstrate irreparable harm. A PPP loan is money, and its value can be estimated, whether by comparison to the terms of a market-rate loan, or by assuming full or partial forgiveness. While there is no doubt of the unprecedented impact of the pandemic on many businesses,

1 including plaintiffs, these unsupported assertions do not meet the standard of
2 irreparable harm in the Ninth Circuit.

3 Plaintiffs make no showing of irreparable harm. Their only claim of irreparable
4 harm is a bare, generalized assertion that the COVID-19 pandemic has negatively
5 impacted their cash flow and the lack of a PPP loan will “negatively impact their
6 ability to maintain healthcare offerings to the surrounding community and
7 reorganize.” ECF No. 2 at 31, 40; *see also* ECF No. 1 at ¶ 56. There are no specific
8 claims of immediate and irreparable harm. There is no allegation that they will be
9 forced to close facilities and will not be able to provide healthcare services to the
10 community. There is not even an allegation that employees will be furloughed or laid-
11 off due to their inability to obtain a PPP loan. *See* ECF No. 2 at 40 (Declaration of
12 Gallagher). In fact, any claims of irreparable harm are belied by plaintiffs’ weekly
13 cash flow budget, which evidences a positive weekly net cash flow in nearly all weeks
14 and a positive ending cash balance every week. ECF No. 1 at 84. Further, the
15 restrictions on nonessential elective medical procedures in Washington have been
16 lifted (subject to extensive safety protocols).⁹
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24 ⁹ *See* Proclamation of the Governor of the State of Washington 20-24.1, Reducing
25 Restrictions on, and Safe Expansion of, Non-Urgent Medical and Dental Procedures
26 available at [https://www.governor.wa.gov/sites/default/files/proclamations/20-
27 24.1%20-%20COVID-19%20NonUrgent%20Medical%20Procedures%20Ext%20%28tmp%29.pdf](https://www.governor.wa.gov/sites/default/files/proclamations/20-24.1%20-%20COVID-19%20NonUrgent%20Medical%20Procedures%20Ext%20%28tmp%29.pdf).

Moreover, plaintiffs only vaguely assert that lack of a PPP loan may impair their ability to reorganize. ECF No. 1 at ¶ 56. They offer no substantiation for this claim. Plaintiffs' Sixth Status Report and oral representations during the May 19, 2020 status hearing made no reference to the plaintiffs' inability to obtain a PPP loan and its effect on plaintiffs' reorganization. *In re Astria Health*, 19-01189-11-WLH, ECF No. 1285.

Such vague and unsubstantiated claims of irreparable harm are insufficient to meet the high standard required to obtain the extraordinary relief sought by the plaintiffs. *See* RJN Exhibit 5, *NAI Capital, Inc.*, Tr. at 13:7 – 14:24 (Debtors only make "more generalized arguments that the PPP funds will help the debtor achieve its future goals, that they will assist the debtor in its reorganization, that not having the funds will make it more difficult for the debtor to make payroll and pay its rent. That will make reorganization more challenging. These statements to me do not establish the likelihood of harm that would result in the absence of the temporary restraining order."). Accordingly, plaintiffs' motion for a preliminary injunction should be denied.

F. THE PUBLIC INTEREST WEIGHS AGAINST ENJOINING THE SBA.

Finally, to obtain injunctive relief in a case against the United States, plaintiffs must show that the injunction they seek would be in the public interest. *Nken*, 556 U.S. at 435. Plaintiffs cannot make that showing for at least four reasons: (1) they

1 have not demonstrated a specific direct and negative impact will result to the public
2 from their inability to obtain a PPP loan; (2) the resolution of complex and competing
3 policy interests at stake in administering the PPP is best left to Congress and the SBA;
4
5 (3) the SBA has already determined that it should apply eligibility restrictions contrary
6 to those plaintiffs prefer when administering the PPP and Congress has determined
7 that the SBA's implementation of the PPP should not be subject to injunction; and (4)
8 the relief plaintiffs seek has "potentially unknowable effects." *Profiles, Inc. v. Bank of*
9 *Am. Corp.*, 2020 WL 1849710, at *11 (D. Md. Apr. 13, 2020).

11 First, it is inarguable that the Yakima region has been significantly affected by
12 the COVID-19 pandemic and the need for healthcare in the region is critically
13 important. However, plaintiffs have not demonstrated that their inability to obtain PPP
14 loans will have a specific direct and negative impact the public interest in their
15 operating area. Plaintiffs make only a vague and unsubstantiated assertion that the
16 lack of a PPP loan with "negatively impact their ability to maintain healthcare
17 offerings to the surrounding community and reorganize." ECF No. 2 at 40 (Decl. of
18 Gallagher). As noted above, plaintiffs make no showing of irreparable harm that
19 would then result in adverse impact on the public interest.
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23 Second, if granted, plaintiffs' proposed injunction would short-circuit the
24 rapidly-evolving political and administrative landscape of responding to COVID-19.
25 During this unprecedented situation, the public interest is best served by permitting
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1 the SBA to carry out the duties Congress assigned it, namely ensuring the swift flow
2 of loan guarantees that Congress has deemed essential to protecting small businesses
3 and the overall economy, in accordance with the law. As one court has already
4 observed, “given the competing policy interests, the need to balance the desire to
5 assist the widest swath of small businesses with the need to incentivize lender
6 participation, and the overall fluidity of this epidemic, Congress is better positioned to
7 remedy any defects in the CARES Act, and to pass the supplemental legislation it
8 believes best aimed at ameliorating the effects of the COVID-19 crisis.” *Profiles*,
9 2020 WL 1894970, at *12. In short, plaintiffs’ requested injunction “may undermine
10 Congress’s goal to maximize relief for American small businesses” and therefore run
11 directly counter to the public interest. *Id.* at *11; *see also Am. Ass’n of Political*
12 *Consultants v. SBA*, 2020 WL 1935525, at *7 (D.D.C. Apr. 21, 2020) (denying a TRO
13 motion seeking to overturn the prohibition on political or lobbying groups from
14 receiving Section 7(a) loans).

15 Third, imposing plaintiffs’ requested injunction would reverse the SBA’s stated
16 policy preference, which Congress chose to make immune from injunction. The SBA
17 has a clear policy to exclude bankrupt entities from PPP lending because such lending
18 “would present an unacceptably high risk of an unauthorized use of funds or non-
19 repayment of unforgiven loans.” Fourth Interim Final Rule, 85 Fed. Reg. at 23451.
20 Plaintiffs wish to replace this judgment with their own policy preference. But, as
21

1 explained above, Congress chose to empower the SBA to implement the PPP, thus its
2 policy carries the force of law. Congress also chose to immunize the SBA from
3 injunctive relief. Issuing an injunction here would run directly against that public
4 policy, which provides further proof that the balance of the equities must be struck in
5 the United States' favor. Thus, issuing the injunction plaintiffs seek would represent
6 precisely the sort of interference with the SBA Administrator's statutory obligations
7 that runs contrary to the public interest.
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10 Fourth, as another court has already explained, the broad injunctive relief
11 plaintiffs seek could "have consequences reaching far beyond the litigants in this
12 particular case." *Profiles, Inc.*, 2020 WL 1849710, at *11. Its impacts would cost
13 "valuable time" for both Congress and the SBA to effectively respond to changing
14 circumstances and for small businesses applying for current or potential future PPP
15 loans to receive funds. *Id.* In short, issuance of plaintiffs' requested injunction would
16 throw a wrench into policymakers' evolving responses to the pandemic's economic
17 fallout and would adversely affect thousands of small businesses that need help now.
18 In these circumstances, "[t]he proper balance between the competing and compelling
19 public interests implicated in this incredibly complex situation must be struck by the
20 legislative branch." *Id.* at *4.
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1 Under these unprecedented circumstances, the Court should strike the balance
2 in the United States' favor and deny plaintiffs' unprecedented requests for injunctive
3 relief.

4
5 **G. PLAINTIFFS MAY NOT SEEK RELIEF ON BEHALF OF OTHERS.**

6 Plaintiffs seek relief on behalf of all debtors under the Bankruptcy Code and
7 request a writ of mandamus under 28 U.S.C. § 1361 "compel the SBA and the
8 Administrator to remove from all PPP applications all purported prohibitions against
9 debtors in bankruptcy participating in PPP." ECF No. 1 at ¶ 114. But, even if plaintiffs
10 were entitled to relief for themselves, they cannot obtain the order they seek because
11 they lack standing to seek relief on behalf of others. *See Gill v. Whitford*, 138 S. Ct.
12 1916, 1930 (2018) ("a plaintiff's remedy must be limited to the inadequacy that
13 produced his injury in fact") (internal marks omitted) (rejecting standing for a
14 statewide gerrymandering challenge because a plaintiff's remedy must be limited to
15 his injury).

16
17 Further, in the Ninth Circuit, it is a "well-established rule that injunctive relief
18 must be tailored to remedy the specific harm alleged." *East Bay Sanctuary Covenant*
19 *v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (refusing "nationwide injunction" though
20 "case presents a rule that applies nationwide"). The requested nationwide injunction
21 goes far beyond the minimum necessary to preserve plaintiffs' claims until a final
22 decision is entered on the merits, and thus should be denied.

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IV. CONCLUSION

For the foregoing reasons, plaintiffs' request for a mandatory temporary restraining order and preliminary injunctive relief should be denied.

RESPECTFULLY SUBMITTED: May 26, 2020.

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:

ASTRIA HEALTH, et al.¹

Debtors and Debtors in Possession,

ASTRIA HEALTH, et al.,

Plaintiffs,

v.

Lead Case No. 19-01189-11

Adv. Proc. Case No. 20-80016-WLH

U.S. SMALL BUSINESS
ADMINISTRATION AND JOVITA
CORRANZA'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
DEFENDANTS OPPOSITION TO
PLAINTIFFS' MOTION FOR

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).

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

Defendants.

TEMPORARY RESTRAINING
ORDER

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER

Pursuant to Federal Rules of Evidence, Rule 201(d), Defendant United States, on behalf of U.S. Small Business Administration ("SBA") and Jovita Carranza, solely in her Official Capacity as Administrator for the U.S. Small Business Administration (collectively, the "Defendant"), hereby requests that the Court take judicial notice of the following:

1. SBA Standard Operating Procedures, SOP 50-10-05(K), a true and correct copy of which is attached hereto as Exhibit 1 and incorporated herein by this reference.
2. SBA Official Form 1919, a true and correct copy of which is attached hereto as Exhibit 2 and incorporated herein by this reference.
3. *Business Loan Program Temporary Changes; Paycheck Protection Program –Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility* (Fourth Interim Final Rule), 85 Fed. Reg. 23450, a true and correct copy of which is attached hereto as Exhibit 3 and incorporated herein by this reference.
4. *NAI Capital, Inc. v. Jovita Carranza, in her capacity as administrator for the U.S. Small Business Administration*; Adv. No.: 1:20-ap-01051-DS, United States

Attachment A - page 2 of 6

Bankruptcy Court, Central District of California, Hearing Transcript from May 19, 2020 hearing on Plaintiff's Motion for Temporary Restraining Order and Order to Show Cause Why A Preliminary Injunction Should Not Issue, a true and correct copy of which is attached hereto as Exhibit 4 and incorporated herein by this reference.

5. *NAI Capital, Inc. v. Jovita Carranza, in her capacity as administrator for the U.S. Small Business Administration*; Adv. No.: 1:20-ap-01051-DS, United States Bankruptcy Court, Central District of California, Hearing Transcript from May 20, 2020 hearing on Plaintiff's Motion for Temporary Restraining Order and Order to Show Cause Why A Preliminary Injunction Should Not Issue, a true and correct copy of which is attached hereto as Exhibit 5 and incorporated herein by this reference.

6. *Cosi, Inc., et al. v. The U.S. Small Business Administration, and Jovita Carranza, as Administrator of the U.S. Small Business Administration*, Adv. Proc. No. 20-50591, United States Bankruptcy Court, District of Delaware, Hearing Transcript on Plaintiff's Motion for Temporary Restraining Order, a true and correct copy of which is attached hereto as Exhibit 6 and incorporated herein by this reference.

7. *Asteria Education, Inc. v. Jovita Carranza, in her Capacity as Administrator of the U.S. Small Business Administration*, Case No: 20-05024-CAG, United States Bankruptcy Court, Western District of Texas, San Antonio Division, Hearing Transcript on Plaintiff's Application for Temporary Restraining Order, a true and correct copy of which is attached hereto as Exhibit 7 and incorporated herein by this reference.

Attachment A - page 3 of 6

8. *Trudy's Texas Star, Inc. v. Jovita Carranza, in her Capacity as Administrator of the U.S. Small Business Administration*, Case No: 20-01026-HCM, United States Bankruptcy Court, Western District of Texas, Austin Division, Hearing Transcript on Plaintiff's Emergency Application for Temporary Restraining Order, a true and correct copy of which is attached hereto as Exhibit 8 and incorporated herein by this reference.

9. *Breda, a Limited Liability Company v. Jovita Carranza, in her capacity as Administrator for the U.S. Small Business Administration*, Adv. Proc. No. 20-1008, United States Bankruptcy Court, District of Maine, Hearing Transcript on Order Denying Plaintiff's Request For Temporary Restraining Order, a true and correct copy of which is attached hereto as Exhibit 9 and incorporated herein by this reference.

10. *Abe's Boat Rentals, Inc. v. Jovita Carranza, in her capacity as Administrator of the U.S. Small Business Administration*, Adv. No. 20-01029, United States Bankruptcy Court, Eastern District of Louisiana, Order Denying The Plaintiff's Emergency Application For A Temporary Restraining Order And Setting A Hearing On The Application For A Preliminary Injunction, a true and correct copy of which is attached hereto as Exhibit 10 and incorporated herein by this reference.

11. *Schuessler et al. v. The U.S. Small Business Administration, and Jovita Carranza, Solely as Administrator of the U.S. Small Business Administration*, Adv. No. 20-02065-bhl, *Steffen et al. v. The U.S. Small Business Administration, and Jovita Carranza, Solely as Administrator of the U.S. Small Business Administration*, Adv.

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No. 20-02068-bhl, *Thull Farms, LLC v. The U.S. Small Business Administration, and Jovita Carranza, Solely as Administrator of the U.S. Small Business Administration*, Adv. No. 20-02069-bhl (consolidated cases), United States Bankruptcy Court, Eastern District of Wisconsin, Decision on Core Claims and Report and Recommendation of Non-Core Claims dated May 22, 2020, a true and correct copy of which is attached hereto as Exhibit 11 and incorporated herein by this reference.

12. *PPV, Inc. and Bravo Environmental NW, Inc. v. The U.S. Small Business Administration and Jovita Carranza, Solely as the Administrator of the U.S. Small Business Administration*, Adv. No. 20-03054-dwh, United States Bankruptcy Court, District of Oregon, Hearing Transcript on Order Denying Motion for Temporary Restraining Order and Motion for Preliminary Injunction and Order to Show Cause dated May 20, 2020, a true and correct copy of which is attached hereto as Exhibit 12 and incorporated herein by this reference.

13. *Jovita Carranza, Administrator, U.S. Small Business Administration v. Hidalgo County Emergency Service Foundation*, Case No. 20-cv-108, United States District Court, Southern District of Texas, Order dated May 11, 2020 staying the

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Attachment A - page 5 of 6

preliminary injunction entered by the bankruptcy court, a true a correct copy of which is attached hereto as Exhibit 13 and incorporated herein by this reference.

RESPECTFULLY SUBMITTED: May 26, 2020.

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SBA

SOP 50 10 5(K)

Lender and Development Company Loan Programs

Office of Financial Assistance

U.S. Small Business Administration



SMALL BUSINESS ADMINISTRATION STANDARD OPERATING PROCEDURE

SUBJECT:	S.O.P.		REV
Lender and Development Company Loan Programs	SECTION 50	NO. 10	5(K)

INTRODUCTION

1. Purpose: Update SOP 50 10 5(K) Lender and Development Company Loan Programs.
2. Personnel Concerned: All SBA Employees
3. SOP Canceled: None. Previous edition of SOP 50 10 will continue to have applicability to loans that were approved during their effective time periods.
4. Updated Information: This full update of SOP 50 10 5 is necessary for the SOP to conform to recently revised regulations in 13 CFR Part 120, and to provide guidance that clarifies and streamlines policy and procedures affecting the 7(a) and 504 programs. This version, which will be SOP 50 10 5(K), includes revised guidance in the following general areas:
 - a) Incorporates regulatory changes published in the May 7, 2018, Final Rule on Debt Refinancing in 504 Loan Program (83 FR 19915), effective June 6, 2018;
 - b) Incorporates the availability of 504 Debentures with a maturity of 25 years, in accordance with the Federal Register Notice published April 4, 2018, available for 504 Projects approved on or after April 2, 2018;
 - c) Incorporates policy changes published in SBA Policy Notice 5000-17057, effective April 3, 2018, including:
 - i. Revised guidance on credit elsewhere for 7(a) and 504 loans;
 - ii. Clarified the minimum equity requirements for 7(a) loans involving change of ownership transactions between existing owners;
 - iii. Provided additional guidance regarding the eligibility of marijuana-related businesses and hemp-related businesses; and
 - iv. Reduced the minimum monitoring requirements for Working Capital CAPLines; and
 - d) Clarifies guidance for SBA Lenders (7(a) lenders and CDCs) on the delivery of 7(a) loans (including SBA Express, Export Express, Export Working Capital Program and International Trade) and 504 program loans.
5. Originator: Office of Capital Access

AUTHORIZED BY:		EFFECTIVE DATE
William M. Manger Associate Administrator Capital Access		April 1, 2019
		Page 1

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SOP 50 10 5(K)

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SUBPART A
SBA LENDER AND CERTIFIED DEVELOPMENT COMPANY
PARTICIPATION REQUIREMENTS

PURPOSE OF THIS SUBPART

This Subpart contains the requirements for Lenders and Certified Development Companies (CDCs) to participate in SBA lending programs. This Subpart also explains the different types of delegated authority SBA grants to Lenders and CDCs, as well as how Lenders and CDCs maintain their participating status with SBA. Finally, this Subpart provides a brief overview as to how SBA oversees its participating Lenders and CDCs.

When the policy set forth in this Subpart does not adequately address the unique circumstances regarding a particular matter, an exception to policy may be approved by the Director of the Office of Financial Assistance (D/FA). For Export Working Capital Program (EWCP) and International Trade loans (ITL), an exception to policy may be approved by the Director, International Trade Finance (D/ITF). For Export Express loans, an exception to policy may be approved by the D/ITF with the concurrence of the Director, Office of Credit Risk Management (D/OCRM). The D/FA or D/ITF may not approve an exception to policy if such exception would be inconsistent with a statute or regulation. A request for an exception to policy must be submitted to the Loan Guaranty Processing Center (LGPC) for 7(a) applications, including EWCP, ITL and Export Express loan applications, and to the Sacramento Loan Processing Center (SLPC) for 504 applications. The processing center will analyze the request and make a recommendation to the D/FA or D/ITF, as applicable, or an individual acting in that capacity, who will make the final decision (with the concurrence of the D/OCRM for Export Express loans). The decision must be documented in the appropriate Agency loan file. This procedure may only be used in situations where a minor deviation from standard policy is necessary for the specific situation. Exceptions to policy will be considered on a case-by-case basis and the decision will only apply to the specific request.

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CHAPTER 1: 7(a) LENDERS**I. THE 7(A) LOAN PROGRAM**

- A. The 7(a) Loan Program is authorized by section 7(a) of the Small Business Act and is governed by the regulations outlined in Parts [103](#), [105](#), [120](#), and [121](#) of [Title 13 of the Code of Federal Regulations \(CFR\)](#).
- B. This multi-purpose business loan program is administered as a deferred participation program where SBA guarantees a portion of the loan made by a Lender. The Lender initiates the loan to a small business and, if the SBA agrees to guarantee the loan, the Lender funds and services the loan. In the event of default, the Lender conducts the work-out or the liquidation efforts and the Lender and SBA share in the loss, if any, in accordance with the percentage guaranteed by the SBA.
- C. Definitions applicable to this subpart can be found in 13 CFR §§[103.1](#), [105.201](#), [120.10](#), and [120.420](#).

II. BECOMING A 7(A) LENDER

- A. The following lenders may apply to participate with SBA as a 7(a) Lender:
 - 1. Federally Regulated Lenders, including those lenders regulated by Federal Financial Institution Regulators (e.g., the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Farm Credit Administration); and
 - 2. SBA Supervised Lenders:
 - a. Non-Federally Regulated Lenders (NFRLs, including State-regulated lenders without Federal deposit or share insurance protection; and
 - b. Small Business Lending Companies (SBLCs).
- B. The following lenders may not apply to participate with SBA as a 7(a) Lender:
 - 1. SBA-licensed Small Business Investment Companies (SBICs);
 - 2. Certified Development Companies (see [13 CFR § 120.820\(c\)](#), except with respect to the Community Advantage Pilot Program); and
 - 3. Bank holding companies.
- C. Process to Become a 7(a) Participating Lender:
 - 1. Federally Regulated Lenders:
 - a. An institution that has Federal deposit or share insurance protection and is a State or National bank, a State or federally-chartered thrift institution or a State or federally-chartered credit union must submit a request in writing to the SBA Field Office serving the geographic area where the lender's principal office is located. With the exception of State-chartered credit unions, these institutions automatically comply with the Agency's examination and supervision requirements.
 - b. When a State-chartered credit union applies to become a participating Lender:
 - i. If the credit union has Federal deposit or share insurance protection, it must submit an

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application to the SBA Field Office servicing the geographic area where its principal office is located.

- ii. If the credit union does not have Federal deposit or share insurance protection, it must send to the SBA Field Office the items required in paragraph II.C.2.b) below for Non-Federally Regulated Lenders.
 - iii. The SBA Field Office must contact the Office of Credit Risk Management (OCRM) and ask for a written determination by OCRM regarding the State's level of regulatory supervision and examination.
 - iv. The SBA District Counsel must review the application for legal sufficiency. As part of that review, District Counsel must determine that the credit union has the authority to apply for participation with SBA and, specifically, that the person who submitted the application has the authority to act on behalf of the credit union. Applications submitted on behalf of a credit union by a Credit Union Service Organization (CUSO) or Lender Service Provider (LSP) are not acceptable.
- c. A lender must be considered in good standing with its state regulator and considered to be Satisfactory by its Federal Financial Institution Regulator (FFIR) as determined by SBA. For purposes of participation in the 7(a) program, SBA considers a lender to be in good/satisfactory standing with its state/FFIR if it has satisfactory financial condition and satisfactory small business credit administration and servicing policies, procedures and practices. Accordingly, the lender's written request to participate must include a written statement that to the best of its knowledge, the lender has satisfactory: i) financial condition (e.g., capital and liquidity); ii) small business credit administration policies, procedures, and practices that it continues to adhere to in its operations; and iii) small business servicing policies, procedures, and practices that it continues to adhere to in its operations. When reviewing good standing or whether a lender is considered Satisfactory, SBA will look to see that a lender does not have significant deficiencies or weaknesses in these areas. "Significant" may be evidenced by the number or seriousness of the deficiencies, as determined by SBA in its discretion. SBA will verify any good standing/satisfactory status statement where possible with public (e.g., Cease and Desist Orders and Call Reports) and/or non-public information from the lender's primary and/or other regulators.
- d. The SBA Field Office must determine whether the lender meets the requirements of [13 CFR § 120.410](#) to be a 7(a) participant. If the Field Office determines that the lender meets these requirements, it may enter into a Loan Guaranty Agreement with the lender. Both parties will execute a Loan Guaranty Agreement (Deferred Participation), [SBA Form 750](#), and/or a Loan Guaranty Agreement (Deferred Participation) for Short-Term Loans, [SBA Form 750B](#). Once the SBA Form 750 is executed, the SBA Field Office will add the lender to the SBA Partner Information Management System (PIMS), which identifies the lender as an SBA participating Lender.
- e. If a Lender makes a major change in its structure or organization after execution of the SBA Form 750/750B, it must notify the SBA Field Office in writing. Major changes that may impact continued SBA participation include:
- i. Acquisition by another entity;

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- ii. Merger into another legal entity;
- iii. A change of name;
- iv. Substantial changes in management;
- v. Substantial changes in how the Lender handles SBA loans; or
- vi. Takeover or closure of the Lender by a regulatory agency.

2. Non-Federally Regulated Lenders:

- a. Non-Federally Regulated Lenders (NFRLs) are entities engaged in small business lending that are subject to the oversight and supervision by a state regulator authorized to evaluate the safety and soundness of its regulated members. These entities operate without Federal deposit or share insurance protection (such as Business and Industrial Development Companies (BIDCOs)). NFRLs are authorized by the Administrator to make loans pursuant to section 7(a) of the Small Business Act. NFRLs are subject to additional regulations specific to SBA Supervised Lenders (see [13 CFR §§ 120.460-120.465](#)) as well as all other 7(a) regulations specific to loan processing, servicing, and liquidation. NFRLs must have internal controls that meet the requirements set forth for SBLCs in Chapter 2, Paragraph I.B.3 of this Subpart.

To become a 7(a) participant, the lender must submit an application containing the information and documents specified below to the Office of Financial Assistance (OFA) at SBA's Headquarters in Washington, D.C. The applicant must submit two (2) complete binders of fully executed paper copies and one (1) executed electronic scanned copy (in pdf format) to OFA addressing each of the elements set forth below ("NFRL Application"). The NFRL Application must be complete and organized in tabular format. Incomplete NFRL Applications will not be processed by SBA and will be returned to the applicant. An applicant that submits an incomplete NFRL Application (as determined by SBA) must wait 30 calendar days before reapplying.

SBA reserves the right to deny any applicant requesting to become an NFRL in its sole discretion. In addition to SBA's evaluation of the elements required in paragraph b. below, SBA may consider risk factors in its evaluation of an NFRL Application. These factors include, but are not limited to, historical performance measures (such as default, purchase and loss rate), and other performance data associated with the lender or its senior management team, along with other relevant information (such as SBA-observed gaps in small business lending not served by the existing 7(a) Lender population).

- b. The lender's application must include:
 - i. Lender's name, address, telephone number and email address;
 - ii. A copy of the lender's organizational formation documents and bylaws filed with the appropriate authority and certified by an appropriate officer of the applicant;
 - iii. The identification of all classes of stock, partnership interest or members interests, the rights and preferences accorded to these forms of ownership, including voting rights, redemption rights, distribution rights and rights of convertibility and any conditions for the transfer, sale or assignment of such interests;

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- iv. The lender's proposed geographical area of operations, as authorized by the lender's state regulator;
- v. A list of officers, directors, managing partners, managing members, Associates, and holders of 10% or more of any class of the lender's capital stock or ownership interest ("Associates" are defined in [13 CFR § 120.10](#));
- vi. An organizational chart showing all officers, directors, managers and key employees of the lender, including any relationships between the lender and any Associates;
- vii. An executed [SBA Form 1081](#), "Statement of Personal History," and either Form [FD-258](#) (fingerprint card) or electronic fingerprint submission, each signed and dated within 90 days of submission to SBA ("electronic fingerprint submission" is defined in [Subpart B, Chapter 2, Paragraph III.A.13.d.iv](#) of this SOP), for:
 - a) Each officer, managing partner, and managing member of lender, and all holders of 10% or more of any class of stock or ownership, limited partnership or member's interest; and
 - b) Each director and key employee (an employee who manages daily operations, e.g., overseeing a department or a division, not a clerical staff position) of the lender organization. Directors and key employees must only submit either Form FD-258 (fingerprint card) or electronic fingerprint submission along with SBA Form 1081 if the individual answered affirmatively to questions 10a, 10b, 10c, 11a, and/or 11b on the SBA Form 1081.
- viii. A copy of the most recent audited financial statements of the lender;
- ix. A copy of the most recent audited financial statements on any entity, other than natural persons, holding 10% or more of any class of the lender's stock or ownership interest;
- x. An operations plan detailing the nature of the lender's proposed loan activity, the volume of activity projected over the first 3 years as a 7(a) Lender, projected balance sheets, income statements and statement of cash flows of the lender, with alternative profit and loss scenarios based on run rates equivalent to 70% and 50% of projected loan activity, the type and projected amount of financing needed to support its lending plan, along with a discussion of lender's proposed wind-down plan in the event the lender decides to leave the program;
- xi. A detailed analysis of the lender's projected secondary market activities during the first 3 years of operation, including a sensitivity analysis of the effect any changes in premium from the sale of the guaranteed portion of 7(a) loans in SBA's secondary market may have on the lender's prospective earnings. The analysis must also include a description of the lender's plans (if any) to securitize or sell participations in the unguaranteed portion of 7(a) loans;
- xii. If the lender intends to acquire any 7(a) loans, a written plan detailing the extent of this acquisition activity in its operating plan, and how the lender intends to manage the transition of the 7(a) loan portfolio;
- xiii. A copy of the lender's policies and procedures governing business loan origination, servicing, and liquidation;

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- xiv. A certification that the lender will not be engaged primarily in financing the operations of an Affiliate, as defined in 13 CFR §§ [121.103](#) and [121.301](#).
- xv. A copy of the State or Federal statute or regulations governing the lender's operations, including those pertaining to audit, examination and supervision of the lender. Each lender bears the burden of demonstrating that it is subject to continuing supervision by a State or Federal regulatory authority satisfactory to SBA;
- xvi. A copy of the latest report covering the examination of the lender, and/or any regulatory orders if such reports can be released to SBA. If the report cannot be released or the lender is newly formed and has not been examined by its primary regulator include a statement to that effect;
- xvii. A copy of the license, if any, issued to the lender by a regulatory authority;
- xviii. A certified copy of a Resolution of the Board of Directors designating the person(s) authorized to submit the application on behalf of the lender;
- xix. Disclosure of any and all actions, proceedings, investigations or litigation, pending or threatened, against the lender, including complete details of any actions disclosed; and
- xx. A written legal opinion of independent counsel ("Independent Counsel" is counsel that is not an "Associate" of the lender under [13 CFR § 120.10](#).), satisfactory to SBA that addresses whether the lender:
 - a) Is duly formed, organized, and validly existing in good standing under the laws of the State of its organization, and is in full compliance with all Federal, State, and local laws in connection with the formation and organization of the lender;
 - b) Has the power, legal right, and authority to conduct business in the lender's proposed operating area; and
 - c) Is in full compliance with all appropriate Federal and State securities laws.
- c. Once received, the D/FA or designee, in consultation with the Director, Office of Credit Risk Management (D/OCRM), makes the final determination on the application and notifies the SBA Field Office. If the application is approved, the SBA Field Office executes an [SBA Form 750](#) and/or [SBA Form 750B](#), with the Lender and sends a copy of the executed agreement to the D/FA. The D/FA or designee will add the Lender to the SBA Partner Information Management System (PIMS), which identifies the Lender as an SBA participating Lender.
- d. Change of Ownership or Control: SBA's prior written consent is required for any change of ownership or control of ten percent (10%) or more of any class of an NFRL's stock or ownership interests. SBA's prior written consent is also required for any proposed transaction or event that results in control by any entity or person(s) not previously approved by SBA. Control, as defined in this paragraph, means the possession, direct or indirect, or the power to direct or cause the direction of the management or policies of an NFRL, whether through the ownership of voting securities, by contract, or otherwise.
 - i. A new application in accordance with paragraph II.C.2.b. above must be submitted for SBA's prior written consent with respect to a change of ownership or control

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transaction. For change of control transactions, the Lender must reapply for any delegated authorities.

