

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

JAMES L. DAY (WSBA #20474)
THOMAS A. BUFORD (WSBA #52969)
BUSH KORNFELD LLP
601 Union Street, Suite 5000
Seattle, WA 98101
Tel: (206) 292-2110
Email: jday@bskd.com
tbuford@bskd.com

HON. ROSANNA M. PETERSON

SAMUEL R. MAIZEL (Admitted *Pro Hac*
Vice)
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300
Fax: (213) 623-9924
Email: samuel.maizel@dentons.com

SAM J. ALBERTS (WSBA #22255)
DENTONS US LLP
1900 K. Street, NW
Washington, DC 20006
Tel: (202) 496-7500
Fax: (202) 496-7756
Email: sam.alberts@dentons.com

*Attorneys for Appellees / Cross-Appellants,
Chapter 11 Debtors and Debtors In Possession*

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

In re: ASTRIA HEALTH, <i>et al.</i> , Debtors and Debtors in Possession. ¹	District Court Case No. 2:20-cv-3098-RMP, Consolidated with District Court Case No. 1:20-cv- 3089-RMP On Appeal from United States Bankruptcy Court for the Eastern District of Washington Bankruptcy Court Lead Case No. 19-01189-11 Chapter 11, Jointly Administered Adversary Proceeding No. 20-80016-WLH
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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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DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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

5 Appellants /
6 Cross-Appellees,

7 v.

8 ASTRIA HEALTH, *et al.*,

9 Appellees /
10 Cross-Appellants.

**OPENING AND RESPONSE BRIEF OF
APPELLEES / CROSS-APPELLANTS**

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DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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 chapter 11 bankruptcy cases (collectively, the “Chapter 11 Cases”), pending in the United States Bankruptcy Court for the Eastern District of Washington (the “Bankruptcy Court”) and the appellees / cross-appellants herein, hereby submit their opening and responsive brief in opposition to the opening brief [Docket No. 13] (the “Appellants’ Brief”) filed by United States Small Business Administration (the “SBA”) acting through Jovita Carranza in her capacity as the Administrator of the SBA (the “Administrator”, and together with the SBA, the “Appellants”), and respectfully request the Court affirm the Bankruptcy Court’s *Order Granting Preliminary Injunction, Denying Stay Pending Appeal, And Certifying Issues To The Ninth Circuit Court Of Appeals* entered on June 10, 2020 [Appellants’ App.² No. 13-1] [Adv. Pro. Docket No. 22] (the “Order”) and accompanying “Oral Ruling” attached thereto as **Exhibit A**, which was incorporated by reference pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a)(1) of the Federal Rules of Civil Procedure, except that the Debtors request this Court overrule the Order to the extent it holds that the Debtors failed to establish a likelihood of success on the merits of the

² Citations to “Appellants’ App.” refer to *Appendix to Appellants’ Opening Brief*, filed at Docket No. 13-1.

1 Debtors' claims under § 525(a) of title 11 of the United States Code, §§ 101 *et seq.*
 2 (the "Bankruptcy Code").³

3 **I. STATEMENT OF ORAL ARGUMENT**

4 The Debtors request oral argument. This appeal and cross-appeal concern a
 5 federal program of national importance as lawsuits raising similar issues as this
 6 appeal have been filed across the country. Moreover, this appeal implicates
 7 significant issues regarding debtors' rights in bankruptcy proceedings, and the
 8 Debtors believe oral argument will assist the Court in understanding the facts and
 9 law of this appeal and cross-appeal.

10 **II. BASIS OF APPELLATE JURISDICTION**

11 The Bankruptcy Court had jurisdiction over the adversary proceeding
 12 pursuant to 28 U.S.C. §§ 157, 1331, 1334, 1361, 1367, and 15 U.S.C. § 634(b).
 13 Jurisdiction was proper under the judicial review provisions of the Administrative
 14 Procedure Act, 5 U.S.C. § 701 *et seq.* (the "APA"). Both the declaratory and
 15 injunctive relief sought is consistent with 5 U.S.C. § 706. The adversary
 16 proceeding was a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The venue in
 17 the Bankruptcy Court was proper pursuant to 28 U.S.C. §§ 1391, 1408, and 1409.
 18 The Bankruptcy Court had the power to grant the relief requested based on, among
 19 other things, §§ 105, 106, and 525, as well as Rule 65 of the Federal Rules of Civil
 20 Procedure, which is applicable to this action pursuant to Rule 7065.

21 The Debtors agree with the Appellants that this Court has jurisdiction over
 22 this appeal and cross-appeal, pursuant to 28 U.S.C. § 158(a)(1), following the
 23
 24
 25

26 ³ All references to "section" or "§" herein are to sections of the Bankruptcy Code
 27 unless otherwise noted. All references to "Rule" are to the Federal Rules of
 28 Bankruptcy Procedure.

Appellants' notice of appeal [Adv. Pro. Docket No. 28], the Debtors' notice of cross-appeal [Adv. Pro. Docket No. 34], and as provided for by Rule 8005(a)(1).⁴

III. ISSUES PRESENTED ON APPEAL

The Debtors do not disagree with the Appellants' version of the issues they present in the Appellants' Brief at 9. However, although the Appellants list seven issues in the *Appellants' Designation of Record on Appeal and Statement of Issues to be Presented* [Adv. Pro. Docket No. 38] (the "Appellants' Statement of Issues"), they only argue three (3) in the Appellants' Brief (some of which appear to have been consolidated). Their failure to argue any issue constitutes forfeiture or waiver of that issue, which at minimum here includes the sixth (regarding irreparable harm) and seventh (regarding the Debtors' burden of proof) issues. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.").

The Debtors' issue on cross-appeal is: Whether the Bankruptcy Court erred in holding funds received under the Paycheck Protection Program ("PPP") as part of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Public Law 116-136 (signed into law March 27, 2020), as augmented by the

⁴ Although the Appellants insist on the relief granted being deemed "mandatory" injunctive relief (Appellants' Brief at 8, ln. 11), the relief granted merely "restrained" the Appellants and other relevant parties from certain activities, *i.e.*, from discriminating against the Debtors solely due to their status as debtors in chapter 11 proceedings, and is therefore a prohibitory injunction. Indeed, the distinction between mandatory and prohibitory injunctions has been criticized. *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997) (The distinction between mandatory and prohibitory injunctions is often more semantical than substantive). However, it is undisputed that a prohibitory injunction can compel acts necessary to return to the status quo, *i.e.*, the last undisputed point, without being characterized as a mandatory injunction. *Litton Sys., Inc. v. Sundstrand Corp.*, 750 F.2d 952, 961 (Fed. Cir. 1984) (*citing Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)); *accord Washington Capitals Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969).

1 Payment Protection Program and Health Care Enhancement Act, Pub. L. 116-139
 2 (signed into law April 24, 2020) and by Public Law No: 116-147 (signed into law
 3 July 4, 2020), are not an “other similar grant” within the meaning of § 525(a).⁵

4 **IV. STANDARD OF REVIEW**

5 Preliminary injunctions are reviewed for abuse of discretion, which is based
 6 “on an erroneous legal standard” or “on clearly erroneous findings of fact.”
 7 *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir.
 8 1985); *see also In re Conceicao*, 331 B.R. 885, 889 (B.A.P. 9th Cir. 2005).
 9 “[C]onclusions of law and questions of statutory interpretation [are reviewed] de
 10 novo” *In re Conceicao*, 331 B.R. at 889. “Under [the abuse of discretion]
 11 standard, a ‘reviewing court cannot reverse unless it has a definite and firm
 12 conviction that the court below committed a clear error of judgment in the
 13 conclusion it reached upon a weighing of the relevant factors.’” *In re Sunnymead*
 14 *Shopping Ctr. Co.*, 178 B.R. 809, 814 (B.A.P. 9th Cir. 1995) (quoting *In re*
 15 *Goldberg*, 168 B.R. 382, 384 (B.A.P. 9th Cir. 1994)). This standard of review is
 16 “highly deferential” to the trial court’s decision. *DV Diamond Club of Flint, LLC v.*
 17 *SBA.*, 960 F.3d 743, 746 (6th Cir. 2020).

18 **V. STATEMENT OF THE CASE**

19 The PPP funds at issue in this appeal are being used to keep hospitals open in
 20 a world-wide pandemic that is the most difficult healthcare crisis facing the world
 21 in general, and the United States in particular, since the Spanish flu pandemic of
 22 1918. This matter arises out of Banner Bank’s denial, at the direction of the SBA
 23 acting through the Administrator, of two of the Debtors’ applications (“PPP
 24 Applications”) for loans under the PPP solely because the applicants are debtors in
 25 bankruptcy. The Debtors filed a *Verified Complaint* [Adv. Pro. Docket No. 1] (the
 26 _____

27 ⁵ The Bankruptcy Court found that the Debtors had a reasonable likelihood of
 28 success in establishing all other requisite elements of § 525(a). Oral Ruling at 9-10.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 “Complaint”) and a *Motion For Temporary Restraining Order And Request For*
2 *Hearing And Briefing Schedule With Respect To The Debtors’ Request For A*
3 *Preliminary Injunction; Declaration Of John M. Gallagher In Support Thereof*
4 [Adv. Pro. Docket No. 2] (the “Motion”)⁶ seeking relief from the Bankruptcy Court
5 to have the SBA and the Administrator enjoined from their improper and unlawful
6 administration of PPP, which Congress enacted and the President signed as part of
7 the CARES Act.⁷ The CARES Act included stimulus funds designed to assist
8 businesses, including 501(c)(3) nonprofits, and to ensure that American workers
9 continued to be paid despite the economic impact of the Novel Coronavirus
10 (“Covid-19”).

11 Section 1102 of the CARES Act established PPP under § 7(a) of the Small
12 Business Act, codified in 15 U.S.C § 636. While nominally called a “loan,”⁸ PPP
13 disbursements are grants—there are no repayment obligations—if, among other
14 things, a certain percentage of PPP funds are used for payroll and wage expenses,
15 interest on mortgages, rent, or utilities. Importantly, neither the CARES Act, the
16 Small Business Act, nor any other applicable law or regulation prohibits the
17 granting of PPP funds to bankruptcy debtors, with the exception of an SBA rule
18 issued and published after the Debtors submitted their PPP Applications.
19 Nevertheless, the Appellants originally denied the Debtors access to PPP
20

21 ⁶ See also *Reply To Defendants Brief In Opposition To Plain-Tiffs’ Motion For*
22 *Temporary Restraining Order (ECF No. 2) And Request For Preliminary*
23 *Injunction (ECF No. 1); Declaration Of John M. Gallagher In Support Thereof*
24 [Adv. Pro. Docket No. 16] (the “Reply”), which the Debtors filed in support of their
25 Motion and in opposition to the “Reply”) to the Appellants’ opposition [Adv. Pro.
26 Docket No. 14] (the “Opposition”).

27 ⁷ A full text of the CARES Act may be found at
28 <https://www.govtrack.us/congress/bills/116/hr748/text> (last visited on May 14,
2020).

⁸ The Debtors’ use of the term “loan” or “loans” herein is not intended to waive or
diminish its contention that PPP is in reality a support/grant program.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 disbursements on the sole basis that the Debtors are debtors in the Chapter 11
2 Cases, and in so doing exceeded their statutory authority and improperly, unfairly,
3 arbitrarily, capriciously, and unlawfully discriminated against the Debtors.

