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Chapter 11 Debtors and Debtors In Possession*

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

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
Possession.²⁹

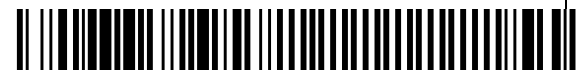
District Court Case No. 2:20-cv-3098-RMP,
Consolidated with District Court Case No. 1:20-cv-
3089-RMP

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

²⁹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).



1 UNITED STATES SMALL
2 BUSINESS ADMINISTRATION 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 /
Cross-Appellants.

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

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

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
 Possession.¹

ASTRIA HEALTH, *et al.*,

Plaintiffs,

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

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

VERIFIED COMPLAINT

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

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

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1 v.

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

7 Defendants.

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

19 I. JURISDICTION AND VENUE

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

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

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

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

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

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

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

14 II. PARTIES

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

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

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

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

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

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

21
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Additionally, a copy can be served by e-mail to the following individuals:

15 Ruth Harvey
16 Director
17 Commercial Litigation Branch
18 Civil Division
19 U.S. Department of Justice
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to judicial review of agency actions that exceed agency authority where the remedies
would not interfere with internal agency operations.”).

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6 **III. SUMMARY OF RELIEF REQUESTED**

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

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

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

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

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

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

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

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

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

4 **IV. BACKGROUND**

5 **A. General Background.**

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

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

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

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

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

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

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

17 19. Nevertheless, based on recommendations from the federal Centers for
 18
 19
 20
 21

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 36. In addition, the SBA and the Administrator released Official SBA Form
8 2484, titled “Lender Application Form–Paycheck Protection Program Loan
9 Guaranty,” which is the SBA’s official form that lenders must submit to the SBA in
10 connection with a PPP funds request (the “Lender Application” and, together with the
11 PPP application, the “PPP Applications”). A copy of the Lender Application is
12 attached to this Complaint as **Exhibit D**.

13
14 ¹² Notably, Senator Susan Collins, who drafted PPP, sent a letter to the Administrator
15 stating her disagreement with the Administrator’s position that hospital-debtors
16 cannot participate in PPP. Senators Angus King, Patrick Leahy, and Bernard Sanders,
17 along with Congressman Peter Welch, have also submitted letters to the Administrator
18 echoing the Debtor’s position. A copy of these letters are attached as **Exhibit C**. The
19 Collins letter refers to a possible waiver by the SBA of certain requirements. Upon
20 information and belief, this is unavailable.

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

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

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

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

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

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

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

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

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

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

13 46. The Debtors sized their request for PPP funds to ensure that the funds
14 would be treated as a grant and be forgivable. To the extent any portion of the funds
15

16 ¹³ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill. What’s*
17 *In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), available at
18 [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)
19 [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).
20

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

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

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

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

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

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

1 interim final rule (the “Fourth Interim Rule”) with respect to PPP that states “[i]f the
 2 applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either
 3 at the time it submits the application or at any time before the loan is disbursed, the
 4 applicant is ineligible to receive a PPP loan.” The stated basis for this rule is that the
 5 Administrator “determined that providing PPP loans to debtors in bankruptcy would
 6 present an unacceptably high risk of an unauthorized use of funds or non-repayment
 7 of unforgiven loans.” A copy of this Fourth Interim Rule is attached hereto as **Exhibit**
 8 **J.** The SBA and the Administrator published the Fourth Interim Rule on April 28,
 9 2020.

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

16 53. On May 6, 2020, the Debtors received official notice (the “May 6, 2020
 17 Notice”) that Banner Bank was unable to approve the Debtors Applications because
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1 the Debtors “do[] not meet SBA eligibility criteria.”¹⁴ A true and correct copy of the
 2 May 6, 2020 Notice is attached hereto as **Exhibit K**.

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

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

12
 13 _____
 14 ¹⁴ The Debtors actually received two identical notices, both for Toppenish. The
 15 Debtors believe this was in error and that Banner Bank intended that one of the notices
 16 be in regards to Astria Home Health. The Debtors have asked for confirmation from
 17 Banner Bank that the second notice was intended for Astria Home Health, but as of
 18 the date of filing have received no answer. Nevertheless, the Debtors were informed
 19 orally that the Astria Home Health Application was denied. The Debtors will
 20 supplement this filing with an exhibit of the notice as soon as they receive it.

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

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

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

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

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

4 **COUNT I**

5 **(Preliminary and Permanent Injunction)**

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

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

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

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

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

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

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

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

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

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

6 **COUNT II**

7 **(Declaratory Relief)**

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

10 68. The Debtors are entitled to seek declaratory relief pursuant to 28 U.S.C.
11 § 2201 and Rule 7001(9) of the Federal Rules of Bankruptcy Procedure.

12 69. Neither the CARES Act nor the Small Business Act prohibit
13 disbursements under PPP to the Debtors based on their status as debtors under chapter
14 11 of the Bankruptcy Code.

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

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

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

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1 exceeded their statutory authority.

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

5 **COUNT III**

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

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

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

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

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

1 qualified businesses that are akin to grants.

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

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

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

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

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

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

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

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

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

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

COUNT IV

(Administrative Procedure Act – Exceeding Statutory Authority)

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

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

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

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

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

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

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

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

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

11 95. The Debtors have no adequate remedy at law.