- ii. If the proposed change of ownership is for less than a majority interest, SBA, in its sole discretion, may limit the items required by the Lender in paragraph II.C.2.b) to support a request for prior SBA consent.

3. Small Business Lending Companies ("SBLCs") (13 CFR §§ [120.460](#) - [120.490](#)):

A Small Business Lending Company (SBLC) is a non-depository lending institution that is authorized by SBA to only make loans pursuant to section 7(a) of the Small Business Act and loans to Intermediaries in SBA's Microloan program. See Chapter 2 of this Subpart for more information on becoming an SBLC.

D. Loan Guaranty Agreement – [SBA Form 750](#) and [SBA Form 750B](#):

1. The Loan Guaranty Agreement (SBA Form 750) provides a basic framework for the responsibilities and duties of the Lender and SBA when making, closing, and administering any individual SBA-guaranteed loan. (13 CFR § 120.400) This agreement is subject to SBA's rules and regulations, as amended from time to time.
2. SBA Form 750 governs loans with a maturity greater than 12 months. A Lender must execute this agreement prior to submitting any applications for guaranty to SBA.
3. SBA Form 750B governs loans with a maturity of 12 months or less. If the Lender intends to approve loans with a maturity of 12 months or less, it must also execute SBA Form 750B.

E. Responsibilities of 7(a) Lenders:

1. In making SBA-guaranteed loans, 7(a) Lenders must:
 - a. Submit applications for guaranty with all required forms, documentation and credit analyses, to the designated SBA processing center for review;
 - b. Execute the Authorization;
 - c. Close the loan in accordance with the Authorization and all SBA policies and regulations;
 - d. Maintain complete loan files;
 - e. Service the loan in accordance with [SOP 50 57](#) and regulations;
 - f. Liquidate the loan in accordance with [SOP 50 57](#) and regulations;
 - g. Comply with SBA Loan Program Requirements (as defined in [13 CFR § 120.10](#)) for the 7(a) program, as such requirements are revised from time to time. SBA Loan Program Requirements in effect at the time that a Lender takes an action in connection with a particular loan govern that specific action. For example, although loan closing requirements in effect when a Lender closes a loan will govern closing actions, a Lender's liquidation actions on the same loan are subject to the liquidation requirements in effect at the time that a liquidation action is taken ([13 CFR § 120.180](#)). SBA Loan Program Requirements, Center contacts, and other information can be found at <https://www.sba.gov/partners/lenders/7a-loan-program>;
 - h. Individuals and entities suspended, debarred, revoked, or otherwise excluded under the SBA

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or Government-wide debarment regulations are not permitted to conduct business with SBA, including participating in an SBA-guaranteed loan. Lenders are responsible for consulting the System for Awards Management's (SAM) Excluded Parties List System (EPLS) or any successor system to determine if an employee or an Agent has been debarred, suspended or otherwise excluded by SBA or another Federal agency (<https://www.sam.gov/portal/SAM/>); and

- i. SBA expects Lenders to exercise due diligence and prudent oversight of their third party vendors, including Lender Service Providers (LSPs) and other loan agents, which should include having written policies governing such relationships and monitoring performance of loans referred by an Agent or where an Agent provided assistance. SBA will review evidence of such due diligence and oversight of such relationships when conducting lender oversight activities. Federally-regulated Lenders are reminded that they must comply with the requirements of their primary Federal Financial Institution Regulator regarding third party vendors.
2. Preferences:
- a. A Lender may not take any action in connection with an SBA-guaranteed loan that establishes a preference in favor of the Lender (13 CFR § 120.411). A Lender must be particularly careful to avoid establishing a preference when using its delegated authority (for example, reducing its existing exposure to the Borrower through the use of an SBA-guaranteed loan).
 - b. A Lender must not:
 - i. Take any side collateral or guaranty that would secure only its own interest in a loan;
 - ii. Obtain a separate guaranty on the unguaranteed portion of the 7(a) loan without SBA's approval, such as through a co-guaranty program or arrangement;
 - iii. Require a Borrower to purchase certificates of deposit;
 - iv. Maintain a compensating balance not under the control of the Borrower;
 - v. Take a side loan which would have the effect of ensuring a risk-free or limited-risk investment on the participant's share; or
 - vi. Have an SBA-guaranteed loan in a "piggyback" structure.
 - a) Piggyback financing occurs when one or more lenders provide more than one loan to a single Borrower at or about the same time, financing the same or similar purpose, and where the SBA-guaranteed loan is secured with a junior lien position or no lien position on the collateral securing the non-guaranteed loan(s).
 - b) SBA does not consider a scenario where both loans are for working capital and the non-SBA guaranteed loan is secured only by working capital assets to be a piggyback structure.
 - c) SBA does not consider a shared lien position with the lender (pari passu) as a piggyback structure.
 - c. Under the following circumstances, a Lender may make a side loan to the Borrower to

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purchase stock of the participating Lender (as may be required by certain Lenders, such as Farm Credit Administration entities):

- i. The enabling authority of the Lender requires the purchase as a condition for making the loan.
- ii. The Lender makes a separate side loan not guaranteed by SBA for the Borrower to buy the stock or debentures. The side loan must be subordinated to the SBA loan, but the Lender may hold a first lien on any stock collateralizing the side loan.
- iii. The interest to be charged on the side loan must not exceed the maximum rate of interest acceptable for SBA-guaranteed loans, and the maturity of the side loan must not be less than that of the SBA-guaranteed loan.
- iv. In the event of default, either on the side loan or the SBA-guaranteed loan, the Lender may not take any action to collect or liquidate the side loan, except canceling or retiring the stock securing the side loan, until the SBA loan has been fully liquidated.

3. Ethical Requirements Placed on a Lender:

SBA Lenders must act ethically and exhibit good character ([13 CFR § 120.140](#)). Conduct of a Lender's Associates (including Agents and Lender Service Providers) and staff will be attributed directly to the Lender. Lenders are required to notify SBA immediately upon becoming aware of any unethical behavior by its staff or its Associates. Examples of unethical behavior are found at [13 CFR § 120.140](#).

a. Conflicts of Interest:

Neither a Lender nor its Associates may have a real or apparent conflict of interest with a small business or SBA ([13 CFR § 120.140](#) and [13 CFR Part 105](#)). Lenders must exercise care and judgment in determining whether a conflict of interest exists and document the file in detail. SBA will not guarantee a loan if the Lender, its Associates, partner(s) or a close relative:

- i. Has a direct or indirect financial or other interest in the Applicant; or
- ii. Had such interest within 6 months prior to the date of application.

SBA reserves the right to deny liability on its guaranty in the event that the Borrower defaults if the Lender, its Associates, partner(s) or a close relative acquires such an interest at any time during the term of the loan.

b. The Standards of Conduct Counselor for the Agency is the Designated Agency Ethics Official. ([13 CFR § 105.402\(a\)](#))

c. Standards of Conduct ("Conflict of Interest") Approvals:

- i. If an Applicant has, as an employee, owner, general partner, managing member, attorney, agent, owner of stock, officer, director, creditor or debtor, an individual who, within one (1) year prior to the loan application, was an SBA Employee (as defined by [13 CFR § 105.201\(a\)](#)), the loan application must be approved by the Standards of Conduct Counselor. ([13 CFR § 105.203\(a\)](#))
- ii. If an Applicant has, as its sole proprietor, general partner, managing member, officer,

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director, or stockholder with a 10% or more interest, an individual who is an SBA Employee (as defined by [13 CFR § 105.201\(a\)](#)) or a Household Member of an SBA Employee, the loan application must be approved by the Standards of Conduct Committee at SBA Headquarters. ([13 CFR § 105.204](#)) A “Household Member” of an SBA Employee includes:

- a) The spouse of the Employee;
- b) The minor children of the Employee; and
- c) The blood relatives of the Employee, and the blood relatives of the Employee’s spouse, who reside in the same place of abode as the Employee.

([13 CFR § 105.201\(d\)](#))

- iii. If an Applicant has, as its sole proprietor, general partner, managing member, officer, director, or stockholder with a 10% or more interest, or a Household Member of such individual, an individual who is a Member of Congress, an appointed official of the legislative or judicial branch of the Federal Government, a member or employee of a Small Business Advisory Council, or a SCORE volunteer, the loan application must be approved by the Standards of Conduct Committee. (13 CFR §§ [105.301\(c\)](#) and [105.302\(a\)](#))
- d. When a Standards of Conduct approval is required, the application should be processed by the appropriate processing center and, if appropriate, be conditionally approved and forwarded to the Standards of Conduct Counselor or Standards of Conduct Committee (through the Standards of Conduct Counselor). The Standards of Conduct Counselor will notify the processing center of the final Agency decision and the processing center will notify the lender accordingly.
- e. Other Government Employees:

The Applicant must submit a statement of no objection from the pertinent department or military service ethics officer if its sole proprietor, general partner, managing member, officer, director, or stockholder with a 10% or more interest, or a Household Member of such individual, is an employee of another department or agency of the Federal Government (Executive Branch) in a grade of at least GS-13 (or its equivalent) or higher. Lenders must submit the statement to SNOMemos@sba.gov and receive written clearance from SBA prior to submitting the application to LGPC (non-delegated) or processing the application under their delegated authority. Non-delegated Lenders must submit a copy of SBA’s written clearance with the application to the LGPC. ([13 CFR § 105.301\(a\)](#))

4. Forward Commitments:

A forward commitment exists when a Lender issues a commitment to a builder or developer to finance future sales of real estate. The SBA will not guarantee loans made by the Lender to small businesses to purchase such real estate. This is a potential conflict of interest for the Lender because of its predisposition to make SBA loans in order to honor their prior agreement with the builder or developer. Such loans are ineligible for SBA’s guarantee regardless of whether the Lender gets a fee for issuing the commitment.

5. Advertising of Relationship with SBA ([13 CFR §120.413](#)):

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- a. General Advertising. A Lender may publicize its relationship with SBA, including identifying itself as an SBA participating Lender, by placing the appropriate SBA-approved decal on the window of the lending institution or placing identical decal icons on its website. A Lender may not use the SBA logo in any manner in any advertisement, brochure, publication or promotional piece, or state or imply that the Lender or its Borrowers will receive any preferential treatment by SBA.
 - b. Use of Window Decals. The SBA-approved Lender decal may only be used to inform the public of the Lender's relationship with SBA and may not be used to promote, or appear to promote, the Lender's non-SBA products or services. Window decals are available from SBA Field Offices.
 - c. Use of Decal Icons on Website. The SBA-approved Lender decal icon is an exact replica of the window decal and may only be used to inform the public of the Lender's relationship with SBA and may not be used to promote, or appear to promote, the Lender's non-SBA products or services.
 - i. When using the SBA-approved Lender decal icon on a website, the Lender must include the following public statement: "Approved to offer SBA loan products under SBA's Preferred Lender Program" (or SBA Express Program, etc.).
 - ii. The Lender decal icon may be downloaded from and must be used in accordance with SBA's Lender decal guidelines found at <https://www.sba.gov/document/support-object-object-advertising-your-sba-relationship>.
 - d. Oversight. A Lender's usage of the window/building decal and any identical decal icons on its website may be reviewed as part of the Agency's Lender oversight activities.
6. Record Retention:
- a. Lenders must retain the original Note; Guaranty(ies); Security/Collateral documents such as mortgages, deeds of trust, security agreements; SBA application (SBA Form 1919, SBA Form 1920 and any SBA Forms 912); and SBA Form(s) 159. Hard-copy records of those documents requiring original signatures must be retained unless the original signature was made electronically in accordance with applicable standards governing electronic signatures. (See Appendix 8 for guidance on electronic signature standards.)
 - b. Federally-regulated Lenders must comply with the requirements of their FFIR's requirements governing how long to retain documentation.
 - c. SBA Supervised Lenders must comply with 13 CFR § 120.461.

III. HOW SBA OVERSEES 7(A) LENDERS

SBA oversees 7(a) Lenders through:

A. Loan and Lender Monitoring System (L/LMS):

1. L/LMS is an internal SBA data system that includes the use of historical data and predictive small business credit scoring. All SBA 7(a) loans with an outstanding balance are credit-scored quarterly. Data on 7(a) loans are aggregated, analyzed and evaluated to assess the credit quality of each

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individual 7(a) Lender's portfolio of SBA-guaranteed loans. SBA uses this information to monitor the performance of 7(a) Lenders individually and in comparison to their peers.

2. Using SBA's L/LMS system, SBA assigns all 7(a) Lenders a composite rating. The composite rating reflects SBA's assessment of the potential risk to the government of that 7(a) Lender's SBA portfolio. The specific performance factors which comprise the composite rating are published from time to time by SBA's Office of Credit Risk Management (OCRM). In general, these factors reflect both historical 7(a) Lender performance and projected future performance. SBA performs quarterly recalculations on the common factors for each 7(a) Lender, so 7(a) Lenders' composite risk ratings are updated on a quarterly basis.
3. SBA has established peer groups to minimize the differences that could result from changes in loan performance for portfolios of different sizes. The peer groups are based upon gross outstanding SBA loan dollars. For 7(a) Lenders, they are:
 - a. \$350,000,000 or more
 - b. \$100,000,000 - \$349,999,999
 - c. \$10,000,000 - \$99,999,999
 - d. \$4,000,000 - \$9,999,999
 - e. \$1,000,000 - \$3,999,999
 - f. \$0 - \$999,999B (active with at least one loan disbursed in past 12 months)
 - g. \$0 - \$999,999A (inactive with no loans disbursed within the past 12 months)
4. SBA assigns a composite rating of "1" to "5" to each 7(a) Lender generally based upon its portfolio performance, as reported in L/LMS. A rating of "1" indicates strong portfolio performance, the least risk, and requires the lowest degree of SBA management oversight (relative to other 7(a) Lenders in its peer group). A "5" rating indicates weak portfolio performance, the highest risk, and requires the highest degree of SBA management oversight. (See [13 CFR § 120.10](#) (definitions related to Risk Rating); [13 CFR § 120.1015](#) (Risk Rating System); [75 FR 9257, March 1, 2010](#); [75 FR 13145, March 18, 2010](#); and [79 FR 24053, April 29, 2014](#) (Risk Rating Notices)) As set forth in the Risk Rating Notices, SBA may take into account rapid growth that may skew metrics and other factors in considering a Lender's risk.

B. Lender Portal:

1. SBA communicates Lender performance to individual 7(a) Lenders through the use of SBA's Lender Portal (Portal). The Portal allows a 7(a) Lender to view its own quarterly performance data, including, but not limited to, its current composite risk rating, peer and portfolio averages, and its PARRiS score (as discussed below). Portal data includes both summary performance and credit quality data. Summary performance data is largely derived from data that 7(a) Lenders provide to SBA through [SBA Form 1502](#) and 172 Reports; therefore, 7(a) Lenders bear much of the responsibility for ensuring data accuracy. If a 7(a) Lender reviews its performance components and finds a discrepancy with its records, the 7(a) Lender should contact OCRM.
2. SBA 7(a) Lenders with at least 1 outstanding SBA loan may apply for the Portal access. Currently, SBA issues only one Portal user account per 7(a) Lender. Submission of initial requests for a Portal user account must be submitted to SBA's OCRM, and must include the following information:

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- a. Request must be made by a senior officer with proper authority of the 7(a) Lender (Senior Vice President or higher);
- b. Request must be sent via regular or overnight mail to the SBA's OCRM at 409 Third Street SW, Washington DC 20416, ATTN: Director, Office of Credit Risk Management;
- c. Request must be made using the 7(a) Lender's stationery;
- d. Request must include the user's business card;
- e. The stationery and business card should include the 7(a) Lender's name and address;
- f. The request should include the following data:
 - i. SBA FIRS ID Number(s);
 - ii. Account user's name and title;
 - iii. Account user's mailing address, telephone number and email address at the 7(a) Lender;
 - iv. Requesting officer's name and title; and
 - v. Requesting officer's mailing address, telephone number and email address at the 7(a) Lender.
- g. Once SBA receives and approves the user's request, SBA will forward the approval to SBA's Portal contractor for issuance of a user account name and password. The Portal contractor will email the user his or her user name and password within approximately 2 weeks of account approval. The user can then access its data by logging into the SBA Lender Portal web page. Before accessing the Portal, Lenders must agree to the terms of a Confidentiality Agreement, which is found on the SBA Lender Portal web page.
- h. Lenders are responsible for complying with and maintaining the Portal user accounts and passwords as set forth in the Confidentiality Agreement on the Portal web page, and as published by SBA from time to time. Lenders are also responsible for timely informing SBA to terminate or transfer an account if the person to whom it was issued no longer holds that responsibility for the 7(a) Lender. Lenders must take full responsibility for protecting the confidentiality of the user password and the 7(a) Lender risk rating, PARRiS score, and confidential information and for ensuring the security of the data. See [13 CFR § 120.1060](#).

C. Monitoring and Reviews: (13 CFR §§ [120.1025](#) and [120.1050 - 1060](#))

L/LMS provides performance information that allows SBA to monitor and conduct reviews of all Lenders. L/LMS-related monitoring/reviews serve as the primary means of reviewing Lenders with less than \$10 million in gross outstanding SBA loan dollars although SBA may determine, in its discretion, to conduct other more in-depth reviews (e.g., Analytical, Targeted, Full, or Delegated Authority Renewal) of these Lenders. ("L/LMS-related" refers to the L/LMS reviews and the SBA Lender Profile Assessment (LPA) including the PARRiS Score.) SBA will contact the Lender if the review detects performance issues or trends requiring further discussion.

1. For Lenders with more than \$10 million in gross outstanding SBA loan dollars, L/LMS details historical and projected performance data:
 - a. For use in planning and conducting more in-depth reviews or examinations;

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- b. To assist in prioritizing more in-depth reviews or examinations; and
 - c. To monitor Lenders between the more in-depth reviews or examinations.
- 2. SBA's 7(a) risk-based reviews generally feature a composite risk measurement methodology and scoring guide, known as "PARRiS." PARRiS is an acronym for the specific risk areas or components that SBA reviews: Portfolio Performance; Asset Management; Regulatory Compliance; Risk Management; and Special Items.
- 3. Additionally, in accordance with [13 CFR § 120.1010](#), a Lender must allow SBA's authorized representatives, including representatives authorized by SBA's Inspector General, during normal business hours, access to its files to review, inspect and/or copy all records and documents relating to SBA-guaranteed loans or as requested for SBA oversight.
- 4. SBA may request reports on a case-by-case basis.
- 5. Additional information regarding reviews and examinations can be found in [13 CFR §§ 120.1050-1060](#), [SBA Policy Notice 5000-1332](#): Revised Risk-Based Review Protocol for SBA Operations of Federally Regulated 7(a) Lenders (December 29, 2014), [SBA Information Notice 5000-1397](#): Updated PARRiS Methodology for Oversight of SBA Operations of Federally Regulated 7(a) Lenders (November 15, 2016), [SBA Policy Notice 5000-1940](#): Revised Risk-Based Review/Examination Protocol for SBA Supervised Lenders (January 18, 2017), and SBA's [SOP 51 00](#).
- 6. Lender oversight fees. Lenders are required to pay SBA fees to cover the costs of examinations and reviews and, if assessed by SBA, other Lender oversight activities. ([13 CFR § 120.1070](#))
 - a. The fees may cover:
 - i. The cost of conducting L/LMS-related reviews/monitoring of a 7(a) Lender;
 - ii. The cost of conducting more in-depth reviews of a 7(a) Lender (e.g., Analytical, Targeted, and Full Reviews, Delegated Authority Reviews, Quarterly Condition and Certification of Capital Compliance Reviews (for SBA Supervised Lenders), Secondary Market Evaluations, and related review activities, such as corrective action assessments);
 - iii. The cost of conducting loan reviews (e.g., Secondary Market loan-by-loan reviews);
 - iv. The cost of conducting safety and soundness examinations of an SBA Supervised Lender (SBLCs and NFRLs); and
 - v. Any additional expenses that SBA incurs in carrying out Lender oversight activities (e.g., technical assistance and analytics to support the monitoring and review program, supervision and enforcement activity costs, salaries and travel expenses of SBA employees, and equipment expenses directly related to Lender oversight.
 - b. In general, where the costs that SBA incurs for a review, examination, monitoring, or other Lender oversight activity are specific to a particular 7(a) Lender, SBA will charge that Lender a fee for the actual costs of the oversight activity. For example, for most examinations or reviews conducted under a)ii and a)iv above, SBA will invoice each Lender for the amount owed following completion of the examination or review.

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- c. In general, where the costs that SBA incurs for the Lender oversight activity are not sufficiently specific to a particular Lender, SBA will assess a fee based on each 7(a) Lender's portion of the total dollar amount of SBA guaranties in SBA's total portfolio or in the relevant portfolio segment being reviewed or examined, to cover the costs of such activity. For these fees, such as the L/LMS related reviews/monitoring conducted under subparagraph a)i above and other Lender oversight activity expenses incurred under a)v above, SBA will invoice each Lender on an annual basis.
 - i. The invoice will state the charges, the date by which payment is due and the approved payment method(s).
 - ii. The payment due date will be no less than 30 calendar days from the invoice date.
 - iii. SBA may waive the fees assessed under this paragraph 5.c) for those Lenders owing less than a threshold amount if SBA determines that it is not cost effective to collect the fee.
- d. Payments that are not received by the due date shall be considered delinquent, and SBA will charge interest and other applicable charges and penalties as authorized by [31 U.S.C. 3717](#). A Lender's failure to pay any of the fee components described above, or to pay interest, charges and penalties that have been charged, may result in a decision to suspend or revoke a Lender's eligibility to participate in SBA's loan programs or participant's delegated authority or other remedy available under law. ([13 CFR § 120.1070](#))

D. Supervision and Enforcement:

An integral part of overseeing the 7(a) loan program is SBA's authority to supervise and take enforcement actions as necessary. For further guidance on Lender Supervision and Enforcement, see [SOP 50 53\(A\)](#).

E. Suspension or Revocation:

1. SBA may suspend or revoke the authority of a Lender to conduct 7(a) program activities, in accordance with [13 CFR §§ 120.1400-1600](#).
2. Examples of circumstances that may result in suspension or revocation under the above cited regulation include but are not limited to:
 - a. Failure to comply materially with any requirement imposed by Loan Program Requirements, including but not limited to Lender eligibility requirements and prudent lending requirements (SBA will consider the severity and frequency of violations among other factors);
 - b. Repeated failure to properly report on loan disbursements and status; or
 - c. Less Than Acceptable examination/review assessment or repeated Less Than Acceptable Risk Rating, the latter generally in conjunction with other grounds.
3. SBA will notify the Lender of a proposed suspension or revocation in accordance with [13 CFR § 120.1600](#). The Lender will be provided an opportunity to respond prior to final action.

F. Receiverships of NFRLs:

1. Upon SBA's determination that grounds for an enforcement action against a NFRL exist under 13 CFR § 120.1400, SBA may, pursuant to 13 CFR § 120.1500(c)(3), apply to a Federal court for the

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appointment of a receiver. Typically, SBA will use its receivership authority as a remedy of last resort. The appointment of a receiver is only one of several types of enforcement actions set forth in 13 CFR § 120.1500.

2. SBA will review the facts and circumstances of the enforcement action when deciding whether or not to seek the appointment of a receiver. SBA will also make a determination regarding the scope of the receiver's duties and powers, including whether the receivership will be limited to the NFRL's assets related to the SBA loan programs. In deciding whether to seek a receiver and in determining the scope of a receivership, SBA will consider the following:
 - a. The existence of fraud or false statements;
 - b. A NFRL's refusal to cooperate with SBA enforcement action instructions or orders;
 - c. A NFRL's insolvency (legal or equitable);
 - d. The size of the NFRL's SBA loan portfolio(s) in relation to other activities of the NFRL;
 - e. The dollar amount of any claims SBA may have against the NFRL; and/or
 - f. The existence of other non-SBA enforcement actions against the NFRL.
3. Under 13 CFR § 120.1400(a)(2), a NFRL that makes 7(a) guaranteed loans after October 20, 2017, has consented to SBA's right to seek a receivership in appropriate circumstances. As described in 50 10 5(J), such consent is deemed to apply only if the NFRL makes 7(a) loans on or after January 1, 2018. The NFRL's consent does not in any way preclude the NFRL from contesting whether or not SBA has established the grounds for seeking the remedy of receivership. A NFRL's consent to receivership as a remedy does not require SBA to seek the appointment of a receiver in any particular SBA enforcement action.

IV. DELEGATED AUTHORITY IN THE 7(A) LOAN PROGRAM

A. Delegated Authority Criteria:

1. In making its decision to grant or renew a delegated authority, SBA considers whether the Lender, as determined by SBA in its discretion:
 - a. Has the continuing ability to evaluate, process, close, disburse, service, liquidate and litigate SBA loans. This includes the ability to develop and analyze complete loan packages. SBA may consider the experience and capability of Lender's management and staff;
 - b. Has satisfactory SBA performance (as defined in [13 CFR § 120.410\(a\)\(2\)](#)). The Lender's Risk Rating, among other factors, will be considered in determining satisfactory SBA performance. Other factors may include, but are not limited to, review/examination assessments, historical performance measures (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA's mission);
 - c. Is in compliance with SBA Loan Program Requirements (i.e., [SBA Form 1502](#) reporting, timely payment of all fees to SBA);
 - d. Has completed, to SBA's satisfaction, all required corrective actions;
 - e. Is in good standing with SBA as defined in [13 CFR § 120.420\(f\)](#) (as determined by SBA in its discretion), and, as applicable, with its state regulator and is considered Satisfactory by its

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FFIR (as determined by SBA and based on, for example, information in published orders/agreements and call reports) ([13 CFR § 120.410\(e\)](#)):

- i. The Lender's written request to participate must include a written statement that to the best of its knowledge, the Lender has satisfactory: (a) financial condition (i.e., is deemed well-capitalized based on size of entity, has sufficient liquid assets, etc.); (b) small business credit administration policies, procedures, and practices that it continues to adhere to in its operations; and (c) small business servicing policies, procedures, and practices that it continues to adhere to in its operations. When reviewing good standing/Satisfactory status, SBA will look to see that a Lender does not have significant deficiencies or weaknesses in these areas. "Significant" may be evidenced by the number or seriousness of the deficiencies, as determined by SBA in its discretion. SBA will verify any good-standing/Satisfactory status statement where possible with public (e.g., Cease and Desist Orders and Call Reports) and/or non-public information from the Lender's primary and/or other regulators.
 - ii. In conjunction with this eligibility criteria, SBA reviews whether Lender is subject to any enforcement action, order or agreement with a regulator or the presence of other regulatory concerns as determined by SBA;
 - f. Is not subject to any SBA enforcement actions;
 - g. Has not received a major substantive objection from its lead SBA Field Office relating to the delegated authority criteria; and
 - h. Exhibits other risk/program integrity factors (i.e., has rapid growth; low SBA activity; SBA loan volume; Lender, an officer or director is under investigation or indictment, inadequate capital, inadequate governance or management).
2. Delegated authority decisions are made by the appropriate SBA official in accordance with Delegations of Authority, and are final.
 3. If delegated authority is approved or renewed, Lender must execute a Supplemental Guarantee Agreement, which will specify a term not to exceed 2 years. SBA may grant shorter renewals based on risk or any of the other delegated authority criteria. Lenders with less than 3 years of SBA lending experience will be limited to a term of 1 year or less.

B. Certified Lenders Program (CLP):

As CLP authority has been eliminated from [13 CFR Part 120](#), no new CLP loans may be made. However, any existing CLP loans must comply with applicable Loan Program Requirements, including but not limited to those set forth in [SOP 50 57](#).

C. Preferred Lenders Program (PLP) ([13 CFR § 120.450](#))

The most experienced Lenders may be designated as PLP Lenders and delegated the authority to process, close, service, and liquidate most SBA guaranteed loans without prior SBA review.

1. The PLP Lender:

PLP Lenders are authorized to make SBA guaranteed loans without prior SBA review of eligibility or creditworthiness. An SBA Loan Number is assigned by SBA upon notification by the PLP Lender

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of approval of the loan. In addition, they are expected to handle servicing and liquidation of all of their SBA loans with limited involvement of SBA.

2. Qualifications for Initial PLP Consideration:

The Lender must demonstrate to SBA's satisfaction that it:

- a. Has disbursed at least five (5) SBA loans within the past 24 months; and
- b. Meets the criteria for delegated authority set forth in Paragraph IV.A above.

3. Process to obtain PLP authority:

A Lender's initial request for PLP authority must be submitted electronically to D/OCRM or designee at 7aDeleAuthNomination@sba.gov.

A Lender requesting to reinstate or expand existing delegated authority must submit a request electronically to D/OCRM or designee at 7aRedelegationNominations@sba.gov.

- a. The Lender's request should include:
 - i. Legal name and address of Lender;
 - ii. Legal name of any holding company of Lender;
 - iii. Name, title, address, phone number, e-mail address and fax number for contact person at Lender;
 - iv. Lender's lead SBA Field Office (the SBA Field Office serving the area in which the Lender's headquarters is located);
 - v. A copy of the Lender's [SBA Form 750](#) and [SBA Form 750B](#), if applicable;
 - vi. If Lender was previously a PLP Lender, an explanation of why the Lender left the Preferred Lenders Program;
 - vii. A description of the Lender's history, organization, and management, including:
 - a) When the Lender was chartered; and
 - b) Any recent mergers or acquisitions;
 - viii. Personnel who will be in charge of PLP loans for the Lender, have PLP loan approval authority, and their experience with the Lender, in the industry, and with SBA loans, including any training they have received.
 - ix. Where and how PLP loans will be processed, closed, serviced and liquidated;
 - x. A good standing/Satisfactory statement (as described in paragraph IV.A.1.e. i. above).
- b. D/OCRM or designee will consider:
 - i. Any SBA Field Office concerns regarding the Lender;
 - ii. The processing, servicing and liquidation Centers' written opinion of Lender's ability to process, close, service and liquidate SBA loans, as applicable; and
 - iii. The Lender's commitment to SBA lending.
- c. D/OCRM or designee then informs the Lender of SBA's decision.