4 Indeed, despite the stated goal that PPP was to help small businesses survive
5 economic hardships caused by the Covid-19 pandemic through funding payroll
6 costs, rent, interest and utilities during the initial shelter-in-place period, the
7 Appellants illogically excluded certain of those businesses—even hospitals on the
8 “front lines” of treating patients—solely because they are/were in bankruptcy at the
9 time they submitted their PPP Applications. But this cannot be what Congress
10 intended, as seen in terms of what Congress considered valid grounds for approving
11 or disapproving the disbursement of PPP funds and the numerous letters
12 congressmen sent to the Appellants on this very issue. *See e.g.*, **Exhibit C** attached
13 to the Complaint.

14 Therefore, the Debtors sought, among other relief more fully described in the
15 Complaint, an order requiring the Appellants and all agents, servants, employees,
16 and any parties acting in concert with any of the foregoing (the “Restrained
17 Parties”) to consider the Debtors’ PPP Applications and any related forms,
18 applications, or other documents⁹ without any consideration of the involvement of
19 the Debtors or any owner of the Debtors in any bankruptcy. The Debtors also
20 sought an order requiring the Restrained Parties to refrain from making or
21 conditioning the approval of any PPP funds to the Debtors contingent on the
22 Debtors or any owner of the Debtors not being “presently involved in any
23 bankruptcy.” In addition, the Debtors sought declaratory relief relating to the
24 Defendants’ violations of the § 706(2) of the APA and § 525(a) of the Bankruptcy
25 Code. The Debtors also sought damages and an award of their costs and attorneys’
26

27
28 ⁹ This includes the Lender Application (defined below).

1 fees against the United States generally, or against the Appellants specifically,
2 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, among other things.

3 After significant briefing of the issues, including submission of evidence in
4 the form of testimony by declaration by the Debtors (the SBA declined its
5 opportunity to present evidence) and a hearing on June 3, 2020 (the “Hearing”), the
6 Bankruptcy Court issued the Order granting the Debtors’ request for relief on
7 grounds that the Debtors were likely to succeed on their claim that the Appellants
8 had violated § 706(2) of the APA, but denied injunctive relief on the grounds that
9 the Debtors were unlikely to succeed on their claim that the Appellants’ implicated
10 § 525(a). Oral Ruling at 23, ln. 8-14. The Debtors resubmitted their PPP
11 Applications, striking “[is] presently involved in any bankruptcy,” and their PPP
12 Applications were approved and funded shortly thereafter. The Appellants
13 appealed the Order as it relates to the APA, and the Debtors cross-appeals the Order
14 as it relates to § 525(a).

15 **VI. BACKGROUND**

16 Appellants do not dispute the primary factual basis for the Debtors’ claims,
17 *i.e.*, that the Appellants discriminated against the Debtors solely on the basis that
18 the Debtors are debtors in bankruptcy. Moreover, the Debtors generally agree with
19 the Appellants’ characterization of the facts found in Appellants’ Brief, Section “II”
20 entitled “Facts & Procedural History.” At issue, however, is the relevance and
21 characterization of many assertions the Appellants set forth in Appellants’ Brief,
22 Section “I” entitled “Statutory and Regulatory Background,” which address the
23 CARES Act, the PPP, and the Appellants’ rule-making process.

24 **A. General Background.**

25 The Debtors filed voluntary petitions for relief under chapter 11 of the
26 Bankruptcy Code on May 6, 2019 (the “Petition Date”). The Chapter 11 Cases are
27 currently being jointly administered before the Bankruptcy Court. [Lead Docket
28

No. 10]. Since the Petition Date, the Debtors have been operating their businesses as debtors in possession pursuant to §§1107 and 1108.

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

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

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

The purpose of these efforts was to allow volumes of patient care to be more manageable for the healthcare system. A spike in patient volume could and may still overwhelm the healthcare system. The Debtors, as providers with acute care facilities, are among the front-line providers being called on to serve and treat patients during the crisis.

A significant portion of the Debtors' revenue is derived from outpatient procedures providing essential medical services to the citizens of the Yakima Valley and Central Washington, one of the nation's regions hardest hit by the pandemic. Nevertheless, based on recommendations from the Centers for Disease

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Control (the “CDC”)¹⁰ and an order by the Governor of the State of Washington,¹¹ in early to mid-2020, the Debtors postponed nonessential elective medical procedures, and continue to do so to some degree. Only essential urgent and emergency procedures that if delayed would cause harm were still being provided in early to mid-2020, and those delays are still occurring in large part. At this time, the Debtors continue to implement procedures in response to Covid-19 and state and federal directives such as: restricting staff and visitor access to the hospital; screening all patients, visitors, and staff before entry into the facility; and providing both in person and telehealth visits to patients. Before the infusion of PPP funds, Covid-19 had a significant negative impact on the Debtors’ cash flow.¹² A true and

¹⁰ See, e.g., CDC, “Coronavirus Disease 2019 (COVID-19) Healthcare Facility Guidance,” available at 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.)

¹¹ See Proclamation by the Governor of the State of Washington 20-24 entitled Restrictions on Non Urgent Medical Proceedings, available at [https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-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, 2020) (prohibiting all hospitals from “providing health care services, procedures and surgeries that, if delayed, are not anticipated to cause harm to the patient within the next three months”).

¹² The Debtors are not alone in suffering significant financial impact from foregoing elective surgeries and other repercussions of the pandemic. “Hospitals across the U.S. are losing more than \$1 billion in daily revenue as they experience significant declines in patient volume during the COVID-19 pandemic, according to a [report](#) from Crowe, a public accounting, consulting and technology company.” Ayla Ellison, *US hospitals losing \$1.4B in revenue per day, Becker’s Hospital CFO Report*, (May 4, 2020), available at 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 correct copy of the Debtors' then-current weekly cash flow budget is attached to the
2 Complaint as **Exhibit A**.

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

5 (i) The SBA 7(a) Loan Program, the CARES ACT, and PPP.

6 Prior to the enactment of the CARES Act, the "SBA 7(a) Loan" was the
7 SBA's primary loan program for providing financial assistance to small businesses.
8 Under typical circumstances, the SBA 7(a) Loan (under the pre-CARES Act
9 requirement) required that the applicant meet, among other things, the credit
10 requirements detailed in 13 CFR § 120.150. In that regard, 13 CFR § 120.150 lists
11 the following criterion:

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

- 15 (a) Character, reputation, and credit history of the
16 applicant (and the Operating Company, if applicable), its
17 Associates, and guarantors;
- 18 (b) Experience and depth of management;
- 19 (c) Strength of the business;
- 20 (d) Past earnings, projected cash flow, and future
21 prospects;
- 22 (e) Ability to repay the loan with earnings from the
23 business;
- 24 (f) Sufficient invested equity to operate on a sound
25 financial basis;
- 26 (g) Potential for long-term success;
- 27 (h) Nature and value of collateral (although inadequate
28 collateral will not be the sole reason for denial of a loan
request); and
- (i) The effect any affiliates (as defined in part 121 of this
chapter) may have on the ultimate repayment ability of
the applicant.

While there is no *per se* listed exclusion of a bankruptcy debtor participating
in the prior SBA 7(a) Loan program, when these criteria are coupled with the

1 requirements that the associated lending institution practice appropriate diligence
2 and credit assessment, the effect was *de facto* exclusion of any bankruptcy debtors
3 from securing an SBA 7(a) Loan.

4 On or about March 27, 2020, Congress enacted and the President signed the
5 CARES Act. The CARES Act included stimulus funds designed to assist
6 businesses, including 501(c)(3) nonprofits, and to ensure that American workers
7 continue to be paid despite the economic impact of Covid-19 and social distancing
8 measures. Section 1102 of the CARES Act established PPP under § 7(a) of the
9 Small Business Act, codified at 15 U.S.C § 636. While nominally called a “loan,”
10 PPP disbursements are treated as grants—and there are no repayment obligations—
11 if, among other things, 75% of PPP funds are used for payroll and wage expenses,
12 interest on mortgages, rent, or utilities.¹³

13 A qualified borrower may receive PPP funds equal to two and a half times its
14 average monthly payroll, up to a limit of \$10 million. A borrower need not exhaust
15 its other credit options prior to receiving PPP funds.¹⁴ A borrower can obtain funds
16 under PPP by applying with any federally insured participating lender using an
17 application form created by the SBA, and the SBA guarantees the loan.

18 The entire purpose of the program is to provide grants to companies in order
19 to ensure that workers can be paid. The CARES Act specifically waives all
20 underwriting considerations under § 7(a) of the Small Business Act, including but

21 ¹³ Funds not used in conformity with this ratio would be required to be repaid, but
22 at a low, fixed interest rate, with payments deferred for up to a year. *See* § 1102(g)
23 of the CARES Act.

24 ¹⁴ The Appellants’ reference, without citation, to the fact that the Debtors may have
25 received funds appropriated by Congress under the CARES Act’s Provider Relief
26 Fund is a red herring. *See* Appellants’ Brief at 16-17. PPP and the Provider Relief
27 Fund are not mutually exclusive. *See* Hannah L. Cross and Lester J. Perling, “A
28 Guide to the CARES Act Medicare Provider Relief Fund,” April 20, 2020,
available at <https://www.lexology.com/library/detail.aspx?g=e543c353-b3cc-4041-a5dc-557202db4692>.

1 not limited to, underwriting requirements, collateral review, or loan covenants.
 2 There is no evaluation of risk because there is no expectation of repayment,
 3 provided funds are used for permitted purposes. All small businesses have a right
 4 to apply for PPP funds.

5 (ii) The Appellants' Emergency Rule-Making Process.

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

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

17 The SOP 50-10 provides that in order to be eligible for a small business loan,
 18 an applicant must: "be an operating business;" "be organized for profit;"¹⁵ "be
 19 located in the United States (including its territories and possessions);" "be small
 20 under SBA size requirements;" and "demonstrate the need for desired credit." *See*
 21 SOP 50-10, pp. 91-104.

22 The SOP-50-10 expressly states that the types of businesses *listed as*
 23 *ineligible* in 13 CFR § 120.110 are not eligible for an SBA loan. Importantly,
 24 bankruptcy debtors are not listed as ineligible businesses in 13 CFR § CFR 120.110
 25 and the SOP 50-10. *See* SOP 50-10, pp. 104-117.

26
 27
 28 ¹⁵ The CARES Act has been extended to 501(c)(3) nonprofits.

1 The First Interim Rule also states that “[t]he program requirements of PPP
2 identified in this rule *temporarily supersede any conflicting Loan Program*
3 *Requirement* (as defined in 13 CFR 120.10).” (Emphasis added).

4 The First Interim Rule contains no explicit or implicit exclusion for debtors
5 in bankruptcy. The SBA and the Administrator published the First Interim Rule on
6 April 15, 2020. See First Interim Rule attached as **Exhibit B** to the Complaint.

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

14 Even though no law, regulation, or rule of any kind (including § 1102 of the
15 CARES Act or the First Interim Rule) disqualified or authorized the SBA or the
16 Administrator to disqualify bankruptcy debtors from participating in PPP, Official
17 SBA Form 2483 asks whether “the Applicant . . . [is] presently involved in any
18 bankruptcy” and then goes on to state that answering “yes” to that question means a
19 request for PPP funds will not be approved.¹⁶

20 In addition, the SBA and the Administrator released Official SBA Form
21 2484, titled “Lender Application Form–Paycheck Protection Program Loan
22

23 ¹⁶ Notably, Senator Susan Collins, who drafted PPP, sent a letter to the
24 Administrator stating her disagreement with the Administrator’s position that
25 hospital-debtors cannot participate in PPP. Senators Angus King, Patrick Leahy,
26 and Bernard Sanders, along with Congressman Peter Welch, have also submitted
27 letters to the Administrator echoing the Debtor’s position. A copy of these letters
28 are attached as **Exhibit C** to the Complaint. The Collins letter refers to a possible
waiver by the SBA of certain requirements, but to date, no such waiver has been
made available.