12 COUNT V

13 (Administrative Procedure Act – Arbitrary and Capricious)

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

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

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

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

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

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

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

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

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

106. The Debtors have no adequate remedy at law.

COUNT VI

(Mandamus – 28 U.S.C. § 1361)

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

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

109. The SBA and the Administrator breached this duty.

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

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

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

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

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

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

16 COUNT VII

17 **(Declaration Regarding Interpretation of Ambiguous Language)**

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

20 116. PPP Applications state that any applicant “presently involved in any
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1 bankruptcy” is ineligible to participate in PPP.

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

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

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

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

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 ADMINISTRATOR re PPP Funds**

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

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

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

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

1 rescue.

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

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

8 **V. NO BOND IS REQUIRED**

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

15 **VI. RELIEF REQUESTED**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 [or] an abuse of discretion” in violation of the APA.

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

3 (A) That the Court issue a writ of mandamus under 28 U.S.C. § 1361 to
4 compel the SBA and the Administrator to remove from all PPP
5 Applications all purported prohibitions against debtors in bankruptcy
6 participating in PPP and to process the Debtors’ Applications without
7 regard to their status as debtors in bankruptcy; and

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

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

13 (A) That the Court make a determination that the SBA and the
14 Administrator’s use of the phrase “involved in any bankruptcy” in the
15 Fourth Interim Rule and the PPP Applications is overly broad, vague, and
16 difficult to apply, and therefore ambiguous;

17 (B) That the Court enter a declaratory judgment stating that the questions in
18 the PPP Applications that ask whether the applicant is “presently involved
19 in any bankruptcy” shall be interpreted as asking only whether the applicant
20 is a debtor in a case under chapter 7 of the Bankruptcy Code; and

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

With respect to **Count I, Count II, Count III, Count IV, Count V, Count VI, and Count VII**, the Debtors request that they be awarded attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(b). *See Murkeldove v. Astrue*, 635 F.3d 784 (5th Cir. 2011); *In re Transcon Lines*, 178 B.R. 228, 232 (Bankr. C.D. Cal. 1995) ("bankruptcy court has jurisdiction to award fees" under EAJA).

The Debtors also request any other and further relief be granted that may be appropriate.

Dated: May 15, 2020

/s/ Samuel R. Maizel

JAMES L. DAY (WSBA #20474)
THOMAS A. BUFORD (WSBA
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**COMPLAINT AGAINST SBA AND
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VERIFICATION OF JOHN M. GALLAGHER

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

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

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

Dated: May 15, 2020

ASTRIA HEALTH

By: 

John M. Gallagher

President and Chief Executive
Officer

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

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Exhibit 1

(Hildago Country Emergency Service Foundation Hearing Transcript)

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

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

HIDALGO COUNTY EMERGENCY	)	CASE NO: 20-02006
SERVICE FOUNDATION,	)	ADVERSARY
)	
Plaintiff,	)	Houston, Texas
)	
vs.	)	Friday, April 24, 2020
)	
JOVITA CARRANZA,	)	(9:01 a.m. to 10:04 a.m.)
)	
Defendant.)	

HEARING

BEFORE THE HONORABLE DAVID R. JONES,
UNITED STATES BANKRUPTCY JUDGE

REMOTE AND TELEPHONIC APPEARANCES:

For Plaintiff: NATHANIEL PETER HOLZER, ESQ.
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Also present: DAVID ELLIOTT

For Defendant: RICHARD A. KINCHELOE, ESQ.
United States Attorney's Office
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Court Reporter: Recorded; FTR-Mobile

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 8365
Corpus Christi, TX 78468
361 949-2988

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transcript produced by transcription service.

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Houston, Texas; Friday, April 24, 2020; 9:01 a.m.

(Remote and telephonic appearances)

(Call to order)

THE COURT: All right, good morning, everyone. This is Judge Jones. Today is Friday, April the 24th, 2020, which is the docket for Corpus Christi, Texas.

First matter on this morning's docket is Adversary Number 20-2006, Hidalgo County Emergency Services versus the director of the Small Business Administration. Take appearances, please.

Mr. Holzer, I see you there, you want to lead us off, please.

MR. HOLZER: Pete Holzer, your Honor, for the Plaintiff, Hidalgo County Emergency Service Foundation. I believe my co-counsel, Kay Walker, is on the line, and also believe the Chief Restructuring Officer of the Debtor, Mr. Romero, was going to call in.

THE COURT: All right, thank you. Good morning to everyone.

Mr. Kincheloe, and I look at the official title, I said director of the SBA. I see that the title is administrator. I meant nothing by it, my apologies. Do you want to go ahead and make your appearance, please?

MR. KINCHELOE: Thank you, your Honor, Rick Kincheloe for the Defendant.

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1 **THE COURT:** All right, thank you. Anyone else wish
2 to make an appearance?

3 **MR. ELLIOTT:** This is David Elliott (indisc.) for
4 Hidalgo County.

5 **THE COURT:** All right, thank you, Mr. Elliott. Good
6 morning to you. Anyone else?

7 **MR. ELLIOTT:** Good morning (indisc.)