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- d. Upon approval, OCRM notifies the Lender and the SBA Field Office:
 - i. That the request for delegated authority is approved; and
 - ii. The term of the delegated authority (not to exceed 2 years). For Lenders with less than 3 years of SBA lending experience/data, the Agency may consider performance over the period of time that the Lender has been a participating Lender, but will limit the Lender's initial term of delegated authority to 1 year or less. Lenders that identify significant differences between the performance numbers developed by the Lender and those developed by SBA (not related to a lack of accurate [SBA Form 1502](#) reporting) should contact OCRM.
 - e. OCRM sends the Lender a Supplemental Guaranty Agreement, Preferred Lenders Program ([SBA Form 1347](#)) signed by the appropriate SBA official. The Lender must sign and return the SBA Form 1347 to OCRM before the Lender's PLP authority is effective. (Agreements must be signed and returned to OCRM within 30 days of receipt or a new application to the program will be required.)
 - f. OCRM sends the appropriate SBA Field Office a copy of the approval letter. OCRM will enter the effective term of the Lender's PLP authority on the SBA Partner Information Management System (PIMS). This is an essential step for Lenders processing PLP loans.
 - g. Decline of PLP application:

If the PLP application is declined, OCRM notifies the Lender and SBA Field Office with the reason(s) for decline. The Lender may re-apply for PLP authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for decline. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.
4. Process for Renewal of PLP Authority:
- a. OCRM automatically starts the renewal process just prior to the expiration of a Lender's PLP authority. OCRM asks for comments from the SBA Field Office and the SBA's processing, servicing and liquidation centers. The comments should pertain to the Lender's most recent PLP term and must include:
 - i. Whether they recommend renewal;
 - ii. If they do not recommend renewal, why not;
 - iii. Whether the Lender can process, close, service and liquidate SBA loans;
 - iv. Changes in Lender's organization or management;
 - v. Any recurring denial of liability or repair situations with the Lender;
 - vi. Reasons for any unfavorable loan volume or repurchase rate data;
 - vii. Identification of any areas of concern; and
 - viii. An explanation of any discussions with the Lender that may impact the PLP decision.
 - b. OCRM contacts the Lender to obtain a good standing/Satisfactory status statement.

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- c. OCRM gathers the information relevant to a Lender's renewal. OCRM performs an analysis, makes a decision and informs the Lender of SBA's decision.
- d. For renewal of its PLP authority, the Lender must demonstrate to SBA's satisfaction that it meets the criteria for delegated authority set forth in Paragraph IV.A.

5. Notification of Renewal:

OCRМ notifies the Lender and SBA Field Office that:

- a. The renewal is approved; and
- b. The term of the renewal.
- c. OCRM sends the Lender a new signed by OCRM on behalf of the appropriate SBA official. The Lender must sign and return the SBA Form 1347 to OCRM before the Lender's PLP renewal is effective.

6. If Renewal is Declined:

OCRМ notifies the Lender and SBA Field Office of the reason(s) for decline of the PLP renewal. The Lender may not make PLP loans after its PLP authority expires. The Lender may re-apply for PLP authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for decline. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

7. Temporary Extension of PLP Authority:

If a Lender's PLP authority is expiring and SBA has not completed the renewal process, OCRM may extend a Lender's PLP authority for a short, interim period as determined by the D/OCRМ.

8. Non-Renewal and Shortened Renewals:

- a. If SBA determines in its discretion that a Lender does not meet delegated authority criteria or increased supervision may be necessary, SBA may either not grant or renew delegated authority or may grant a shortened renewal period. See [SOP 50 53\(A\)](#), Chapter 3 on Increased Supervision.

9. Reinstatement:

If a Lender's PLP authority was revoked, declined or voluntarily terminated, the Lender may ask SBA to reinstate its PLP authority. However, the Lender must generally wait 6 months before requesting reinstatement and follow paragraph IV.C.3.) of this chapter.

10. PLP - Export Working Capital Program (EWCP) Authority:

- a. This program offers the opportunity for SBA 7(a) Lenders with experience making EWCP loans or who are participants in the Delegated Authority Lender Program of the Export-Import Bank to apply for PLP authority to underwrite EWCP loans. Lenders with PLP-EWCP authority are delegated the same level of authority to process, close, service, and liquidate EWCP loans as is granted to approved 7(a) Lenders with PLP authority.
- b. Application requests include the following elements:
 - i. Legal name and address of Lender;

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- ii. Address, city and state where Lender's EWCP underwriting will be performed;
 - iii. Name, title, telephone and fax numbers and e-mail address of the lending unit's primary contact for the EWCP program;
 - iv. A copy of the Lender's [SBA Form 750EX](#);
 - v. Identification of the USEAC offices the lending unit works through on EWCP loans;
 - vi. A description of the lending unit's experience in international trade lending, including its level of EWCP lending over the last 2 years, Export-Import Bank ("Ex-Im") lending activity over the same 2-year period, and identification of any form of delegated lender authority with Ex-Im Bank or other trade finance agencies;
 - vii. Identification of personnel in charge of EWCP lending and explanation of their experience in export trade finance for small concerns; and
 - viii. Documentation supporting the bank's delegation of authority to the contact person filing this PLP expansion request.
- c. Completed applications should be directed to the Office of International Trade ("OIT") at SBA. OIT staff will be responsible for screening and collecting information from the applicable SBA offices on the current regulatory authority of the Lender and the Lender's unit's capabilities as an EWCP participant. OIT will electronically forward its recommendation and the comments of the other offices to OCRM for a final decision. The Lender must demonstrate to SBA's satisfaction that it:
- i. Has a satisfactory history of providing trade finance to exporters (both the Lender and the Lender's loan officers); and
 - ii. Has been an active participant in the EWCP with SBA and/or with Ex-Im Bank for at least 6 consecutive months immediately prior to the SBA Field Office's recommendation and, if not an Ex-Im Bank delegated lender, has booked no fewer than three (3) SBA EWCP loans during the 24 months prior to application; and
 - iii. Meets the criteria for delegated authority in Paragraph IV.A. above.
- d. Lenders are notified of the final decision by written letter from OCRM with a copy to OIT and the appropriate SBA Field Office. If approved, OCRM will provide the Lender with [SBA Form 2310](#), "Supplemental Guaranty Agreement – Preferred Lender Program (PLP) for Export Working Capital Program (EWCP) Loans," which the Lender must execute and return to SBA before the Lender can submit any loan applications under its PLP-EWCP authority. (Agreements must be signed and returned within 30 days of receipt or a new application to the program will be required.)
- e. If the PLP-EWCP application is declined, OCRM notifies the Lender, OIT, and SBA Field Office with the reason(s) for decline. The Lender may re-apply for PLP-EWCP authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OIT and must show how it has overcome the reason(s) for decline. OIT will review the request, make a recommendation and send it to OCRM for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.
- f. All PLP-EWCP expansion approvals will be for a period not to exceed the existing term of

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the Lender's PLP authority. The succeeding PLP renewal of the Lender will include a section on the Lender's EWCP lending, with comment requests from OCRM directed to the OIT.

- g. Lenders that are participating in the Delegated Authority Lender Program of the Export-Import Bank of the United States (Ex-Im Bank) (or any successor Program) are eligible to participate in the PLP-EWCP program. Lenders should be aware that they must comply with [13 CFR § 120.410\(d\)](#), which requires SBA Lenders to "be supervised and examined by either a Federal Financial Institution Regulator or a state banking regulator satisfactory to SBA." Ex-Im Bank Delegated Authority Lenders must comply with the PLP-EWCP application procedures described above; however, such lenders are not required to have prior experience with SBA 7(a) lending and are deemed to be an active participant with Ex-Im Bank for purposes of the application.

11. Authority and Responsibilities:

a. Eligibility Requirements:

In addition to the SBA's primary business loan eligibility standards set forth in Subpart B, Chapter 2 of this SOP, the following additional restrictions apply to PLP Loans.

- i. Lenders may use PLP only for 7(a) loans. Lenders may not use PLP for any pilot program unless SBA authorizes use of PLP for the pilot.
- ii. The following types of loans are not eligible under PLP processing:
 - a) Disabled Assistance Loans (DAL);
 - b) Qualified Employee Trusts (ESOP) (loans made to an ESOP or 401K under [13 CFR §§ 120.350 through 120.354](#));
 - c) Cooperatives;
 - d) Pollution Control program;
 - e) International Trade Loans not secured by a first lien position on the assets being financed;
 - f) Applications Previously Submitted to LGPC for Processing. Once submitted to LGPC, an application withdrawn by the Lender, screened-out, or declined by LGPC may not be approved by any Lender under its PLP Authority. No Lender may knowingly submit an application for the same project under its PLP authority that was previously submitted through LGPC by a different Lender. E-Tran will not permit the submission of such an application under any Lender's PLP authority for a period of 12 months from the date of the withdrawal, screen-out, or decline of the application; and
 - g) Revolving credits are not eligible except under CAPLines and, if the Lender has authority from SBA to make PLP-EWCP loans, under the EWCP.
- iii. The same types of businesses that are not eligible under standard 7(a) also are not eligible under PLP. See Subpart B, Chapter 2.
- iv. Additional restrictions specific to PLP refinancing are found in ([13 CFR § 120.452](#)), and explained further in Subpart B, Chapter 2.

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b. PLP Lenders' Processing Responsibilities ([13 CFR § 120.452\(a\)](#)):

SBA's business loan eligibility requirements, credit policy, and procedures apply to PLP loans. The PLP Lender must stay informed on and must apply all of SBA's Loan Program Requirements.

i. Lender's Eligibility Review:

- a) A PLP Lender must analyze a PLP loan Applicant's eligibility in the same way that SBA analyzes eligibility for a regular 7(a) Applicant. The PLP Lender must keep in its loan file documentation supporting its eligibility analysis. SBA will not conduct an eligibility review prior to issuing a loan number. SBA may review the Lender's documentation supporting its eligibility determination as part of any guaranty purchase request or when conducting lender oversight activities.
- b) For a PLP loan, size of the Applicant is determined as of the date of the Lender's approval of the loan. A PLP Lender may accept as true the size information provided by the Applicant, unless credible evidence to the contrary is apparent.

ii. Credit Analysis:

SBA has authorized PLP Lenders to make the credit decision without prior SBA review. The Lender must perform a thorough and complete credit analysis of the applicant, establish that the loan is of such sound value as to reasonably assure repayment and document its analysis in the loan file. See Subpart B, Chapter 4 of this SOP for specific guidance on processing loan guaranty requests.

iii. The Authorization:

PLP Lenders draft the Authorization without SBA review and execute it on behalf of SBA. The Lender must make sure that all collateral and other requirements documented in the Lender's credit analysis are in each Authorization. The Lender also must include all SBA-required authorization provisions. See Subpart B, Chapter 5 of this SOP.

iv. Closing Requirements:

SBA closing requirements are the same for PLP loans as for non-delegated 7(a) loans. The same SBA forms are required. The Lender must obtain all required collateral positions and must meet all other required conditions before loan disbursement. SBA delegates to the PLP Lender responsibility for all pre-disbursement Authorization requirements in this SOP. The only actions that the Lender may not take on a PLP loan are those specifically reserved to SBA. See Subpart B, Chapter 7 of this SOP.

After closing the loan, the PLP Lender must submit electronically to SBA through E-Tran a copy of the executed Authorization. The Lender should not send SBA any other closing documentation, including disbursement information, except through the required periodic loan status reports ([SBA Form 1502](#)).

v. Servicing and Liquidation Responsibilities:

See [SOP 50 57](#) and [13 CFR § 120.453](#) and [13 CFR Part 120, Subpart E](#) for guidance.

c. Change of PLP Lender's Structure:

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- i. To determine the effect on a Lender's delegated authority due to a change in the Lender's structure, please see the chart below.
- ii. If a PLP Lender changes its structure or organization in any of the following ways, it must inform OCRM in writing:
 - a) The Lender is acquired by another lender;
 - b) The Lender is merged into another legal entity;
 - c) The Lender changes its name;
 - d) The Lender substantially changes the management of its SBA business;
 - e) The Lender substantially changes how it handles SBA loans; or
 - f) A regulatory agency takes over or closes the Lender.
- iii. An SBA Field Office that discovers any of the above circumstances also must immediately notify OCRM in writing.
- iv. Requests for New SBA Guaranty Agreements:
When necessary, the Lender may obtain:
 - a) A new [SBA Form 750](#) from the SBA Field Office; and
 - b) [New SBA Form 1347](#) from OCRM.

If a PLP Lender continues as the same legal entity that signed the SBA Form 1347 (PLP) and	Then
(1) The PLP Lender changes its name.	OCRM records the name change. The Lender's PLP authority is not changed. A new SBA Form 1347 (PLP) is not needed.
(2) The PLP Lender is acquired by another entity. The PLP Lender continues as a separate legal entity.	OCRM records the holding company name. The Lender's PLP authority is not changed. A new SBA Form 1347 (PLP) is not needed.
(3) The PLP Lender acquires another lender. The acquired lender does not continue as a separate legal entity.	The PLP Lender may continue to make PLP loans under its PLP authority unless there is a substantial change in its ability to make PLP loans.
(4) The PLP Lender acquires another lender. The acquired lender continues as a separate legal entity.	The acquired lender may not make PLP loans. The acquired lender may apply for PLP authority.

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If a PLP Lender continues as the same legal entity that signed the SBA Form 1347 (PLP) and	Then
(5) The PLP Lender is closed or taken over by a regulatory authority.	The Lender's PLP authority automatically terminates and the Lender must cooperate with SBA to transfer responsibility for servicing and liquidating its SBA portfolio. OCRM notifies the Lender, SBA Field Office(s) and appropriate Centers that the Lender may not make any new loans.
(6) The PLPLender changes its operations so much that it cannot show that it handles SBA loans appropriately.	SBA will not renew the Lender's PLP authority or will suspend or revoke the lender's PLP authority.
If a PLP Lender does not continue as the legal entity that executed the SBA Forms 1347 (PLP) and	Then
(1) The PLP Lender is merged into a non-PLP Lender. The original PLP Lender's SBA operations are unchanged.	The original PLP Lender no longer has the authority to make PLP loans. The surviving lender may apply for PLP authority and execute a PLP agreement.
(2) The PLP Lender is merged into another PLP Lender.	The original PLP Lender no longer has the authority to make PLP loans under its agreements with SBA. However, PLP loans may be made under the surviving PLP Lender's agreements and the surviving PLP Lender is responsible for servicing and liquidating the acquired SBA loan portfolio.
(3) The PLP Lender is dissolved. It does not merge into another lender.	PLP authority terminates automatically and the Lender must cooperate with SBA to transfer responsibility for servicing and liquidating its SBA portfolio. OCRM notifies the Lender, SBA Field Office(s) and appropriate Centers that the Lender may not make any new loans.

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c) Monitoring and reviews:

See Paragraph III.A through C of this Chapter for further information on monitoring and reviews.

d) Supervision and enforcement:

See Paragraph III.D of this Chapter for further information on supervision and enforcement.

e) Suspension and revocation:

SBA may suspend or revoke a Lender's PLP authority in accordance with [13 CFR §§ 120.1400-1600](#).

D. SBA Express Program:

1. SBA Express was established as a permanent SBA program under P.L.108-447 and signed into law on December 8, 2004. The program reduces the number of government mandated forms and procedures, streamlines the processing and reduces the cost of smaller, less complex SBA loans. The program allows Lenders to utilize, to the maximum extent practicable, their respective loan analyses, procedures, and documentation. In return for the expanded authority and autonomy provided by the program, Lenders agree to accept a maximum SBA guaranty of 50 percent.

2. The SBA Express Lender:

To the maximum extent practicable, SBA Express Lenders may use their own forms, internal credit memoranda, notes, collateral documents, and servicing and liquidation documentation. In using their documents and procedures, Lenders must follow their established and proven internal procedures used for their similarly sized non-SBA guaranteed commercial loans. See Subpart B, Chapter 6 for a listing of the forms SBA requires for SBA Express.

3. Qualifications for Initial SBA Express Lender Authority:

- a. An existing SBA Lender must demonstrate to SBA's satisfaction that it meets the criteria for delegated authority set forth in Paragraph IV.A. above.
- b. For SBA Lenders with less than 3 years of SBA lending experience/data, the Agency may consider performance over the period of time the Lender has been an SBA Lender, but will limit the Lender's initial term of participation to 1 year or less. Lenders that identify significant differences between the performance numbers developed by the Lender and those developed by SBA (not related to a lack of accurate [SBA Form 1502](#) reporting) may contact OCRM.

c. Lenders that do not currently participate with SBA:

In addition to meeting the Agency's Lender requirements as set forth in paragraph II.C. of this chapter, a lender that does not currently participate with SBA also must demonstrate to SBA's satisfaction that it:

- i. Is in good standing or considered Satisfactory by its state/FFIR, as applicable. The Lender's written request to participate must include a written statement that to the best of its knowledge, the Lender has satisfactory: i) financial condition (e.g., capital and liquidity); ii) small business credit administration policies, procedures, and practices

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that it continues to adhere to in its operations; and iii) small business servicing policies, procedures, and practices that it continues to adhere to in its operations. When reviewing good standing/Satisfactory status, SBA will look to see that a Lender does not have significant deficiencies or weaknesses in these areas. “Significance” may be evidenced by the number or seriousness of the deficiencies, as determined by SBA in its discretion. SBA will verify any good standing/Satisfactory status statement where possible with public (e.g., Cease and Desist Orders and Call Reports) and/or non-public information from the Lender’s primary and/or other regulators.

- ii. Has at least 20 commercial or business loans for \$350,000 or less at its most recent fiscal year end;
- iii. Ensures its primary SBA loan personnel have received appropriate training on SBA’s policies and procedures (such training could include SBA Field Office training and/or trade association training that adequately addresses SBA’s regulations and Standard Operating Procedures, including SBA’s loan processing, servicing, and liquidation requirements); and
- iv. Has no major substantive objections from the D/OCRM (e.g., relating to risk or program integrity).

4. Process to become an SBA Express Lender:

- a. A Lender’s initial request for delegated authority must be sent electronically to D/OCRM or designee at 7aDeleAuthNomination@sba.gov.

A Lender requesting to reinstate or expand existing delegated authority must submit a request electronically to D/OCRM or designee at 7aRedelegationNominations@sba.gov.

- b. As noted above, lenders not currently participating with the SBA must meet the Agency’s Lender requirements as set forth in paragraph II.C. of this chapter and must become an approved SBA Lender before participating in SBA Express. (An application for SBA Express authority may be made simultaneously with the application for SBA Lender authority.)
- c. OCRM gathers the information relevant to a Lender’s participation request. OCRM performs an analysis, makes the final determination, and notifies the Lender and SBA Field Office(s) of SBA’s decision.
- d. SBA may limit a new SBA Lender to a yearly maximum of \$25 million of SBA Express in its first year of participation.

5. Supplemental Guaranty Agreement:

- a. If the Lender’s request for SBA Express authority is approved, OCRM notifies the Lender of the decision and sends the Lender an SBA Express [SBA Form 2424](#), “Supplemental Loan Guaranty Agreement SBA Express Program” Agreement to sign and return. OCRM also sends the Lender instructions for submitting SBA Express applications.
- b. The Lender must sign and return the agreement to OCRM before the Lender’s SBA Express authority is effective. (Agreements must be signed and returned to the Center within 30 days of receipt or a new application to the program will be required.)

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- c. If the Lender is a PLP Lender, the term of its SBA Express authority, when possible, will be tied to the Lender's remaining PLP term.
- d. Lenders not currently participating in SBA's loan programs that are approved for SBA Express will be limited to an initial SBA Express term of 1 year.

6. Decline of SBA Express Authority:

If SBA declines a request for nomination for SBA Express authority, OCRM notifies the Lender and SBA Field Office of the reason(s) for decline of the request. The Lender may re-apply for SBA Express authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for decline. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

7. Renewals of SBA Express Authority:

- a. OCRM will automatically start the renewal process a few months prior to the expiration of a Lender's SBA Express authority. OCRM contacts the Lender to obtain a current statement of Satisfactory status (as described in paragraph 3 above).
- b. OCRM will also contact the Lender's SBA Field Office and the SBA's processing, servicing and liquidation Centers. The comments of those offices should pertain to the Lender's most recent SBA Express term and must include:
 - i. Whether renewal is recommended;
 - ii. If renewal is not recommended, why not;
 - iii. Whether the Lender can effectively process, close, service and liquidate SBA loans;
 - iv. Changes in Lender's organization or management;
 - v. Any recurring denial of liability or repair situations with the Lender;
 - vi. Reasons for any unfavorable loan volume or repurchase rate data;
 - vii. Identification of any areas of concern; and
 - viii. An explanation of any discussions with the Lender that may impact the SBA Express decision.
- c. OCRM gathers the information relevant to a Lender's renewal. OCRM performs an analysis, makes a recommendation and sends it to the appropriate SBA official who makes a decision and notifies OCRM. OCRM then informs the Lender of SBA's decision.
- d. Lenders that have participated in SBA Express for 2 years or more may be renewed in the program for a term up to 2 years, but SBA may renew for less than 2 years if Lender or program circumstances warrant. Lenders participating in SBA Express for less than 2 years may be renewed in SBA Express for an additional year and may be renewed for up to 2 years thereafter.
- e. For renewal of a Lender's SBA Express authority and to determine its renewal term for SBA Express, the Lender must demonstrate to SBA's satisfaction that it meets the criteria for delegated authority in Paragraph IV.A. above.

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- f. OCRM notifies the Lender of SBA's decision and, if the renewal is approved, OCRM sends the Lender a new SBA Express Supplemental Guaranty Agreement to sign.
 - g. The Lender must sign and return the agreement to OCRM before the Lender's SBA Express renewal is effective. (Agreements must be signed and returned to OCRM within 30 days of receipt or a new application to the program will be required.)
 - h. If the renewal is declined, the Lender will be notified of the reason(s) for the decline, and it may not make SBA Express loans after its SBA Express authority expires. The Lender may re-apply when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for denial. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.
 - i. If a Lender's SBA Express authority was revoked, declined or voluntarily terminated, the Lender may ask SBA to reinstate its SBA Express authority. However, the Lender must follow paragraph C.4 of this section.
8. Authority and Responsibilities:
- a. SBA Express Lenders may make SBA Express loans in any area of the country.
 - b. SBA Express Lenders must apply and comply with all of SBA's Loan Program Requirements.
 - c. Eligibility Requirements: In addition to the SBA's primary business loan eligibility standards set forth in Subpart B, Chapter 2 of this SOP, the following restrictions apply to SBA Express loans.
 - i. Lenders may not use SBA Express for any pilot program unless SBA authorizes use of SBA Express for the pilot.
 - ii. The following types of loans are not eligible under SBA Express processing:
 - a) Disabled Assistance Loans (DAL);
 - b) Qualified Employee Trusts (ESOP) (loans made to an ESOP or 401k under [13 CFR §§ 120.350](#) through 120.354);
 - c) Cooperatives;
 - d) Pollution Control program; and
 - e) CAPLines program.
 - f) Applications Previously Submitted to LGPC for Processing. Once submitted to LGPC, an application withdrawn by the Lender, screened-out, or declined by LGPC may not be approved by any Lender under its SBA Express Authority. No Lender may knowingly submit an application for the same project under SBA Express that was previously submitted by a different Lender. E-Tran will not permit the submission of such an application under any Lender's SBA Express authority for a period of 12 months from the date of withdrawal, screen-out, or decline of the application.
 - g) An application that did not receive an acceptable credit score under 7(a) Small

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Loan procedures may be withdrawn prior to submission through E-Tran or SBA One and may be processed under SBA Express. See Subpart B, Chapters 4 and 6 of this SOP.

- d. SBA Express Lender's Processing Responsibilities:
 - i. Lender's Eligibility Review:
 - a) SBA Express is a streamlined program, so complex or ambiguous eligibility issues should be processed using standard 7(a) procedures rather than through SBA Express. SBA grants SBA Express Lenders increased responsibility for screening applicants and loans for SBA eligibility. SBA Express Lenders must be fully familiar with SBA's eligibility requirements as set forth in the SBA Loan Program Requirements and must screen all SBA Express Applicants and loans to ensure they meet those requirements.
 - b) Lenders may rely, in many instances, on certifications provided by the Applicant, several of which are included in the SBA Express application documents. In the case of size, the Lender may rely on information provided by the Applicant at the date of application, unless the Lender has credible evidence to the contrary.
 - c) Certain eligibility issues require additional lender review and/or verification. Lenders must follow all standard 7(a) eligibility requirements and maintain appropriate documentation supporting their eligibility screening in the loan file.
 - d) Lenders must carefully review and screen SBA Express Applicants and loans to ensure they meet SBA's eligibility requirements before transmitting the SBA Express guaranty request and supplemental information via E-Tran.
 - e) Lenders must ensure all required forms/information are obtained, complete, and properly executed. Appropriate documentation must be maintained, including adequate information to support the eligibility of the Applicant and the loan, in the Lender's loan file.
 - ii. Credit Analysis:
 - a) SBA has authorized SBA Express Lenders to make the credit decision without prior SBA review. The credit analysis must demonstrate that there is a reasonable assurance of repayment. The Lender is required to use appropriate, prudent and generally accepted industry credit analysis processes and procedures (which may include credit scoring), and these procedures must be consistent with those used for its similarly sized non-SBA guaranteed commercial loans. Lenders that do not use credit scoring for their similarly sized non-SBA guaranteed commercial loans may not use credit scoring for SBA Express. Lenders must validate (and document) with appropriate statistical methodologies that their credit analysis procedures are predictive of loan performance, and they must provide that documentation to SBA upon request. SBLCs are required to provide credit scoring model validation to SBA on an annual basis. In addition, the credit scoring results must be documented in each loan file and available for SBA review.

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- b) Lenders must not make an SBA Express loan which would be inconsistent with SBA's "credit not available elsewhere" standard (see Subpart B, Chapter 2 of this SOP), i.e., Lenders must not make an SBA-guaranteed loan that would be available on reasonable terms from non-Federal, non-State, or non-local government sources, including from the Lender, without an SBA guaranty.
- c) The credit decision, including how much to factor in a past bankruptcy or whether to require an equity injection, is left to the business judgment of the Lender. Also, if the Lender requires an equity injection and, as part of its standard processes for non-SBA guaranteed loans verifies the equity injection, it must do so for SBA Express loans. While the credit decision is left to the business judgment of the Lender, early loan defaults will be reviewed by SBA pursuant to [SOP 50 57](#).

iii. Application Documents and Authorization:

- a) After the loan is closed, the Lender must continue to apprise SBA of certain critical performance data as well as changes in certain basic Borrower information, such as trade name and address. See Subpart B, Chapters 7 and 8 of this SOP.
- b) The Lender completes the SBA Express Authorization without SBA review and signs it on behalf of SBA. See Subpart B, Chapter 5 of this SOP.

e. Closing, Servicing and Liquidation:

The SBA Express Lender must close, service, and liquidate its SBA Express loans using the same reasonable and prudent practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans.

9. Monitoring and reviews:

SBA uses the L/LMS system to assess SBA Express Lenders quarterly through the composite risk rating. In addition, those SBA Express Lenders with outstanding SBA balances of \$10 million or more are also reviewed in accordance with [SOP 51 00](#). See Paragraph III.A through C of this Chapter for further information on monitoring and reviews.

10. Supervision and enforcement:

See Paragraph III.D of this Chapter for further information on supervision and enforcement.

11. Suspension or revocation:

See Paragraph III.E of this Chapter for further information on suspension and revocation.

E. Export Express Program:

- 1. The Export Express Program is designed to help SBA meet the export financing needs of small businesses too small to be effectively met by existing SBA export loan guaranty programs. It is generally subject to the same loan processing, making, closing, servicing, and liquidation requirements as well as the same maturity terms, interest rates, and applicable fees as the SBA Express Loan Program. Any differences between the Export Express requirements are set forth in the appropriate section of this SOP. (For example, certain uses of loan proceeds are allowed under Export Express that are not allowed under SBA's other lending programs. See Subpart B, Chapter 2

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of this SOP.)

2. Becoming an Export Express Lender:

- a. Lenders must have a signed Export Express Supplemental Guaranty Agreement to make Export Express loans.
- b. The procedures for receiving Export Express authority are different based on the Lender's existing authority:

i. Active SBA Express Lenders:

Lenders that currently have SBA Express authority that would like to make Export Express loans must submit a request to SBA. The request should be submitted to the Lender's local SBA Field Office or U.S. Export Assistance Center (USEAC). These offices should submit the Lender's request to the OCRM, at 7aRedelegationNomination@sba.gov. OCRM will send the Lender the Export Express Supplemental Guaranty Agreement (Agreement), with a copy of the approval letter to OIT, and the Lender will have 30 days to execute and return the Agreement to OCRM.

ii. Existing 7(a) Lender that Does Not Participate in the SBA Express Program:

An existing 7(a) Lender that would like to participate in the Export Express Program must submit a request to its local SBA Field Office or U.S. Export Assistance Center (USEAC). These offices should submit the request to OCRM at 7aDeleAuthNomination@sba.gov. OCRM will contact the local SBA USEAC for comments and process the request in accordance with the procedures and process for the SBA Express Program, as described in Paragraph IV.C.4. above. Lenders can request SBA Express and Export Express authority simultaneously, but are not required to do so. OCRM will send the Lender the Export Express Supplemental Guaranty Agreement, with a copy of the approval letter to OIT, and the Lender will have 30 days to execute and return the Agreement to OCRM.

c. To retain or renew Export Express authority, SBA Express Lenders must:

- i. Effectively process, make, close, service, and liquidate Export Express loans;
 - ii. Remain in compliance with SBA Loan Program Requirements;
 - iii. Have received no major substantive objections regarding renewal from the Field Office(s) covering the territory where the Lender generates significant numbers of Export Express loans; and
 - iv. Received acceptable review results on the Export Express portion of any SBA-administered Lender reviews.
- d. SBA will generally grant Lenders Export Express loan authority for a term that coincides with the Lender's SBA Express term, unless the D/OCRM determines a shorter term is appropriate. The maximum term for all Export Express Lenders is 2 years. For 7(a) Lenders who have not participated with SBA previously, the term may be less than 2 years at the discretion of the D/OCRM.

3. Monitoring and reviews:

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SBA uses the L/LMS system to assess Export Express Lenders quarterly through the composite risk rating and other performance metrics. In addition, those Lenders with outstanding SBA balances of \$10 million or more may also receive more in-depth reviews. See Paragraph III.A through C of this Chapter for further information on monitoring and reviews.

4. Supervision and enforcement:

See Paragraph III.D of this Chapter for further information on supervision and enforcement.

5. Suspension or revocation:

See Paragraph III.E of this Chapter for further information on suspension and revocation.

F. Export Working Capital Program (EWCP):

To participate in the Export Working Capital Program (EWCP):

1. An existing SBA Lender may contact the local United States Export Assistance Center (USEAC) or the local SBA Field Office to request authority to participate in the EWCP. (A complete listing of USEAC locations and personnel may be found at <https://www.sba.gov/tools/local-assistance/eac>.) The USEAC or Field Office staff will provide the Lender with [SBA Form 750EX](#), "Supplemental Guarantee Agreement Export Working Capital Program," which the Lender must execute and return to the USEAC.
2. Non-SBA lenders must be approved by SBA to participate in the 7(a) loan guaranty program before they can participate in EWCP. Such lenders may also contact the local USEAC or local SBA Field Office to request authority to participate in SBA lending. If the lender meets the criteria set forth above for 7(a) Lenders, the USEAC or Field Office staff will provide the lender with [SBA Form 750](#) and/or [SBA Form 750B](#), as appropriate, and [SBA Form 750EX](#), which the lender must execute and return to the USEAC.
3. The Regional Manager of SBA's Export Solutions Group located at each USEAC will consult, advise and train Lenders and small business exporters on the procedures and benefits of SBA's EWCP.
4. To request authority to participate in the Preferred Lender Program (PLP) for EWCP, see paragraph IV.C.10 of this Chapter.