1 Guaranty,” which is the SBA’s official form that lenders must submit to the SBA in
2 connection with a PPP funds request (the “Lender Application” and, together with
3 the PPP application, the “PPP Applications”). A copy of the Lender Application is
4 attached to the Complaint as **Exhibit D**.

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

10 On or about April 4, 2020, the SBA and the Administrator issued a
11 supplemental interim final rule (the “Second Interim Rule”) providing further
12 guidance on PPP. Like the First Interim Rule, the Second Interim Rule does not
13 state that bankruptcy debtors are ineligible for PPP funds. On April 15, 2020, the
14 SBA and the Administrator published the Second Interim Rule. *See* Second Interim
15 Rule attached as **Exhibit E** to the Complaint.

16 On April 14, 2020, the SBA issued a third interim final rule (the “Third
17 Interim Rule”). Not only does the Third Interim Rule make no mention of
18 bankruptcy debtors, but it specifically states, “The Administrator recognizes that,
19 unlike other SBA loan programs, the financial terms for PPP Loans are uniform for
20 all borrowers, and the standard underwriting process does not apply because no
21 creditworthiness assessment is required for PPP Loans.” This disavowal by the
22 SBA and the Administrator of any concern for creditworthiness cuts directly against
23 any argument the Appellants make that their exclusion of bankruptcy debtors is
24 motivated by this concern. On April 20, 2020, the SBA and the Administrator
25 published the Third Interim Rule. *See* Third Interim Rule attached as **Exhibit F** to
26 the Complaint.

27 (iii) The Debtors Applied For PPP Funds.
28

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

11 PPP funds were available on a first come, first served basis. As early as
12 April 3, 2020, the Debtors considered submitting an application for PPP funds;
13 however, they were informed such application would be denied because of their
14 status as debtors in bankruptcy. The first tranche of PPP funding was completely
15 exhausted on April 16, 2020.

16 In anticipation of additional PPP funding, on April 17, 2020, Debtors
17 Toppenish and Astria Home Health submitted PPP Applications (individually, the
18 “Toppenish Application” and the “Astria Home Health Application”, respectively)
19 to their commercial lender, Banner Bank (attached, respectively to the Complaint as
20 **Exhibits G and H**). Based on an average monthly payroll of \$1,130,622.00 for its
21 318 employees, the Toppenish Application requested a total of \$2,826,556.00, to be
22 used for solely for payroll, lease and/or mortgage interest, and utilities. **Exhibit G.**
23 Based on an average monthly payroll of \$188,790.00 for its 24 employees, the
24 Astria Home Health Application requested a total of \$471,975.00, to be used solely
25 for payroll purposes. **Exhibit H.**

26 The Debtors specifically sized their request for PPP funds to ensure that the
27 funds would be treated as a grant and be forgivable. To the extent any portion of
28 the funds requested by the Debtors would exceed the amount to be forgiven, the

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

4 The Debtors truthfully answered “yes” to question 1 on the PPP
5 Applications, thus evidencing they were debtors. The SBA directed Banner Bank
6 not to process the PPP Applications. Thus, on April 21, 2020, Banner Bank’s Vice
7 President and Sunnyside Branch Manager, Cece Ibarra (“Ms. Ibarra”), unofficially
8 contacted the Debtors’ Controller, Sandra Cortez, via electronic mail regarding the
9 PPP Applications. A true and correct copy of Ms. Ibarra’s correspondence is
10 attached as **Exhibit I** to the Complaint. In this e-mail, Ms. Ibarra, explaining that
11 the Debtors are not eligible for PPP funds, informs the Debtors that it is “an SBA
12 rule” that “the bankruptcy is going to prevent you [the Debtors’] from qualify[ing]
13 for the loans” and that this rule “appl[ies] to any entity that was included in the
14 bankruptcy.” Ms. Ibarra further writes, “Sorry[,] I personally think that if someone
15 deserves this loan [it] is the Hospitals. But that’s an SBA rule.”

16 On or about April 23, 2020, Congress enacted legislation making additional
17 funds available for PPP. As of the date the Debtors filed the Complaint, the second
18 tranche of funding had not yet been exhausted. However, availability of those PPP
19 funds ended on June 30, 2020 or when PPP funds were exhausted, whichever came
20 first.¹⁷

21 On April 24, 2020, the SBA and the Administrator proposed another interim
22 final rule (the “Fourth Interim Rule”) with respect to PPP that states “[i]f the
23 applicant or the owner of the applicant is the debtor in a bankruptcy proceeding,
24 either at the time it submits the application or at any time before the loan is

25 ¹⁷ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill.*
26 *What’s In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), available
27 at [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)
28 [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).

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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.” *See* Fourth Interim Rule attached as **Exhibit J** to the Complaint. The SBA and the Administrator published the Fourth Interim Rule on April 28, 2020. This is the sum total of the administrative record.

After receiving no official denial from Banner Bank or the SBA, on or about April 30, 2020, the Debtors’ then-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.

On May 6, 2020, the Debtors received official notice (the “May 6, 2020 Notice”) that Banner Bank was unable to approve the Debtors’ PPP Applications because the Debtors “do[] not meet SBA eligibility criteria.” A true and correct copy of the May 6, 2020 Notice is attached as **Exhibit K** to the Complaint.

The Fourth Interim Rule had not been proposed at the time the Debtors first submitted their Applications or when the SBA and the Administrator directed Banner Bank not to process the Applications. One of the interim final rules in effect at the time the Debtors submitted their Applications, the First Interim Rule, states that “[t]he program requirements of PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10).” The CARES Act, the Small Business Act, the First Interim Rule, the Second Interim Rule, and the Third Interim Rule contained no exclusion against debtors receiving PPP funds.

The PPP funds have been critical to the Debtors’ ability to continue to operate their businesses. These funds continue to be essential to providing medical care that will inevitably result in fewer deaths to the citizens of the Yakima Valley

1 and Central Washington, one of the nation's regions hardest hit by the pandemic.
 2 Lack of funding under this program would inevitably result in reductions or even
 3 elimination of the Debtors' ability to provide essential medical services to the
 4 communities they serve, at a time when those services are more essential than ever.

5 The Debtors are eligible borrowers under PPP and sought, through
 6 preliminary injunction, to ensure adequate funds were available under the second
 7 tranche of PPP funding. The Debtors resubmitted their PPP Applications, striking
 8 "[is] presently involved in any bankruptcy," and their PPP Applications were
 9 approved and funded shortly thereafter.

10 **VII. SUMMARY OF ARGUMENT**

11 The Appellants unilaterally and without authority denied the Debtors' PPP
 12 Applications in violation of (A) the APA, and (B) § 525(a), and are now attempting
 13 to hide behind a non-existent record and post hoc rationalization that itself fails to
 14 support their position. The Appellants essentially and erroneously argue (i) the
 15 Bankruptcy Court lacked subject matter jurisdiction to grant injunctive relief; (ii)
 16 these APA claims are non-core; and (iii) the Bankruptcy Court applied the wrong
 17 standard. None of these arguments survive even cursory review.

18 Moreover, as an initial matter, this appeal should be dismissed as it is
 19 equitably moot—the Debtors have already received the requested PPP funds and
 20 used them to pay innocent third parties, including nurses and other essential
 21 healthcare staff who are on the front lines of fighting a global pandemic. Second,
 22 this is a limited appeal of the Bankruptcy Court's issuance of a preliminary
 23 injunction. Thus, the Court need not adjudicate all of the Debtors' claims—the
 24 Court's de novo review is of discrete legal issues, simply to determine whether the
 25 Bankruptcy Court used an erroneous legal standard. Here, except as to the Debtors'
 26 claim under § 525(a), the Bankruptcy Court applied the correct standards to the
 27 facts and circumstances of this case. Third, the Bankruptcy Court correctly decided
 28 that Congress waived sovereign immunity under the circumstances at issue here

through §§ 105, 106, and 525 of the Bankruptcy Code and § 634(b)(1) of title 15 of the United States Code. Fourth, the Appellants are mistaken—these are core claims under 28 U.S.C. § 157(b)(2) and *Stern v. Marshall*, 564 U.S. 462, 499 (2011), the leading case on this issue, because the Debtors’ claims arise in and/or under chapter 11 of the Bankruptcy Code. Indeed, it is nonsensical to determine otherwise because the only reason the PPP funds were denied initially and this adversary proceeding commenced is because the Debtors are in bankruptcy. Fifth, the Bankruptcy Court expressly referenced and applied the correct standard to the APA claims. Indeed, the Appellants reference this very standard in the Appellants’ Brief. Finally, the Debtors have established a likelihood of success of their claim under § 525(a) because PPP funds are “other similar grants” within the meaning of the Bankruptcy Code. Because the Bankruptcy Court used an erroneous legal standard, construing “other similar grant” too narrowly in contradiction of Congress’s express intent that an expansive view be taken, this Court should overrule the Bankruptcy Court on this single point.

VIII. ARGUMENT

A. The Appeal Is Equitably Moot.

As a threshold matter, equitable mootness bars this appeal. Equitable mootness is a prudential doctrine by which a court elects not to reach the merits of a bankruptcy appeal. *In re Transwest Resort Props., Inc.*, 801 F.3d 1161, 1167-68 (9th Cir. 2015) (citing *Rev Op Grp. v. ML Manager LLC (In re Mortgs. Ltd.)*, 771 F.3d 1211, 1215 n. 2 (9th Cir. 2014)). Equitable mootness arises “when there has been a comprehensive change of circumstances ... so as to render it inequitable for this court to consider the merits of the appeal.” *In re Mortgs., Ltd.*, 771 F.3d at 1214. For an appeal to be equitably moot, “[t]he question is whether the case presents transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply.” *Motor Veh. Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012). In other words,

1 “[e]quitable mootness concerns whether changes to the status quo following the
2 order being appealed make it impractical or inequitable to unscramble the eggs.”
3 *Castaic Partners II, LLC v. Dacca-Castaic, LLC (In re Castaic Partners II, LLC)*,
4 823 F.3d 966, 968 (9th Cir. 2016). The Appellants, through counsel, specifically
5 admitted that failure to receive a stay pending appeal would make it “very difficult
6 to unscramble that egg.” *Verbatim Transcription of Proceedings* (June 3, 2020)
7 [Adv. Pro. Docket No. 17] (the “Hearing Transcript”) at 125, ln. 2-3.

8 Although the doctrine of equitable mootness is most commonly applied to
9 avoid disturbing plans of reorganization, the doctrine is not a stranger to appeals
10 from other kinds of orders, such as DIP financing and cash collateral orders. *See*,
11 *e.g.*, *In re Samuel*, 2018 WL 3639047 (B.A.P. 9th Cir. July 31, 2018) (holding that
12 an appeal of a cash collateral order is moot if the funds have been spent); *Dahlquist*
13 *v. First Nat’l Bank*, 737 F.2d 733, 735 (8th Cir. 1984) (same); *Congress Fin. Corp.*
14 *v. Shepard Clothing Co. (In re Shepard Clothing Co.)*, 2002 WL 1739021, at *1 (D.
15 Mass. July 26, 2002) (appeal moot where the time period covered by the cash
16 collateral order has expired and the collateral authorized to be spent has been used);
17 *Bankwest, N.A. v. Todd*, 49 B.R. 633, 637-38 (D.S.D. 1985) (court finding cash
18 collateral order moot to the extent of the amounts already expended by debtors, but
19 finding appeal still equitably moot as to the unspent funds because it would be both
20 “economically unwise and inequitable” to reverse the cash collateral order);
21 *Aurelius Capital Master, Ltd. v. Touse Inc.*, 2009 WL 6453077 (S.D. Fla. Feb.6,
22 2009) (the court expressed concerns about “unraveling” and “fashioning” a new
23 cash-collateral order at that stage of the bankruptcy).