8 **THE COURT:** All right, thank you, Mr. Castillo. Let
9 me -- Mr. Holzer and Mr. Kincheloe, let me sort of bring you
10 sort of full circle in my thoughts since yesterday. I spent a
11 good part of the night reading the entirety of the CARES Act.
12 I have come to conclude it is a very long and often complicated
13 document to work your way through, but I spent a lot of time
14 with it. I also have spent significant time reviewing the
15 SBA's final interim (indisc.) I believe the number is 2020-
16 0015. I have also looked at relevant provisions governing --
17 and, again, I will apologize if I don't get the title right,
18 but SBA 7(A) loans. I have also thought a great deal about the
19 jurisdictional issues that are present. And I have gone back
20 and reviewed some recent decisions by my circuit. And I am --
21 it is very clear to me that my circuit has concerns as to just
22 how far the jurisdiction of an Article One court goes. And I
23 don't want to entertain that argument today. And so to the
24 extent that I grant any relief, it will be as to this debtor
25 only in this adversary only. And to the extent that there are

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1 what I'm going to call class-like issues, I do not want Rule 23
2 or anything close to Rule 23 to become part of this discussion.
3 I -- for a couple of reasons. Number one, it's my belief that
4 by the time that we were able to work through all of those
5 issues, the Debtor's economic situation might probably have
6 dictated the outcome. And that shouldn't be anyone's goal. I
7 also think that to the extent that there are (indisc.) 23
8 issues in a case like this, they are better left to my Article
9 Three colleagues. I think that's all I wanted to say in terms
10 of what I've done in preparation. Obviously I've read
11 everything. Mr. Kincheloe, I have read your brief. I have had
12 a time -- I have had an opportunity to review the authorities
13 cited in that brief. I've had a chance to do my own research.
14 So I feel like as though I'm fairly well-educated on the
15 applicable law. I think I understand the issue. That doesn't
16 mean that you shouldn't take the opportunity to advance any
17 position that you think. But I am prepared to talk about a
18 number of issues as we work our way through that. Any
19 questions before we get started?

20 **MR. HOLZER:** No, your Honor.

21 **MR. KINCHELOE:** No, your Honor.

22 **THE COURT:** All right, thank you. Mr. Holzer, I
23 think that it is your burden so if you'd like to lead off,
24 please.

25 **MR. HOLZER:** Thank you, your Honor. Pete Holzer for

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1 the Plaintiff, Hidalgo County Emergency Services Foundation. I
2 know the Court is up to speed. I'm not going to belabor the
3 facts that have before you in the three sworn declarations.
4 The one of Mr. Romero in the sworn complaint, certain
5 paragraphs of that factual basis. There is a sworn declaration
6 of Mr. Elliott that was filed last night. And then just a few
7 moments ago Mr. Ponce's declaration hit the docket. I don't
8 know if the Court has had a chance to see Mr. Elliott and
9 Mr. Ponce's declarations.

10 **THE COURT:** I've read Mr. Elliott's. I did not see
11 Mister you said Ponce, I've not seen (indisc.) --

12 **MR. HOLZER:** Mr. Ponce.

13 **THE COURT:** Yes, I have not seen that one. I am
14 reading it as you talk. So go ahead.

15 **MR. HOLZER:** I was going to let you finish reading,
16 Judge.

17 **THE COURT:** Pretty short, direct, four paragraphs, I
18 got it.

19 **MR. HOLZER:** Okay, so Mr. Ponce really talks about
20 the background of the company and where it is and touches on
21 the impact of the coronavirus problem.

22 Mr. Elliott is certainly much more specific addressed
23 a few things that may have not been in the complaint that we
24 talked about yesterday, that is the process by which we got to
25 where we are and what we think happened and so forth.

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1 So I think what I really want to do is talk sort of
2 in general about some of the issues that Mr. Kincheloe raised
3 in his brief, which is actually quite helpful in my thinking
4 about how things go together and what the administrator does
5 and how the government looks at these kind of issues. I think
6 one very important thing is that despite what we now know from
7 Mr. Kincheloe's brief, we still don't know who, where, why, or
8 how the bankruptcy exclusion came to be -- came about as part
9 of the application form. There's no doubt that it's there in
10 the form. And I do see the I'll call it a tenuous connection
11 that the government makes between the implementing rule and
12 that there's a form, okay, so there is a connection. But it
13 doesn't really tell us -- we just have no understanding and no
14 knowledge or any idea how, who, where, or why this exception
15 language showed up in this application on the PPP loan program.
16 I can speculate, and here's what my speculation is. First of
17 all, I think we're all aware that there are other lawsuits now,
18 a lot of them from what I've read in the papers, where the SBA
19 is being sued about giving these PPP loans to a larger
20 corporation, Fortune 500 companies, that really didn't make any
21 sense to be allowed under the PPP loan program and wound up
22 exhausting it, all these big-monied corporations. And so
23 that's ongoing. That's not really before this Court but it's
24 certainly out there. But it looks to me like what happened in
25 this agency is they took this CARES Act, which I agree, I've

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1 read the whole thing, too, and it's, you know, about what you'd
2 expect from legislation that occurred over just a period of a
3 few days and weeks. There is a section that has loans for
4 large companies and like the airlines and so on and so forth
5 that does have a bankruptcy exclusion, it's a specific one in
6 there. And then there's the paycheck protection loan under --
7 in Section 1100, 1102, that does not. And so it looks to me
8 like what the SBA has done is they then drafted the bankruptcy
9 exclusion in the large company section and they've applied it
10 also to the PPP loan protection. And then conversely they let
11 the --

12 **THE COURT:** (Indisc.)

13 **MR. HOLZER:** -- large companies into the PPP
14 (indisc.) --

15 **THE COURT:** Mr. Holzer, if I could just interrupt you
16 because I want to make sure that the record is clear. The
17 bankruptcy exclusion is actually in the section for midsized
18 businesses defined those companies with more than 500, less
19 than 10,000 employees, can be found at page 193 of the Act. I
20 have read it, I'm familiar with it. I just -- I don't think
21 there necessarily is a section that I read with respect to
22 large-sized businesses. The actual subtitle of the provision
23 are loans for midsized businesses.