SBA 7(a) Borrower Information Form
For use with all 7(a) Programs

OMB Control No.: 3245-0348

Expiration Date: 07/31/2020

Purpose of this form:

The purpose of this form is to collect information about the Small Business Applicant ("Applicant") and its principals, the loan request, indebtedness, information about current or previous government financing, and certain other topics. The information also facilitates background checks as authorized by section 7(a)(1)(B) of the Small Business Act, 15 U.S.C. 636(a)(1)(B). This form is to be completed by the Applicant and all individuals identified below and **submitted to your SBA Participating Lender**. Submission of the requested information is required for SBA or the Lender to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

This form is divided into two sections. Section I requests information about the Small Business Applicant and must be completed in its entirety, signed and dated by an authorized representative of the Small Business Applicant that is requesting a business loan. *A separate Section I is required to be completed and signed for each co-applicant (e.g. "Eligible Passive Company (EPC)" or "Operating Company (OC)").*

Section II of this form requests information about each of the Small Business Applicant's principals. This section must be completed in its entirety, signed and dated by the following:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm; or any partner that is involved in management of the applicant business;
- For a corporation, all owners of 20% or more of the corporation, and each officer and director;
- For limited liability companies, all members owning 20% or more of the company, each officer, director, and managing member;
- Any Person hired by the business to manage day-to-day operations ("key employee"); and
- Any Trustor (if the Small Business Applicant is owned by a trust).

All parties listed above are considered "Associates" of the Small Business Applicant as defined in 13 CFR § 120.10, as well as "principals." *A separate Section II is required to be completed and signed by each principal of the Small Business Applicant.*

For clarification regarding any of the questions, please contact your Lender.

Definitions:

1. **Affiliation** – Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls or has power to control both. For example, affiliation may arise through ownership, common management (including through a management agreement), or when there is an identity of interest between close relatives with identical, or substantially identical, business interests. The complete definition of "affiliation" is found at 13 CFR § 121.301(f).
2. **Close Relative** – Close Relative is a spouse; a parent; or a child or sibling, or the spouse of any such person.
3. **Eligible Passive Company ("EPC")** – is a small entity or trust which does not engage in regular and continuous business activity which leases real or personal property to an Operating Company for use in the Operating Company's business, and which complies with the conditions set forth in 13 CFR § 120.111.
4. **Household Member** – A "household member" of an SBA employee includes: a) the spouse of the SBA employee; b) the minor children of said individual; and c) the blood relatives of the employee, and the blood relatives of the employee's spouse who reside in the same place of abode as the employee. [13 CFR § 105.201(d)]
5. **Operating Company ("OC")** – is an eligible small business actively involved in conducting business operations now or about to be located on real property owned by an Eligible Passive Company, or using or about to use in its business operations personal property owned by an Eligible Passive Company.


SBA 7(a) Borrower Information Form
 (Section I: Applicant Business Information)

 OMB Control No.: 3245-0348
 Expiration Date: 07/31/2020

Applicant Business Legal Name <input type="checkbox"/> OC <input type="checkbox"/> EPC)		DBA or Tradename if applicable	
Applicant Business Primary Business Address		Applicant Business Tax ID	Applicant Business Phone () -
Project Address (if other than primary business address)		Primary Contact	Email Address

Amount of Loan Request: \$	# of existing employees employed by business? (including owners):	
	# of jobs to be created as a result of the loan? (including owners):	
	# of jobs that will be retained as a result of the loan that otherwise would have been lost? (including owners):	
Purpose of the loan:		

Small Business Applicant Ownership

List all proprietors, partners, officers, directors, and holders of outstanding stock. 100% of ownership must be reflected. Attach a separate sheet if necessary. Based on this form's instructions not all owners will need to complete the Principal Information section of this form.

Owner Name	Title	Ownership %	Address

Unless stated otherwise, if any of the questions below are answered "Yes," please provide details on a separate sheet.

#	Question	Yes	No
1	Are there co-applicants? (If "Yes," please complete a separate Section I: Applicant Business Information for each.)	<input type="checkbox"/>	<input type="checkbox"/>
2	Has an application for the requested loan ever been submitted to the SBA, a lender, or a Certified Development Company, in connection with any SBA program? (If "Yes," provide details on a separate sheet.)	<input type="checkbox"/>	<input type="checkbox"/>
3	Is the Small Business Applicant presently suspended, debarred, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency?	<input type="checkbox"/>	<input type="checkbox"/>
4	Does the Small Business Applicant operate under a Franchise/License/Distributor/Membership/Dealer/Jobber or other type of Agreement? (If "Yes," provide copies of your agreement(s) and any other relevant documents.)	<input type="checkbox"/>	<input type="checkbox"/>
5	Does the Small Business Applicant have any Affiliates? (If "Yes," please attach a listing of all Affiliates.)	<input type="checkbox"/>	<input type="checkbox"/>
6	Has the Small Business Applicant and/or its Affiliates ever filed for bankruptcy protection?	<input type="checkbox"/>	<input type="checkbox"/>
7	Is the Small Business Applicant and/or its Affiliates presently involved in any pending legal action?	<input type="checkbox"/>	<input type="checkbox"/>
8	Has the Small Business Applicant and/or its Affiliates ever obtained a direct or guaranteed loan from SBA or any other Federal agency or been a guarantor on such a loan?	<input type="checkbox"/>	<input type="checkbox"/>
	a) If you answered "Yes" to Question 8, is any of the financing currently delinquent?	<input type="checkbox"/>	<input type="checkbox"/>
	b) If you answered "Yes" to Question 8, did any of this financing ever default and cause a loss to the Government?	<input type="checkbox"/>	<input type="checkbox"/>
9	Are any of the Small Business Applicant's products and/or services exported or is there a plan to begin exporting as a result of this loan?	<input type="checkbox"/>	<input type="checkbox"/>
	If "Yes," provide the estimated total export sales this loan will support: \$		
10	Is the Small Business Applicant using (or intending to use) a packager, broker, accountant, lawyer, etc. to assist in (a) preparing the loan application or any related materials and/or (b) referring the loan to the lender?	<input type="checkbox"/>	<input type="checkbox"/>
11	Are any of the Small Business Applicant's revenues derived from gambling, loan packaging, or from the sale of products or services, or the presentation of any depiction, displays or live performances, of a prurient sexual nature?	<input type="checkbox"/>	<input type="checkbox"/>



#		True	False
	SBA may not provide financial assistance to an applicant where there is any appearance of a conflict of interest with an SBA or other governmental employee. With the exception of question 15, <u>if any of the questions below are answered "False," this application may not be submitted under any delegated processing method, but must be submitted to the LGPC for non-delegated processing.</u> Note: This does not mean that your loan will be denied, only that your lender will need to use different SBA procedures to process this loan. If the answer to question 15 is "no," the application may be processed under a lender's delegated authority only after the lender received clearance from SBA.		
12	No SBA employee, or the household member (see definition on page 1) of an SBA employee, is a sole proprietor, partner, officer, director, or stockholder with a 10 percent or more interest, of the Applicant. [13 CFR 105.204]	<input type="checkbox"/>	<input type="checkbox"/>
13	No former SBA employee, who has been separated from SBA for less than one year prior to the request for financial assistance, is an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor or debtor of the Applicant. [13 CFR 105.203]	<input type="checkbox"/>	<input type="checkbox"/>
14	No member of Congress, or an appointed official or employee of the legislative or judicial branch of the Federal Government, is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or household member of such individual, of the Applicant. [13 CFR 105.301(c)]	<input type="checkbox"/>	<input type="checkbox"/>
15	No Government employee having a grade of at least GS-13 or higher is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or a household member of such individual, of the Applicant. [13 CFR 105.301(a)]	<input type="checkbox"/>	<input type="checkbox"/>
16	No member or employee of a Small Business Advisory Council or a SCORE volunteer is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or a household member of such individual, of the Applicant. [13 CFR 105.302(a)]	<input type="checkbox"/>	<input type="checkbox"/>

By Signing Below, You Make the Following Representations and Certifications

REPRESENTATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order included in this form, and I understand them.
- I will comply, whenever applicable, with the hazard insurance, lead-based paint, civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.

ACCURACY CERTIFICATION

I certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that the penalty for knowingly making a false statement to obtain a guaranteed loan from SBA is that I may be fined up to \$250,000 and/or be put in jail for up to 5 years under 18 USC § 1001 and if false statements are submitted to a Federally insured institution, I may be fined up to \$1,000,000 and/or be put in jail for up to 30 years under 18 USC § 1014.

Signature of Authorized Representative of Applicant Business

Date

Print Name

Title



SBA 7(a) Borrower Information Form
(Section II: Principal Information)

OMB Control No.: 3245-0348

Expiration Date: 07/31/2020

Applicant Business:			
Principal Name	Social Security Number or Tax ID if an Entity	Date of Birth	Place of Birth (City & State or Foreign Country)
		/ /	
Home Address		Home Phone	% of Ownership in the Small Business Applicant
		() -	

Veteran/Gender/Race/Ethnicity data is collected for program reporting purposes only.
Disclosure is voluntary and has no bearing on the credit decision.

	Enter Response Below
Veteran	1=Non-Veteran; 2=Veteran; 3=Service-Disabled Veteran; 4=Spouse of Veteran; X=Not Disclosed
Gender	M=Male; F=Female; X=Not Disclosed
Race (more than 1 may be selected)	1=American Indian or Alaska Native; 2=Asian; 3=Black or African-American; 4=Native Hawaiian or Pacific Islander; 5=White; X=Not Disclosed
Ethnicity	H=Hispanic or Latino; N=Not Hispanic or Latino; X=Not Disclosed

Unless stated otherwise, if any of the questions below are answered "Yes," please provide details on a separate sheet.

#	Question	Yes	No
17	Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction? (If "Yes," the loan request is not eligible for SBA assistance.) Initial here to confirm your response to question 17 →	<input type="checkbox"/>	<input type="checkbox"/>
18	Have you been arrested in the last 6 months for any criminal offense? Initial here to confirm your response to question 18 →	<input type="checkbox"/>	<input type="checkbox"/>
19	For any criminal offense – other than a minor vehicle violation – have you ever: 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 19 →	<input type="checkbox"/>	<input type="checkbox"/>
If you answer "Yes" to questions 18 or 19, you must complete SBA Form 912, "Statement of Personal History." You will need to furnish details, including dates, location, fines, sentences, level of charge (whether misdemeanor or felony), dates of parole/probation, unpaid fines or penalties, name(s) under which charged, and any other pertinent information. If you answer "Yes" to question 19 and are currently on parole or probation, the loan request is not eligible for SBA assistance.			
20	Are you presently suspended, debarred, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency?	<input type="checkbox"/>	<input type="checkbox"/>
21	If you are a 50% or more owner of the Small Business Applicant, are you more than 60 days delinquent on any obligation to pay child support arising under an administrative order, court order, repayment agreement between the holder and a custodial parent, or repayment agreement between the holder and a state agency providing child support enforcement services.	<input type="checkbox"/>	<input type="checkbox"/>
22	<input type="checkbox"/> I am a U.S. Citizen <u>OR</u> <input type="checkbox"/> I have Lawful Permanent Resident status Registration Number: _____ <input type="checkbox"/> I am not a U.S. Citizen or Lawful Permanent Resident Country of Citizenship: _____ Initial here to confirm your responses to question 22 →		
23	Do you have any ownership in other businesses which would be defined as an Affiliate in the definition found on page 1? (If "Yes," attach a listing of all businesses and your ownership percentage or position in the business.)	<input type="checkbox"/>	<input type="checkbox"/>
24	Have you, or any business you controlled, ever filed for bankruptcy protection?	<input type="checkbox"/>	<input type="checkbox"/>
25	Are you, or any business you control, presently involved in any legal action (including divorce)?	<input type="checkbox"/>	<input type="checkbox"/>
26	Have you or any business owned or controlled by you ever obtained a direct or guaranteed loan from SBA or any other Federal agency or been a guarantor on such a loan? (This includes student loans.)	<input type="checkbox"/>	<input type="checkbox"/>
	(a) If you answered "Yes" to Question 26, is any of the financing currently delinquent?	<input type="checkbox"/>	<input type="checkbox"/>
	(b) If you answered "Yes" to Question 26, did any of this financing ever default and cause a loss to the Government? (If Yes to (a) or (b) above, please provide Lender with a written explanation.)	<input type="checkbox"/>	<input type="checkbox"/>



By Signing Below, You Make the Following Representations, Authorizations, and Certifications

REPRESENTATIONS AND AUTHORIZATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order and I understand them.
- I will comply, whenever applicable, with the hazard insurance, lead-based paint, civil rights or other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.

I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

ACCURACY CERTIFICATION

I certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that the penalty for knowingly making a false statement to obtain a guaranteed loan from SBA is that I may be fined up to \$250,000 and/or be put in jail for up to 5 years under 18 USC § 1001 and if false statements are submitted to a Federally insured institution, I may be fined up to \$1,000,000 and/or be put in jail for up to 30 years under 18 USC § 1014.

Signature

Date

Print Name/Title



SBA 7(a) Borrower Information Form
Statements Required by Law and Executive Order

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

Please read the following notices regarding use of federal financial assistance programs and then sign and date the certification.

SBA is required to withhold or limit financial assistance, to impose special conditions on approved loans, to provide special notices to applicants or borrowers and to require special reports and data from borrowers in order to comply with legislation passed by the Congress and Executive Orders issued by the President and by the provisions of various inter-agency agreements. SBA has issued regulations and procedures that implement these laws and executive orders. These are contained in Parts 112, 113, and 117 of Title 13 of the Code of Federal Regulations and in Standard Operating Procedures.

Privacy Act (5 U.S.C. 552a) -- Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. Disclosures of name and other personal identifiers are, however, required for a benefit, as SBA requires an individual seeking assistance from SBA to provide it with sufficient information for it to make a character determination. In determining whether an individual is of good character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act). Further, for all forms of assistance, SBA is authorized to make all investigations necessary to ensure that a person has not engaged in acts that violate or will violate the Act or the Small Business Investment Act, 15 USC Sections 634(b)(11) and 687(b)(a), respectively. For these purposes, you are asked to voluntarily provide your social security number to assist SBA in making a character determination and to distinguish you from other individuals with the same or similar name or other personal identifier.

Any person can request to see or get copies of any personal information that SBA has in his or her file when that file is retrieved by individual identifiers such as name or social security numbers. Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act.

The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks; only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) -- This is notice to you as required by the Right to Financial Privacy Act of 1978, of SBA's access rights to financial records held by financial institutions that are or have been doing business with you or your business, including any financial institutions participating in a loan or loan guaranty. The law provides that SBA shall have a right of access to your financial records in connection with its consideration or administration of assistance to you in the form of a Government guaranteed loan. SBA is required to provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records, after which no further certification is required for subsequent accesses. The law also provides that SBA's access rights continue for the term of any approved loan guaranty agreement. No further notice to you of SBA's access rights is required during the term of any such agreement. The law also authorizes SBA to transfer to another Government authority any financial records included in an application for a loan, or concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) -- This law provides, with some exceptions, that SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Flood Disaster Protection Act (42 U.S.C. 4011) -- Regulations have been issued by the Federal Insurance Administration (FIA) and by SBA implementing this Act and its amendments. These regulations prohibit SBA from making certain loans in an FIA designated floodplain unless Federal Flood insurance is purchased as a condition of the loan. Failure to maintain the required level of flood insurance makes the applicant ineligible for any financial assistance from SBA, including disaster assistance.

Executive Orders -- Floodplain Management and Wetland Protection (42 F.R. 26951 and 42 F.R. 26961) -- SBA discourages settlement in or development of a floodplain or a wetland. This statement is to notify all SBA loan applicants that such actions are hazardous to both life and property and should be avoided. The additional cost of flood preventive construction must be considered in addition to the possible loss of all assets and investments due to a future flood.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) -- This legislation authorizes the Occupational Safety and Health Administration in the Department of Labor to require businesses to modify facilities and procedures to protect employees or pay penalty fees. Businesses can be forced to cease operations or be prevented from starting operations in a new facility. Therefore, SBA may require additional information from an applicant to determine whether the business will be in compliance with OSHA regulations and allowed to operate its facility after the loan is approved and disbursed. Signing this form as an applicant is certification that the OSHA requirements that apply to the applicant business have been determined and that the applicant, to the best of its knowledge, is in compliance. Furthermore, applicant certifies that it will remain in compliance during the life of the loan.



Civil Rights Legislation (13 C.F.R. 112, 113, 117) -- All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. This includes making their goods and services available to handicapped clients or customers. All business borrowers will be required to display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) -- The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Executive Order 11738 -- Environmental Protection (38 F.R. 251621) -- The Executive Order charges SBA with administering its loan programs in a manner that will result in effective enforcement of the Clean Air Act, the Federal Water Pollution Act and other environment protection legislation.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) -- These laws require SBA to collect aggressively any loan payments which become delinquent. SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may take one or more of the following actions: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice or other attorneys for litigation, or (6) foreclose on collateral or take other action permitted in the loan instruments.

Immigration Reform and Control Act of 1986 (Pub. L. 99-603) -- If you are an alien who was in this country illegally since before January 1, 1982, you may have been granted lawful temporary resident status by the United States Immigration and Naturalization Service pursuant to the Immigration Reform and Control Act of 1986. For five years from the date you are granted such status, you are not eligible for financial assistance from the SBA in the form of a loan guaranty under Section 7(a) of the Small Business Act unless you are disabled or a Cuban or Haitian entrant. When you sign this document, you are making the certification that the Immigration Reform and Control Act of 1986 does not apply to you, or if it does apply, more than five years have elapsed since you have been granted lawful temporary resident status pursuant to such 1986 legislation.

Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821 et seq.) -- Borrowers using SBA funds for the construction or rehabilitation of a residential structure are prohibited from using lead-based paint (as defined in SBA regulations) on all interior surfaces, whether accessible or not, and exterior surfaces, such as stairs, decks, porches, railings, windows and doors, which are readily accessible to children under 7 years of age. A "residential structure" is any home, apartment, hotel, motel, orphanage, boarding school, dormitory, day care center, extended care facility, college or other school housing, hospital, group practice or community facility and all other residential or institutional structures where persons reside.

Executive Order 12549, Debarment and Suspension (2 CFR 180, adopted by reference in 2 CFR Part 2700 (SBA Debarment Regulations)) -- By submission of this loan application, you certify and acknowledge that neither you nor any Principals have within the past three years been: (a) debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a transaction by any Federal department or agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the Regulations; or (d) delinquent on any amounts due and owing to the U.S. Government or its agencies or instrumentalities as of the date of execution of this certification.

If you are unable to certify and acknowledge (a) through (d), you must obtain and attach a written statement of exception from SBA permitting participation in this loan. You further certify that you have not and will not knowingly enter into any agreement in connection with the goods and/or services purchased with the proceeds of this loan with any individual or entity that has been debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a Transaction. All capitalized terms have the meanings set forth in 2 C.F.R. Part 180.

NOTE: According to the Paperwork Reduction Act, you are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated burden for completing this form, including time for reviewing instructions, gathering data needed, and completing and reviewing the form is 8 minutes per response. Comments or questions on the burden estimates should be sent to U.S. Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Rm. 10202, Washington DC 20503.

PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF WASHINGTON

3 In Re:) Lead Case No.
4 ASTRIA HEALTH) 19-01189-11
5)
6) Adv. Pro. Case No.
7) 20-80016 - WLH
8)
9 V.)
10 UNITED STATES SMALL)
11 BUSINESS)
12 ADMINISTRATION and)
13 JOVITA CARRANZA, in)
14 her capacity as)
15 Administrator for)
16 the United States)
17 Small Business)
18 Administration,)
19 Defendants.)
20

21 VERBATIM TRANSCRIPTION OF PROCEEDINGS
22 From audio recording
23 June 3, 2020

24 TAKEN BEFORE THE HONORABLE WHITMAN HOLT

25 CERTIFIED COPY

26 TRANSCRIBED BY:
27 Andie Evered, CCR 2393

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1

APPEARANCES

2

3 Samuel Maizel, Sam Alberts, Attorneys for Debtor
4 Jim Day, Attorney for Debtor
5 Boris Mankovetskiy, Attorney for Creditors Committee
6 Ian Hammel, Attorney for UMB Bank, N.A., Lapis
7 Advisers, LP
8 Sarah Schrag, Attorneys for the Debtor
9 Jane Pearson, the Unsecured Creditors Committee
10 Geoffrey Miller for the plaintiffs
11 John Gallegos
12 Andrew Sherman
13 Gary Dyer
14 Mark Sacks
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1 PROCEEDINGS

2

3 THE COURT: Our next matter is on the
4 motion for temporary restraining order and request
5 for preliminary injunction in the matter of Astria
6 Health, et al versus the United States Small
7 Business Administration, and Jovita Carranza in
8 her capacity as administrator for the U.S. Small
9 Business Administration, case number 20-80016. On
10 the line we have Sam Alberts for the plaintiffs.

11 MR. ALBERTS: Good morning, Your Honor.

12 COURT CLERK: Jim Day also for the
13 plaintiffs.

14 MR. DAY: Good morning, Your Honor.

15 COURT CLERK: Sam Maizel for the
16 plaintiffs.

17 MR. MAIZEL: Good morning, Your Honor.

18 COURT CLERK: Jeffery Miller for the
19 plaintiffs.

20 MR. MILLER: Good morning, Your Honor.

21 COURT CLERK: Sarah Schrag for the
22 plaintiffs.

23 MS. SCHRAG: Good morning, Your Honor.

24 COURT CLERK: John Gallegos (phonetic).

25 Mr. GALLEGOS: Good morning, Your Honor.



1 COURT CLERK: Michael Lane for Astria
2 Health.

3 MR. LANE: Good morning, Your Honor.

4 COURT CLERK: We have William Cannel for
5 UMB Bank.

6 MR. CANNEL: Good morning, Your Honor.
7 We're not a party in this adversary proceeding.

8 COURT CLERK: And Mr. Mankovetskiy. Boris
9 Mankovetskiy.

10 MR. MANKOVETSKIY: Good morning, Your
11 Honor.

12 COURT CLERK: For the Unsecured Creditors
13 Committee, we have Jane Pearson.

14 MS. PEARSON: Good morning, Your Honor.

15 COURT CLERK: And Andrew Sherman.

16 MR. SHERMAN: Good morning, Your Honor.

17 COURT CLERK: Gary Dyer for the U.S.
18 Trustee.

19 MR. DYER: Good morning, Your Honor.

20 COURT CLERK: There's Marc Sacks for the
21 United States Small Business Administration.

22 MR. SACKS: Good morning, Your Honor.

23 COURT CLERK: Brian Donovan for the United
24 States Small Business Administration.

25 MR. DONOVAN: Good morning, Your Honor.



1 COURT CLERK: This is being recorded.

2 Please proceed.

3 THE COURT: Good morning, everyone. It
4 sounds like some of them might be on their cell
5 phone so I'll just remind people to mute your
6 phone when you're not speaking. It sounded like
7 someone might be outside or in their car; I'm
8 getting a little wind background.

9 Okay. So I read the debtors moving
10 papers, supporting declaration, the opposition by
11 the United States, as well as the accompanying
12 request for judicial notice and all of the
13 associated transcripts and orders that were
14 attached to that, as well as the reply brief.

15 What I'd like to do is hear argument from
16 the debtors first and then from the Government
17 second. And there may be some follow-up questions
18 or issues that I ask the debtors to respond on.
19 I'm generally going to let you guys talk. I have
20 some questions for both sides that I'll try and
21 hold until the end of your presentation. We'll
22 then likely take, you know, three or four minutes
23 just so I can gather my thoughts and I'll orally
24 rule on that, on the motion.

25 Whoever is arguing for the debtors, please



1 go ahead.

2 MR. MAIZEL: Good morning again, Your
3 Honor. Sam Maizel Dentons U.S. LLP on behalf of
4 the debtors. Thank you for taking this on. This
5 is a heavy lift. There's a lot of interesting and
6 unusual issues here and then in dealing with it in
7 pretty short notice. We appreciate the Court
8 letting us file our reply brief Monday evening. I
9 know it doesn't give the Court a lot of time, but
10 we appreciate the courtesy. I think both the
11 Government and us have been moving at a pretty
12 good speed here. What I'd like to do is take on
13 four issues, statements made by -- first of all,
14 I'm going to assume, having now been in front of
15 you since the fall, that I -- I have no doubt
16 you've read everything already and are probably
17 way ahead of us in terms of reading all the
18 transcripts and being aware of the issues. So
19 what I'd like to do is highlight four issues that
20 are raised in the reply brief that I think warrant
21 really special attention. And then hit some of
22 the specific issues of the Chevron deference,
23 Grant versus a loan 525 (a) in no particular
24 order. And then take questions, if that's
25 agreeable to the Court?



1 THE COURT: That sounds good. Thank you,
2 Mr. Maizel.

3 MR. MAIZEL: All right, Your Honor. First
4 of all, you know, there are four statements that
5 really occurred in the first few pages of the
6 government's reply brief that absolutely require a
7 response from the debtors here. First, the SBA
8 argues that granting this preliminary injunction
9 would, "disrupt the administration of the PPP in
10 the middle of a loan distribution during a global
11 pandemic." And of all the things that they could
12 have said, the hyperbole here is pretty dramatic.

13 This is a request for about \$3 million of
14 loans, to be put aside pending a final
15 determination by the Court on the issues, out of
16 over \$650 billion of loans. So that is before the
17 Court here, the dollar value of 0.0005 percent.
18 Plus, as the Court's aware having read all the
19 papers, the bank does all the paperwork. And so
20 it's hard to imagine that a loan that is 0.0005
21 percent of the total loan amounts, where the
22 paperwork is done by the bank, and, as all the
23 papers show, the paperwork is meant to be -- if
24 it's two pages long, it's meant to be a very light
25 lift for the -- both the bank and the Government.



1 It's hard to imagine that granting a
2 preliminary injunction here would disrupt the
3 administration of the PPP. In fact, it's not
4 even, you know, there's an expression of the tail
5 wagging the dog? Your Honor, this is not even the
6 flea on the tail, wagging the dog.

7 If the administrator is really worried
8 about some alleged disruption of the program, the
9 administrator could just change this rule and
10 administer the program as we argue in our
11 briefs -- and I'll go further here this morning --
12 just to administer the program in a way that is
13 consistent with what Congress wrote, cutting out
14 all this litigation.

15 Your Honor, the second issue raised that
16 really jumps out of the papers from the SBA is the
17 assertion by the SBA that, "Congress explicitly
18 delegated authority to be the SBA to issue rules,
19 excluding companies in bankruptcy." And that's at
20 page four, line seven through 10. It is beyond
21 dispute that Congress did not explicitly delegate
22 authority to the SBA to issue any such rules. But
23 in fact, to the contrary, there's no mention in
24 the PPP about disqualifying debtors at all, unlike
25 other parts of the legislation. And as we argued,



1 and as the rules of statutory construction require
2 the Court to consider where Congress includes some
3 specific language in one part of a statute, and
4 does not include that language in another part of
5 the statute -- here in section 4,003 -- Congress
6 specifically included language disqualifying
7 debtors in bankruptcy and did not do that in the
8 PPP program. The Court's required to think that
9 Congress meant something by the different
10 languages, by the different use of its exclusion
11 from debtors in the 4,003 provisions and not -- in
12 no such exclusion in the PPP program. Then,
13 there's also -- it's also not in the legislative
14 history. So not only isn't it expressing the
15 language, but it's also not expressed the
16 legislative history. To the contrary -- and the
17 SBA had the opportunity. In fact, it was invited
18 by this Court to provide some evidence of the
19 rule-making it -- what it considered in addressing
20 the rules it has promulgated, which it decided to
21 not avail itself of that opportunity. So there is
22 no evidence of what the administrator considered
23 in creating the rules. There's certainly no
24 legislative history suggesting that Congress
25 intended to exclude debtors in bankruptcy from



1 considering -- from being considered fairly for
2 this program.

3 We submitted four letters from members of
4 the Senate and the House. So to the extent
5 there's any indication of what Congress thought
6 when it passed this, about allowing debtors to
7 participate, they all suggest that at least that
8 hospitals in bankruptcy, which is exactly the
9 circumstances before the Court, they did not
10 intend to exclude such companies from
11 consideration under the PPP.

12 So you've got no express delegation to
13 exclude companies in bankruptcy, and you have no
14 legislative history. In fact, to the contrary,
15 the limited import into the insight into the
16 consideration of the Senate or the House suggests
17 quite the contrary.

18 The next statement that really jumps out,
19 Your Honor, is the discussion of irreparable harm.
20 Here, the SBA says that the plaintiff's -- "the
21 plaintiffs offer only a single statement that
22 COVID-19 pandemic has negatively impacted their
23 cash flow." Well, that may be true if you don't
24 read the unrebutted declaration of the CEO, John
25 Gallagher, who is present here and if the Court



1 has questions about the impact to further clarify
2 the really significant financial impacts of three
3 factors, that unrebutted declaration, plus his
4 availability here to testify if there are further
5 questions, puts -- it makes it hard to fathom how
6 they could allege that we offered only a single
7 statement that the pandemic has negatively
8 impacted our cash flow. It is literally,
9 uncontroverted, both in Washington State and
10 nationally, that hospitals -- and it's common --
11 it's been reported so widely, Your Honor, that it
12 is hard that the -- hard to believe the SBA is not
13 aware of this, that hospitals and the hospital
14 industry throughout the United States, have
15 suffered huge economic losses from the widespread
16 direction from state governments, including the
17 Washington State government, that hospitals cease
18 all elective surgeries, and that has been in place
19 for months. Second, the reduction in emergency
20 room visits, which, because of people's concerns
21 about COVID-19, the direction for people to
22 shelter in place. All of that, all of that, has
23 resulted -- those two things have resulted in huge
24 economic increases -- huge economic negative
25 impacts, and then increased costs related to



1 preparing for treating patients in a COVID-19
2 pandemic world. Those three things combined have
3 resulted in, according to news reports, \$50
4 billion of losses in the hospital industry
5 monthly.

6 And as the unrebutted testimony of
7 Mr. Gallagher shows, Astria is no different and
8 has suffered significant harm from the COVID-19
9 pandemic. But in some respects, Your Honor, this
10 is a red herring because the irreparable injury
11 that the Court is considering today in the context
12 of a preliminary injunction, is the looming
13 deadline of June 30th for cutting off
14 applications. So that what will happen is if
15 this -- if a preliminary injunction is not granted
16 and the Government is not directed to consider the
17 applicant -- to hold the application. Because
18 again, we're not asking the Court to order the
19 application to be granted. But to not allow the
20 Government to discriminate because of section 525
21 (a), if, when the Court decides that issue, if the
22 money is reserved and the application is held in
23 abeyance, then the purposes of the preliminary
24 injunction will be served. And as we cited, the
25 idea that non-monetary losses, although we all are



1 aware of the general rule, but that monetary
2 losses can't be considered in issuing a
3 preliminary injunction. But, here, the
4 irreparable harm is our inability to participate
5 in this program meant to provide assistance to
6 companies just like Astria. That would be the
7 irreparable harm if the Court does not grant us a
8 preliminary injunction today pending decision on
9 the 525 (a) issue.