24 The Ninth Circuit has set four considerations to help determine whether an
25 appeal is equitably moot. The court will:

26 look first at whether a stay was sought, for absent that a
27 party has not fully pursued its rights. If a stay was sought
28 and not gained, we then will look to whether substantial
consummation of the plan has occurred. Next, we will

1 look to the effect a remedy may have on third parties not
2 before the court. Finally, we will look at whether the
3 bankruptcy court can fashion effective and equitable relief
4 without completely knocking the props out from under the
5 plan and thereby creating an uncontrollable situation for
6 the bankruptcy court.

7 *In re Transwest Resort*, 801 F.3d at 1167-68 (citing *In re Thorpe Insulation Co.*,
8 677 F.3d at 881). While these factors expressly pertain to an appeal from a
9 bankruptcy court's confirmation order, they are nonetheless relevant to an appeal
10 from an order granting injunctive relief related to financing for the Debtors, *i.e.*,
11 where funds were subsequently distributed to a debtor and then disbursed by the
12 debtor to innocent third parties.

13 The first factor, whether a stay was sought, is not dispositive here. Courts
14 have said caution must be applied when invoking the doctrine of equitable
15 mootness when a party has been *diligent* about seeking a stay. *Id.* at 1168
16 (comparing a debtor who never asked for a stay pending appeal and a debtor who,
17 once denied by the bankruptcy court, submitted a request to the district court).
18 However, where an appellant "sat on its rights," such inaction will weigh heavily in
19 favor of holding the appeal to be equitably moot. *Id.* (citing *In re Mortgs. Ltd.*, 771
20 F.3d at 1214). Here, while the Appellants moved orally at the Hearing for a stay
21 pending appeal under Rule 8007, the Appellants did not file a written motion for
22 reconsideration before the Bankruptcy Court nor did they attempt to pursue any
23 stay in this Court, although that right is available. *See* Oral Ruling at 35, ln. 20-21
24 ("If you want -- if you want to stay, you're going to have to go get it somewhere
25 else."). The Appellants could have, but failed, to request a stay pending appeal
26 with this Court before the PPP funds disbursed on or about June 23 and 29, 2020.

27 With respect to the second factor, the Order is fully consummated. The
28 Order authorized the Debtors to resubmit PPP Applications, pursuant to which the
Debtors have already received the requested PPP funds. The Debtors have, in fact,

1 been using the PPP funds for the intended purposes, including paying the wages
2 and benefits for nurses and other essential medical staff at two acute care hospitals
3 in the Yakima Valley, and accounting for them appropriately. *See* Monthly
4 Operating Reports [Lead Case Docket Nos. 1582 at 6; 1728 at 4; and 1829 at 6]. In
5 *In re Samuel*, the Ninth Circuit Bankruptcy Appellate Panel found satisfaction of
6 this factor to “weigh heavily in favor of mootness.” 2018 WL 3639047, at* 3.

7 The third factor requires this Court to consider the effects on third parties not
8 before the Court. This factor also weighs heavily in favor of mootness as the
9 parties who indirectly received the PPP funds (*e.g.*, the Debtors’ employees, critical
10 service providers, landlords, and utility providers) are not before this Court. As
11 noted by the court in *In re Samuel*, these creditors “relied on the bankruptcy court’s
12 order and presumably spent the funds long ago. Thus, clawing back money from
13 these third parties would be largely impracticable, even if possible.” *Id.* Indeed,
14 while these funds were spent on permissible expenditures like payroll and wage
15 expenses, interest on mortgages, rent, or utilities, the Debtors might have made
16 different calculations regarding those third parties’ services had they not had these
17 funds. Even if these funds could be returned to the Debtors and then returned to the
18 Appellants, it’s unclear how and whether the Debtors’ obligations to these third
19 parties could be met, in light of the fact that the Debtors have obligations to certain
20 secured parties and the use of their cash collateral under the Debtors’ DIP loan and
21 related Bankruptcy Court order.

22 The fourth factor, whether the bankruptcy court on remand may be able to
23 devise an equitable remedy without creating an uncontrollable situation for the
24 bankruptcy court, is also particularly relevant here. The Appellants’ proposed
25 remedy is essentially to (a) vacate the Bankruptcy Court’s Order, and (b) vacate the
26 Bankruptcy Court’s “holdings” that the Appellants “violated 5 U.S.C. § 706(2)(A).”
27 Appellants’ Brief at 42, *ln.* 14-28. However, it is unclear what such relief would
28 accomplish. In this instance there is no way the Bankruptcy Court can fashion an

equitable remedy without substantially threatening the future of the Chapter 11 Cases. Would the Debtors then be required to immediately repay the PPP funds? What is the impact on nurses and other essential medical staff whose wages were paid with those funds? If not from those who received the PPP funds indirectly from the Debtors, where would those funds come from now that the PPP funds have been spent? Would the repayment PPP funds violate the Bankruptcy Court's orders allowing the Debtors' use of cash collateral under their DIP loan? These unanswered questions illustrate that the egg cannot be unscrambled.

On the whole, these factors weigh strongly in favor of finding that the SBA's appeal is equitably moot.

B. The Appellants Misstate The Appropriate Standard Of Review.

(i) The Court Should Review the Bankruptcy Court's Decision for Abuse of Discretion, Not *De Novo*

The Appellants would have this Court rule on the entire adversary proceeding in this appeal. However, the Order at issue here is merely for a preliminary injunction, and not a final disposition of the adversary proceeding as a whole. Preliminary injunctions¹⁸ are reviewed for abuse of discretion, based "on an erroneous legal standard" or "on clearly erroneous findings of fact." *Parker*, 776 F.2d at 849; *In re Conceicao*, 331 B.R. at 889; *In re Sunnymead Shopping Ctr. Co.*, 178 B.R. at 814 (quoting *In re Goldberg*, 168 B.R. at 384). There are four factors

¹⁸ Indeed, orders issued by a trial court relating to equitable determinations and choices of remedies are all reviewed for abuse of discretion. *Stone v. City and County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992) (citing *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15, (1971)). That proposition is equally well established for both district court and bankruptcy appellate panel review of bankruptcy decisions. *See, e.g., In re Yuri Lee*, No. CV 18-6851-JFW, 2018 WL 7501124 *7 (C.D. Cal. Dec. 7, 2018), *aff'd sub nom. Matter of Lee*, 781 F. App'x 677 (9th Cir. 2019) and *In re Sunnymead Shopping Ctr. Co.*, 178 B.R. at 814; *see also In re A&C Properties*, 784 F.2d 1377 (9th Cir. 1986); and *Levernier v. Educ. Credit Mgmt. Corp. (In re Levernier)*, 307 B.R. 684, 686 (C.D. Cal. 2004).

1 necessary to determine whether a preliminary injunction is appropriate, three of
2 which the Appellants concede, because only the first of which has been appealed:
3 “(1) a strong likelihood of success on merits, (2) the possibility of irreparable injury
4 to the [moving party] if the preliminary relief is not granted, (3) a balance of
5 hardships favoring the [moving party], and (4) advancement of the public interest
6 (in certain cases).” *In re Conceicao*, 331 B.R. at 889. Thus, here, the Court is
7 tasked with determining whether the Bankruptcy Court’s determination that the
8 Debtors had a strong likelihood of success on its APA claims was based on an
9 erroneous legal standard.

10 Here, the facts are essentially undisputed, and all that remains for this Court
11 is a discrete review of the proper interpretation of the law, *i.e.*, (a) whether
12 Congress waived sovereign immunity under § 106 and 15 U.S.C. § 634(b)(1) such
13 that the Bankruptcy Court could issue injunctive relief, (b) whether the Debtors’
14 APA claims are “core” under 28 U.S.C. § 157 such that the Bankruptcy Court could
15 adjudicate them, (c) whether the Appellants violated § 706(2) of the APA by
16 exceeding their statutory authority and/or acting arbitrarily and capriciously when
17 they denied the Debtors access to the PPP funds based solely on their status as
18 debtors in the Chapter 11 Cases, and (d) whether PPP funds constitute “other
19 similar grant” under § 525(a). Although these discrete legal issues are reviewed de
20 novo, such review is only to determine whether the Bankruptcy Court based the
21 Order on an erroneous legal standard.

22 (ii) The Abuse of Discretion Test Allows Significant Deference
23 Towards the Lower Court’s Ruling

24 In *Hinkson*, the Ninth Circuit adopted a two-part test to determine objectively
25 whether a district court has abused its discretion. *US v. Hinkson*, 585 F.3d 1247,
26 1261 (9th Cir. 2009).

27 . The *Hinkson* court said:
28

the first step of our abuse of discretion test is to determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion. If the trial court identified the correct legal rule, we move to the second step of our abuse of discretion test. This step deals with the tension between the Supreme Court's holding that we may reverse a discretionary trial court factual finding if we are "left with the definite and firm conviction that a mistake has been committed," *United States v. U.S. Gypsum Co.*, 333 U.S. 364 at 395 (1948), and its holding that we may not simply substitute our view for that of the district court, but rather must give the district court's findings deference, *see Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639 at 642, (1976). Resolving that tension by reference to *Anderson*, we hold that the second step of our abuse of discretion test is to determine whether the trial court's application of the correct legal standard was (1) "illogical," (2) "implausible," or (3) without "support in inferences that may be drawn from the facts in the record." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 at 577 (1985). If any of these three apply, only then are we able to have a "definite and firm conviction" that the district court reached a conclusion that was a "mistake" or was not among its "permissible" options, and thus that it abused its discretion by making a clearly erroneous finding of fact.¹⁹

Id. at 1262. The *Hinkson* court described the abuse of discretion test as a "significantly deferential test that looks to whether the district court reaches a result that is illogical, implausible, or without support in inferences that may be drawn

¹⁹ The *Hinkson* Court went on to find that when "an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Id.* at 1259 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

1 from the record.” *Id.* The Appellants cannot establish the Order and Oral Ruling
2 fail to survive the abuse of discretion test.

3 C. Congress Waived Appellants’ Sovereign Immunity.

4 Congress waived the Appellants’ sovereign immunity under the
5 circumstances presented here, and the Appellants are unable to establish is
6 “illogical, implausible, or without support.” *Hinkson* at 1262. While true that the
7 United States is immune from suit unless it consents to be sued, *US v. Sherwood*,
8 312 U.S. 584 (1941), § 106 of the Bankruptcy Code and § 634(b)(1) of title 15 of
9 the United States Code provide that express congressional consent. Indeed, the
10 Appellants concede that under § 634(b)(1), “Congress has waived the SBA’s
11 sovereign immunity,” at least to some degree. Appellants’ Brief at 23, ln. 3-4; *see*
12 *generally, In re Liberty Const.*, 9 F.3d 800, 801 (9th Cir. 1993) (assuming without
13 discussion that § 634(b)(1) waives sovereign immunity against the *SBA*, not just the
14 Administrator). However, the Debtors dispute the Appellants’ interpretation of the
15 extent of this waiver.

16 Section 634(b)(1) states,

17 In the performance of, and with respect to, the functions,
18 powers, and duties vested in him by this chapter the
19 Administrator may--(1) sue and be sued . . . in any United
20 States district court, and jurisdiction is conferred upon
21 such district court to determine such controversies . . . ;
22 but no attachment, injunction, garnishment, or other
23 similar process, mesne or final, shall be issued *against the*
24 *Administrator or his property.*

25 15 U.S.C. § 634(b)(1) (emphasis added).