24 **MR. HOLZER:** All right, (indisc.) --

25 **THE COURT:** (Indisc.)

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1 **MR. HOLZER:** -- then I apologize, Judge. I conflated
2 those two and I've done the same mistake that I'm accusing the
3 SBA of. So I'm not -- I guess the point being, there's no ill
4 will. This is not a intentional ill will, they're out to get
5 the bankrupt companies. I think it's just a mistake in a badly
6 implemented process that they've done here, as evidenced by the
7 lawsuits for the big companies getting into this program and
8 exhausting it. In any event, I think it's an abuse of
9 discretion the way they've handled this and the way they've put
10 this bankruptcy exception. They've conflated these two
11 different programs. And then we're faced with this form that
12 has this exception and bank lenders that look at the form and
13 say, well, here's the exception, it's right here in the form I
14 have to use so I can't give you a loan. So with respect to the
15 abuse of discretion, and we are arguing, Judge, both Section
16 525, 523, I forget the number, is discrimination and a exercise
17 of authority that doesn't comply with the statute. And then so
18 I want to jump down to some cases Mr. Kincheloe has. His brief
19 talks about the Anti-Injunction Act in section -- in the Small
20 Business Act. And I looked at those cases. I have a couple of
21 cases, your Honor, if you need them that explain why in a
22 situation like this, the -- in a situation where the
23 administrator of a government agency exceeds the scope of their
24 authority like they're arguing here, that Anti-Injunction Act
25 doesn't apply. And I would start with the Supreme Court. It's

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1 the case is -- oh, where'd it go? *South Carolina versus Regan*
2 at 465 U.S. 367 from 1984. That case is a holding where the
3 anti-injunction provisions are inapplicable where Congress
4 didn't provide the plaintiff with an alternative legal way to
5 challenge the administration's ruling. And that was a case
6 related to taxes. We have *Canterbury Career School versus*
7 *Riley*, District of New Jersey, 1993, 833 F.Supp. 1097 basically
8 saying the same thing. This is a Secretary of Department of
9 Education has a similar anti-injunction provision in their
10 statute. The court said if the defendant, the Secretary of
11 Department of Education, has exceeded the scope of his
12 authority, then this court has jurisdiction to grant
13 appropriate injunctive relief, notwithstanding the anti-
14 injunction provision. And then, lastly, a case out of this
15 court from Judge Schmidt back in 1992, an unreported case, it's
16 a 1992 Westlaw 551256 pointing out that the Fifth Circuit has
17 left (indisc.) by implication recognizing that injunctive
18 relief is permissible where the government agency exceeds its
19 statutory authority. So with those cases and my arguments, I
20 think the question of whether or not this Court has
21 jurisdiction authority to enter an injunction, I think it does.
22 And I think it's well-supported in the law and under the facts
23 of this case.

24 So I wanted to talk about next a -- what I think is
25 why this statute does exceed the administrator's authority.

1 And it's partly a policy argument. So let's talk about a
2 hypothetical. So let's say you have a loan applicant who's
3 preparing for bankruptcy, hired bankruptcy counsel, hired the -
4 - hired a -- hired bankruptcy lawyer, paid them a retainer,
5 they're working on the schedules, but they haven't filed
6 bankruptcy yet. And so would that company -- would that
7 potential debtor qualify for these loans? Yes, because they
8 could answer that question "no." Let's talk about another
9 company (indisc.) --

10 **THE COURT:** Could they? I mean, Mr. Holzer, could
11 they?

12 **MR. HOLZER:** Could they --

13 **THE COURT:** (Indisc.)

14 **MR. HOLZER:** Could they?

15 **THE COURT:** I mean, if you look at the -- if you
16 compare the wording in the portion of the statute involving
17 midsize debtors, it actually says you aren't eligible if you
18 are a debtor in a case. The words in the form are: "presently
19 involved in a bankruptcy case." What does that mean? Does
20 that mean that if you (indisc.) a claim against someone in
21 bankruptcy, that you're not eligible under the Act? Does it
22 mean that if you consult with a bankruptcy (indisc.)
23 contemplated bankruptcy that you are not eligible for
24 participation (indisc.). What do the words "presently
25 involved" actually mean in your mind?

1 **MR. HOLZER:** Yes, I don't know because you're right,
2 a creditor in a bankruptcy could be presently involved. A
3 (indisc.) --

4 **THE COURT:** What if you're (indisc.) who has a lease,
5 are you presently involved in a bankruptcy case?

6 **MR. HOLZER:** Right. I do think the most natural
7 construction there is that you're a debtor in bankruptcy. I'm
8 not sure that there's any difference in the way I look at that
9 language and the way the government looks at the language. But
10 I do agree with the Court that there is some ambiguity. But
11 that's -- if you look at that language, a company that's
12 preparing to file bankruptcy is not presently involved in a
13 bankruptcy. It's just thinking about it. And if it hasn't
14 already, would it qualify for this loan, could it check the
15 "no" box on that form? I think there's no doubt it could and
16 should and would qualify for a loan. So let's talk about
17 another company that's insolvent and hasn't hired a bankruptcy
18 lawyer, but they're broke, they (indisc.) business, all the
19 employees have gone home, they're out of money, and they have
20 no idea whether they're going to survive, and can they apply
21 for a loan, you know, get the employees (indisc.) and the
22 answer is, yes, they would check that box "no." And so another
23 company that's virtually shut down, it's overdrawn on its bank
24 account, and would they be able to check the "no" box? The
25 answer is of course, they check the "no" box. And so all three

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1 of those hypotheticals are ways where a company who is
2 completely uncreditworthy can get one of these PPP loans. So
3 compare that to a debtor in possession that's operating,
4 complying with all the rules, filing its monthly operating
5 reports, running its business, and not only that, it's a
6 systemically important business, particularly in the time of an
7 active pandemic, and operating, but they don't qualify. It
8 simply makes no sense for the other companies that would
9 qualify to be able to get one of these forgivable loans and for
10 my client (indisc.) that I'm (indisc.) is not.