10 The last point that really jumps out from
11 the papers, Your Honor, is again on page four,
12 lines 20 to 21 of the opposition filed by the SBA,
13 where the SBA argues that awarding an injunction
14 here would be against the broader public interest.

15 Your Honor, nothing could be further from
16 the truth. This money will be used to pay the
17 staff, including nurses who are literally on the
18 front lines of fighting a global pandemic, and
19 keep two essential hospitals in rural areas, that
20 are underserved to start with, available to
21 COVID-19 patients. The Court at the last hearing
22 on this adversary proceeding suggested it would
23 take judicial notice of the widespread issues
24 related to the pandemic in the Yakima Valley. I
25 hope the Court will continue and do that today.



1 It's interesting because the SBA says in
2 its opposition on page 10 that's the purpose of
3 the PPP -- it was enacted to extend relief to
4 small experienced economic hardship as a result of
5 the public health measures being taken to minimize
6 the public's exposure to COVID-19. What could be
7 more consistent with that purpose of the PPP, and
8 therefore in the public interest, than granting a
9 preliminary instruction to preserve these
10 essential hospitals' rights to participate in this
11 program.

12 The SBA follows up on this by arguing that
13 Astria is asking the Court to substitute its
14 policy preference for the SBA's policy preference.
15 But that isn't true. What Astria is asking the
16 Court to do is to not allow the SBA to substitute
17 (inaudible) for the express conditions already set
18 forth by Congress. Congress was very clear in
19 what the conditions to participate were, and the
20 SBA has simply grafted a policy consideration of
21 its own with no support from the legislation or
22 the legislative history for this substantial
23 policy preference for Congress, just policy
24 preference.

25 Your Honor, it's also interesting in



1 reading all the hearing transcripts, I was really
2 struck by one, and that is judge -- bankruptcy
3 Judge Craig Gargotta, who was an assisting U.S.
4 attorney, actually in Texas when I was at main
5 justice myself, and we worked together on many
6 cases before I went into private practice and he
7 became a judge. But it was interesting because in
8 that context, he denied a temporary restraining
9 order. Relying, he said, on Fifth Circuit
10 precedent about (inaudible) injunction against the
11 SBA, but also because he thought the public policy
12 was not well-served in that context. But in his
13 comments, he said, you know, I have a restaurant
14 before me and it would be different if it was like
15 a medical facility or a public health facility,
16 which is, of course, exactly what we have here,
17 which is why I think if, if the Court's looking
18 for precedent that deals with our situation, it
19 should look to the hospitals in Maine and Vermont
20 where the Court had no trouble granting temporary
21 restraining orders, because that, you know, in the
22 context of a pandemic, preserving hospitals, which
23 are on the front lines of fighting the pandemic,
24 it is clearly in line with public policy and in
25 the public interest.



1 Your Honor, those are the four points I
2 really wanted to highlight that I thought just
3 struck me from the SBA's papers. I'll stop
4 because I can't see you. I'll stop here, take a
5 breath and see if the Court has any questions.
6 And then I'll go on and address Chevron.

7 THE COURT: Sure, Mr. Maizel. I don't
8 think -- I read the Chevron point in your papers
9 and I'm not even sure if Chevron's strictly is
10 applicable in this context. As I read Chevron,
11 it, you know, Congress passes a statute that has
12 the term saying no vehicles in the park and
13 delegate to an agency the ability to expand on the
14 legislation so the Agency issues rules that the
15 vehicles include, you know, cars, trucks, bikes,
16 trikes, et cetera. Someone litigates and says,
17 well, wait a second. A trike isn't really a
18 vehicle. The Agency says we're in touch with the
19 Chevron deference because Congress delegated
20 rulemaking authority. So when you're interpreting
21 a statute, Judge, you'd defer that (inaudible)
22 interpretation. Here, I mean, certainly no one
23 delegating to the SBA, the ability to provide
24 rulemaking authority for the meaning of anything
25 in the bankruptcy code, which I think is really



1 the only statute I have to interpret. So I'm not
2 even sure if Chevron applies, but I -- I
3 (inaudible) from the papers, your points of that.
4 I do have a couple of questions, I think, and then
5 I'll probably hear it from the Government, and I
6 may have some follow-up based on what they have to
7 say, Mr. Maizel, if that's okay?

8 MR. MAIZEL: I'm hesitant to say that I
9 don't want to keep going, Your Honor, but I
10 certainly will stop and take questions.

11 THE COURT: Okay. And this may prompt
12 you -- I have a couple questions and it may prompt
13 you for other parts of your remarks to focus on.

14 So, you know, this is an issue that's
15 deeply split the bankruptcy court so far. Several
16 other bankruptcy courts have denied these
17 requests. Most notably, recently, Judge Deborah
18 Saltzman, who I know well, in the Central District
19 of California, and Judge Brett Ludwig in
20 Wisconsin, who has a pending nomination to be a
21 district judge so I guess will soon be rising
22 above the bankruptcy (inaudible). Do you
23 primarily distinguish those cases on the facts,
24 kind of those more hospitals and this is a
25 hospital, or they rely on just bad law and those



1 judges are wrong? Both, neither? Could you help
2 me figure it out, how I disagree with those other
3 judges?

4 MR. MAIZEL: Well, first of all, Your
5 Honor, I've also known Judge Saltzman for a long
6 time, and I'm not going to say publicly if I think
7 she's rocking or not. I will say that I disagree
8 with her conclusion, and I think for two reasons.
9 One is the reason the Court just stated, which is
10 hospitals, to the extent that the public interest
11 is heavily weighted towards the debtors here, I
12 think in the last hearing, the Court suggested it
13 was 99-point-something percent. And I think
14 that's right. And I think in the context of a
15 hospital in an area still heavily engaged in -- in
16 efforts against the pandemic, I think the public
17 interest clearly sways -- swings to the debtors
18 benefit here. But more importantly, in cases like
19 Judge Saltzman's opinion, I don't think -- with no
20 disrespect to my peers in the bar -- I don't think
21 that the Chevron issue was well briefed and well
22 presented. I think that, at least from reading
23 the transcripts, that the debtors, perhaps, didn't
24 engage fully on the Chevron issue the way we have
25 tried to. And I think the Court's right in -- in,



1 if I can presume to understand where the Court's
2 going, with Chevron -- I think the standard here
3 it not only is the fact that -- and so this is
4 going back to Judge Saltzman's opinion because she
5 clearly, as several of the other judges have in
6 these decisions that have gone against the debtor,
7 they have deferred -- they have applied Chevron
8 without -- without really any in-depth analysis.
9 And just said, "look, the government's offered an
10 explanation. Under Chevron we should just defer
11 to it. And so we will," and that's the end of the
12 discussion. And I think, as we've pointed out on
13 our papers, Chevron simply doesn't even apply here
14 because Chevron only applies in the context of a
15 formal rulemaking, really, in which we clearly do
16 not have here where the -- where the rulemaking
17 had the force of law, is an expression used by the
18 Ninth Circuit, and so we clearly don't have that
19 here. And so then we're into the Skidmore
20 standard, right? And that's the standard set
21 forth in Skidmore versus Swift, a Supreme Court
22 decision from 1944, also cited in our papers. And
23 that is much less deferential to the Agency,
24 right? They're the Court. Under that standard,
25 the Court's got to look at the thoroughness of the



1 consideration of the factors by the Agency, the
2 validity of the reasoning, the consistency of the
3 pronouncements and other factors that cause the
4 Agency to reach its conclusions. And at most
5 there, the Agency decision provides some guidance
6 to the Court. So if you are in the Skidmore
7 standard, as I think we would be, we should be, it
8 clearly weighs heavily against the SBA. So let's
9 just look at one of the factors the Court
10 enunciated in Skidmore, and that's the consistency
11 of pronouncements. So as we pointed out in our
12 papers, the administrator in interim rules one and
13 two makes no mention of bankruptcy eligibility.
14 It isn't until the third rule that we even see
15 things that we can apply. And, oddly enough, the
16 third interim rule expressly reaches a different
17 conclusion than what we see the SBA articulating
18 today. In the third interim rule, the SBA says,
19 unlike other SBA loan programs, the financial
20 terms for the PPP loans are uniform for all
21 borrowers, which, of course, we know now is untrue
22 because it's not uniform for debtors in
23 bankruptcy. And the standard underwriting process
24 does not apply because no creditworthiness
25 assessment is required for PPP loans. Which is



1 interesting, because now in the fourth interim
2 rule, where they, I think it's fair to say, are
3 just simply trying to provide some ad hoc
4 justification litigation reasoning, having been
5 sued repeatedly on this issue, they now say that
6 it is in fact the -- the significant risk factor
7 of the ability to repay unforgiven loans is one of
8 the two factors they say they are considering --
9 they've considered when they denied debtors in
10 bankruptcy the right to apply. That, of course,
11 is exactly the credit worthiness of -- the credit
12 worthiness assessment. What they are saying is we
13 don't find debtors in bankruptcy credit worthy
14 because they are more likely to default if they're
15 forced to repay, which is totally inconsistent
16 with the statement they made in the third rule
17 where they say standard underwriting process does
18 not apply because no credit worthiness assessment
19 is required.

20 So if you look at the differences between
21 three, four -- one, two, three, and four, the
22 interim rules, and then you think the Skidmore
23 standard says one of the factors you should apply
24 in considering whether to -- how much weight to
25 give the guidance by the SBA rules is the



1 consistency of the pronouncements it's clearly
2 (inaudible) against giving it weight. It is
3 clearly, simply, them trying to provide a
4 litigation explanation, having been called out.

5 And I think I -- you know, Your Honor, I
6 hope I answered your question about those two
7 prior opinions. I think primarily they were very
8 differential to (inaudible) Chevron in a way
9 that's inappropriate here, and they did not deal
10 with hospitals in terms of the public interest
11 factor.

12 THE COURT: Thank you, Mr. Maizel. So my
13 next question relates to kind of irreparable harm
14 and the urgency. I mean, one thing I saw on the
15 record, and I'm just curious for the
16 explanation -- it looks like the official loan
17 denial relating to this occurred on May 6th but
18 the litigation wasn't commenced until May 15th.
19 And I was just curious why it took so long to seek
20 relief if this is, you know, truly as urgent as
21 the debtors claim?

22 MR. MAIZEL: Well, Your Honor, the
23 urgency, again in regard to the preliminary
24 injunction, relates to the cutoff date of June
25 30th. And as you could see, we have -- they have



1 been pursuing this for some time, right? And
2 we -- we were waiting for formal denials, the
3 e-mails, and then letters. And we never -- we
4 were hoping to get two letters that actually
5 addressed the two loans. We finally filed without
6 waiting for the second one. If you saw, we got
7 two denials, basically referring to the same
8 debtor. We believe, and we've not been told
9 anything differently, that there actually were two
10 denials that meant to apply to the two different
11 applications. And, Your Honor, we wanted to make
12 sure the pleadings were good. These are not
13 issues that we brief or raise every day. And a
14 lot of thought and discussion with lawyers, both
15 internally and externally, went into preparing it.

16 THE COURT: Thank you, Mr. Maizel. So the
17 final question I have, and then I think it
18 probably makes sense to hear from the Government
19 for a bit, relates to section 525 and an issue
20 where I'm having trouble, I don't think
21 Judge Shannon said this expressly but it's
22 something that's given me a little bit of a
23 interpretive problem, is a point that the SBA
24 makes, I think in a footnote, and I think it's
25 stronger than a footnote point. And that's --



1 let's assume I agree with the debtors that this is
2 a grant, not a loan. And so now I need to decide
3 whether it's a grant that's similar to the other
4 listed items in the statute, right? The
5 (inaudible) grants modified by similar, the
6 debtors position, relying largely on a second
7 circuit case involving real estate leads, that
8 it's, you know, similar because PPP loans are
9 exclusively available by the Government from the
10 Government. But so then I skim down and I look at
11 525 (c) and it talks about, and has specific
12 rules, about denials of student grants. And a
13 student grant, of course, is free money, you know,
14 often exclusively available through our Pell grant
15 or from the university. So how do I put monetary
16 grants into 525 (a) without making that part of
17 525 (c) superfluous.

18 MR. MAIZEL: Well, Your Honor, I think --
19 I think that you've got to -- it is clear that 525
20 (c) deals with a specific subset of grants. So
21 that's -- there's no -- and loans. And that's
22 where courts have grappled with the inclusion of
23 that provision and why courts have consistently
24 held that loans, if it's truly a loan, are
25 excluded from the provisions of 525.



1 I think the definition -- when you read
2 the context of 525 (a), it is much broader and it
3 is much broader than the language in 525 (c) and
4 that's where Stoltz is so instructive. So if you
5 look at the list of 525 (a), it talks about
6 charters, franchises, permits, licenses, which are
7 basically government authorizations to conduct
8 business.

9 And so if you think of -- if you think of
10 a grant in the terms of a grant of money, yes, 525
11 (c) is applied. But if you think of the use of
12 the term grants here, as the Court is (inaudible)
13 it, which is the grant of a property interest that
14 are unobtainable from the private sector and
15 essential to a debtor's fresh start, then I think,
16 you know, that's a more consistent use of the word
17 grant here. And -- and so I think that the
18 term -- when they say a similar grant, they're
19 referring to the substance -- the set of items
20 that come before. And here it is consistent,
21 right? This is the grant of a -- this is the
22 grant of a property interest that's unobtainable
23 from the private sector. This is basically a
24 government financial assistance to help out
25 companies that are faced with the economic trauma



1 that accompanied the pandemic. And so in that
2 respect, I think the definition that -- the
3 interpretation of what the list and the terms -- a
4 similar grant in 525 (a) that the Court reached
5 out to Stoltz, is right. And that distinguishes
6 it from the student grants that are covered in 525
7 (c). We did provide to the extent courts --
8 there's been a lot of courts grappling with what
9 the definition of a grant is. And I know you've
10 read the transcripts that we provided and the SBA
11 provided, and probably others, but, you know, it's
12 interesting, the (inaudible) -- the code of
13 federal regulations provides a definition of a
14 grant, and it is directly on point for us, right?
15 It is the principle purpose of to transfer a thing
16 of value, (inaudible) money out a public purpose.

17 (Crosstalk) -- are supported by a law of
18 the United States.

19 (Crosstalk) -- that of course is true
20 here if you have a bank loan. So I think if the
21 Court adopts the analysis presented by the second
22 circuit in Stoltz -- and actually it's
23 interesting. You know, the Fifth Circuit, even
24 though the Court in the Fifth Circuit --

25 (Audio compromised in this section)



1 I hope that wasn't a comment on my
2 arguments. I think even in the Fifth Circuit,
3 which is a very tough rule on interpretation of
4 525 (a) in Escondido Services, the Fifth Circuit,
5 in 1987, held that in SBA program under section 8
6 (a), which deals with minority loans, was in the
7 nature of a franchise.

8 I recognize this is because of the --
9 there, first of all, there's not a tremendous
10 amount of case law interpreting 525 (a). And it
11 is, you know, not wide -- because the case is
12 limited, it's also not across a broad spectrum of
13 different situations. And because what we have
14 here is really a unique situation, Your Honor. It
15 is, you know, there's not a lot of history of the
16 Government handing out hundreds of billions of
17 dollars, basically free gifts to companies, small
18 businesses in America. So in some respects, Your
19 Honor, your and other courts that are grappling
20 with this issue, are writing on a blank page. But
21 I do think Stoltz provides the language that the
22 guides are through the interpretation.

23 THE COURT: Thank you, Mr. Maizel. Why
24 don't I go ahead and hear from the Government.
25 And again, I'll let you do your presentation and



1 then have a handful of questions for you.

2 MR. SACKS: Thank you, Your Honor, I
3 appreciate it. This is Marc Sacks for the Small
4 Business Administration.

5 You haven't heard me in your courtroom
6 before, Your Honor. I'm with DOJ in D.C. and I've
7 worked closely with Mr. Donovan on this case and
8 I've both listened to and read the transcripts of
9 the Court's May 19th hearing. So I'm certainly
10 familiar with -- and we'll hope to address many of
11 the concerns -- the concerns the Court had then
12 and may have today.

13 Let me start, Your Honor, with some
14 breaking news, because I just got (inaudible) sent
15 to me, that I've had a chance to review, but we
16 talked a lot about the hospital cases here, and I
17 know that the plaintiffs here have mentioned the
18 two hospitals in Maine, Penobscot and Calais.
19 Well, Judge Fegone (inaudible) -- a TRO or PI, I
20 don't recall now -- just issued a 31-page addendum
21 proposed findings of facts and conclusions of law,
22 finding for the Government on -- on the -- denying
23 relief to the two hospitals. I noted, just in the
24 second page he said, "Although there is room for
25 disagreement on the law, the better view is that



1 the defendant -- armed with a mandate from
2 Congress and facing an economic crisis of
3 unprecedented magnitude -- made reasonable choices
4 about how to allocate a large but finite amount of
5 aid among struggling businesses. Those choices
6 may produce seemingly harsh results, but they are
7 not illegal."

8 So, we'll get that uploaded to you today
9 after the hearing, but I -- one of the things I
10 want to focus on, a little bit as we go through my
11 presentation, is that in terms of the legal issues
12 relating to hospitals versus non hospitals.
13 Arguably, they may impact the public interest
14 prong of the preliminary injunction test. They
15 don't have any impact on the (inaudible) prong for
16 certain. And, they really shouldn't have any
17 impact on the irreparable harm prong because
18 that's what can be individualized. And a hospital
19 may well indeed be -- because it is a hospital, be
20 able to show irreparable harm, (inaudible) so
21 many, like a bank or a restaurant or a shop, and
22 we have to look at each case individually.

23 The plaintiff spent a lot of time in its
24 presentation talking about if hospitals all over
25 the country have this, and have that, and have the



1 other. That may well be the case, but that's not
2 how courts analyze irreparable harm. And so, I
3 want to spend a little bit of time talking about
4 that issue in this case, but -- but let me start
5 by reading one thing that Your Honor said on May
6 19th. You said there's a majority -- an emerging
7 majority view among several bankruptcy judges that
8 -- I'm aware that there's a minority view to this
9 as well. Essentially what I think Your Honor was
10 saying was that the majority view was that the
11 Government and the SBA acted improperly here and
12 the minority view is contrary to the government's
13 position. That's no longer the case.

14 Including today's result, there's at least
15 19 cases where courts have denied relief to
16 plaintiffs, making the same claims that plaintiffs
17 are making here. There's eight cases in which the
18 court has granted some kind of relief. One of
19 those, as Your Honor knows, is the Hidalgo case
20 just recorded in (inaudible) -- there state that
21 case pending appeal. And Your Honor understands
22 that the standard for getting a state-pending
23 appeal is equally as high as getting an
24 injunction. So, that case is now before the Fifth
25 Circuit and the briefing schedule there will end



1 in a couple of weeks and so we may have a decision
2 from the circuit court, on short-order, in that
3 regard.

4 But to the extent that there's a majority
5 and minority view, it's certainly in favor of the
6 Government. And, in fact, since May 8th, in the
7 last month, there were obviously some early
8 impassioned decisions from Judge Jones in Texas
9 and from Judge Newman in New Mexico.

10 Your Honor mentioned that you thought
11 Judge Newman's decision very compelling. And, you
12 may still hold that opinion, but since May 8th,
13 there's been 15 cases that have been decided in
14 the government's favor and two that have been
15 decided in the plaintiffs' favor. I think when
16 courts have taken a look at the issues, with time,
17 more consideration, looking at some of the other
18 transcripts and recent decisions by someone like
19 Judge Shannon, they recognized here -- and again,
20 you know, I think every judge that's ruled in the
21 government's favor has said, "We disagree with the
22 rules. We don't think it's fair and we don't like
23 it. We can protect the money coming into the
24 bankruptcy estate better than a debtor, than
25 someone whose not in bankruptcy." The Government



1 has the authority to make those rules, and I'm
2 going to hopefully discuss in detail why that is
3 the case, because Your Honor said Chevron is not
4 applicable. And with all due respect, Your Honor,
5 I think that's dead wrong. And I'm going to
6 hopefully try to convince you why -- why you are
7 wrong on that. And you may disagree with me, but
8 I'm going to give it my best shot. And I'd like
9 to cite the law and explain to you our position on
10 that. As I'm going to go through, there's to be
11 six components to my argument.

12 First, I want to touch briefly on the
13 issue of sovereign immunity. And Congress, as you
14 know by its plain language, has prohibited
15 injunctions of the SBA, so I want to discuss that
16 briefly. I found something that's -- that the
17 plaintiff has mentioned here in argument today,
18 but they briefed that in detail in their reply.
19 Second and third, I'll address the two nearest
20 issues and argue, right (inaudible) of success of
21 the 525 of the APA, then we'll talk about
22 irreparable harm and the other factors. And then
23 sixth, I don't know (inaudible) talk about this
24 any longer, but -- but at least by the terms of
25 the complaint, the plaintiffs are asking you for a



1 nationwide injunctive relief. I don't know if
2 they really are, but I certainly would suggest
3 that the Court --

4 THE COURT: I can tell you, Mr. Sacks,
5 there is zero chance of that happening. I mean,
6 nationwide injunctions generally are dubious. I
7 think in the bankruptcy context, they may be even
8 more dubious. And, certainly in front of me,
9 that's not going to happen. So there's no need to
10 address that.

11 MR. SACKS: All right, then I certainly
12 won't.

13 So, but let me talk briefly a bit, first,
14 about whether or not this court has the power to
15 enjoin the SBA. And I just want to focus briefly
16 on 15 USC, 634 (b)(1). That's the operative
17 statute that allows the SBA to be sued in federal
18 courts that says specifically no injunction shall
19 be issued against the Agency. There's very little
20 authority for that in this circuit. There's
21 certainly no Ninth Circuit authority. We cited in
22 our papers one -- other cases, at least, it's --
23 around the country that has held that language
24 strictly and read it closely and (inaudible) the
25 fifth. (Inaudible) in the fourth, (inaudible) in



1 the 10th. The plaintiffs (inaudible) here relied
2 heavily on the Cavalier closed case out of the
3 quarter federal claims in Washington. It's a very
4 different case than this one, Your Honor.
5 (Inaudible) a protest case, a pre-award contract
6 case where the Department of Defense personnel
7 support center was considering whether to give a
8 contract in the plaintiff, Cavalier (inaudible) of
9 the DPSC -- the defense personnel support center,
10 denied it. The plaintiff then sought a
11 certificate of competency as a small business from
12 the SBA, which the SBA granted, but then withdrew.
13 And the plaintiff sued, and the Court of federal
14 claims said in a case like this, (inaudible)
15 protest for the award complaint, there's no
16 consideration of that, that Congress would not
17 have suggested that the SBA could be enjoined. We
18 don't have that kind of case here. We have a case
19 that's fundamental about the SBA's programming.
20 The SBA's carrying out this mission to provide aid
21 to small businesses. And so the Government, here,
22 would suggest that there is not room for the Court
23 to enjoin the Agency.
24 I understand, obviously, the Court can
25 disagree and find it -- certainly under 106, it



1 would have the power if it finds a 525 violation.
2 We point the Court to 106 (a)(4), which suggests
3 non-bankruptcy law applies when the Court is
4 considering whether to grant an injunction based
5 on a code provision.

6 I think it's a different story when it
7 comes to the APA. All the reports had enjoined
8 SBA in these cases based on the APA and found that
9 a preliminary junction is a non-final order that
10 allows the bankruptcy court to rule in that
11 regard. So unless the Court has questions on
12 that, I won't address that any further.

13 THE COURT: Mr. Sacks, I do have one
14 question on this, and I might as well do it now
15 rather than saving it to the end.

16 In the reply the debtors raised, I thought
17 it was a very interesting statutory interpretation
18 argument. They didn't cite a case for this, but
19 there's a reading of the statute that the
20 injunction prohibition only relates to the
21 administrator's personal property in her
22 individual capacity, not the property of the SBA.
23 And, you know, it's really -- I can't issue an
24 injunction against the administrator to do
25 anything with her house, or her car, or her -- or



1 her money, or anything else. And that -- that's
2 the scope of the statute. And (inaudible)
3 literally that does appear to be what it says. So
4 I'd be interested in your reaction to that kind of
5 novel read of the statute that the debtors
6 offered.

7 MR. SACKS: Yeah. I don't think there's
8 any basis for that, Your Honor. I think if Your
9 Honor looks at the history of these sue and be
10 sued provisions, like the SBA has here, and why
11 there's anti-injunction language, it's because
12 government agencies who were operating in commerce
13 have found themselves -- you know, the Government,
14 as you know, from -- from government contracts
15 position is treated like any other contractors.
16 There was an issue where, if the Government was
17 going to have certain agencies engage in commerce
18 and contracts, then it would not be fair for the
19 (inaudible) to be able to claim sovereign immunity
20 and gain more rights in the sense than contractors
21 today.

22 That's why Congress passed these
23 (inaudible) clause for various agencies. And in
24 doing so, you know, gave and took away. You know,
25 you can be sued, but there's a limit to that and



1 you can't enjoin. So I think if you look at the
2 history of the basis of these types of provisions,
3 I don't think there would be any suggestion that
4 Congress intended to limit them to one person
5 within an agency. But if that's what the plain
6 language of the statute says, obviously we're
7 making the plain language argument as well. So
8 that may be (inaudible) to the Court. I don't
9 think there's a basis for that. And as you said,
10 there's no cited authority for that in our reply
11 brief.

12 THE COURT: Okay. Thank you, Mr. Sacks.

13 MR. SACKS: Your Honor, let me go on to
14 the true merits issues and let me start with 525.
15 And -- and -- and I think from Your Honor's
16 question, I may sense that Your Honor is leaning
17 towards an interpretation here that this PPP loan
18 does not qualify under 525. And, that really is
19 the only answer. This is about as dramatic of a
20 one-sided issue as I think I've ever seen. And in
21 fact, since May 8th, we've now seen not a single
22 court rule that there was a violation of 525 in,
23 compared to now, I think 17 cases that ruled the
24 Government is not discriminate on 525 (inaudible).
25 And it's important to note that in the replies,



1 the plaintiff cites the Weather King case. This
2 is Judge Koschik out of the Norther District of
3 Ohio. He did indeed enjoin the SBA and found
4 there was an (inaudible) violation, but he was
5 very clear. (Inaudible) using injunction was not
6 based on 525. He did not believe there was a 525
7 violation. So, I think that case was erroneously
8 sided by the plaintiffs. There has been no case
9 in almost a month that has ruled against the
10 Government on the 525 issue and I think that's --
11 that's pretty obvious.

12 Let me read briefly to you from the Star
13 Plex case out of Arizona. You don't yet have the
14 transcript. We've only got that a couple of days
15 ago. We'll upload that to you. But what the
16 Court said there is what 525 speaks to is
17 essentially an authorization by governmental units
18 to do some kind of business. Or, if they engage
19 in some kind of activity -- and that's where
20 they're talking about a license, or permit, or
21 charter, or a franchise, or some other similar
22 grant, don't see a PPP loan and it is a loan.
23 Whoever gets that PPP loan is going to have to
24 sign loan documents. You sign a loan application
25 at the outset. I don't see those loans processed



1 as anything really akin to a grant, even though
2 there is the possibility that the loan itself will
3 be forgetful. So what I see as a grant is a loan
4 followed by the possibility of (inaudible) loan.
5 But at any event, I don't see it as a grant.

6 That's at 115 to 116 of that transcript, which we
7 will get you, Your Honor.

8 And so let me briefly talk about 525. And
9 let's do it this way. First, let's look at the
10 plain language of the statute. Second, the
11 administrative history around the (inaudible)
12 statute and then how case law is addressed by 525.
13 So I think, as Your Honor already indicated,
14 there's four terms that begin with statute
15 licensed, permit, charter, franchise, followed by
16 other similar grants. So, we know the grant has
17 to be similar to those initial four items. And,
18 Your Honor hit on the importance of section C 525.
19 How do we know the language at 525 does not
20 include loans of the type here? Because Congress
21 had to amend 525 and add subsection c to apply to
22 any student grant or loan program.

23 And what Mr. Maizel told you, I believe in
24 his argument, was, "525 (a) is broader than 525
25 (c). If that's the case, if 525 (a) encompassed



1 already what's in 525(c), why would Congress have
2 to amend 525 to add paragraph C to include another
3 form of (inaudible) not covered under 525 (a)?

4 And I think that should be pretty obvious.

5 Legislative history supports the argument
6 here as well. As you know, Your Honor, 525 (a)
7 came out of the 1971 Supreme Court Perez case
8 which involved an Arizona driver's license, where
9 the State denied an individual, who had been a
10 debtor in a bankruptcy, the right to have a
11 driver's license. And the Supreme Court used the
12 supremacy clause, the whole of that bankruptcy
13 code's fresh start concept, overrode the State's
14 law preventing a driver's license to someone who'd
15 been in bankruptcy. And, you know, so -- and
16 that's where we get license, obviously, out of the
17 four terms be given by 525. And permanent charter
18 franchises are all similar to that in terms of
19 things given by the Government that allow you to
20 do something else. And then we have, of course,
21 other similar grants.

22 I think it's important to look at the
23 (inaudible) case out of the Fourth Circuit and the
24 plaintiffs and their -- sorry, Your Honor?

25 THE COURT: No, please go ahead.



1 MR. SACKS: I thought I heard someone
2 trying to interrupt.

3 So in their reply brief, the plaintiffs
4 make a claim that the highest case out of the
5 Fourth Circuit agrees with their position. I
6 don't think it does. They make the point, very
7 clearly, that those four things in 525 are all
8 governmental authorizations that typically permit
9 an individual to pursue some occupation or
10 endeavor in the economic betterment. A home loan
11 guarantee, on the other hand, does not implicate
12 the government's gatekeeping role in determining
13 who may pursue certain livelihoods. Because
14 unlike enumerated items of 525 (a), a person can
15 obtain a home loan guarantee from the private
16 sector. And the same is true here, obviously.
17 You can get a loan from the private sector. It
18 may be difficult to get that loan, but that
19 doesn't change the analysis. In fact, the highest
20 court said if a governmental entity refuses to
21 guarantee your home loan, the individual's not
22 doomed to homelessness. He needs to get
23 (inaudible) from family or friends, to get a
24 private loan -- perhaps on less favorable terms --
25 or he may rent. So there's a recognition there



1 that -- that money itself, even in terms of a
2 guarantee, simply does not constitute the type of
3 other similar grants contemplated by Congress.
4 (Inaudible) in the sixth, the Watts case on the
5 third, (inaudible) in the second. I think it's
6 pretty overwhelming there that the case law
7 supports a narrow reading of 525 based on its
8 terms. I won't read you, again, the language he
9 cited from Judge Shannon and the Cozie case, Judge
10 Martin of the Western District, and (inaudible)
11 they all have pretty strong language on the issue.

12 We certainly know, from section -- from
13 the CARES Act itself, just in terms of the fact
14 that the -- that Congress put it within the
15 existing 7(a) loan program and the fact that the
16 PPP itself is just replete with uses of the phrase
17 loan, so that all gives us good indications here
18 that we're talking about a loan.