26 Section 634(b)(1) of title 15 of the United States Code was enacted in 1953,
27 and subsequently amended in 1958, P.L. 85-536, § 5, prior to the enactment of
28 §§ 105, 106, and 525. At that time, injunctive relief was generally not available
against the federal government, but 15 U.S.C § 634(b)(1) was not intended to grant

1 the SBA any greater immunity from injunctive relief than any other agency.
2 *Cavalier Clothes, Inc., v. U.S.*, 810 F.2d 1108, 1112 (Fed. Cir. 1987) (reversing and
3 remanding order denying injunctive relief for claims involving SBA). Much like
4 the task before the Court now, the *Cavalier Clothes* court had to harmonize 15
5 U.S.C § 643(b)(1) with later-enacted statutes that specifically authorized injunctive
6 relief against the government—but which did not name the SBA. In doing so, the
7 *Cavalier Clothes* court reasoned as follows:

8 That recent expression of Congress’ purpose necessarily
9 gives a new focus to the bare words of § 634(b)(1) with
10 respect to such contract claims.

11 In that connection, nothing either in the language or the
12 legislative history of § 634 suggests that Congress
13 intended to grant the SBA any greater immunity from
14 injunctive relief than that possessed by other
15 governmental agencies. At the time § 634 was originally
16 adopted as part of the Small Business Act, injunctive
17 relief was not available against the United States or
18 Government entities acting in their governmental
19 capacity; because the SBA was expressly made suable by
20 the Small Business Act, Congress added the no-injunction
21 provision to make sure that the “suable” clause did not
22 permit specific relief against SBA, any more than the
23 Tucker or Tort Claims Acts, though they allow suits for
24 monetary relief, permit specific relief against the United
25 States. Consequently, there is no basis for any inference
26 that Congress intended to exclude the SBA when it later
27 authorized injunctive relief against government agencies
28 and departments generally on pre-award contract claims.

23 *Id.* at 1112; *see also Related Indus., Inc. v. U.S.*, 2 Cl. Ct. 517, 522 (1983)
24 (providing extensive discussion of 15 U.S.C § 634(b)(1) and its origin and
25 ultimately determining injunctive relief was available against SBA under a later
26 statute, even though the later statute did not specifically name SBA).

1 The Federal Circuit and Claims Court are not alone in holding that 15 U.S.C.
2 § 634(b)(1) does not bar injunctive relief against the SBA. The United States Court
3 of Appeals for the First Circuit engaged in a similar deep analysis of 15 U.S.C §
4 634(b)(1) and ultimately reached the same conclusion:

5 The no-injunction language protects the agency from
6 interference with its internal workings by judicial orders
7 attaching agency funds, etc., but does not provide blanket
8 immunity from every type of injunction. In particular, it
9 should not be interpreted as a bar to judicial review of
10 agency actions that exceed agency authority where the
remedies would not interfere with internal agency
operations.

11 *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987); *see also*
12 *Hartshorne Mining LLC v. Carranza*, (*In re Hartshorne Holdings LLC*), 20-ap-
13 04012 (W.D. Ky. Bankr.), slip opinion at *2 (Docket No. 20)(collecting adversary
14 proceedings that found debtors were “entitled to a TRO prohibiting the
15 Administrator from applying bankruptcy eligibility rule to PPP”).²⁰ Injunctive
16 relief here did not interfere with the internal workings of the SBA. The cases cited
17 by the Appellants do not change this analysis. Appellants’ Brief at 22-29. Indeed,
18 the Supreme Court has not addressed *Ulstein* or otherwise overruled it, and contrary
19 to Appellants’ assertions, *Lane v. Pena*, 518 U.S. 187, 192 (1996) does not address
20 *Ulstein*. *See* Appellants’ Brief at 25 (“In *Lane v. Pena*, the Supreme Court rejected
21 *Ulstein*’s approach”).

22 The Bankruptcy Court’s task at issue here was the same as in *Cavalier*
23 *Clothes, Related Industries*, and *Ulstein*. These decisions provide a clear path to

24
25 ²⁰ Defendants may argue that the same result is achieved through declaratory relief,
26 to which the Debtors are clearly entitled, but such a declaration would be a dead
27 letter without an injunction to enforce it. *See Camelot Banquet Rooms, Inc. v.*
28 *United States Small Bus. Admin.*, No. 20-C-0601, 2020 WL 2088637 (E.D. Wis.
May 1, 2020).

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 harmonize 15 U.S.C § 634(b)(1) with §§ 105(a), 106(a), and 525(a). Section
2 634(b)(1) provides a general limitation on the availability of injunctive relief,
3 whereas the later-enacted provisions of the Bankruptcy Code bar discrimination
4 against debtors, expressly provided the Bankruptcy Court with authority to enter
5 any order necessary to remedy such discrimination, and waive sovereign immunity
6 with respect to those orders. This is patently clear from §§ 105(a), 106(a)(1)-(3),
7 and 525(a). The situation before the Bankruptcy Court was exactly like the one
8 addressed in *Cavalier Clothes, Related Industries*, and *Ulstein* at 1262. Thus, this
9 Court should not overrule the Bankruptcy Court’s grant of injunctive relief.

10 Assuming *arguendo*, the Court does not agree, the Bankruptcy Court’s Order
11 had additional basis for its conclusion that the Appellants are not shielded from
12 injunctive relief when they are acting outside the scope of their lawful authority.
13 By its plain language, the anti-injunction clause under § 634(b)(1) of title 15 is
14 limited to those circumstances in which the Appellants are acting “[i]n the
15 performance of, and with respect to, the functions, powers, and duties vested in
16 [them] by this chapter[.]” Thus, when the Appellants acted outside the scope of
17 their authority, *i.e.*, in violation of the APA or § 525(a), the anti-injunction clause
18 does not apply. *See e.g., Dubrow v. Small Bus. Admin.*, 345 F.Supp. 4, 7 (C.D. Cal.
19 1972) (injunctive relief available if administrator acts outside scope of authority but
20 determining actions were not outside authority); *see also Elk Assoc. Funding Corp.*
21 *v. Small Bus. Admin.*, 858 F.Supp.2d 1, 22-3 (D.D.C. 2012) (“courts [of this circuit]
22 have strongly intimated that injunctive relief is available, at a minimum, when the
23 SBA exceeds its statutory authority”).

24 Another permissible basis stems again from the plain language of the test. It
25 was reasonable for the Bankruptcy Court to determine that the anti-injunctive
26 clause actually relates only to suits against *the Administrator in her personal*
27 *capacity*. *See* Oral Ruling at 14-15. If Congress had meant to provide that no
28 injunction could issue against the SBA’s property, it would have stated as much.

1 Tellingly, the Appellants attempt to make a different plain language argument while
2 simultaneously altering the statutory language with brackets. *See* Appellants’ Brief
3 at 23, ln. 11-12 (changing “shall be issued against the Administrator or his
4 property” to “shall be issued against the [agency] and [its] property”).

5 Even *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) requires a “fair reading of
6 the text” and does not preclude a review of legislative history. *Id.* at 290. Here, a
7 fair reading allows for both of these plain text readings.

8 To the extent Appellants’ argument relies on the Fifth Circuit’s decision *In re*
9 *Hidalgo Cty. Emergency Servs. Found.*, 962 F.3d 838 (5th Cir. 2020), such reliance
10 is misplaced. That case is (a) nonbinding on this Court, (b) is wholly cursory,
11 relying on a previous Fifth Circuit opinion that determined all injunctive relief
12 against the Appellants is “*absolutely prohibited*,” which the debtors there conceded,
13 and (c) does not undermine the basis of the Bankruptcy Court’s decision, which did
14 not actually rely on *Hidalgo* for this point (*but see* Appellants assertions otherwise,
15 Appellants’ Brief at 23, ln. 22-23). Instead the Order relied on *Ulstein*, 833 F.2d at
16 1052, as well as *DV Diamond Club of Flint, LLC v. SBA*, Case No. 20-cv-10899,
17 U.S. District Lexus 82213 at *19-23, (E.D. Mich. May 11, 2020) and *Springfield*
18 *Medical Care Systems v. Kuranda (In re Springfield Medical Care Systems)*, 2020
19 Lexus 11238 at *1669 (D. Ct. Vt. May 2020), or alternatively the plain language
20 interpretation that the statute’s limitation is to the Administrator in her personal
21 capacity and not against the SBA/United States more generally. Oral Ruling at 13-
22 14.

23 Although there is no Ninth Circuit precedent on point, the decisions from
24 other Circuit Courts of Appeal strongly support the Bankruptcy Court’s decision.
25 *Ulstein*, 833 F.2d at 1052; *Cavalier Clothes*, 810 F.2d at 1112; *see also DV*
26 *Diamond Club of Flint, LLC v. SBA*, 960 F.3d at 745. Thus, there is sufficient legal
27 support for the Order such that the Bankruptcy Court did not abuse its discretion in
28 granting the preliminary injunction.

D. These Proceedings Are Core Proceedings Under 28 U.S.C. § 157 and *Stern*.

As the Bankruptcy Court determined, these proceedings and claims are core proceedings and claims under *Stern* and 28 U.S.C. § 157(b)(2), which require that they arise under or in (and not merely relate to) a bankruptcy case. Oral Ruling at 9-13 (citing 28 U.S.C. § 157; Rule 83.5 of the Local Civil Rules of the Eastern District of Washington; *Stern v. Marshall*, 564 U.S. at 499 (making clear that any claims stemming from the bankruptcy itself are properly within the adjudicatory powers of the bankruptcy court); *Harkey v. Grobstein (In re Point Ctr. Fin., Inc.)*, 957 F.3d 990, 993 (9th Cir. 2020).

The Appellants essentially argue the Bankruptcy Court was without power to enter a preliminary injunction on the Debtors' APA claims specifically because APA claims generally arise wholly unconnected from bankruptcy proceedings.²¹ Appellants' Brief at 30-32 ("APA claims are not claims that inherently arise only in bankruptcy cases. The opposite is true. APA claims almost never arise in a bankruptcy case and are instead filed in district court."). This is illogical. The Debtors' claims, including the APA claims, arise precisely *because of* the Chapter 11 Cases, and not merely *incidental to* the Chapter 11 Cases. The Appellants cannot ignore that these APA claims are different from almost every other APA claim because the Appellants unfairly and without basis made them different.

Appellants cite the Ninth Circuit and Eleventh Circuit for the proposition that "Non-core proceedings are those that 'do not depend on the Bankruptcy Code for

²¹ Significantly, through the Appellants' stated standard of review analysis, the Appellants seem to recognize these proceedings must be "core." Appellants' Brief at 9 ("A district court reviews "final judgments of a bankruptcy court in core proceedings . . . under traditional appellate standards." *Stern v. Marshall*, 564 U.S. 462, 474–75 (2011). Under these standards, the Court "review[s] the bankruptcy court's conclusions of law *de novo* and its factual findings for clear error.").