11 **THE COURT:** Mr. Holzer, let me go back to your
12 example because I'm not sure you really vetted that example
13 out. What if you have a company that is as you said
14 contemplating bankruptcy, and you have an owner in the business
15 who owns one percent of that company and is a creditor in a
16 large oil and gas bankruptcy case that's pending because they
17 own -- that person owns a small royalty interest, could the
18 company check the box or not?

19 **MR. HOLZER:** Haven't though through that one, Judge.
20 I would think they could check the "no" box. But, you know,
21 there's certainly a --

22 **THE COURT:** (Indisc.)

23 **MR. HOLZER:** -- (indisc.) of the language --

24 **THE COURT:** Read the language --

25 **MR. HOLZER:** -- that they would -- yeah.

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1 **THE COURT:** Read the language. Is the business or
2 any owner presently involved in any bankruptcy?

3 **MR. HOLZER:** That's right. I think that you're
4 highlighting, your Honor, the flaws in this -- in what this
5 form says and all the ambiguities that are evidence of a poorly
6 instituted program beyond the administrator's authority. All
7 right, so let's see. So that's arbitrary and capricious is
8 what I think and gives you a basis to enter an injunction.

9 Let me just say that I do understand that the limit
10 on the jurisdiction. We never intended to seek relief for
11 anybody but my client, the Plaintiff in this lawsuit. Whether
12 it would be appropriate for a nationwide injunction or even a
13 Southern District injunction is not our concern. I'm only
14 worried about my client. My client only cares about its
15 survival.

16 So I wanted to then go to the question of whether or
17 not this is bankruptcy discrimination. I do agree in reading
18 Mr. Kincheloe's brief, he cited the Exquisito (phonetic) case
19 out of the Fifth Circuit and the Ares (phonetic) case out of I
20 believe it's the Fourth Circuit. And they're both in his brief
21 and those are cases that we came up in our research as well.
22 And I do think they -- those two cases are useful to compare
23 and contrast. Exquisito involved a program that the court
24 said, well, this is really about the jobs, not about a loan.
25 And so the -- so it was discrimination. Ares was more about a

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1 loan than anything else and so that was not. So the case law
2 does say that if it's just a loan program, then the anti-
3 injunction -- excuse me, the -- it's not bankruptcy
4 discrimination.

5 So let's look at what we have here. Is this more
6 like the facts in *Exquisito* or more like the facts in *Ares*? I
7 think it's clearly this is more about saving jobs, preventing
8 collapse of the economy. It's not really about a company
9 borrowing money that under the statute it has to show its
10 ability to pay back. And that's in fact if you read the
11 requirements for qualify for a loan, that's just not in there.
12 You just have to say what you're going to use it for and that's
13 what my client needs it for is to pay payroll and help with the
14 rent and the other permissible uses for the funds. It's really
15 more of a grant to protect the economy, save jobs, than it is a
16 straightforward loan. So I would say that the cases that say
17 loans don't apply really don't have any impact here.

18 There's another case Mr. Kincheloe cited in his
19 brief, the *Toth*, T-O-T-H, case, and that also involved an
20 extension of credit which is really not what's happening here.
21 This is a different animal. So with that, Judge, I think I've
22 said everything I wanted to say for now. I think the facts are
23 pretty clear what happened that we qualify, except for this
24 arbitrary inclusion of a bankruptcy exception on the
25 application form, and that it is bankruptcy discrimination and

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1 the Court should grant an injunction.

2 **THE COURT:** All right, thank you. Mr. Kincheloe.

3 **MR. KINCHELOE:** Yes, your Honor, Rick Kincheloe.

4 (Indisc.) start with Mr. Holzer's discussion of he -- the
5 reasons for the exclusion. And I will say I really appreciate
6 Mr. Holzer sending me the cases he was going to discuss before
7 today. It certainly was an extreme professional courtesy.

8 I have received a regulation that I understand is
9 going to be published imminently like Monday. I can broadcast
10 it for the Court if the Court would like to read it because I
11 think it does explain (indisc.) saying about the wording of the
12 application but the regulation that's going to be published
13 does add some color to that. So just this is going to be at 13
14 CFR (indisc.) and 121. And then the bankruptcy exclusion
15 appears here. And so this is that if an applicant is currently
16 a debtor in bankruptcy or if it files bankruptcy before the
17 loan is funded, then it is ineligible. And this -- the second
18 paragraph explains kind of the rationale. There's a concern
19 that the SBA loses control over the funds because they become
20 property of the estate. There's also a concern the Court --
21 your Honor, is the Court done reading? I'll stop sharing so I
22 can go back to video.

23 **THE COURT:** Yeah, no, I read it. Thank you.

24 **MR. KINCHELOE:** Okay.

25 **MR. HOLZER:** Mr. Kincheloe, I'm -- I didn't --

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1 **MR. KINCHELOE:** Oh, I --

2 **MR. HOLZER:** -- (indisc.) second page.