19 And we also know from -- I think it's
20 important to understand that there's something
21 called the HEROES Act that Your Honor may have
22 seen referenced in our brief. But this is what
23 the House has passed to potentially amend the PPP.
24 It's not an active law yet, but I want to take it
25 for more than it's worth. But, it includes a



1 (inaudible) provision of the PPP, which says it
2 will provide technical assistance for community
3 financial institutions in which treasury shall use
4 a billion dollars to provide "grants to certain
5 financial institutions to ensure such an
6 institution's update their systems and efficiently
7 -- efficiently provide loans that are guaranteed
8 under the PPP." That's the section 90001
9 subsection K of the HEROES Act. The use of the
10 phrase grants and loans, as Your Honor well knows,
11 Congress knows how to create a grant program; it
12 does it all the time. Congress also knows how to
13 create a loan program. There really is no dispute
14 what it created here. And then that, alone, shows
15 you that this does not fall within 525 (a). So
16 unless Your Honor has more on that, I'll move on
17 to the APA.

18 THE COURT: I don't. Thank you.

19 MR. SACKS: Okay. Thank you, Your Honor.

20 So let me -- let me try to address the APA
21 and some of the comments raised here and see if I
22 can explain to the Court what I think the
23 government's position this here.

24 I think if I read what the plaintiff's is
25 arguing, they essentially have two APA claims.



1 And you'll find this in 706, right? One of the
2 claims is for exceeding statutory authority. That
3 means that Congress has said something explicitly
4 and the Agency disobeyed, right? If that happens,
5 APA violation, end of the story. That's Chevron
6 (inaudible) step one. Second, Congress is silent.
7 Congress authorized the Agency to regulate and the
8 Agency does so and that regulation is before the
9 Court. That's Chevron step two. Has the Agency
10 issued a rule that was arbitrary or capricious?
11 If it does, if (inaudible) violation, plaintiff
12 wins. Those are the two claims they make. And
13 the kind of two-step analysis in Chevron that we
14 need to examine here -- I'll make it an initial
15 point that I won't discuss further unless Your
16 Honor wants to -- is that we believe the APA
17 claims here are non-core claims. And, therefore,
18 there is a sturdy marshal limitation on the
19 Court's ability to issue on a relief on those
20 claims, but I won't discuss that further unless
21 the Court would like to.

22 THE COURT: I have one question for you on
23 that, and I understand what you just said. Your
24 brief's a little different at a few points when it
25 talks about how I don't have jurisdiction and



1 Stern, in article three, are not jurisdictional.
2 Stern says that -- that -- are you arguing I don't
3 have bankruptcy jurisdiction and this isn't even
4 related to the bankruptcy case or is the argument
5 just even in a statutory jurisdiction, but this is
6 not either statutorily core or permissibly within
7 the scope of what you can do under Article three?

8 MR. SACKS: Your Honor, I am not a
9 bankruptcy lawyer or an expert on these issues so
10 I'm reluctant to just speak more beyond what we
11 have in our briefing on this. But we certainly, I
12 think, don't disagree that the Court would have
13 the authority to issue -- (inaudible) wanted to
14 enter on a relief on the AP claims to issue
15 findings of fact and recommendations for the
16 district courts. That would be our position on
17 that.

18 THE COURT: Okay. Thank you. I
19 understand that.

20 MR. SACKS: Okay. So let me try to
21 address, then, the APA claims. And we'll start
22 with, you know, kind of the statutory authority
23 claim. And, Your Honor said, again, that Chevron
24 is not applicable. I believe you said no one
25 delegated authority to the SBA to interpret the



1 meaning of the bankruptcy code, if I understood
2 what you said correctly. And then I believe that
3 Mr. Maizel, on the same kind of issue, said there
4 was no express delegation to exclude companies in
5 bankruptcy. It's just a little -- let me see if I
6 can try to explain what we think the proper
7 framework is here.

8 We did not disagree there was no express
9 delegation to exclude companies in bankruptcy.
10 That would actually not be a delegation. That
11 would be Congress saying you may not exclude
12 companies in bankruptcy from the PPP. If Congress
13 has said that, then this is a Chevron step one
14 case, and we lose. There's no doubt about that.
15 But Congress did not say that. Congress did not
16 speak as to whether an entity in bankruptcy was,
17 or is, or is not eligible for a PPP loan. That
18 tells us Congress was silent on the issue and that
19 alone takes us into Chevron step two. And we have
20 to look, then, at, does the Agency have the power
21 to regulate? And I have to address, in both
22 briefing and today -- administrative law is a
23 difficult concept. It's not something that
24 bankruptcy courts, or likely Mr. Maizel, does on a
25 full-time basis. He told you Chevron only applies



1 in the context of formal rulemaking. And in their
2 briefings, cited the Mead case from the Supreme
3 Court in supportive that. That's just not right
4 and that's just not the law.

5 Chevron deference applies when an agency
6 acts within delegated authority given to it by
7 Congress. So, we have to look at the CARES Act
8 and we have to ask, did the Agency here, no matter
9 what it did, act within delegated authority? And
10 then we can examine what it -- it what it did, was
11 arbitrary and capricious? Well, there's two ways
12 that we know the Agency has brought authority
13 here. First, as you know, the PPP was put in the
14 existing 7(a) loan program. As we cited in our
15 brief, Congress has given broad authority under
16 that program for the SBA to implement it. And as
17 you know in the PPP, Congress said, "We changed
18 certain things about the 7(a) program, but nothing
19 -- everything else, we need in place." So that
20 broad authority was left in place.

21 And then -- perhaps claimants overlooked
22 that here, but you need to look at section 1114 of
23 the CARES Act. And let me just pull that up for
24 Your Honor so I can read it directly -- and
25 apologize on not having it up on my screen, will



1 get it quickly.

2 THE COURT: No problem.

3 MR. SACKS: Essentially 1114, emergency
4 rulemaking authority, not later than 15 days after
5 the date of enactment of this act, the
6 administrator shall issue regulations to carry out
7 this title and amendments made by this title
8 without regards to notice requirements under
9 section 553 subsection b of Title Five U.S. Code.

10 So, Congress is instructing the SBA that
11 you must issue emergency rule making within 15
12 days and you must do it without regard to those
13 requirements that are generally required in
14 federal regulation. So when Mr. Maizel
15 complained, and when Your Honor says, wait a
16 minute, where's the deliberate process here by
17 which the Government reached a decision? Why
18 don't we have empirical studies that analyze
19 whether or not there was bankruptcy? We need to
20 go back in time for a second and look at what day
21 the PPP, as part of the CARES Act, was enacted
22 into law. It was March 27th of 2020. And
23 Congress said you have no later than 15 days to
24 issue emergency regulation. As you well know,
25 Congress wanted money out on the street into the



1 hands of people that needed it, very quickly. So
2 that's the situation the SBA was faced with. Now,
3 in general --

4 (Crosstalk).

5 THE COURT: So what was done in that 15
6 days? I mean, this gets into an area where I have
7 a bunch of questions, so this may be a good
8 (inaudible) to break. So footnote 6 on page 25 of
9 your brief says, "Judicial review of agency action
10 is generally limited to the administrative
11 record." So the issue I'm having is where is
12 that? What, in this case, is the administrative
13 record to which I'm to confine? So even if it had
14 to happen past those 15 days, like, where do I
15 have any evidence or a record of anything being
16 done? Show me precisely where that is.

17 MR. SACKS: Sure, Your Honor. So here's
18 what we have. First of all, it wasn't 15, it was
19 a limit of 15 days for the Agency to act. The
20 Agency actually took seven days, because on April
21 2nd, it issued the interim final rule one and the
22 application for the PPP. Now again, the SBA could
23 have taken two months to do this, but that would,
24 I think everyone would agree, was not what
25 Congress was looking for. It was looking to get



1 this money out to make loans. And, in fact, as of
2 today, there have been 4.5 million PPP loans made.
3 So put in contrast with that, we have about 50
4 cases around the country where debtors in
5 bankruptcy have taken exception of the SBA's
6 rule-making power. We have 4,495,950 loans that
7 have been made to people who have asked for and
8 received that money. So it took Congress about
9 seven days to make the application for the interim
10 final rule.

11 Mr. Maizel tells you that there's
12 inconsistencies between the first interim final
13 rules. There is not. The first interim final
14 rule incorporates -- it specifically references
15 (inaudible) 2483, that's the application.

16 THE COURT: Mr. Sacks, can we go back just
17 to my question again? What is the administrative
18 record? Is it just these four rules? I mean, is
19 there something else? Your brief tells me you
20 stay within the administrative record and I don't
21 want to dilate that (inaudible) the Ninth Circuit
22 Rule. So what am I staying within? I mean,
23 explain to me like I'm five years old. Like, what
24 is the administrative record here?

25 MR. SACKS: That's a fair question, Your



1 Honor.

2 THE COURT: I'm not missing something?

3 MR. SACKS: So the administrative record
4 is the documents and other evidence upon which the
5 Agency based its decision, right? And one of the
6 things Your Honor mentioned in the May 19th
7 hearing is you want to hear from someone at the
8 SAB about their deliberative process. That's not
9 how an administrative works -- the administrative
10 record works. There's usually, you know,
11 discovery of the Agency beyond the record and the
12 Agency is allowed to withhold (inaudible) process
13 materials from the record. But what is the record
14 here? We don't have that yet, Your Honor. What
15 we do have is a partial component of that record,
16 and that's the application form and the fourth
17 interim final rule. The Agency is in the process
18 of compiling that record and (inaudible) if these
19 cases proceed to trial on the merits, the Agency
20 will have that record that it can provide to
21 court. Obviously, that record, here, is going to
22 be much shorter than a court may be -- would
23 normally be expecting it in a months- or
24 years-long process by what the Agency issues those
25 common rulemakings --



1 (Crosstalk)

2 THE COURT: -- be Post-Hoc like that? I
3 mean, that seems extraordinary to me. I mean,
4 like the immigration case that went up to the
5 Supreme Court, right? The Supreme Court said,
6 well, no, we don't -- you know, this rationale was
7 inappropriate. You need to go back and do it
8 again. I don't think they said you can build it
9 after the fact. I mean, is there a case that lets
10 you do that? That seems remarkable.

11 MR. SACKS: Your Honor, I apologize. I
12 think I'm not explaining myself very well. So let
13 me try again.

14 There was zero post-hoc rationalization or
15 (inaudible) here. There was compiling the record
16 of what happened contemporaneously in leading up
17 to the decision to exclude the debtors from
18 bankruptcy in the form issue in April 2nd. That
19 was the record that is being compiled. And, that
20 is the story that the Agency will tell. But
21 they've already told that story in the fourth
22 interim final rule, at least in sufficient basis,
23 for this court to find that the decision they may
24 be to (inaudible) debtors, as numerous other
25 courts have found, was not arbitrary and



1 capricious because the Agency listed two basis on
2 which it included the bankruptcy exclusion in the
3 form as of April 2nd. As Your Honor knows,
4 (inaudible) are a risk of unauthorized use of the
5 funds and a risk of non-repayment of the loan.
6 Those were the basis on which the Agency made the
7 decision to exclude bankrupt debtors. That's why
8 the -- the exclusion within the form on April 2nd
9 and the Agency, as it continued its rulemaking,
10 explained that in the fourth interim final rule.

11 THE COURT: I want to make sure I'm
12 following.

13 So your brief talks a lot about reasoned
14 decision making. So that -- that, that sentence
15 with the two reasons is the reason? And thus far
16 -- I guess, it's still being built, but thus far,
17 the record is the form and the fourth interim rule
18 with -- with the sentence you're referencing,
19 that's the entirety of the reasoning? Am I
20 missing something?

21 MR. SACKS: That is what Your Honor has
22 before it at this time and that is more than
23 sufficient at this stage of the proceedings. And,
24 a likelihood of success standard defined that the
25 plaintiffs do not have a likelihood of success or



1 will prevail on the APA claim. And again, it's
2 not that we're building the administrative record,
3 we're compiling it from contemporaneous documents.
4 It's very different; a post-hoc rationalization of
5 what's happened. That is not -- you're absolutely
6 right about the legal standard that would apply if
7 that were the case, but that's not what's
8 happening here. The very first time that the
9 Agency spoke about the PPP was April 2nd, when it
10 issued the application that excluded debtors in
11 bankruptcy. That was the decision that was made.
12 And the Agency later explained why that position
13 had been made --

14 (Crosstalk).

15 THE COURT: -- the one sentence with the
16 explanation?

17 MR. SACKS: Yes, that's right.

18 THE COURT: Okay. So can I ask you to
19 (inaudible) on this? Because I mean, this is --
20 I'm very troubled by all this.

21 So page 25 of your (inaudible) cites a
22 Ninth Circuit case that deference is warranted "if
23 the agency's path maybe reasonably discerned."
24 And can you just walk me through how do I discern
25 the path to get to that one sentence?



1 MR. SACKS: Sure. I'm happy to. So
2 again, we have to recognize here that the PPP was
3 put into the existing 7(a) lending program. And
4 the existing 7(a) lending program, because it is
5 not as fast-paced program as this one is, has a
6 slower underwriting process where you go to the
7 SBA, or, as usually what happens, delegated
8 lending institutions are instructed to consider a
9 broad number of factors with the goal of meeting
10 the statutory mandate from Congress that all loans
11 must be of sound value to ensure repayment.

12 That is a statutory mandate in the 7(a)
13 program that is unchanged in the PPP. That is one
14 confirmed (inaudible) that Congress did not touch.
15 So the Agency is still under the obligation to, if
16 possible, to make sure that loans provided under
17 the PPP are of that sound value.

18 So what the Agency was forced to do when
19 the PPP was passed was consider how the existing
20 7(a) loan program can streamline or convert the
21 application and underwriting process there to the
22 PPP. Now, one option might have been to continue
23 the exact same underwriting process within 7(a)
24 with -- for the SBA, for foreign PPP, changing
25 only the eligibility requirements now allowing



1 non-profits to get loan, now allowing (inaudible)
2 individuals to get loans.

3 So eligibility is increased, but the
4 process stays the same. Because if you look at
5 the PPP very carefully, what did Congress tell the
6 SBA to do? Did Congress say you must eliminate
7 creditworthiness? No. Congress was fine on that
8 issue. All Congress did was simply broaden the
9 pool of people who were eligible for PPP loans as
10 compared to those eligible for 7(a) loans.

11 So one option the SBA has was just to
12 continue with 7(a) process. Well, again, if that
13 was the case, we have given, by this point, about
14 200 loans in two months because of the
15 underwriting process. At the same time, debtors
16 would not have been automatically excluded. We
17 would have considered their status in bankruptcy,
18 but a debtor may have been able to show a bank
19 that, hey, despite the fact we're in bankruptcy,
20 we really do -- are able to ensure you that we can
21 repay the loans and use as authorized. So that
22 was an option the SBA had before it, right?
23 That's not the option the SBA chose because it
24 wouldn't have accomplished congressional objective
25 to get the large amount of money, billions of



1 dollars, on the street quickly. So what did the
2 SBA decide to do? How did they decide to take the
3 sound value mandatory requirement that applies to
4 the PPP and apply it to (inaudible) loan? What
5 they simply did was they giveth and they taketh
6 away. They said, you know what? To protect sound
7 value, we're going to remove all credit worthiness
8 requirements from the PPP. You fill out a
9 two-page form. You make certain certifications,
10 but banks do not have to take extra steps to
11 ensure that you can repay the money and that the
12 use is authorized. In a sense that is based on
13 your own certifications. At the same time they
14 get, they tooketh away, and said at the same time
15 we think that institutions within bankruptcy do
16 not meet that (inaudible) requirement. And
17 because we don't have the time to go one by one
18 and look at each one, they're all bankrupt
19 debtors, including Chapter 7, Chapter 11
20 liquidators, those who are on the verge of filing
21 a plan, those who filed three days ago. It is a
22 bright line rule to respect the (inaudible)
23 requirement that applies.

24 The Agency took away credit worthiness for
25 all borrowers, but we decided that it would be



1 credible in the standards following the
2 requirement of sound value for entities in
3 bankruptcy. It's not -- and so the language using
4 the claimant's (inaudible) whether it was
5 inconsistent or contradictory. In fact, it's the
6 opposite. It was not at all. And as Your Honor
7 knows --

8 THE COURT: And the path you took to get
9 to that conclusion, again, is that sentence in the
10 fourth rule? That's the path I'm looking for --
11 to eliminate the path, kind of light up the
12 stones. I hear what you're saying. So you got to
13 the conclusion through the explanatory sentence in
14 the fourth interim rule; right?

15 MR. SACKS: Well, I think you're almost --
16 I would say the fourth interim rule explains the
17 decision making process the Agency went to, to
18 include the bankruptcy exclusion in the form.

19 THE COURT: Right. I mean the form, it
20 just drops out of nowhere, right?

21 MR. SACKS: Your Honor, that's a fair
22 point, but let me try to explain that to you, if I
23 can.

24 Again, the PPP was passed on March 27th.
25 This month, the Congress wanted this money out the



1 door quickly. So, yes, the form dropped out of
2 nowhere. The alternative would have been for the
3 Agency to release a draft form and allow the
4 public to comment, consider all those comments,
5 update the form. Again, there would have been no
6 money issued by this point if that had been the
7 case. So, yes, the form dropped out of nowhere
8 because in the six-day period, the SBA worked very
9 hard at (inaudible) with treasury to figure out
10 how to give away this money consistent with the
11 7(a) loan program, which Congress specifically
12 required the SBA to act in concert with because of
13 their (inaudible) put the PPP lending program. So
14 I guess dropped out of nowhere, to the extent Your
15 Honor uses that phrase pejoratively, I don't think
16 that's -- that that's fair based on what the
17 Agency was faced with here and what it had to do.

18 Again, we would all like a more recent
19 process, but the trade-off here would have been no
20 money given under the PPP to anyone. And instead,
21 4.5 million people have benefited from it.

22 THE COURT: Or maybe no bankruptcy
23 exclusion or bankruptcy consideration as with --
24 under normal 7(a) loans, but not outcome
25 determinative; right?



1 MR. SACKS: So those -- let me address
2 those two points. Yes, absolutely. A choice they
3 could have made was no bankruptcy exclusion, but
4 Your Honor's job is not to decide whether that was
5 a better choice. Your Honor's job is to decide
6 whether the Agency is entitled to deference in the
7 choice they did make.

8 And then the second option you mentioned,
9 well, thank you for this one factor. Like the
10 7(a) program, that would be completely
11 inconsistent with the two-page form you filed
12 today, and if you certified correctly, you get the
13 money tomorrow. So, sure, Congress could have
14 said -- the Agency could have said, okay, let's
15 take a separate category for bankrupt entities and
16 we'll have a longer process for them. That's in
17 no one's interest here. That's not what the
18 Agency decided to do. It made a hard and fast
19 rule. Is that rule unfair? I just read you the
20 language from Judge Fegone in Maine. He thought
21 it was unfair. And it certainly is most likely
22 unfair to some debtors, but that doesn't change
23 whether it's arbitrary or capricious.

24 THE COURT: Right. Okay.

25 MR. SACKS: Yeah. Let me -- let me just



1 make three points if I can, Your Honor. Because
2 at least -- at least the judge that addressed this
3 point. Judge -- you know some judges start with
4 the position, "Hey, again, I oversee these
5 bankruptcies. I can make sure the money goes
6 where it's supposed to." But let me just read you
7 what some judges have said. Judge Sulfen
8 (phonetic) "It is true they are (inaudible)
9 maintaining loans of bankruptcy debtors that are
10 real, and they don't come into play when making a
11 loan to non-debtors. And if the administrator
12 could have had in mind -- some of those were
13 brought up in other cases and we talked a little
14 bit about a couple of those yesterday -- like the
15 idea of funds ending up in the hands of the
16 secured lender (inaudible) default. Judge Shan
17 (phonetic) there are circumstances (inaudible) to
18 making loans or providing financial accommodation
19 through a debtor in possession that do not exist
20 when dealing with a non-debtor.

21 There was at least a possibility here that
22 PPP funds could go to uses that were not intended
23 by the CARES Act. Judge Mack in Texas -- let me
24 find that. "It is true that in bankruptcy cases
25 there are layers of claim payment priorities set



1 forth in the code. The steps towards payment
2 priorities can range --" dah, dah, dah -- "it's
3 possible that 75 percent of the PPP loans may not
4 be able to be used for payroll in a bankruptcy
5 case, given bankruptcy claim payment parties and
6 liens. It is true that sometimes debtors in
7 Chapter 7 -- 11 cases end up in Chapter 7
8 liquidation and creditors are not paid."

9 So again, there is a basis for the
10 decision the Agency made. It --

11 THE COURT: Where is anything you've just
12 read in the administrative record?

13 MR. SACKS: Again, it's in the interim
14 final rule 4, which says risk of loan not being
15 repaid and risk of unauthorized use of the funds.
16 That is what the Agency considered when it decided
17 to include the bankruptcy exclusion (inaudible).

18 THE COURT: Okay. I understand.

19 MR. SACKS: Okay. And let me -- so again,
20 I think that -- that it's important to consider
21 that, you know, (inaudible) authority for this,
22 with the (inaudible) case out the Ninth Circuit,
23 the APA does not allow the Court to overturn the
24 (inaudible) because it disagrees with the
25 decision. The San Louis and Delta Mendota Water



1 Authority case, even when the Agency explains a
2 decision with less than ideal clarity, or if you,
3 the Court, will not upset the decision on the
4 account of the agency's passing reasonably certain
5 what Your Honor read. You may not like the level
6 of clarity you're getting from the Agency here,
7 but is the Agency decision reasonable? I think it
8 certainly is.

9 And if we look at the State Farm case in
10 the Supreme Court, it tells you how to determine
11 if something is arbitrary and capricious.

12 So what does it tell you? First, has the
13 Agency relied on factors as Congress has not
14 intended it to consider? Certainly not here. Has
15 the Agency entirely failed to consider an
16 important aspect of the problem? I mean,
17 arguably, this is unfair, but they've considered
18 the aspect of the problem. What are --

19 (Crosstalk)

20 THE COURT: Where do I see that? Where is
21 that consideration? Show me.

22 MR. SACKS: It's -- the question is
23 whether they failed to an important aspect of the
24 problem. So we'd have to identify what that
25 aspect of the problem would be. I don't think



1 we've done that. The only issue, here, is who was
2 entitled to get a loan in a first come first serve
3 basis from an infinite pool of money and how does
4 the Government ensure those loans are sound, which
5 Congress has mandated the supply of PPP loans as
6 well. And the Agency considered that, the
7 conditions that are relevant there. Unauthorized
8 use (inaudible) for and a potential risk of
9 non-repayment. There --

10 (Crosstalk)

11 THE COURT: -- consideration is evidenced
12 by -- again, by defendants.

13 MR. SACKS: Yes. And I guess I'll try not
14 to -- I have to keep repeating myself. I'm not
15 hiding the ball here. There's nothing else that I
16 haven't told you that -- that you should be
17 considering here. And -- and -- and I won't try
18 to belabor this point. I think -- I think the law
19 is very clear of the standard for what and what
20 not -- what is not arbitrary and capricious. And,
21 we cite that extensively in our brief. And before
22 -- interim final rule clearly meets that standard
23 and surpasses that standard, because it gives two
24 reasoned explanations for why a PPP loan to a
25 debtor is different than a PPP loan to a



1 non-debtor. And, that's what court after court
2 has recognized. That it may be unfair, it may not
3 apply to all debtors, but (inaudible) applies to
4 some, and that shows the agency's decision was
5 reasoned and not arbitrary and capricious. It
6 doesn't have to be the best addition. It doesn't
7 have to be the decision Your Honor would make.
8 But under these extreme and unique circumstances
9 of six days to loan billions of dollars and the
10 Government having to make difficult choices about
11 who is entitled to a limited pool of money, the
12 Agency made a bright line decision. And that
13 decision was not arbitrary or capricious. It may
14 be unfair, it's certainly difficult for some
15 debtors, but it's not arbitrary or capricious.

16 THE COURT: Okay. I under I understand
17 your position.

18 MR. SACKS: Okay. Let me, if I can, try
19 to address a few of the other APA points that the
20 client has raised. Let me address briefly the
21 issue of section 4003 of the CARES Act, because
22 what the clients are telling you, essentially, is
23 that because that provision of the CARES Act
24 contains a specific exclusion for entities in
25 bankruptcy, you need to consider the action the



1 (inaudible) from the PPP to be determinative. And
2 they rely on the standard, (inaudible) certainly
3 correct. Can the statutory construction, that
4 something mentioned one place in the statute but
5 omitted elsewhere, is generally deemed to be
6 purposeful. But, that's not the case here. And
7 let me briefly try to explain why this is the
8 point Your Honor has an interest in. The reason
9 for that is that we don't have one uniform statute
10 here. The PPP, as you know, was placed into the 7
11 (a) loan program. It's now an amended part of the
12 15 USC 636. The new program is actually 4003,
13 which will have this new, unique statutory
14 designation, which is one by treasury and not the
15 SBA. It is something that has never existed
16 before; it's a program to give money to small and
17 medium businesses. And the only way to look at
18 4003 in comparison to the PPP is this: As you
19 know the PPP, Congress expanded the size
20 eligibility for businesses that can receive PPP to
21 500 people. Well, Congress and section 4003 made
22 a new program for 500 and above, up to, I think,
23 10,000. So that's really how you need to look at
24 those two statutes in concert. But, because 4003
25 was new, Congress chose to explicitly include a



1 bankruptcy exclusion there, wherein the 7(a)
2 lending program, bankruptcy is already a
3 consideration in the lending, and that is true as
4 well for the 7(a) program. So that (inaudible)
5 construction is absolutely valid and generally
6 applies on the surface. And it may be appealing
7 here, but you can't reach that conclusion unless
8 you look closely at the two statutes. But once
9 you do, you simply can't discern anything about
10 the PPP from the inclusion of that language in the
11 4003.

12 Your Honor, if you give me a second, I
13 jumped around a bit and I'm just looking at my own
14 notes to see if anything else I wanted to cover,
15 if you don't mind.

16 THE COURT: Sure. Why don't we take just
17 a quick couple minute break.

18 MR. SACKS: Thank you.

19 THE COURT: You can get organized and
20 we'll be back in about two minutes.

21 (Whereupon, a recess was taken)

22 THE COURT: Are you ready to continue?

23 MR. SACKS: I am. I have two final points
24 on the APA issue and then I'll move on to
25 irreparable harm, unless Your Honor has questions.



1 The first (inaudible) is important to
2 understand the exact language of the statutes
3 here. The CARES Act requirement about sound value
4 is a "shall" requirement. That's in 15 USC 636 a
5 6. The CARES Act obligation for the Agency to
6 make PPP loans is a "may" requirement. It says
7 the administrator may guarantee covered loans
8 under the same terms and conditions as 7(a).
9 That's in CARES Act section 1102, subsection a 2.
10 That shall/may distinction is a giant one that
11 tells the Court a lot about Congress's decision to
12 delegate, to the SBA, the authority to decide in
13 these -- in the may guarantee language, who
14 they're going to guarantee loans to and who
15 they're not.

16 Let me also address some -- some, I think,
17 significant issues about the HEROES Act, which,
18 again, was the bill passed by the House on May
19 15th and what it says.

20 The plaintiffs point you to four letters,
21 I believe by members of Congress, who suggest -- I
22 haven't looked at them too closely, but I think it
23 suggests that the -- the House, because the
24 Congress did not mean the PPP to exclude -- to
25 (inaudible) to have those excluded. Those --



1 first of all, they're hearsay and since this is an
2 evidentiary hearing, a PI should not be permitted.
3 But, nonetheless, they're not legislative history
4 and no court would say they are legislative
5 history. The HEROES Act, which would have been
6 the PPP, and which the House passed, has a
7 specific amendment in section 9000 1 (c) which
8 says during the coverage period of the PPP, any
9 nonprofit organization that is a critical access
10 hospital shall be eligible to receive a covered
11 loan regardless of the status of such a hospital
12 that the debtor in a case under Chapter 11 of
13 Title 11. So again, this is only the House and
14 only a bill passed for the House, but the House
15 recognized that if someone in bankruptcy whose
16 going to get a PPP loan, that the Congress would
17 have to amend the PPP to permit that. And I think
18 that is further significant (inaudible) that when
19 the SBA acted within its delegated authority, it
20 was doing so.

21 So let me now turn to the irreparable harm
22 issue, if I could. And I want to start with what
23 I think is important. And that really is the very
24 highest standard that plaintiff must meet to have
25 a showing of irreparable harm in its favor.



1 Let me -- let me cite to you
2 Judge Saltzman on this. I think that what is - I
3 think that is what the case law requires. There's
4 got to be some sort of showing of immediate and
5 irreparable harm. There was no allegation, for
6 example, that not receiving the funds would cause
7 the debtor to be unable to organize, would lead to
8 a conversion or a dismissal of the case, would
9 lead the debtor shutting down. None of that is in
10 the record. And, to me, that is a sort of
11 irreparable harm if the case law looks to when
12 deciding whether a temporary restraining order is
13 appropriate. Another recent case Your Honor
14 doesn't have, and we'll upload this to you as
15 well, in the Hartshorn case out of the Western
16 District of Kentucky. This is the case where the
17 Court granted a TRO in favor of the debtor and set
18 a PI hearing. After a PI hearing the Court issued
19 an order denying relief (inaudible) based on the
20 fact the debtors had not proved irreparable harm.
21 The Court said the debtors have not proved
22 directly that -- irreparable harm if they are
23 denied the PPP funds they have requested because
24 they have not shown that the PPP funds are
25 necessary to stave off economic destruction or an



1 inability to continue with their DIP operation
2 going forward. All the judges recognized it, that
3 irreparable harm is requires certain and actual
4 evidence of immediate harm. A PI is an
5 extraordinary remedy and it was only justified in
6 those types of cases. That's the standard that a
7 plaintiff must meet to prevail on this factor of
8 the four-factor test.

9 Now, the question then becomes what is in
10 the record, here, from the plaintiffs that show
11 whether they have met this factor or not? And I
12 submit to you, Your Honor -- and course Your Honor
13 knows this bankruptcy. You've been overseeing it
14 for a year. You know, this -- I think at least
15 that's the case -- but you know this -- the -- the
16 evidence here far better than I do from just
17 trying to review some facts and pleadings. But, I
18 certainly can review what the plaintiffs have
19 said, and they don't say anything in their initial
20 motion, in the declaration attached to that
21 motion, and in their reply that supports an
22 argument that they met that very high standard of
23 irreparable harm.

24 Let me submit that I think what Mr. Maizel
25 told you was that, "We want this money. We need



1 this money. And there's irreparable harm here is
2 if you move on our favor, we won't get it." With
3 all due respect, Your Honor, that is insufficient
4 to find irreparable harm. Simply wanting the
5 money is not enough. If that was the case, every
6 plaintiff in every one of these cases who didn't
7 get a loan would automatically prove irreparable
8 harm. That certainly hasn't been what happened.
9 Of course, the Courts have held plaintiffs to a
10 higher standard. And this court should do --
11 without a higher standard, the standard, that the
12 courts have set out for what is irreparable harm.