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 their existence and they could proceed in another court. . . . [A] core proceeding is
2 one that invokes a substantive right provided by title 11 or . . . a proceeding that, by
3 its nature, could arise only in the context of a bankruptcy case.” Appellants’ Brief
4 at 30 (citing *Battle Ground Plaza, LLC v. Ray*, 624 F.3d 1124, 1131 (9th Cir.
5 2010); also citing *Wortley v. Bakst*, 844 F.3d 1313, 1318 (11th Cir. 2017); 1
6 COLLIER ON BANKRUPTCY P 3.01(3)(e)(iv) (16th ed. 2020)). However, any analogy
7 to those factual scenarios is inapposite, as the claims in those cases appear by
8 happenstance to be made in bankruptcy proceedings. For example, in COLLIER, the
9 referenced defamation claims against a non-debtor overlooks the fact that those
10 particular claims would not impact the rights and property of the *debtor* in the
11 slightest, and indeed are purely state law claims. *Ray* is similarly inapposite as it
12 was premised on the fact that the dispute there was a matter of pure state law, *i.e.*,
13 the sale of real property and breach of contract, that did not impact the plan of
14 reorganization, “did not necessarily depend upon resolution of a substantial
15 question of bankruptcy law,” and which could have existed “entirely apart from the
16 bankruptcy proceeding.” *Ray*, 624 F.3d at 1135. In *Wortley*, the issue was whether
17 the bankruptcy judge failed to recuse himself under 28 U.S.C. § 455 based on
18 personal connections to the counsel arguing before him, not because of anything
19 particular to the bankruptcy case itself. *Wortley*, 844 F.3d at 1316.

20 Here, however, the Appellants’ denial of PPP funds inexplicably *targeted*
21 debtors in bankruptcy proceedings. This is not a “but for” correlation referenced in
22 COLLIER, but is instead a “because of” connection. Because the sole basis for the
23 Appellants’ denial is that the Debtors are/were debtors in bankruptcy, *i.e.*,
24 “presently involved in any bankruptcy,” these claims fall squarely within the
25 definition of “core” because they arise under or in a bankruptcy proceeding. It
26 cannot be underscored enough: the Appellants’ violations of the APA here attack
27 substantive rights provided under title 11. As the Appellants concede, a core matter
28 is “a proceeding that, by its nature, could arise only in the context of a bankruptcy

1 case.” Appellants’ Brief at 30. Here, where only debtors in bankruptcy could be
 2 subject to this SBA rule, it is clear that an adversary proceeding challenging that
 3 rule is a proceeding that could only arise in the context of a bankruptcy case.

4
 5 Alternatively, although not addressed in the Order or Oral Ruling, the
 6 Debtors contend other subsections of § 157(b)(2) of title 28 of the United States
 7 Code provide a basis to determine these proceedings are “core.” For example,
 8 under *Stern* and 28 U.S.C. § 157(b)(2)(C) (citing counterclaims generally), because
 9 the United States is one party and has filed proofs of claim in the Chapter 11 Cases
 10 (*see, e.g.*, Proofs of Claim Nos. 7 (filed by the U.S. Department of Health & Human
 11 Services (“DHHS”) for \$415,571.68 against Sunnyside Home Health), 18 (filed by
 12 DHHS for \$53,721.90 against Astria Home Health), 66 (filed by the Internal
 13 Revenue Services (the “IRS”) for \$4,150.79 filed against Toppenish), and 90 (filed
 14 by the IRS for \$254,498.49 against SHC Medical Center -Yakima), all of Debtors’
 15 claims may be resolved by the Bankruptcy Court as “core” under the argument of
 16 *permissible* counterclaims. *See, e.g., In re HAL, Inc.*, 122 F.3d 851 (9th Cir. 1997),
 17 *aff’g*, 196 B.R. 159 (B.A.P. 9th Cir. 1996) (“[F]ederal government agencies, with
 18 the exception of those acting in a distinctly private capacity, are a single entity for
 19 purposes of setoff under § 553.”); *In re Chateaugay Corp.*, 94 F.3d 772, 779 (2d
 20 Cir. 1996) (holding that there is a common law right to offset tax refunds against
 21 claims of other federal agencies); *In re Turner*, 84 F.3d 1294 (10th Cir. 1996) (en
 22 banc), vacating panel decision at 59 F.3d 1041 (10th Cir. 1995) (“We are convinced
 23 that the presence or absence of a bankruptcy proceeding does not affect the United
 24 States’ status as a unitary creditor.”); *In re Moore*, 350 B.R. 650, 554 (Bankr. W.D.
 25 Va. 2006) (HUD and IRS one entity for setoff purposes); *In re Huff*, 317 B.R. 679,
 26 681-82 (Bankr. W.D. Pa. 2004) (same re USDA, Dept. of Treasury and IRS); *In re*
 27 *Bourne*, 262 B.R. 745, 749 (Bankr. E.D. Tenn. 2001) (same re IRS and HUD); *In re*
 28

1 *Nuclear Imaging Systems, Inc.*, 260 B.R. 724, 733-34 (Bankr. E.D. Pa. 2000) (same
2 re IRS and the Health Care Financing Administration).

3 Thus, the Bankruptcy Court had authority to rule on the Debtors request for
4 preliminary injunction including based on the likelihood of success of the merits of
5 the APA claims, and its legal basis is sufficient.

6 **E. The Appellants' Acts Were Arbitrary And Capricious.**

7 Appellants argue that the Bankruptcy Court did not apply the correct
8 standard here, *i.e.*, the *State Farm* standard. Appellants' Brief at 32-36. However,
9 as mentioned below, the Bankruptcy not only identified the *State Farm* standard,
10 but spent several pages of the Hearing Transcript specifically applying that standard
11 to the facts and administrative record (or lack thereof).

12 As background, the APA provided the Bankruptcy Court with authority to set
13 aside the Appellants' decisions because they were "arbitrary, capricious, an abuse
14 of discretion, or otherwise not in accordance with law." 15 U.S.C. § 706(2)(A).
15 The Appellants argue that their decision to exclude the Debtors was based on the
16 record, and that ends the analysis. However, as the Bankruptcy Court pointed out,
17 the sum total of the record is a one sentence conclusion without analysis: "[the
18 Administrator] determined that providing PPP loans to debtors in bankruptcy would
19 present an unacceptably high risk of an unauthorized use of funds or non-repayment
20 of unforgiven loans." See Fourth Interim Rule attached as **Exhibit J** to the
21 Complaint." This is insufficient to exclude the Debtors from PPP.

22 Moreover, Appellants' decision is based on the false premise that debtors in
23 bankruptcy are more likely to misuse PPP funds or refuse to repay those funds if
24 they fail to use them in accordance with the applicable guidelines. However, as the
25 Bankruptcy Court noted, debtors in bankruptcy are subject to strict oversight.
26 Additionally, PPP requires applicants to certify that "the uncertainty of economic
27 conditions makes necessary the loan request to support the ongoing operations of
28 the eligible recipient." CARES Act § 1102(G)(i)(I). *Literally every* PPP applicant

1 must certify that they are concerned they are going out of business under the current
2 economic conditions. Claiming that every debtor in any chapter 11 is more risky
3 than a restaurant, bar, indoor gym, live music venue, barbershop, etc. that was not
4 in bankruptcy before the Covid-19 crisis is pure conjecture. More importantly for
5 the purposes of this appeal, the administrative record provides literally no support
6 for that assertion.²²

7 To the extent the Appellants now argue that applicants “must be
8 creditworthy” and loans “must be so sound as to reasonably assure repayment”
9 (Appellants’ Brief at 13, ln. 9-10 (citing 13 C.F.R. § 120.150; 15 U.S.C. §
10 636(a)(6)), such is directly contradicted in the Third Interim Rule: “The
11 Administrator recognizes that, unlike other SBA loan programs, the financial terms
12 for PPP Loans are *uniform for all borrowers*, and the *standard underwriting*
13 *process does not apply* because *no creditworthiness* assessment is required for PPP
14 Loans.” Third Interim Rule (emphasis added). Indeed, the Appellants require
15 literally zero creditworthy assessment or repayment assessment for all non-debtor
16 applicants, including the unexhausted laundry list of considerations identified in 13

17
18 ²² That the Appellants simply made up this rationalization after the fact is
19 demonstrated by the fact that the Appellants don’t actually care if a company
20 dismisses a pending bankruptcy case for the express purpose of getting PPP funds
21 and then re-commencing its case, or starting a new case once the PPP funds are in
22 hand. *In re Blue Ice Investments, LLC*, Case No. 2:20-bk-02208-DPC (Bankr. D.
23 Ariz.) (Case where the debtors dismiss the chapter 11 proceeding, applied for PPP
24 funds, obtained funds, and then reinstated the same chapter 11 proceeding, and the
25 Appellants have not objected.); *In re Eastern Niagara Hospital, Inc.*, Case No. 19-
26 12342-CLB (Bankr. W.D.N.Y.) (Case where the debtor dismissed the chapter 11
27 proceeding, applied for PPP funds, obtained the funds, and then file a new chapter
28 11 case, and the Appellants have not objected); *In re Jack Cty. Hosp. Dist.*, Case
No. 20-40858 (Bankr. N.D. Tex.); *see also* Salerno, Weidner, Simpson & Ebner,
“This DIP Loan Should be Brought to You by Someone who CARES! (Or ‘You
Can’t Get There from Here),” Am. Bankr. Institute (April 27, 2020) (discussing
these very scenarios and concluding the Appellants do not care).

1 C.F.R. § 120.150. When the repayment liability is \$0.00, then a “loan” of funds to
 2 *literally anyone* is reasonably assured to provide repayment of such liability.

3 In short, Appellants’ decision to exclude the Debtors from PPP based solely
 4 on their status as debtors in the Chapter 11 Cases was unreasonable, in violation of
 5 the APA, which is exactly the reasoning set forth in the Order. Moreover, contrary
 6 to Appellants’ analysis (Opposition at 23), developing a bright line rule based on an
 7 arbitrary and capricious metric is still arbitrary and capricious. Alternatively, for
 8 example, had the rule been drafted so as to consider debtors who would use the
 9 funds for their intended purpose and only to the extent they are forgivable, then the
 10 rule would not have been arbitrary and capricious, an abuse of discretion, or
 11 otherwise not in accordance with the law. The Appellants’ counterargument to
 12 examples like this is that the “Bankruptcy Court ignored [the SBA’s] policy
 13 decisions and substituted its own judgment for the SBA’s judgment about how to
 14 allocate finite PPP funds.” Appellants’ Brief at 20. But that’s not what
 15 happened—there was nothing to substitute, as it was a decision *without basis*.

16 Nevertheless, the Appellants argue deference is owed to this conclusory
 17 statement that “providing PPP loans to debtors in bankruptcy would present an
 18 unacceptably high risk of an unauthorized use of funds or non-repayment of
 19 unforgiven loans.” Appellants’ Brief at 32 (citing standard found in *Motor Vehicle*
 20 *Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Even
 21 under this standard, which the Bankruptcy Court *clearly* articulated in the Oral
 22 Ruling (at 16, ln. 6-18), and which the Debtors clearly articulated in their Reply at
 23 28-33, deference is unwarranted here.²³

24
 25 ²³ Apparently the Appellants concede that the *Chevron* deference doctrine is
 26 inapplicable. Appellants’ Brief at 32-33. Thus, the Debtors and the Appellants are
 27 in agreement that *Chevron* deference is inapplicable. *US v. Mead*, 533 U.S. 218,
 28 226-27 (2001); *Reno v. Koray*, 515 U. S. 50, 61 (1995) (internal agency guideline
 that is not “subject to the rigors of the [APA], including public notice and
 comment” is entitled only to “some deference” (internal quotation marks omitted));

1 For the avoidance of doubt, the Bankruptcy Court used the proper legal
2 standard:

3 Regardless, courts will find an action to [be] arbitrary and
4 capricious, “if an agency has relied on factors, which
5 Congress has not intended to consider entirely failed
6 to consider an important aspect of the problem, offered an
7 explanation for its decision that runs counter to the
8 evidence before the agency, or (inaudible) possible that it
9 could not be ascribed to a difference in view or the
10 product of agency expertise.” That’s from **Motor
11 Vehicle Manufacturer Association v. United States
12 versus State Farm Mutual Auto Insurance Company,**
13 **463 U.S. 18 at page 43, 1983 Supreme Court decision.**
14 Moreover, the agency must articulate a rational
15 connection between the facts found and the conclusions
16 made. See, for example, *Latino Issues Forum versus*
17 *United States, EPA 558 at 3rd, 936 at page 941, Ninth*
18 *Circuit 20 -- 2009.* Although a court is not entitled to
19 substitute its own judgment for the agency’s judgment, the
20 court must [not] ultimately act as a rubber stamp and is
21 obligated to, “ensure that agency decisions are founded
22 on a reasoned devaluation of relevant facts and
23 circumstances.” See, for example, *Arizona Cattle*
24 *Growers Association versus United States Fish and*
25 *Wildlife Bureau of Land Management 273 F 3rd, 1229 at*
26 *page 1236, a 2001 decision from the Ninth Circuit.*

27 The Court should not go beyond the agency’s
28 administrative record, which means, “the basis for the
decision must come from the agency. The reviewing
court may not substitute regions for agency action that are
not contained in the record.” That’s also *Arizona Cattle*
Growers Association, the same page.