3 **MR. KINCHELOE:** The second page --

4 **MR. HOLZER:** (Indisc.)

5 **MR. KINCHELOE:** -- is just -- I can send it to you
6 shortly.

7 **MR. HOLZER:** Okay, that'll be fine.

8 **MR. KINCHELOE:** I don't think it was relevant. But
9 the other concern is the pandemic has created a unique public
10 need with unprecedented unemployment to get loans funded
11 extremely quickly. And in this need for speed, the traditional
12 underwriting is just not going to work. it's going to take too
13 long. And so to avoid that traditional underwriting and to get
14 this -- get these loans out guaranteed by SBA as quickly as
15 (indisc.) could, the decision was made to say if you're in
16 bankruptcy, you're excluded. We certainly had maybe a good --
17 it can be argued whether that's a good or bad decision from
18 public policy standpoint but at least that was the motivation
19 is get these loans out quickly and minimize the amount of
20 underwriting that needs to be done.

21 **THE COURT:** In fact there really is no underwriting
22 that's done, right? I mean, aren't the lenders authorized to
23 simply accept what's on the form and act just on the form, and
24 so long as they rely on the form, then they are protected;
25 isn't that the way that it works?

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1 **MR. KINCHELOE:** From the interim rule I've read, yes.
2 But from the --

3 **THE COURT:** (Indisc.)

4 **MR. KINCHELOE:** -- regulation I just posted, I
5 haven't read the entire regulation. I got it maybe five
6 minutes before we started. And so unless something in the
7 regulation changes that, that's my understanding.

8 **THE COURT:** Got it.

9 **MR. KINCHELOE:** Turning to the jurisdictional issue,
10 admittedly the provision in the Small Business Act is unique.
11 I'm not aware of any other provision this broad. And certainly
12 there are other anti-injunctive language that appears in
13 various statutes. You know, the Anti-Injunction Act deals
14 (indisc.) I think that's a little different. The one thing I -
15 - there's a case -- well, it's -- there's so many other cases
16 out there, and one that Mr. Holzer shared, where there's a
17 statute that said except as otherwise provided herein, you
18 can't issue an injunction. And certainly that language seems
19 to suggest that, well, okay, if you violate the statute, we can
20 enjoin you, we just can't enjoin you otherwise. For 634, 15
21 USC 634, I don't see any similar condition. I mean, it just is
22 (indisc.) the Fifth Circuit (indisc.) decision I cite at
23 footnote six which, you know, I suppose we could, you know,
24 dispute whether it's holding or dicta, but it's a pretty
25 blanket assertion, thou shalt not enjoin the SBA. And again we

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1 can argue whether Congress made a good or bad policy decision
2 in enacting that but I think that's the law. And so turning to
3 106, honestly 106 waives sovereign immunity for the entire
4 Federal government for purposes of 525. But (a)(4) states that
5 waiver is only to the extent it's consistent with applicable
6 non-bankruptcy law, and so I think we have to turn to this
7 likely unique provision applicable to the SBA administrator and
8 say, courts can't enjoin the SBA. Whether that's a good or bad
9 idea, so be it but that's what it says. And so I think
10 106(a)(4) coupled with 15 USC 634 I think means that there is
11 not a waiver of sovereign immunity for an injunction against
12 the SBA, depriving the Court of jurisdiction.

13 On -- moving to the 525(a) argument, it -- in the
14 Exquisito case, as I read it, it seemed to -- one thing that
15 was distinguishable is there was a preexisting relationship
16 between the SBA and the Air Force. That's one thing that's --
17 is noteworthy. The injunction in that case was not against the
18 SBA, it was against the Air Force. The -- there was a pre-
19 bankruptcy relationship in that case. And the Fifth Circuit
20 kind of thought through it and said, you know what, this
21 program is really designed to train minority-owned businesses
22 and so we view it more in the nature of a franchise. Fine, if
23 you're going to call it a franchise then, yeah, it's covered
24 under 525(a). What the Fifth Circuit has not decided, at least
25 as far as I can find, which the (indisc.) court, the *Toth* court

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1 and I believe the (indisc.) Watts (phonetic) court in the Third
2 Circuit, and then the Second Circuit in Goldrich (phonetic) --
3 well, Goldrich dealt with student loans which has been
4 abrogated by 525(c), --

5 **THE COURT:** Right.

6 **MR. KINCHELOE:** -- those courts look at the decision
7 to extend credit, more specifically in the (indisc.) case
8 extend a guarantee of credit. That's something totally
9 different. It doesn't trigger this traditional gatekeeper
10 function of the government. Like, you know, for example, state
11 bar licensing, 525 expresses this desire that we don't want
12 lawyers to file bankruptcy, then they'd be unable to practice
13 law because they filed bankruptcy. No, we want them to be able
14 to continue to engage in the profession. Real estate brokers,
15 any other number of professions, we want them to continue being
16 able to engage in that profession and we don't want the
17 government's gatekeeper role to be influenced by bankruptcy.
18 That doesn't mean the government is not allowed to discriminate
19 in other ways. Again, maybe right, maybe wrong, but 525(a)
20 says it only bars discrimination in the context of licenses,
21 permits, charters, franchises, or other similar grant. The
22 (indisc.) case and the other ones, *Toth* and *Watts*, say that a
23 loan guaranteeing a loan is not really similar to these other
24 claims because it doesn't implicate this gatekeeper function.
25 And because it's not similar, it's not covered by 525(a) so we

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1 don't even need to get to the question of whether the
2 government was motivated by the bankruptcy. It's just not
3 covered.