13 So let's take a look, again, at some of
14 the language that the plaintiffs have used in
15 their pleadings and why that language here is
16 insufficient. Let me see if I can go to that
17 here. In the reply, the harm is the inability of
18 the debtors to apply for governmental assistance
19 to sustain the payroll for its nurses and other
20 staff in the midst of a global pandemic and the
21 economic trauma caused by the debtors following
22 Washington State guidelines requiring the
23 cessation of elective surgeries; that's at 10.
24 There's also similar language at 44 and 45 of the
25 reply. Essentially, what you're hearing there, is



1 we will use this money to keep paying our nurses.
2 We don't dispute that they intend to do that. But
3 the question is, are they unable to pay their
4 nurses without this money? And if so, is the
5 hospital going to cease operations or is it going
6 to cause their bankruptcy to crater? There is
7 zero evidence of that.

8 I believe the record shows they have
9 continued to maintain their payroll and their
10 staff and continue to pay their nurses. Would
11 this money help do that? Perhaps. But is there
12 irreparable harm if they don't get that money
13 (inaudible) in that vein? No, there's not.

14 The economic trauma caused by this
15 cessation of elective surgeries and the other
16 issues that are having (inaudible), we don't
17 dispute or deny any of that. We understood
18 everything the Court took judicial notice of on
19 May 19th, but that does not translate into the
20 immediate and irreparable harm facing the debtor.
21 In fact, not long ago, I believe they filed a
22 motion for emergency relief in the Court to ask
23 them to close their hospital in Yakima. And in
24 doing so, you know, the (inaudible) point that
25 that will help the rest of the debtors in



1 bankruptcy successfully reorganize and get out of
2 bankruptcy. There's been no suggestion in recent
3 status reports, or any other pleadings, that a
4 failure to obtain this loan will have a
5 significant detrimental effect. And, in fact,
6 Judge Saltzman would say it would have to crater
7 the reorganization. There is none of that here.

8 Arguing that the debtors would not be
9 harmed by not getting the money is not the same
10 thing as arguing that they would not suffer
11 irreparable harm for the standard courts --
12 particularly courts in the Ninth Circuit, require
13 for a showing on that prong to get preliminary
14 conjunctive relief, which is what the plaintiffs
15 seek in this case.

16 And again, going back to what Mr. Maizel
17 said in his statement, there is no dispute about
18 hospitals facing challenges nationwide. But that
19 is absolutely not relevant to the question of
20 irreparable harm. That is to (inaudible)
21 individual to the plaintiff. It's their burden to
22 show that through declarations, through financial
23 records, through efforts to obtain loans
24 elsewhere -- all of those things -- they support a
25 finding of irreparable harm here. They come



1 nowhere close under their particular circumstances
2 of showing that here.

3 Now let's go on to the remaining prong.

4 And there's not been one judge yet --

5 THE COURT: Can I ask you one question on
6 irreparable harm, Mr. Sacks?

7 MR. SACKS: Yes, your honor.

8 THE COURT: One thing that goes into the
9 analysis here is whether the plaintiff would have
10 an adequate remedy without getting a preliminary
11 injunction. And let's say I don't issue the
12 preliminary injunction and the June 30th deadline
13 passes or the money runs out, although I think
14 that there may be a lot of money still left. But,
15 you know, for whatever reason they can't get to
16 the money, the money's gone, what's the SBA's view
17 about whether it's liable for damages at that
18 point? I mean is the SBA then -- you know, let's
19 say we then have a trial, right? So the PPP
20 money's gone, the milk spilt out of the cart and
21 we have a trial on the merits and I conclude that
22 the debtor should have gotten a PPP loan. Can
23 they get a money judgment against the SBA?

24 MR. SACKS: That's a complicated question,
25 Your Honor, and one that we're still researching.



1 I would say that the June 30th cutoff for the
2 appropriated funds is a congressional deadline.
3 And so I don't believe the Court would have the
4 power to offer that. Because if you force the
5 executive branch to pay out of -- out of money
6 that has no longer than appropriated, then we're
7 looking at an (inaudible) act violation here. So,
8 I don't believe there could be a basis for that.
9 Is there's an alternative basis, a source of funds
10 for this court to award damages? I'm not sure.
11 Judge Fegone, in a case that he just resolved,
12 asked for briefing and testimony on the issue of
13 damages. It was something that he was
14 considering. Obviously, he decided the Government
15 won, but -- but that is, at this point, an
16 unresolved question, I would say. But I -- I
17 certainly don't want to guarantee that there is a
18 legal basis for the plaintiff to obtain damages
19 here. But I will submit it that even if that's
20 the case and we can conclude today there is no
21 basis to obtain damages after June 30th and they
22 don't get the loan, that is not enough to prove
23 irreparable harm. It's harm, sure. This is money
24 they wanted that they don't get. But it's not
25 irreparable.



1 THE COURT: Okay. I understand. Thank
2 you thinking.

3 MR. SACKS: So turning to the public
4 interest prong. I don't believe there's been a
5 court yet that has determined the government's
6 arguments were the better here. There's a court
7 (inaudible) all of the courts that have granted --
8 denied injunctive relief, which is close to 20
9 now, have found the public interest weighs in
10 favor of the plaintiffs in this case. And, I
11 really won't dispute that here. We briefed what
12 we think are the relevant factors the Court should
13 consider. But, every court has (inaudible) that.
14 And so those issues about -- about, you know,
15 COVID and (inaudible) of the pandemic and the
16 impact on nurses and doctors, all of those are
17 completely valid concerns and arguably relevant to
18 the public interest factor and we're not going to
19 tell the Court not to consider that. But in the
20 grand scheme of looking at how these factors
21 should be weighed, with all respect, there is
22 simply no likelihood (inaudible) from 525 or the
23 ADA, and there's no reparable harm. And those two
24 issues drive any comparison, the other factors,
25 underground. They just can't rise, no matter how



1 significant the public interest. Even accepting
2 your 99 or 100 percent analysis, it's not enough
3 to overcome those other two factors to support
4 injunctive relief here. So, I believe that's all
5 I have, Your Honor. Thank you.

6 THE COURT: Thank you, Mr. Sacks. And I
7 appreciate your candor on that public interest
8 point. So you've preserved, I guess, your
9 position on this and I thank you for your candor
10 and not arguing something you reasonably know
11 you're going to lose. So I appreciate that.

12 Mr. Maizel, I'd like to hear your response
13 to the point Mr. Sacks made about irreparable harm
14 and the Judge Saltzman case, and (inaudible) the
15 case standard and the -- the harm that will befall
16 these debtors if they don't get the PPP money.

17 You're free to also address, you know,
18 anything else you'd like, but that's really the --
19 the one point I'd specifically like you to respond
20 to.

21 MR. MAIZEL: Your Honor, we've covered a
22 lot of ground here today and I appreciate the
23 Court's patience and I appreciate Mr. Sacks
24 arguments.

25 I take one second and digress. I actually



1 had Mr. Sacks' roll. He's been arguing these
2 cases all over the country for weeks now. And
3 actually my first foray in a bankruptcy court was
4 the equivalent of Mr. Sacks representing the
5 Medicare program in bankruptcy courts around the
6 country in the mid-1990s. I had exactly his role
7 in a different context. But, it is telling that
8 Mr. Sacks, having this role, arguing these cases
9 around the country, is incapable today of
10 providing an administrative record to support his
11 argument. The fact that they are now still
12 compiling it, given that the record apparently
13 only consists of six days of deliberations, it's
14 hard to fathom how after, now, almost two months
15 to compile the record, six days of deliberations,
16 they're incapable of producing the Court with any
17 evidence to support the reasoned decision-making
18 the claim is represented in those two phrases in a
19 single sentence.

20 Your Honor, I'll very -- just quickly
21 respond to a couple of the other points, and then
22 I will get to the point of irreparable harm. With
23 regard to sovereign immunity, section 106 (a)(1)
24 waives sovereign immunity as to the 525 claims.
25 It's clear section 106 (a)(4) only requires



1 compliance with procedural requirements for
2 enforcing orders against the Government.
3 And with regard to 15 USC section 634 (b), we cite
4 three cases. The first circuit, the DC circuit
5 and the federal circuit, all recognizing that the
6 subsequent law clearly that the -- the law he
7 relies on for the sovereign immunity argument well
8 predates the bankruptcy codes clear waivers of
9 sovereign immunity. And virtually -- and I think
10 most courts have recognized that in this context.

11 With regard to the 525 (a) argument, yes,
12 we all know the history of 525. It did come out
13 of the Perez case. It did deal with a driver's
14 license. But it is really -- you know, it's not
15 meaningful to site Perez anymore because courts
16 have widely expanded the application. First of
17 all, the language itself widely expands the
18 application beyond the context of a driver's
19 license and courts have widely expanded it beyond
20 that. It's interesting that he refers to the Ayes
21 case, in the Fourth Circuit and then says that
22 that case is different because there was a
23 government gatekeeping role and the Court had said
24 you can get a private -- you can get a loan from
25 private sector, of course.



1 As judges in this context have recognized
2 repeatedly, there is no private -- you can't get a
3 loan from the private sector which is intended to
4 be forgiven and not repaid. And the government's
5 gatekeeping role here is exactly clear. And that
6 is exactly -- ties into the language of Stoltz and
7 why the language installed directs our analysis
8 here to 525 (a) applying. In the Chevron
9 analysis -- look, I mean, his discussion of the
10 Chevron analysis, as he described it, is
11 interesting, but it seems to ignore the Supreme
12 Court's jurisprudence over the last 30 years,
13 which has significantly restricted the application
14 of Chevron. We cite both the Mead case but also
15 Burwell from only four or five years ago, which is
16 the Affordable Care Act case where the Court
17 expressly lays out the application of Chevron and
18 talks about the need for ambiguity for Chevron --
19 for ambiguity to be present before there is an
20 application of Chevron. That's the Supreme Court
21 jurisprudence and government counsel can keep
22 going back to the 1984 decision, but this court
23 has to look at more recent decisions of the U.S.
24 Supreme Court, which clearly apply a much more
25 limiting interpretation to the applicability of



1 Chevron. When you look at those rules, when you
2 look at those cases, it's clear, here, that
3 Chevron deference is simply inapplicable.

4 The Government counsel says that, you
5 know -- if you look at their two sentence --
6 they're one sentence two phrase rule, that shows
7 you that their decision is neither arbitrary or
8 capricious because it shows that they came up with
9 a post litigation rationalization of their
10 decision.

11 It is, again, telling that the first and
12 second rules have no such discussion. The third
13 rule has a discussion, which seems directly
14 contrary to this. And the fourth rule, after
15 Mr. Sacks and others have been repeatedly required
16 to litigate this particular issue, now explains --
17 it doesn't even explain, Your Honor. As the Court
18 pointed out there, no evidence of deliberation,
19 there's no record. Although the Court asked them
20 to provide a record, there is no record to support
21 the decision making here. There is simply blanket
22 statements that the administrator has decided,
23 with apparently no evidence to support it, that
24 debtors who are under the supervision of a federal
25 court, under the supervision of an arm of the



1 United States Department of Justice and have to
2 publicly disclose all their distributions every
3 month in public records, are somehow more likely
4 to misuse the funds and less likely to repay them
5 if they're unforgiven -- which is interesting and
6 I'll come back to that in a minute -- since
7 there's no record to support any of that decision
8 making.

9 It's also interesting that government
10 counsel repeatedly refers to how they put this --
11 Congress placed this program into the existing
12 7(a) program and -- and therefore incorporated the
13 -- incorporated by reference the existing credit
14 worthiness obligation. Which is, of course,
15 completely inconsistent with the precise
16 eligibility rules that Congress did articulate.
17 But more importantly, it's important, as
18 government counsel conceded and I think this court
19 noted, the 7(a) program does not contain any such
20 express prohibition against loaning to debtors.

21 So if Congress, and it's a normal rule
22 (inaudible) construction that Congress, if it
23 intended legislation to change judicially-created
24 concepts or regulatory concepts, it makes that
25 intent specific. That, of course, is the well,



1 ,oft repeated, language from Midlantic National
2 Bank versus the New Jersey Department of
3 Environmental Protection, a Supreme Court decision
4 from 1986. That means that Congress placed --
5 when it is presumed that when Congress placed this
6 PPP into the 7(a) program, it would have done so
7 with the knowledge that the program did not
8 exclude debtors in bankruptcy.

9 And so if the Government counsel wants to
10 rely on the fact that it incorporated -- Congress
11 chose to incorporate this program into the 7(a)
12 program and therefore incorporated this credit
13 worthiness, then it must concede that it would,
14 then, have also expected the administrator to
15 continue the existing rules governing 7(a), which
16 do not exclude debtors in bankruptcy. Which, of
17 course, the administrator completely turned upside
18 down in the PPP program.

19 I'm just trying to run through, Your
20 Honor, the issues. It is interesting that the
21 Government counsel argues, now, that because
22 Congress excused the SBA from full rulemaking,
23 which would've created a rule with the force of
24 law subject to Chevron deference, that somehow the
25 exigencies of the situation and Congress's



1 decision to excuse that rulemaking, means that
2 this court should now apply Chevron deference,
3 even though it's clearly contrary to Supreme Court
4 guidance. And I suggest that the exigencies of
5 the situation, or the fact that the SBA chose not
6 to go through formal rulemaking, doesn't relieve
7 this court of its oversight responsibilities. And
8 in exercising those oversight responsibilities, it
9 has to apply the right rules of review. And that,
10 here, is clearly not Chevron, it is Skidmore. And
11 as we've described before, Skidmore is a much less
12 deferential standard for the SBA's application
13 here.

14 It is interesting, also, that the SBA
15 argues that because -- it is -- it's rulemaking is
16 not unfair, not arbitrary or capricious, because
17 here it decided it -- it decided with apparently
18 no evidence available at least, that the debtors
19 in bankruptcy were more likely to misuse the funds
20 and the debtors in bankruptcy we're less likely to
21 be available to repay it. And they -- and counsel
22 for the Government relied on some language from
23 Judge Saltzman and other cases where they have
24 said, you know, the rules of the -- the rules for
25 distribution of assets might apply or DIP lenders



1 liens might attach. Let me put that to rest here,
2 Your Honor. First of all, the debtor has
3 explained that it will use the proceeds only for
4 purposes consistent with the act, so to make it
5 forgivable. But also will make it clear on the
6 record that the debtor will take these funds, if
7 it's awarded the funds, and put them in a separate
8 account, will not put them in DIP general account,
9 will label that account PPP funds. We will
10 provide an appendix to the monthly operating
11 report, explaining, you know, as we must with
12 regard to the monthly operating report, showing
13 where every distribution of the PPP funds has been
14 made. We will make sure that any order from the
15 Court granting our relief in this matter expressly
16 says that the funds, one, can only be used in
17 accordance with the limits of the PPP. Two, must
18 be held in a separate account. Three, will be
19 reflected in the monthly operating report in an
20 appendix. And perhaps most importantly, given the
21 comments of some of the judges, we have the
22 agreement of Lapis -- and their counsel was on the
23 phone. I don't know if they've lasted this
24 long -- but they were on the phone and they have
25 agreed expressly that their liens, both



1 pre-petition and DIP lending liens, will not
2 attach to the proceeds of the PPP loan. That
3 would also be included in an order, and we would
4 get a stipulation from the -- from Lapis to that
5 effect. That should extinguish any issue with
6 regard to where the funds go. And, the Unsecured
7 Creditors Committee has also agreed to that
8 disposition. They were on the phone earlier; I
9 don't know if they're still on.

10 THE COURT: I understand and appreciate
11 that. Thank you, Mr. Maizel.

12 MR. MAIZEL: So then, Your Honor, the
13 Government argues that the rule itself is the
14 record. That it explains -- and says with
15 remarkable ingenuity that -- it describes that by
16 saying that although it's -- the explanation may
17 be with less than ideal clarity. Well, Your
18 Honor, I think your questions indicated your
19 concerns about the lack of a record which are
20 well-grounded here. There is no way to determine
21 if the agency's decision here was reasonable
22 because all you have is the rule itself, which
23 they claim is to show you the decision-making
24 process. There are no factors here to indicate
25 that the rule is not arbitrary and capricious.



1 And in fact, Your Honor, I think the Court could
2 take judicial notice of the offers we've made that
3 address the issues of the misuse of the funds,
4 that the funds would be escrowed and only used for
5 PPG purposes so that they would be available to be
6 repaid if the loan were not forgiven, and to make
7 sure that the funds are not misused or used
8 inappropriately. So, that, I think undermines the
9 arguments -- the issues raised by the rule to the
10 extent of rule is anything except post hoc
11 rationalization.

12 It is disappointing that the judge in
13 Maine found that the SBA made reasonable choices.
14 I have no idea what the record looks like in those
15 cases. It is hard to fathom how the judge in
16 Maine could have reached those -- could have made
17 that statement given that there's no evidence, at
18 least if the record looks like it does in this
19 case, to support either assertion. There are no
20 -- there's simply no reasoned explanation; there
21 is no reason provided for the decisions.

22 Your Honor, the last point I'd make before
23 out -- I'm sorry, a couple. The argument -- it is
24 interesting the Government counsel argues that you
25 should ignore the fact that Congress was able to



1 include express language in section 403 of the
2 statute, which the Government argues you shouldn't
3 treat the statute as if it was passed at all at
4 one time even though it's not clear that would
5 make a difference, but here, of course it was.
6 They said you shouldn't treat that as a uniform
7 statute. So you should ignore the rule of
8 statutory construction that says Congress, where
9 it includes specific language in one provision and
10 doesn't include it in another, that decision by
11 Congress means something. They want you to ignore
12 that because they say just, you know, don't --
13 don't treat it as if -- as if it means anything.
14 You should ignore it because it deals with
15 different issues, I think, is to reduce their
16 argument to its base. But it is interesting, with
17 regard to 525(a) and 525(c), they're making
18 exactly the opposite argument. And that statute
19 clearly was amended at different times under
20 different circumstances. So with regard to a
21 statute which was uniformly passed recently, where
22 they -- congress included specific language, the
23 Government wants you to ignore the rule of
24 statutory construction, but they rely on it with
25 regard to section 525. It is difficult to



1 understand how they can expect to have it both
2 ways.

3 The argument about "may versus shall" is
4 an old Chestnut trotted out by lawyers repeatedly.
5 It's interesting. The Supreme Court has -- I mean
6 the cases are all over on this, actually. The
7 Supreme Court in Gutierrez D. Martinez versus
8 Lamagano 515 U.S. 417 at 432 note 9, 1995
9 decision, expressly mentions, after going through
10 the history of the convoluted discussions of this
11 shall be mandatory; this may be. You know, they
12 specifically say shall sometimes means may.
13 And -- and what the cases teach us is that you've
14 got to look at context. That you can't draw a
15 bright line with regard to shall versus may. And
16 in fact -- in fact, federal guidelines direct
17 people writing regulations and statutes not to use
18 shall anymore for that express reason. So for
19 example, the Federal Registered Documents Drafting
20 Handbook at section three says don't use shall,
21 use must because shall is unclear. If you want to
22 impose a legal obligation, use the word must. And
23 the Federal Plain Language Guidelines, page 25,
24 which implement the Federal Plain Language Act of
25 2010 -- yes, there is a Federal Plain Language Act



1 from 2010 -- they make the same point. They say
2 if you want to impose a legal obligation use must,
3 not shall. And that is because courts have
4 grappled with the use of shall versus may for many
5 years unsuccessfully.

6 The referenced to the HEROES Act, I don't
7 know what to do with that, Your Honor. It is a
8 piece of unpassed legislation. We have no idea
9 where it's going or what will happen to it, and I
10 doubt we can rely on it.

11 All right, let's get to the issue of a
12 reparable harm. We are in the context of a
13 preliminary injunction. We've asked the Court to
14 do -- to preserve the status quo so we can get a
15 ruling on the merits of the 525 argument after a
16 trial. And we -- I mean in that context, I don't
17 believe that we have to show that we would be put
18 out of business -- which is a pretty high standard
19 -- that we would be put out of business by not
20 getting these particular funds. I think what is
21 clear is the irreparable harm is here. These
22 funds, this program, will not be available after
23 June 30th. So if we don't get the Court to
24 preserve the status quo, which is the last
25 uncontested position of the parties under Ninth



1 Circuit law, then we will have no chance that a
2 remedy the Court could grant us -- if it found
3 that there was discrimination of a 525 in
4 violation of federal law -- would be meaningless
5 because the program will be gone. And so in that
6 context, Your Honor, is that -- that program will
7 be gone.

8 That is the irreparable harm. And I don't believe
9 -- in any event we've cited a bunch of cases that
10 take a much broader definition of irreparable harm
11 than the Government seeks here or that Judge
12 Saltzman implied.

13 I don't believe that irreparable harm
14 requires us to show that it is this or death. And
15 I think that's an incredibly high standard, which
16 is simply not supported by the case law. We
17 support -- we've cited a bunch of cases to the
18 contrary.

19 And in the context of a preliminary
20 injunction, here, where the program -- where there
21 is no dispute from the Government that this
22 program will go away before the Court could rule
23 if we don't get a preliminary injunction requiring
24 them to just escrow the funds necessary to satisfy
25 our loan application, if it's granted, and to hold



1 our application in abeyance pending a ruling on
2 whether it is in violation of federal law to
3 discriminate on this basis. I think that is
4 sufficient irreparable harm under the case law,
5 Your Honor.

6 THE COURT: Okay. Thank you, Mr. Maizel.
7 Have you covered everything you wanted to cover?

8 MR. MAIZEL: Yes, Your Honor. I think so.
9 Thank you.

10 THE COURT: I appreciate it. I appreciate
11 both you and Mr. Sacks' arguments of both counsel
12 today and your advocacy. I understand both sides.
13 If you give me two or three minutes, I just want
14 to dot some I's and cross some T's and I'll come
15 back with an oral ruling for everyone. Give me
16 just a couple of minutes.

17

18 (Whereupon a recess was taken)

19 THE COURT: All right. Mr. Maizel, are
20 you still on?

21 MR. MAIZEL: Yes, Your Honor.

22 THE COURT: Mr. Sacks?

23 MR. SACKS: Yes, Your Honor.

24 THE COURT: Okay. I guess it's now
25 afternoon; we started in the morning and I'll say



1 good afternoon to both of you.

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

14 During the break, the Court read the
15 recent decision issued today by bankruptcy judge
16 (inaudible) in the district of Maine, so the
17 Court's reviewed that decision as well.

18 The Court's now prepared to rule on the
19 debtors' request. In doing so, the Court utilizes
20 the familiar four factors, which largely collapsed
21 to three in this context, regarding whether a
22 preliminary injunction should issue. Although the
23 debtors contested to some extent, I agree with the
24 articulation of the legal standard as set forth on
25 pages 14 to 15 of the government's brief and am



1 applying that heightened standard today. Turning
2 to the factors: Factor one is whether the moving
3 parties or the debtors will probably, or very
4 likely, prevail on the merits. I'm going to break
5 this into two parts and discuss, first, section
6 525, and then second, the Administrative
7 Procedures Act issue.

8 Regarding section 525, the debtors contend
9 that the exclusion of entities in bankruptcy from
10 PPP funding violates bankruptcy code section
11 225(a). Section 225(a) bars bankruptcy-related
12 discrimination involving, "A license, permit,
13 charter, franchise, or other similar grant." The
14 parties disagree about whether PPP funding fits
15 within this phrase. In answering this question,
16 the Court is bound by the text of the statute.
17 The statutory text of the bankruptcy code reflects
18 an area of issues considered by Congress, and the
19 code is not for you to ignore the plain meaning of
20 the text even if the policy outcome is
21 unfavorable. Many recent Supreme court opinions
22 make this crystal clear. See, for example, Puerto
23 Rico versus Franklin, California, Tax Free Trust
24 136 Supreme Court Reporter in 1938 at pages 1946
25 to 49, a 2016 decision in which the Court held



1 that Puerto Rican municipalities were
2 categorically precluded from any form of
3 bankruptcy relief because of the plain text
4 section 903 of the bankruptcy code, a decision
5 that Congress subsequently addressed by passing
6 the (inaudible) litigation. Baker Box LLP versus
7 (inaudible) LLP 135 Supreme Court Reporter 2158 at
8 page 2169, 2015, in which the Court held that the
9 plain text of the bankruptcy code prevents fees on
10 fees in defending professional fee applications
11 and noted that perhaps that's a bad policy
12 decision, but policy decisions are left to
13 Congress. Rabax (phonetic) Gateway Hotel, LLC
14 versus Amalgamated Bank 566, U.S. Reporter, 639 at
15 page 649, a 2012 decision authored by Justice
16 Scalia, noting that the pros and cons of credit
17 bidding in bankruptcy are left strictly to
18 Congress. Pole versus United States, 566, U.S.
19 506 at pages 522 to 23, a 2012 decision, authored
20 by Justice (inaudible) finding that Chapter 12
21 debtors cannot protect tax on the sale of a family
22 farm in the context that's attracted to Chapter 12
23 case from administrative priority, a decision that
24 Congress subsequently overruled through
25 legislation. Moreover, as Justice Keegan recently



1 explained all of the bankruptcy code generally,
2 "aims to make reorganizations possible, it does
3 not commit to anything and everything that might
4 accomplish that goal." And Mission Products
5 Holding, Inc., versus Technology 139 Supreme Court
6 Reporter 1652 at page 1665. That's the decision
7 from last year, 2019.

8 This court is also duty-bound to apply the
9 statute Congress has provided and simply cannot
10 rewrite the text or advance a desirable result in
11 a particular case. Keeping those foundational
12 principles in mind, the Court cannot conclude that
13 the debtors are likely to prevail on the theory
14 that section 525 is violated here.

15 First, the Court agrees with the
16 Government that PPP loans are properly classified
17 as just that, loans. To be (inaudible) these are
18 highly unusual loans that may openly and
19 functionally provide free money, but that doesn't
20 matter. They're not loans in the first instance.
21 There's a borrower, a lender, a promissory note, a
22 promise to repay, and the like.

23 As other -- as many other courts have
24 noted, we certainly are not "market terms," but
25 there can be many loans in society that are not



1 done on market terms or even economically rational
2 terms. But nevertheless, are loans. For example,
3 private equity sponsors sometimes lend troubled
4 portfolio companies money on highly favorable
5 terms, terms no (inaudible) lender would ever
6 offer. Sometimes this leads to bankruptcy fights
7 about re-characterization, but the equity sponsors
8 win most of those fights. Why? Because there was
9 a loan, even if it is an off-market or friendly
10 loan. (Inaudible), I might loan money to my
11 brother or a good friend on off-market terms,
12 perhaps even on terms that will result in total
13 forgiveness of the loan, such as performing
14 charitable work or donating the money to a worthy
15 cause. The point is that in these contexts, there
16 is still some sort of extension of credit with a
17 corresponding obligation.

18 I ultimately agree with the various other
19 bankruptcy judges who have concluded that's the
20 better way to classify PPP loans. Moreover, even
21 if I could conclude the PPP loans -- or I could
22 construe PPP loans as a form of financial grant, I
23 still not -- I still do not think the debtors are
24 likely to succeed on their section 525 argument.
25 I agree with bankruptcy Judge Brendan Shannon from



1 Delaware, that section 525 (a) does not apply to,
2 "money grants." The statute's use of the word
3 similar to modify the word grant has to be given
4 meaning, and it plainly functions to limit grants
5 to those that are in the permits licenses and the
6 like. To be sure, many things could fall with
7 (inaudible) increase. The ability to use the FCC
8 spectrum, specified real property (inaudible) and
9 the (inaudible) real property as in the Stoltz
10 case, perhaps patents or trademarks. But an
11 affirmative money grant is different in kind from
12 what are essentially forms of permission or access
13 that are uniquely granted by the Government.
14 Access to money, even free money, is not subject
15 to governmental controls or unattainable
16 elsewhere. For example, private parties also give
17 money grants. Every time I turn on and listen to
18 NPR, there's a long list of different foundations
19 that have issued free money grants to -- to NPR,
20 demonstrating that free money is, at least in some
21 instances, is available from parties other than
22 the Government.

23 The limited reach of section 525 (a) is
24 illustrated perhaps most clearly by contrasting
25 section 525 (a) with section 525 (c). Section



1 525 (c) prevents discriminatory treatment
2 involving, among other things, "a student grant."
3 A student grant being a Pell grant or University
4 grant is, of course, free money. But if section
5 525 (a) already encompassed an economic grant,
6 then there would be no need to include student
7 grants in section 525. The Court must interpret
8 the statute as a whole and avoid a reading that
9 would render any provisions superfluous. The
10 interpretation that best does that is Judge
11 Shannon's exclusion of "money grants" from the
12 scope of 525 (a). So even if it is not truly a
13 loan, and is some variety of grant, section 525
14 (a) just doesn't stretch far enough to encompass
15 PPP funding.

16 To the extent there's any ambiguity in
17 section 525, itself, I agree with the SBA's point,
18 that the legislative history plainly states that
19 the purpose of the provision is to codify the
20 result of Perez versus Candle 402 U.S. 637, a 1971
21 Supreme Court decision. The Perez case is about
22 denial of the driver's license due to nonpayment
23 of a debt owed the State in a bankruptcy case.
24 The Supreme Court held it improperly limited the
25 debtor's fresh start because of the basic need for



1 driver's licenses and the exclusive control of the
2 State over such licensing. This is consistent
3 with section 525 (a) applying to permit the grants
4 of access or privileges controlled by the
5 Government, but not consistent with expanding into
6 affirmative economics payments.

7 As I said, I'm ultimately constrained by
8 the statute that Congress gave me, and I don't
9 think that statute gets the debtors where they
10 need to go in order to ultimately prevail on this
11 issue.

12 Since I'm not sure where this litigation
13 is going after my ruling today, I do note that if
14 section 525 were applicable, there's zero doubt
15 that the SBA cannot claim sovereign immunity
16 protection. Bankruptcy code section 106 (a) very
17 plainly waives sovereign immunity regarding the
18 entirety of section 525, and section 106 (a) is
19 consistently interpreted and applied in a
20 comprehensive fashion by the Ninth Circuit Court
21 of Appeals, perhaps more so than in any other
22 circuit. See, for example, Huntsinger (phonetic)
23 versus United States 902 F 3rd, 963, Ninth Circuit
24 from 2018, the Valley (phonetic) versus United
25 States in re DBSI, Inc., 1869 F 3rd 1004, a Ninth



1 Circuit decision from 2017.

2 The Court now turns to address the
3 Administrative Procedures Act issue. The debtors
4 argue that the SBA's bankruptcy exclusion can be
5 classified under the Administrative Procedures
6 Act, which allows judicial nullification of agency
7 action when that action is, among other things,
8 arbitrary, capricious and abusive discretion, or
9 otherwise not in accordance with law -- with law 5
10 USC section 7062A. Before turning to the
11 substance of this APA argument, the Court first
12 addresses threshold issues raised by the
13 Government; I first talk about bankruptcy
14 jurisdiction and power. There's federal subject
15 matter jurisdiction under 28, USC 1334 (b). This
16 is a civil proceeding, "Arising under Title 11,"
17 in part the last, including the APA claims or
18 claims, "Arising in a bankruptcy case. And then
19 the question, (inaudible) related to the Chapter
20 11 cases." To the extent that there's any doubt,
21 although I don't believe there is, I note that the
22 Court can exercise supplemental jurisdiction under
23 28 USC section 1367, over any ancillary issues
24 related to bankruptcy. See Montana versus Golden
25 in re Pegasus Gold Corp, 394, F 3rd 1189 at pages



1 1194 to 95, Ninth Circuit, 2005.