26 *see also King v. Burwell*, 135 S. Ct. 2480 (2015); *FDA v. Brown & Williamson*
27 *Tobacco Corp.*, 529 U.S. 120, 159 (2000); *Smiley v. Citibank (South Dakota), N.*
28 *A.*, 517 U. S. 735, 740-41 (1996).

Here, the SBA's decision to categorically exclude all bankrupt debtors from PPP loan eligibility falls far short of the standards. Among other problems, first, there essentially is no administrative record supporting the ultimate conclusion whatsoever. The entirety of the SBA's discussion regarding this matter is encapsulated in paragraph four of the SBA's interim final -- fourth interim final rule Second, there, likewise, there's nothing indicating a, "reasoned evaluation," of anything.

Oral Ruling at 16-18 (emphasis added) (also citing *Reno*, 515 U. S. at 61; *Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002) (discussing how the record or policy must be more than a simple announcement).

Indeed, while there may be a general rule that judicial review of agency action is usually limited to the *administrative* record (see Opposition at 35 (citing 5 U.S.C. § 706, which states, "[T]he court shall review the whole record or those parts of it cited by a party."), there are four exceptions in the Ninth Circuit: when

(1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency.²⁴

Fence Creek Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010). Indeed, courts "may not automatically defer to an agency's conclusions, even when those conclusions are scientific." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) Instead,

²⁴ While the Debtors do not have any indication that the initial decision to exclude debtors in bankruptcy was made in *bad faith*, it is arguable that the Fourth Interim Rule was made in bad faith given the Administrator's statement in the Third Interim Rule regarding lack of underwriting process and creditworthiness considerations, and clearly Defendants' Forgiveness Rule was made in bad faith.

1 review must be sufficiently probing to ensure that the
2 agency has not relied on factors which Congress has not
3 intended it to consider, entirely failed to consider an
4 important aspect of the problem, offered an explanation
5 for its decision that runs counter to the evidence before
6 the agency, or is so implausible that it could not be
ascribed to a difference in view or the product of agency
expertise.

7 *Id.* (citation omitted). Thus, there was more than ample legal basis for the
8 Bankruptcy Court's conclusion that the Appellants acted in an arbitrary and
9 capricious manner.

10 Strangely, although Defendants argue the Court is limited to the
11 administrative record, they simultaneously continue to *change* the administrative
12 record. *See, e.g.*, Third Interim Rule; Fourth Interim Rule; Forgiveness Rule. But
13 the Supreme Court has, for more than seven decades, recognized that the amount of
14 "deference" to which an administrative interpretation should be accorded is in part
15 based upon "its consistency with earlier and later pronouncements" of an
16 agency. *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). The inconsistency of
17 the Administrator's rationale is telling. Appellants claim that they "now have a
18 further developed record and a request by the SBA for deference to its considered
19 judgment, as articulated in the interim rule," implying this Court should "believe
20 that [it is] dealing with a different, or at least, altered landscape than was presented
21 to the Texas Court [the *Hidalgo* Court]." *See* Opposition at 28 (citing *Cosi, Inc. v.*
22 *SBA*, Adv. No. 20-50591 (BLS) (Bankr. D. Del.). However, that is a boldfaced
23 attempt to do exactly what the Appellants are not permitted to do—create an
24 explanation post hoc with the assumption that there is somehow a relationship
25 between the initial decision to exclude debtors and the explanation provided after
26 the fact. The landscape cannot change in that fashion. Despite the admonition
27 from the Bankruptcy Court that the Appellants should produce a witness (or any
28 evidence for that matter) from the SBA to explain the decision-making that

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

occurred from the start, contemporaneously with the decision (*see* Transcript of May 19, 2020 hearing on Motion, at 7), Appellants instead rely on what is clearly post hoc explanation, contrary to the Supreme Court’s holding that “[d]eference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988). When there is “an appearance that the agency’s interpretation is no more than a post hoc rationalization advanced by an agency seeking to defend past agency action against attack, . . . deference is inappropriate.” *Price v. Stevedoring Services of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012) (internal citations and quotations omitted).

Thus, the Bankruptcy Court properly disregarded the Appellants’ reference to the Administrator’s statement in the Fourth Interim Rule for all the reasons set forth in the Order and Oral Ruling. This was not an abuse of discretion.

F. The Debtors Have Established A Likelihood Of Success On Their Claim That The Appellants Violated § 525(a).

While the Debtors believe that the Order was rightly decided on almost all points, the Bankruptcy Court erred when it held that the Debtors were unlikely to succeed on their claim for relief under § 525(a) because the “other similar relief” identified in § 525(a) cannot include PPP funds, which the Bankruptcy Court considered “money grants,” essentially because private parties are free to give money grants at non-market rates—whereas “other similar relief” must instead be something “uniquely granted by the Government.” *See* Oral Ruling at 3-10 (“But an affirmative money grant is different in kind from what are essentially forms of permission or access that are uniquely granted by the Government.”). However, the Bankruptcy Court’s definition of “other similar relief” is too narrow, and thus applied an erroneous legal standard, and indeed does not square with what other courts have included in the list of “other similar relief.” *See generally Rees v.*

1 *Employment Security Commission of Wyoming (In re Rees)*, 61 B.R. 114, 120
2 (Bankr. D. Utah 1986) (collecting cases).

3 Section 525(a) of the Bankruptcy Code prohibits the federal government
4 from discriminating against a person based on that person's status as a debtor with
5 respect to a "license, permit, charter, franchise, or other similar grant[.]" Section
6 525(a)'s list is illustrative, and not exhaustive. Courts have applied § 525(a) to
7 matters involving government contracts, student loan applications, public housing,
8 insurance, public mortgage financing, utility service, building permits, employment
9 termination, and agricultural subsidies. *See In re Rees*, 61 B.R. at 120 (collecting
10 cases). These examples illustrate how the Bankruptcy Court's construction is too
11 narrow. Many items on the *Rees* list are items that could have analogues provided
12 by private parties at non-market rates. Thus, the distinguishing factor is *actually*
13 that the particular benefit is something the *government* is providing, not that no one
14 else *could* provide something similar. For instance, private parties *could and do*
15 generally provide contracts, student loans, even public housing,²⁵ insurance,
16 mortgage financing, utility services, building permits, employment termination, and
17 agricultural subsidies.

18 Indeed, PPP is a grant within the meaning of § 525(a), and there is no
19 binding or controlling caselaw in the Ninth Circuit or elsewhere that prevented the
20 Bankruptcy Court from considering PPP as such. Furthermore, there is
21 considerable support for this position in legislative history, in the Second Circuit,
22 and elsewhere in federal law—and a growing number of bankruptcy courts across

23 ²⁵ See e.g., Community of Morenci, Arizona,
24 <https://morencitown.com/residents#housing> and
25 [https://morencitown.com/sites/morencitown/files/documents/Housing%20Applicati](https://morencitown.com/sites/morencitown/files/documents/Housing%20Application%203.2020.pdf)
26 [on%203.2020.pdf](https://morencitown.com/sites/morencitown/files/documents/Housing%20Application%203.2020.pdf) (last visited October 26, 2020) (discussing the company town of
27 Morenci, Arizona's housing application process whereby the company, Freeport-
28 McMoRan, allows employees and only employees to rent homes in town at very
low rent).

1 the nation concur. *See In re Roman Catholic Church of the Archdiocese of Santa*
 2 *Fe*, 2020 Bankr. LEXIS 1211, Adv. No. 20-1026 (DTT) [Docket No. 15] (Bankr.
 3 D. N.M. May 1, 2020) (SBA has appealed [Docket No. 19]); *In re Springfield*
 4 *Hosp., Inc.*, 2020 Bankr. LEXIS 1205, Adv. No. 20-01003 (CAB) [Docket No. 20]
 5 (Bankr. D. Vt. May 4, 2020); *KP Engineering, LP*, Adv. No. 20-03120 [Docket No.
 6 7, 17] (Bankr. S.D. Tex.); *Organic Power LLC*, Adv. No. 20-00055 [Docket No.
 7 29] (Bankr. D. P.R.) (further trial/decision pending); *Weather King Heating*, Adv.
 8 No. 20-05023 [Docket No. 18, 26] (Bankr. N.D. Ohio).

9 As an initial matter, the Code of Federal Regulations provides a general
 10 definition of a grant that is useful here:

11 Grant means an award of financial assistance that,
 12 consistent with 31 U.S.C. 6304, is used to enter into a
 13 relationship—(a) The principal purpose of which is to
 14 transfer a thing of value to the recipient ***to carry out a***
 15 ***public purpose of support or stimulation authorized by a***
 16 ***law of the United States***, rather than to acquire property
 17 or services for the Federal Government's direct benefit or
 18 use; and (b) In which substantial involvement is not
 19 expected between the Federal agency and the recipient
 20 when carrying out the activity contemplated by the award.

21 2 C.F.R. § 182.650 (emphasis added); *see also* 31 U.S.C. § 6304.

22 When considering whether PPP is a grant within the meaning of § 525(a),
 23 *i.e.*, whether PPP is an “other similar grant,” the Bankruptcy Court should have
 24 adopted the analysis presented by the Second Circuit. *See In re Stoltz*, 315 F.3d 80,
 25 84 (2d Cir. 2002) (finding a public housing lease to be a grant within the meaning
 26 of § 525(a)). “The omission of a statutory definition for the term ‘other similar
 27 grant’ is unsurprising in light of the antidiscrimination provision’s legislative
 28 history, which indicates that ‘. . . the section is not exhaustive . . . and delegates to
 the judiciary the responsibility ‘to mark the contours of the anti-discrimination
 provision’” *In re Stoltz*, 315 F.3d at n.4; *see also* H.R. REP. 95-595, 165,

1 1978 U.S.C.C.A.N. 5963, 6126 (“The doctrine is a developing doctrine, and its
2 precise ultimate contours are not yet clear. More case law will undoubtedly
3 develop the extent of the discrimination that is contrary to bankruptcy policy.”)

4 Of relevance, “[t]he common qualities of the property interests protected
5 under section 525(a), *i.e.*, ‘license[s], permit[s], charter[s], franchise[s], and other
6 similar grants,’ are that these property interests are unobtainable from the private
7 sector and essential to a debtor’s fresh start.” *In re Stoltz*, 315 F.3d 80, 90 (2d Cir.
8 2002).²⁶ Here, the Debtors cannot obtain PPP funds from the private sector and the
9 funds are essential to the Debtors’ fresh start, thus meeting the criteria as an “other
10 similar grant” within the meaning of § 525(a).