4 On the -- I heard -- as I understand the complaint,
5 there's not an APA claim asserted and so it's just whether
6 statutory authority was exceeded. The language in the CARES
7 Act is very broad. I mean, it's just the language for 1102
8 implementing the PPP loan guarantees (indisc.) may and that
9 leaves a very broad, open-ended grant of authority, leaves a
10 lot of discretion in the administrator which makes sense given
11 the context. I mean, this is imagine probably one of the
12 fastest pieces of legislation ever to make it through House,
13 Senate, and White House. And --

14 **THE COURT:** Well, wouldn't you agree that that
15 discretion has certain boundaries on it? For instance, that
16 discretion shouldn't be allowed to frustrate the purpose of the
17 Act itself, agreed?

18 **MR. KINCHELOE:** (No audible response)

19 **THE COURT:** (Indisc.) there are limits. You simply
20 can't say that you can implement rules and make an argument
21 that says, well, that discretion allows me to implement rules
22 that frustrate the application of the law.

23 **MR. KINCHELOE:** So, your Honor, --

24 **THE COURT:** (Indisc.)

25 **MR. KINCHELOE:** -- I agree that there are limits but

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1 I think the use of the word "may," as I read the statute now
2 (indisc.) didn't happen and no one intends for this to happen
3 but if we're just taking the thought experiment to the extreme,
4 I think the use of the word "may," the administrator can say,
5 okay, I've got this authority, I don't have to exercise it.
6 And I think Congress would probably come back and put a shell
7 in there. But I think the way the statute's written, it's
8 pretty broad. Now, there are other limits in the Small
9 Business Act, like the administrator has to ensure that the,
10 you know, loans made under this section are of such sound value
11 or so secured as reasonably to assure repayment. So (indisc.)
12 administrator doesn't do that, the administrator violates the
13 statute. But because Congress prohibited injunctions on the
14 SBA, it really creates this strange space where, yeah, the
15 statute says the administrator has limits but I don't think the
16 statutory -- the statute authorized an injunction against the
17 administrator if the administrator exceeds those limits.

18 **THE COURT:** All right, so let me ask you this. And
19 we're going to come back to that issue in a second. But do I
20 even need to get there? Didn't the SBA effectively delegate
21 the authority to determine who's eligible to the participating
22 financial institutions?

23 **MR. KINCHELOE:** I don't (indisc.)

24 **THE COURT:** Let's take a practical example.

25 Mr. Holzer comes into his local financial institution for a PPE

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1 -- I'm sorry, a PPP loan. He fills out the application. Who
2 makes the decision of whether or not he's eligible?

3 **MR. KINCHELOE:** So the -- as I read (indisc.) then
4 the bank has to receive the form, and as long as the bank
5 follows the form and the guidance, it may issue the loan and
6 it's going to be guaranteed by SBA. But it is still SBA who
7 decided those parameters that go into the form.

8 **THE COURT:** I'm not arguing with you on that. I'm
9 just saying who makes the decision of who's eligible and who's
10 not? The bank. Has to be that way. SBA couldn't do it. SBA
11 doesn't have enough employees, it doesn't have enough local
12 offices. It had to delegate part of that process to financial
13 institutions; otherwise, it would have been a program with
14 absolutely no ability to implement. I'm not complaining. I'm
15 just trying to be practical about it.

16 **MR. KINCHELOE:** Right, yeah. So again with the need
17 for speed, the analysis of whether a borrower meets the
18 appropriate criteria is sent to the banks.

19 **THE COURT:** Right. And in fact there really isn't an
20 underwriting function. I mean, if your instruction is
21 (indisc.) this form and you make the decision off the form,
22 there really isn't an underwriting function. There's no
23 evaluation of ability to repay, there's no evaluation of
24 collateral. And you know what I'm doing, I'm undermining your
25 argument that it's consistent with the (indisc.) power of SBA

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1 7(A). You know, that just doesn't exist in this program. In
2 fact, let's just be practical. The entire intent of the
3 program is for people not to pay this back. It's a way of
4 getting money from the government to people that are being
5 harmed. And so long as they use it in the right way, they
6 don't have to pay it back. Am I -- tell me where I'm wrong
7 about that.

8 **MR. KINCHELOE:** Your Honor, I (indisc.) agree with
9 the Court that the intent was to get money to people who needed
10 it quickly. And certainly to the extent it's used for the
11 proper purpose, it is intended to be forgiven. And, you know,
12 I think the Court's correct, I mean, the amount of underwriting
13 is virtually nil. I mean, the SBA set up parameters and said
14 banks (indisc.) somebody meets these parameters, that's the
15 amount of underwriting we're going to do. And one of the
16 decisions made by SBA was, well, since we can't really -- we
17 don't have the time to go through and do a traditional credit
18 inquiry, we're going to exclude companies in bankruptcy, you
19 know, together with this purpose of we can't control the money
20 once it goes into the bankruptcy estate (indisc.)

21 **THE COURT:** (Indisc.) said that, I mean, (indisc.)
22 hundred and eighty degrees wrong, I mean, isn't part of my job
23 to ensure that debtors act in accordance with the law? I mean,
24 I would think, I mean, assuming that I'm doing my job, and I
25 try really hard to do my job every day, isn't there actually a

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1 greater level of oversight than for someone who's not in
2 bankruptcy who can simply theoretically do what they want to
3 with the money once they get it?