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

11 The next question relates to the
12 allocation of decisional power between this court
13 and the district court. This is the article three
14 issue discussing Stern versus Marshall. To be
15 clear, this has nothing to do with jurisdiction,
16 but rather only relates to whether I can enter a
17 final judgment or need to do a report and
18 recommendation to the district court. Stern
19 itself makes this point, C 564, U.S. 462 at page
20 480. And the Ninth Circuit Court of Appeals just
21 recently underscored the exact same point in a
22 case called Hanky versus Grubstiene (phonetic) in
23 re Point Center Financial, Inc., 2020 US app Lexis
24 13743 at pages star 15 to 16; that's a Ninth
25 Circuit opinion from April 29th of this year



1 that's been designated for publication.

2 The APA claim is statutorily "core" under
3 28 USC section 157 B 2 B A, because it's a matter
4 concerning the administration of this bankruptcy
5 estate. Thus, as a statutory matter, I have both
6 subject matter jurisdiction and the power to
7 finally resolve the claim. That now turns to the
8 Stern question. Does this create a constitutional
9 issue? The Court's, the answer to that is no.
10 This is a dispute within the final adjudicatory
11 power of this court. The entire dispute "at issue
12 stems from the bankruptcy itself," which means
13 this court can properly exercise the judicial
14 power needed to resolve it. See Stern at page
15 499. To be sure that the claim at issue in Stern
16 was quoting the State tort action that exists
17 without regard to any bankruptcy proceedings. The
18 same is not true here. It's not sensible to say
19 that a claim challenging the SBA's exclusion of
20 bankrupt entities for PPP loans could ever exist
21 "without regard to any bankruptcy proceeding" is
22 contemplated and in Stern. Such an action
23 couldn't ever be brought in any other context or
24 court because the plaintiff wouldn't have standing
25 and wouldn't have suffered any harm. This dispute



1 exists only because of the bankruptcy filing and
2 the fact that we're in a bankruptcy case. It
3 depends on and flows entirely from a bankruptcy
4 and could never exist outside of the bankruptcy
5 context. The analysis in Stern versus Marshall
6 makes clear that any claims in stemming from the
7 bankruptcy itself are properly within the
8 adjudicatory powers of the bankruptcy judge. And
9 that's what we have before me today.

10 The Court next addresses the
11 anti-injunctive provisions cited by the SBA as a
12 defense. The Court agrees with the distinction
13 drawn by several other bankruptcy and district
14 judges about why section 634 B 1 of the Small
15 Business Act is not violated in this context.
16 Those courts cogently frame a distinction based on
17 the decision in Olstein (phonetic) Marine Limited
18 versus United States, 833 F 2nd 1052, a First
19 Circuit decision from 1987. And the Court has not
20 been pointed to any contrary Ninth Circuit Court
21 of Appeals case law. The debtors here seek to
22 enforce the law against the SBA. They seek no
23 relief that would interfere with the SBA's
24 internal workings and therefore do not run afoul
25 of the statute. As such, the Court now has



1 (inaudible) incorporates by reference the analysis
2 contained in Diamond DB Diamond Club of
3 (inaudible) LLC versus United States SBA 2020 U.S.
4 district Lexis 82213 at pages star 19 to 23, a May
5 11th, 2020, decision by the Eastern District of
6 Michigan. Also Springfield Medical Care Systems
7 versus Kuranda (phonetic) in re Springfield
8 Medical Care Systems, 2020 bankruptcy Lexis 11238
9 at pages star 1669, a bankruptcy court for the
10 District of Vermont decision from May, 2020.

11 I think the analysis in these decisions is
12 sufficient to resolve this issue, but to the
13 extent there's some lingering doubts, the Court
14 does believe that the debtors have a compelling
15 plain textual argument that the scope of the
16 statutory bar is limited to the property of the
17 SBA administrator in her personal capacity, not
18 against the Government more generally, although it
19 doesn't appear any court had directly endorsed
20 this conclusion. Even so, that plain textual
21 statutory interpretation is an alternative basis
22 supporting the Court's ruling today.

23 The Court now turns to the substance of
24 the APA claim. Under the Administrative
25 Procedures Act and the Supreme Court's Chevron



1 decision, which I note is subject to some serious
2 questions, but at least as of today remains
3 binding, courts adopt a deferential standard of
4 review regarding decisions in rulemaking by
5 administrative agencies. The level of Chevron
6 deference, however, is reduced when, as is the
7 case here, at the Agency action was not subject to
8 formal process see *Reno versus Corey* 515 U.S. 50
9 at page 61. That's a Supreme Court decision from
10 1995. I'd say see, also, a case called *Crozlick*
11 (phonetic) versus *Republic Title Co.* 314, F 3rd
12 875 at page 8 -- 881. This is the Seventh Circuit
13 decision by 2002, written by then circuit Judge
14 Richard Posner. And his decision explains that
15 Chevron deference requires, "something more than a
16 formal -- something more formal, more deliberate
17 than a simple announcement," because, "a simple
18 announcement is too far removed from the process
19 by which courts interpret statutes to earn
20 deference." The decision further ultimately
21 provides no difference when, "the simple
22 announcement is all we have here. One fine day,
23 the policy statement simply appeared in the
24 federal register." Regardless, courts will find
25 an action to be arbitrary and capricious, "if an



1 agency has relied on factors, which Congress has
2 not intended to consider entirely failed to
3 consider an important aspect of the problem,
4 offered an explanation for its decision that runs
5 counter to the evidence before the Agency, or
6 (inaudible) possible that it could not be ascribed
7 to a difference in view or the product of agency
8 expertise." That's from Motor Vehicle
9 Manufacturer Association v. United States versus
10 State Farm Mutual Auto Insurance Company, 463 U.S.
11 29 at page 43, 1983 Supreme Court decision.
12 Moreover, the Agency must articulate a rational
13 connection between the facts found and the
14 conclusions made. See, for example, Latino Issues
15 Forum versus United States, EPA 558 at 3rd, 936 at
16 page 941, Ninth Circuit 20 -- 2009. Although a
17 court is not entitled to substitute its own
18 judgment for the agency's judgment, the Court must
19 ultimately act as a rubber stamp and is obligated
20 to, "ensure that agency decisions are founded on a
21 reasoned devaluation of relevant facts and
22 circumstances." See, for example, Arizona Cattle
23 Growers Association versus United States Fish and
24 Wildlife Bureau of Land Management 273 F 3rd, 1229
25 at page 1236, a 2001 decision from the Ninth



1 Circuit.

2 The Court should not go beyond the
3 agency's administrative record, which means, "the
4 basis for the decision must come from the Agency.
5 The reviewing court may not substitute regions for
6 agency action that are not contained in the
7 record." That's also Arizona Cattle Growers
8 Association, the same page.

9 Here, the SBA's decision to categorically
10 exclude all bankrupt debtors from PPP loan
11 eligibility falls far short of the standards.
12 Among other problems, first, there essentially is
13 no administrative record supporting the ultimate
14 conclusion whatsoever. The entirety of the SBA's
15 discussion regarding this matter is encapsulated
16 in paragraph four of the SBA's interim final --
17 fourth interim final rule, which flatly states
18 that, "the administrator determined that providing
19 PPP loans to debtors in bankruptcy would prevent
20 -- present an unacceptably high risk of an
21 unauthorized use of funds or non repayment of
22 unforgiven loans." That's it. A nonexistent
23 record, by definition, cannot be sufficient to
24 support any conclusion. This is the problem I
25 described at the last hearing as a failure to,



1 "show your work." There's basically nothing
2 explaining or developing how the SBA's conclusion
3 was reached, let alone anything supporting it is a
4 substantive policy matter. Second, there,
5 likewise, there's nothing indicating a, "reasoned
6 evaluation," of anything. There was no material
7 suggesting the SBA considered the relative pros
8 and cons of excluding bankrupt debtors or
9 evaluated whether anything less than a categorical
10 ban might accomplish whatever goals the SBA did
11 have in mind. It's the show your work-problem yet
12 again. The Court sees nothing indicating a
13 process of analysis, reasoning, deliberation,
14 debate, study, or consideration. There's just
15 nothing here other than an insignificant
16 conclusion. Third, the Court further believes the
17 SBA has entirely failed to consider important
18 aspects of this problem. The CARES Act was
19 intended to provide rapid funding to businesses in
20 difficulty. The PPP loans are forgivable if used
21 to pay employees or utilities. Some of the very
22 businesses that are most in need of such relief
23 are going to be operating Chapter 11 debtors.
24 Providing financial support for those debtors so
25 they can, in turn, pay innocent employees,



1 landlords and utilities, is completely consistent
2 with the legislative goal behind the CARES Act,
3 yet nothing indicates the SBA even considered this
4 important aspect of the legislation. Rather, the
5 SBA appears to have unilaterally imposed a
6 categorical ban in the clumsiest way possible.

7 Furthermore, the SBA appears to have
8 (inaudible) an important aspect of the problem in
9 so far as the CARES Act can make certification
10 that, "the uncertainty of economic conditions
11 makes necessary the loan request to support the
12 ongoing operations of the eligible recipient." No
13 healthy business is likely to certify under
14 penalties, penalties of perjury or corporate
15 criminal action, that the loan is, "necessary" if
16 it's otherwise able to operate without it. Thus,
17 it's the debtor's note Congress created a
18 framework under which every PPP applicant must
19 certify that it is concerned that it is going to
20 go out of business under the current economic
21 conditions. The SBA blunderbuss exclusion of some
22 of these troubled businesses simply disregards
23 that entire backdrop assumption, that there is a
24 business that's in trouble, which is the "problem"
25 that motivated enactment of the CARES Act. The



1 Court sees absolutely no consideration of this
2 important aspect of the -- of the problem
3 whatsoever.

4 As I noted earlier, under the APA is the
5 SBA's burden to articulate the basis for its
6 decision. Ninth Circuit case law makes clear,
7 here the articulation is flimsy at best. It is an
8 implausible and insufficient justification for the
9 conclusion. There was no explanation about why
10 the administrator determined debtors in bankruptcy
11 have an "unacceptably high risk of an unauthorized
12 use of funds," and this conclusion flies in the
13 face of the expansive and persistent supervision
14 of such debtors by the bankruptcy court, the
15 United States Trustee Program via the Department
16 of Justice, creditors. And in a case like the
17 Astria case, the entire public and (inaudible).
18 Chapter 11 debtors need to be more transparent
19 about what they're doing with cash than virtually
20 any other debtors. This perfunctory SBA
21 explanation is wholly conclusory and falls to
22 anyone with even a passing familiarity with the
23 bankruptcy process. It is simply impossible for
24 me to call this a reasoned premise. Likewise,
25 there is no explanation of why Chapter 11 debtors



1 pose a high risk of, "non repayment of unforgiven
2 loans." The bankruptcy code contains an array of
3 tools that can make repayment more likely,
4 including finding leans or lanes or administrative
5 priority claims. These tools are part of the law
6 that every person in the country, including the
7 SBA and everyone who works there, is presumed to
8 know, but there was nothing indicating any
9 consideration of these tools by the SBA. There,
10 similarly, is not discussion or even citation of
11 any academic SBA studies of empirical rates of non
12 repayment of DIP loans versus other kinds of
13 loans. Instead, there's just a blanket
14 unsupported and unsightly un-cited statement that
15 is dubious -- that is of dubious veracity, if not
16 wholly implausible. Nothing anywhere in the SBA's
17 published rule, or any other record before me,
18 which is scant at best, provides any reasoned
19 explanation for this conclusion.

20 I understand and appreciate there's a
21 massive burden that was placed on the SBA by
22 Congress. Congress, for whatever reason, chose to
23 use the SBA as the funnel to convey this
24 particular allocated money for the public and the
25 businesses that needed it. At the same time



1 however, the Court cannot act as a rubber stamp
2 for something as weak as the analysis and
3 justification offered by the SBA for this
4 categorical PPP bankruptcy exclusion. Members of
5 the public, including the Astria debtors, are
6 entitled to ensure that their government agencies
7 proceed in a careful, considered, and a reasoned
8 way. To use the same phrase yet again, the
9 agencies have to both do the work and show the
10 work to the public. Here, there is nothing
11 indicating the SBA actually did any work to show,
12 and they certainly don't show them their work. As
13 a result, the apparent knee-jerk conclusion that
14 was reached is not the product of any reasoned
15 agency decision-making, cannot sustain any
16 judicial inquiry whatsoever, and must be nullified
17 as arbitrary and capricious.

18 The Court notes that other judges have
19 reached the same conclusion. The Court now adopts
20 and incorporates by reference the further
21 discussion contained in the Roman Catholic Church
22 of the Archdiocese of Santa Fe versus United
23 States SBA in re Roman Catholic Church of the
24 Archdiocese of Santa Fe 2020 Bankruptcy Lexis 1211
25 and pages star 12 through 16 by the decision by



1 the Bankruptcy Court District of New Mexico, May
2 1st, 2020. In sum, I conclude that the debtors
3 are highly likely to succeed on their
4 administrative procedure act claim that the SBA's
5 bankruptcy exclusion from PPP loan eligibility is
6 subject to invalidation as arbitrary and
7 capricious. As such, this first factor weighed
8 strongly in the debtor.

9 The second factor that the Court
10 considered is whether the moving parties will
11 suffer immediate and irreparable injury if the
12 relief is denied. Here, the record has
13 established an irreparable harm sufficient to
14 support a preliminary injunction. As set forth in
15 Mr. Gallagher's declaration and discussed in the
16 briefing, the COVID-19 situation is having an
17 adverse impact on the debtors business and
18 financial affairs, which, as we all know, is not
19 in the greatest shape to begin with. I had to
20 close the hospital in January that I didn't want
21 to do because of the debtors financial affairs.
22 To continue to provide healthcare services and pay
23 frontline nurses for the benefit of community
24 access, money is essential. Without PPP funding
25 there's a threat to the viability of the debtors



1 trader business. Moreover, why this is -- this is
2 ultimately a dispute about money, there's a
3 significant risk that all PPP money will be gone
4 as a result of the pressing June 30th deadline and
5 the SBA will then assert that it cannot be liable
6 for damages, leaving the debtors with no remedy
7 whatsoever at the end of this litigation, even if
8 their rights have been violated. Several other
9 courts have noted that this prospect of no
10 adequate remedy against the Government constitutes
11 irreparable harm for purposes of an injunctive
12 relief analysis. See, for example, DB Diamond
13 Club of Flint, LLC versus United States SBA 2020
14 U.S. District Lexis 82213 pages star 43 to 45, May
15 11th, 2020, decision by the Eastern District of
16 Michigan. I note that a subsequent SBA request
17 for a state pending appeal was denied by the Sixth
18 Circuit Court of Appeals, including based on the
19 Sixth Circuit finding that, and agreeing with the
20 district court, that there was a prospect of a
21 reputable harm to the plaintiffs. I also cite
22 Camelot Banquet Rooms, Inc., versus United States
23 SBA 2020 U.S. District Lexis 76713 pages star 34
24 to 36. That's a decision from the Eastern
25 District of Washington. Again, a district judge



1 May 1st, 2020. See, also, General United States
2 versus Cal Allman, Inc. 102 F 3rd 999 at pages
3 1002 to 2003. It's a Ninth Circuit decision from
4 1996.

5 Finally, I turned to the remaining factors
6 that collapsed together into a balance and the
7 consideration of the public interest and whether
8 there was favor granting the relief requested. As
9 previewed at the prior hearing, the Court now
10 takes judicial notice of the following facts.
11 First, COVID-19 cases are increasing at an
12 inexplicably high rate in Yakima County. For
13 whatever reason we are doing worse than the rest
14 of Washington State at this point in the process.
15 This is a very troubling situation. In fact,
16 things today are even worse than they were at the
17 prior hearing in May. Governor Inslee just last
18 Friday called Yakima County, "the most dangerous
19 place in Washington State," from a COVID-19 virus
20 perspective. Again, I don't know why this is the
21 case, but the problem is not getting better here.
22 Second, the Court takes judicial notice that many
23 of the new cases are in the lower Valley,
24 including around Sunnyside and Toppenish. This
25 also continues to be true today as it was in May.



1 Third, the Court takes judicial notice of the fact
2 that there's limited access to healthcare other
3 than at the Astria hospitals. That was true in
4 May; it's true today. Fourth, the Court takes
5 judicial notice that these PPP funds will be used
6 to pay frontline medical staff, including nurses.
7 The Court further takes judicial notice that the
8 nurses are the people who are being correctly
9 recognized in the local and national press as the
10 heros dealing with this virus in the trenches.
11 That was true in May and it true today. It will
12 be true forever. Perhaps there could be a more
13 compelling public interest case, but, again, it's
14 hard to think of one. As I said at the prior
15 hearing, we're clearly in the 99th percentile of
16 public interest cases here. And this context is
17 -- it (inaudible) weight on the scales as it comes
18 to the third factor. I agree with the Government,
19 it doesn't affect the first and second factor, but
20 certainly the third factor is relevant. The
21 balancing here is overwhelming and lopsided and
22 favors the debtors. The government's claim,
23 public interest consideration, simply if we do not
24 have counterbalance. Yes, SBA funds are limited,
25 and this is something of a zero sum exercise where



1 PPP borrowers are competing with each other, but I
2 think we cannot imagine other borrowers, in
3 bankruptcy or out, that would be more deserving of
4 this money than these particular borrowers.
5 Certainly there are many borrowers less deserving.
6 I know there are law firms throughout the country
7 that have received PPP money. Money, as I said at
8 the last hearing, some of my best friends are
9 lawyers, but I don't think law firms need this
10 money while hospitals, particularly critical
11 hospitals in rural areas, are denied the money.
12 So the overwhelming public interest and community
13 interest and the debtors receiving this money is
14 manifest.

15 So to summarize, all of the factors
16 individually, weigh in favor of the debtors here.
17 And collectively, they weighed in favor with great
18 force. Therefore issuance of a preliminary
19 injunction is warranted.

20 The details in the process here should
21 resemble what Judge David Jones described in his
22 Hidalgo County Emergency Services Foundation oral
23 ruling with the exception that I do want the
24 debtors to provide and pin down the stipulations
25 they described with Lapis and other parties



1 regarding segregation of the money. As framed by
2 the debtors, the Court agrees that the debtors
3 have the right to have their PPP applications
4 submitted without being discriminated against on
5 the basis of their status as Chapter 11 debtors
6 should the debtors otherwise be eligible for PPP
7 loans.

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

22 Finally, to the extent this is an
23 appealable decision, the Court now on its own
24 motion invokes 28 USC section 158 (d) 2, to
25 certify this dispute for direct appeal to the



1 Ninth Circuit Court of Appeals.

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

15 Second, the order of judgment or decree
16 involves the question of law requiring resolution
17 of conflicting decisions. Bankruptcy judges are
18 all over the map here. There are decisions that
19 have held section 525 applies. There are courts
20 that have held that it doesn't. There are courts
21 that have held that the decision is arbitrary and
22 capricious, including this court today. There are
23 courts that are, apparently, although a few of
24 them expressly, rule the other way. So there's
25 certainly a patchwork and conflicting decisions



1 that weren't resolution at the circuit level.

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

12 So all three of these -- moreover the
13 policy considerations when Congress added this
14 provision to the judicial code are satisfied here.
15 This is important. It's conflicting. It's time
16 to get a final word. It's time this should go up
17 to the Court of Appeals as I think one of these
18 questions already has to the Fifth Circuit.
19 Counsel for the debtor should include their
20 certification in their proposed form of order and
21 getting clear. And to be clear, I certified the
22 entirety of the issues. So if the debtors intend
23 to cross -- cross appeal me regarding the section
24 525 issue, which you're certainly free to do, I
25 think -- I think that appeal would satisfy the



1 conditions for certification of a direct appeal as
2 much as the Administrative Procedures Act.

3 I ask that the debtors prepare the form of
4 judgment that they wish me to enter consistent
5 with -- with the hearing today. And I then leave
6 it for the parties where -- where things go from
7 there.

8 MR. MAIZEL: Your Honor, we'll run the
9 proposed form of order by Mr. Sacks and by
10 Mr. Donovan before we send it too.

11 THE COURT: Thank you, Mr. Maizel.
12 Mr. Sacks, anything further today?

13 MR. SACKS: I have two points, Your Honor,
14 if you would allow me for a second. Certainly not
15 challenging the legal basis for the injunction,
16 but actually the relief that you're granting.

17 I think what Mr. Maizel said before,
18 talking about what they're asking for, is he said
19 that he wanted the application to be held in
20 abeyance and the funds escrowed. And so I'd like
21 to propose something for the Court, if the Court
22 would be willing to consider this. I think the
23 relief you just granted essentially allows them to
24 go out this afternoon and get a loan. And if a
25 bank will process it, then the SBA has no



1 authority to -- the guarantee. I understand
2 that's the Court's ruling. And it would be very
3 difficult to unscramble that egg if indeed -- I
4 certainly have no idea what might happen if this
5 case will be appealed or if there is an appeal,
6 but an alternative may be this. If I understand
7 the Court's ruling, the Court found for the
8 plaintiffs on the APA issue in part because the
9 Agency could not do its work, show its work, and
10 (inaudible) work. So one alternative may be is if
11 the Court were willing to make the relief that the
12 Agency continues to set the money aside and that
13 the application is still held in abeyance -- it's
14 not processed -- and the Court says there's short
15 deadline for the Government to produce
16 administrative records. And then if the
17 Government doesn't, then the Court can rule on
18 that. And if the Government does, then the Court
19 could hold a trial on the merits with that record,
20 and then enter relief based on that. Obviously
21 the Court has suggested it has the ability under
22 the APA claims to enter upon a relief from there.
23 So it will not take the fee (inaudible) at this
24 point, but I understand the Court's ruling. That
25 would really keep the status (inaudible). And we



1 understand there's a short deadline. June 30th is
2 the statutory cutoff and so we understand there'll
3 be short deadlines from the Court on that, but it
4 might allow us to get a ruling on the APA with a
5 record. And the Court may find the record doesn't
6 show the work or do the work or doesn't address
7 the concerns the Court made, or the Court may feel
8 differently once it's seen the record.

9 The alternative is they go out and get the
10 money today and we have appeal rights, but that
11 money is now within the bankruptcy and what can be
12 done with that question I'm not sure of the answer
13 to. So I'd like to first propose that and see if
14 the Court is willing to entertain that.

15 THE COURT: Mr. Sacks, I appreciate the
16 proposal. I'm going to deny that, I think for two
17 reasons. First, I think the record supports that
18 the debtors that have (inaudible) business needs
19 to access the money. You know, you made the point
20 and I don't think Mr. Maizel contested it, that,
21 you know, the record doesn't indicate that the
22 business dies and the hospitals close tomorrow, so
23 they don't get the money. But I think the record
24 does substantiate a logical continuing harm as a
25 result of the orders that Governor Inslee has



1 entered relating to elective surgeries. I think
2 the debtors have -- have a need for the money.
3 And I think that that's established and supported
4 by the record. And that's the request they
5 entered.

6 Second, I hear you on your point about the
7 administrative record, but, just in all candor and
8 fairness, I -- when we were here in May, I think
9 15 days ago, I did my best to -- you know, I
10 wasn't deciding anything then. I spent a lot of
11 time thinking about this since then, but I think I
12 fairly, even strongly, outlined my concerns about
13 the administrative record. I think I used the
14 phrase, show your work. I don't know, I haven't
15 really read the transcripts that the debtors filed
16 yesterday, but I think I used it three or four
17 times. I think I outlined -- you know,
18 (inaudible), I'm not going to tell the Government
19 how to litigate his case, but I don't think there
20 can be any claim of sandbagging since -- you've
21 have 15 days to put that together and it's not
22 there. I mean, I gave you that opportunity
23 already.

24 MR. SACKS: I understand, Your Honor.
25 We're not at all disputing that, and I understand



1 the Court's ruling on that request.

2 If I could make a second request under
3 rule 8007, if the Court would be willing to
4 entertain an oral motion for a state pending
5 appeal?

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

16 MR. SACKS: Thanks, Your Honor. That's
17 all I have.

18 THE COURT: Okay. All right. Anything
19 further, Mr. Maizel?

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

21 THE COURT: Okay. Thank you, both. I,
22 again, appreciate the time and argument today.
23 We'll look for the judgment and, you know, this
24 will go wherever it goes.

25 (Whereupon, hearing concluded)



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CERTIFICATION

I, Andie Evered, do here by declare
under penalty of perjury under the laws of the
State of Washington that the following is true and
correct:

1. That I am an authorized
transcriptionist;

2. This transcript is a true and
correct record of the proceedings to the best of
my ability.

3. I am in no way related to or
employed by any party in this matter; and

4. I have no financial interest in the
litigation.

Dated in Bend, Oregon, this 7th
day June 2020.



Andie Evered, CCR
State of Washington CCR
#2393



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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).

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T 213-623-9300 / F 213-623-9924 T 206-292-2444 / F 206-292-2104

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

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

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

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

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

**ORDER GRANTING
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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.

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

4. No bond is required.

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

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

///End of Order///

PRESENTED BY:

/s/ Samuel R. Maizel
SAMUEL R. MAIZEL (Admitted *Pro Hac Vice*)
SAM J. ALBERTS (WSBA #22255)
SARAH M. SCHRAG (Admitted *Pro Hac Vice*)
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**ORDER GRANTING
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Exhibit A

[Oral Ruling]

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**ORDER GRANTING
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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)

Astria Health vs SBA, et al.

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



Astria Health vs SBA, et al.

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



Astria Health vs SBA, et al.

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



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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



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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



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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 heroes 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



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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



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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



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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?



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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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18 UNITED STATES BANKRUPTCY COURT
19 EASTERN DISTRICT OF WASHINGTON

20 In Re:

21 ASTRIA HEALTH, et al.¹

22 Debtors and Debtors in Possession,

23 ASTRIA HEALTH, et al.,

24 Plaintiffs,

25 v.

Lead Case No. 19-01189-11

Adv. Proc. Case No. 20-80016-WLH

NOTICE OF APPEAL

PRELIMINARY INJUNCTION
APPEAL

26 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).

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

5 Defendants.

6
7 **NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a)(1)**
8 **AND STATEMENT OF ELECTION**

9 **Part 1: Identify the appellant**

10 1. Name(s) of appellant(s):

11
12 United States Small Business Administration and Jovita Carranza, in her
13 capacity as Administrator for the United States Small Business
Administration

14 2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the
15 subject of this appeal:

16 For appeals in an adversary proceeding.

17 ☐ Plaintiff

18 ☒ Defendant

19 ☐ Other (describe)

20 **Part 2: Identify the subject of this appeal**

21 1. Describe the judgment, order, or decree appealed from:

22
23 *Order Granting Preliminary Injunction, Denying Stay Pending Appeal,*
24 *and Certifying Issues to the Ninth Circuit* (ECF No. 22); Transcript of
25 Hearing Held 06/03/2020 (ECF No. 22 at Exhibit A); Minute Entry Re;
26 Motion for Temporary Restraining Order and Use of PPP Funds. HELD
(ECF No. 19).

2. State the date on which the judgment, order, or decree was entered:

The preliminary injunction order was entered on June 10, 2020 (ECF No. 22).

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

Party:

See attached

Attorneys:

See attached

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

☒ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

RESPECTFULLY SUBMITTED: June 23, 2020.

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EXHIBIT A – LIST OF OTHER PARTIES TO THE APPEAL

Party:

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 Association 900 W Chestnut Ave
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 Sunnyside Community Hospital
 Home Medical Supply, LLC 900 W
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DEFENDANTS' NOTICE OF APPEAL - 6



Whitman L. Holt
Bankruptcy Judge

Dated: June 26th, 2020

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:

ASTRIA HEALTH, et al.¹

Debtors and Debtors in Possession,

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.

Lead Case No. 19-01189-11

Adv. Proc. Case No. 20-80016-WLH

STIPULATED ORDER

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).

STIPULATED ORDER

Astria Health, *et al.* (“Plaintiffs”) and United States Small Business Administration, *et al.* (“United States”) hereby stipulate and agree as follows in the above-captioned adversary proceeding (the “Adversary Proceeding”):

WHEREAS:

- (A) On May 15, 2020, Plaintiffs filed its Verified Complaint (ECF No. 1) initiating the Adversary Proceeding. In the Verified Complaint, Plaintiffs sought, among other things, a preliminary injunction against the United States regarding the PPP loan program of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Public Law 116-136.
- (B) On May 15 2020, Plaintiffs filed the Motion for Temporary Restraining Order and Request for Hearing and Briefing Schedule with respect to the Debtor's Request for a Preliminary Injunction (the “Motion”) (ECF No. 2).
- (C) On May 26, 2020, the United States filed a timely opposition to Plaintiff's Motion (ECF No. 14).
- (D) On June 3, 2020, the Court held a hearing on Plaintiffs’ Motion and granted the relief requested by Plaintiffs. On June 10, 2020, the Court entered an Order Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals (ECF No. 22).

1 (E) Plaintiffs have received confirmation that their PPP loan applications
2 have been approved and will be funded within seven (7) business days.

3 (F) Pursuant to the Notice of Scheduling Conference (ECF No. 4), the parties
4 were to submit a proposed joint report pursuant to Rule 26(f) on June 18,
5 2020. In addition, a scheduling conference is scheduled for June 24, 2020.

6 *Id.*

7
8 (G) In order to limit the costs and delay associated with litigation, the parties
9 have agreed to the terms set forth in the ordering paragraphs that follow.

10 Premised on the foregoing recitals, Plaintiff and the United States hereby

11 STIPULATE AND AGREE as follows:
12

13
14 (1) The parties hereby agree to stay this Adversary Proceeding pending the
15 United States' appeal of the Order Granting Preliminary Injunction. Such
16 stay shall only apply to further litigation of this Adversary Proceeding on
17 the merits and does not stay the Order Granting Preliminary Injunction.

18
19 (2) The United States hereby agrees that this agreed upon stay of the
20 Adversary Proceeding does not apply to any relief obtained by Plaintiffs
21 as a result of the Order Granting Preliminary Injunction, or Plaintiffs
22 rights to enforce such relief.

23
24 (3) This stipulation and standstill agreement will remain in effect until the
25 entry of a final order in the United States' appeal of the Order Granting
26 Preliminary Injunction.
27
28

STIPULATED ORDER - 3

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- 1 (4) Upon the lifting of the stay of litigation of this Adversary Proceeding, the
2 parties will meet and confer in good faith to agree on a schedule for
3 briefing and other deadlines, evidentiary issues, and hearing dates for
4 litigation of the Plaintiff's request for a preliminary injunction and/or a
5 final hearing on the merits.
6
7 (5) The parties agree to a status hearing on August 25, 2020 at 1:30 p.m. Any
8 party may request a status hearing prior to that date.
9
10 (6) This Stipulation shall be effective upon endorsement and entry on the
11 docket by the Court.
12

13 **///End of Order///**
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1 PRESENTED BY:

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