11 The Second Circuit is not alone in this viewpoint. Bankruptcy courts have
12 used § 525(a) to remedy abusive government action on many occasions and in
13 many contexts, just as the Bankruptcy Court should have done in the present case.
14 As a bankruptcy court in Virginia concluded:

15 The enumerations in § 525(a) are not intended to be an
16 exhaustive list, rather the section was drafted to permit
17 further development of prohibited discriminatory
18 treatment. *See Collier on Bankruptcy* ¶ 525.01. When
19 read as a starting point, and not as an exclusive and
circumscribed list, the enumerations in § 525(a) can be

20 ²⁶ The Appellants erroneously cited *Ayes v. U.S. Dep’t of Veterans Affairs*, 473 F.3d
21 104 (4th Cir. 2006) and *In re Exquisito Servs., Inc.*, 823 F.2d 151 (5th Cir. 1987) to
22 support their opposition (*see* Opposition at 34), but the Fourth and Fifth Circuits are
23 in *agreement* with the Second Circuit. Notably, in *Ayes*, the court recognized the
24 home-loan guaranty there was “undoubtedly a ‘grant.’” *Ayes* at 108. The only
25 reason those plaintiffs failed is they could not establish that the grant they sought, a
26 home-loan guaranty, could not be obtained from the private sector, meaning it was
27 not a “similar” grant. *Id.* at 105-06. Likewise, *Exquisito* found the program at
28 issue, the Small Business Administration’s § 8(a) program, to be a franchise
“within the scope of 11 U.S.C. § 525(a).” *Exquisito* at 154. The only reason that
plaintiff was denied relief is he could not demonstrate that the discrimination
against him was *solely* because of filing under Chapter 11. *Id.*

viewed as examples of prohibited discriminatory treatment and not the only instances thereof.

In re Stinson, 285 B.R. 239, 246 (Bankr. W.D. VA. 2002); *see also* 1 Collier Pamphlet Edition 2020, p. 515 (Richard Levin & Henry J. Sommer, eds., Matthew Bender) (“[T]he section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination.”). Indeed,

[t]he legislative history to § 525(a) generally supports an expansive application of the discrimination provisions. [] Section 525(a)’s list of discriminatory practices is illustrative, not exhaustive. Those courts supporting the notion that § 525 should be broadly construed focus on the Bankruptcy Code’s fresh start policy. Certain courts sought to limit § 525 to situations analogous to those enumerated in the statute, requiring “proof that the discrimination was caused *solely* by the debtor’s status” However, the Supreme Court’s decision in *NextWave*, *supra*, with its expansive definition of the term “solely because,” undermines those cases advocating a narrow reading of § 525.

In re Env'tl. Source Corp., 431 B.R. 315, 322 (Bankr. D. Mass. 2010) (internal citations and quotations omitted).

A bankruptcy court in Connecticut held that a state mortgage financing program could not deny a mortgage to a former debtor on that basis. *In re Rose*, 23 B.R. 662 (Bankr. D. Conn. 1982). The court explained:

If a state has chosen to enact a program of home financing for its citizens, § 525 prohibits that state from exempting debtors or bankrupts from those benefits solely because of bankruptcy and without taking into account present financial capability. To hold to the contrary would frustrate the Congressional policy of granting the debtor a fresh start by denying him a means open to other citizens of acquiring a home.

1 *Id.* at 666-67.

2 A bankruptcy court in Massachusetts applied § 525(a) to bar discrimination
3 by a governmental unit that had prohibited a school reorganizing in chapter 11 from
4 receiving veterans' benefits to pay the tuition of eligible veteran students. *In re The*
5 *Bible Speaks*, 69 B.R. 368, 371 (Bankr. D. Mass. 1987). After reviewing the
6 definitions of the terms "license" and "franchise" in Black's Law Dictionary, which
7 are broad,²⁷ the court reasoned as follows:

8 By approving the School, the Board conferred privileges
9 on the school analogous to a license or franchise. After
10 approval, the School had the right to represent to veteran
11 students that the Board had approved its unaccredited
12 courses. The School also obtained assurance that the
13 students' tuition for these courses would be subsidized
14 and therefore more likely to be paid. These privileges are
15 not indirect or tenuous. The School had to apply for
16 them, and subjected itself to the oversight of a
government agency in order to continue receiving them.
We conclude, therefore, that the privileges in question
here are a "similar grant" under § 525(a).

17 *Id.*

18 Thus, in determining the contours of § 525(a), the Bankruptcy Court's ruling
19 was contrary to legislative intent. Legislative history states,

20 The purpose of [§ 525] is to prevent an automatic reaction
21 against an individual for availing himself of the protection
22 of the bankruptcy laws. Most bankruptcies are caused by

23 ²⁷ According to the court:

24 Black's Law Dictionary defines a "license" as "[p]ermission to do a
25 particular thing, to exercise a certain privilege or to carry on a
26 particular business or to pursue a certain occupation." BLACK'S LAW
27 DICTIONARY 829 (5th ed. 1979). A "franchise" is defined as "[a]
special privilege conferred by government on individual or
corporation, and which does not belong to citizens of country generally
of common right [sic]." *Id.* at 592.

28 *Id.*

circumstances beyond the debtor's control. To penalize a debtor by discriminatory treatment as a result is unfair and undoes the beneficial effects of the bankruptcy laws.

H.R. REP. NO. 95–595, at 165 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6126.

In the final analysis, Appellants are not outside of the bounds of § 525(a) in this instance, and thus are not permitted to base their denial of PPP funds solely on the Debtors' status as debtors in the Chapter 11 Cases, even if they believe the CARES Act would otherwise allow them to do so (which it does not). “[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *F.C.C. v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 304 (2003) (internal citations and quotations omitted). Coexistence here entails reading the CARES Act eligibility requirements as precluding Defendants’ additional eligibility requirement regarding not being a debtor in bankruptcy. As in *NextWave*, since § 525 and the CARES Act circumscribe the Appellants’ permissible action, discrimination against the Debtors in PPP is not in accordance with law. *Id.* Because “[t]he Administrative Procedure Act requires federal courts to set aside federal agency action that is ‘not in accordance with law,’ 5 U.S.C. § 706(2)(A)—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering” (*NextWave*, 537 U.S. at 300 (emphasis in original) (also citing the APA’s prohibition against arbitrary and capricious actions by an agency)), the Bankruptcy Court was required to set aside the Appellants’ actions.

Moreover, there is no requirement that a court grant deference to Appellants’ label that PPP is a “loan.” As seen from the so-called “duck test,” labels or nomenclature is not definitive. *See generally, Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013) (“WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.”) (internal citations and quotations omitted); *BMC Indus., Inc. v. Barth*

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Indus., Inc., 160 F.3d 1322, 1337 (11th Cir. 1998) (using the duck test in another context).²⁸ The Debtors sought access to a program in which the government provides a grant, nominally through a “guaranty,” that the Debtors will never have to repay. Although the Appellants insist that PPP is a loan program, that interpretation is inconsistent with the clear intent of Congress. In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). All small businesses have the right to apply for PPP. The Debtors should too, without risk of discrimination. The Debtors have said under oath in their Complaint that they only sought PPP funds in an amount that could be forgiven and that they would immediately return any additional funds. While the Debtors have required cash now to survive, they never intended to increase their liabilities. Again, chapter 11 debtors are subject to extensive supervision, transparent reporting in the form of monthly operating reports with bank account activity filed on the docket, and other reporting and public accountability that is completely absent with respect to non-debtor PPP participants. Indeed, there may even be a greater risk of loan guaranties being triggered with non-debtor entities. Finally, the Debtors secured creditors agreed and filed a stipulation to the effect that they would not seek to include the PPP funds in their collateral, and the Bankruptcy Court imposed strict use and reporting guidelines on the Debtors’ use of the PPP funds.

²⁸ The SBA’s reliance on the use of the term “loan” even though PPP is clearly not a loan in any traditional sense of the word, is akin to Humpty Dumpty’s thoughts on use of particular words: “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.” Lewis Carroll, *Through the Looking Glass*, chapter 6, *available at* <http://www.alice-in-wonderland.net/resources/chapters-script/alice-in-wonderland-quotes/> (last visited on May 31, 2020).

1 Because the Bankruptcy Court's decision regarding the likelihood of success
 2 on the Debtors' § 525(a) claim is (a) contrary to congressional intent (which
 3 intended the definition to be "expansive"), and (b) without basis in the Ninth
 4 Circuit, it was an abuse of discretion to so narrowly define "other similar grant" as
 5 excluding PPP funds.

6 **IX. CONCLUSION**

7 Accordingly, the Debtors respectfully request that this Court dismiss the
 8 Appellants' appeal as equitably moot, or, in the alternative, affirm the Bankruptcy
 9 Court's Order, except to the extent it ruled that the Debtors did not meet their
 10 burden on the likelihood of success on the Debtors' § 525(a), on which point, the
 11 Debtors request the Court reverse the Order.

12
 13 Dated: October 28, 2020

/s/ Samuel R. Maizel

JAMES L. DAY (WSBA #20474)
 THOMAS A. BUFORD (WSBA
 #52969)
 BUSH KORNFELD LLP

SAMUEL R. MAIZEL (Admitted *Pro*
Hac Vice)
 SAM J. ALBERTS (WSBA #22255)
 GEOFFREY M. MILLER (Admitted
Pro Hac Vice)
 SARAH M. SCHRAG (Admitted *Pro*
Hac Vice)
 DENTONS US LLP

Attorneys for the Chapter 11 Debtors and
Debtors In Possession

DENTONS US LLP
 601 SOUTH FIGUEROA STREET, SUITE 2500
 LOS ANGELES, CALIFORNIA 90017-5704
 (213) 623-9300

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Bankruptcy Procedure 8015(a)(7), the undersigned certifies that the *Opening and Response Brief Of Appellees / Cross-Appellants* complies with the type- volume limitation and that the *Opening and Response Brief Of Appellees / Cross-Appellants* contains 15,205 words (excluding the cover page, corporate disclosure statement, tables, signature blocks, required certificates) as counted by the computer program used to prepare the *Opening and Response Brief Of Appellees / Cross-Appellants*.

Dated: October 28, 2020

/s/ Samuel R. Maizel

JAMES L. DAY (WSBA #20474)
THOMAS A. BUFORD (WSBA
#52969)
BUSH KORNFELD LLP

SAMUEL R. MAIZEL (Admitted *Pro Hac Vice*)
SAM J. ALBERTS (WSBA #22255)
GEOFFREY M. MILLER (Admitted
Pro Hac Vice)
SARAH M. SCHRAG (Admitted *Pro Hac Vice*)
DENTONS US LLP

*Attorneys for the Chapter 11 Debtors and
Debtors In Possession*

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2020, I electronically filed the Opening and Response Brief Of Appellees / Cross-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.

Dated: October 28, 2020

/s/ Samuel R. Maizel

JAMES L. DAY (WSBA #20474)
THOMAS A. BUFORD (WSBA
#52969)
BUSH KORNFELD LLP

SAMUEL R. MAIZEL (Admitted *Pro Hac Vice*)
SAM J. ALBERTS (WSBA #22255)
GEOFFREY M. MILLER (Admitted
Pro Hac Vice)
SARAH M. SCHRAG (Admitted *Pro Hac Vice*)
DENTONS US LLP

*Attorneys for the Chapter 11 Debtors and
Debtors In Possession*

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300