4 **MR. KINCHELOE:** I disagree, your -- I disagree with
5 your Honor's point. It's not a question of oversight. I think
6 it's a question of the way the statute is written, if Hidalgo
7 receives a PPP loan outside of bankruptcy, they are free to
8 choose how to use those funds. Now, --

9 **THE COURT:** Are they?

10 **MR. KINCHELOE:** -- (indisc.) they use -- well, I
11 think they are. But if they use it for certain purposes,
12 they're required to repay it. If they use it for payroll
13 (indisc.) gets forgiven but if let's say company receives a
14 loan, a week later files bankruptcy. Well, all of those funds
15 then become property of the estate, subject to administrative
16 claims. And I don't think there's anything in the CARES Act
17 which would cause the proceeds of a PPP guaranteed loan to be
18 excluded from property of the estate or to be immune from the
19 claim of (indisc.) creditors or priority creditors.

20 **THE COURT:** Okay.

21 **MR. KINCHELOE:** So that's the motivation. Again, the
22 statutory authority is broad. I hear the Court's comment about
23 underwriting and the requirement to make sound loans. This is
24 the administrator's decision. But I go back to the anti-
25 injunction language in the Small Business Act that even to the

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1 extent the administrator is wrong, the United States has not
2 waived sovereign immunity for an injunction to be issued
3 against the administrator.

4 **THE COURT:** And tell me why I can't issue -- because
5 it -- there's no doubt that the financial institution is
6 (indisc.) participation with the SBA. I think you just told me
7 they are given follow the form and process these loans. And
8 Rule 65 gives me the ability to issue injunctive relief against
9 anyone acting in participation with the parties, agreed?

10 **MR. KINCHELOE:** Would the Court give me a moment?

11 **THE COURT:** Of course. It would be 65(d)(2).
12 Actually (d)(2)(C).

13 **MR. KINCHELOE:** So, your Honor, I don't think the
14 Court can enjoin the bank. As I read this and I -- the Court
15 knows it way better than I do, but at least my quick reading of
16 the language of the rule is this would be if the Court enjoined
17 the administrator and anyone acting in concert with her, that
18 would capture this. I don't know that this lets the Court
19 enjoin the bank without also enjoining the administrator;
20 because without an injunction against the administrator, the
21 administrator doesn't have to guarantee the loan.

22 **THE COURT:** Well, I think -- I agree with you that I
23 can't order the SBA to guarantee a loan. I 100 percent agree
24 with that. The issue is can I order that the application be
25 considered without those four or five words. And if you're

1 telling me the person making that decision is, what was it,
2 PlainsCapital Bank, Mr. Holzer?

3 **MR. HOLZER:** Yes, your Honor.

4 **THE COURT:** You're telling me that I can't order
5 PlainsCapital Bank to consider the application without giving
6 any consideration for those words in the form?

7 **MR. KINCHELOE:** Then again I don't know that it
8 becomes a can't. I think it becomes a question of should or
9 should not. And with that question of whether or not the Court
10 should enjoin PlainsCapital Bank, I think there is a
11 substantial threat of irreparable injury to the bank because if
12 the bank --

13 **THE COURT:** (Indisc.)

14 **MR. KINCHELOE:** Well, because I think if the bank
15 follows the Court's order, ignores that line, and then issues
16 the loan, I think they are at risk if the SBA says we weren't
17 ordered to guarantee it, we're not guaranteeing it.

18 **THE COURT:** Okay, so you just say that I need to
19 order the SBA to comply with the law if I find discrimination.

20 **MR. KINCHELOE:** No, your Honor.

21 **THE COURT:** Is that it?

22 **MR. KINCHELOE:** I -- that -- your Honor, on that one
23 I think it's a question of can or cannot.

24 **THE COURT:** All right. So you're telling me that I
25 took an oath to uphold the statute, and if I find the statute's

1 been violated by the SBA, that I can do nothing about it?

2 **MR. KINCHELOE:** I think the Court is unable to issue
3 an injunction against the SBA, even if the statute has been
4 violated.

5 **THE COURT:** So tell me what it is I can do.

6 **MR. KINCHELOE:** I don't know, your Honor. For today
7 (indisc.) TRO, I do not think the Court can enter a TRO.

8 **THE COURT:** Got it, okay. Anything else?

9 **MR. HOLZER:** Your Honor, briefly.

10 **THE COURT:** No, I don't need anything else.

11 **MR. HOLZER:** Okay (indisc.)

12 **THE COURT:** Anything else, Mr. Kincheloe?

13 **MR. KINCHELOE:** Yes, your Honor. Just in closing, I
14 do dispute that the public policy considerations weigh in favor
15 of enjoining -- of issuing an injunction allowing this loan to
16 go -- to be made and guaranteed -- and/or guaranteed due to the
17 policy considerations. If the SBA is required to implement
18 traditional underwriting requirements, it is likely to slow
19 down this program and likely to delay proceeds to other
20 applicants.

21 **THE COURT:** Well how can it implement traditional
22 underwriting when it's been told what to do?

23 **MR. KINCHELOE:** Your Honor, I mean --

24 **THE COURT:** Simply because if I were to say that
25 there has been discrimination, that doesn't require the SBA to

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1 do anything other than to not discriminate.

2 (Pause)

3 MR. KINCHELOE: Your Honor, I -- sorry, I don't think
4 I understand the Court's point.

5 THE COURT: I got it. Anything else?

6 MR. KINCHELOE: No, your Honor.

7 THE COURT: All right. So I have before me the
8 Debtor's request for a temporary restraining order against the
9 administrator of the SBA. I do find that I have jurisdiction
10 over the matter pursuant to (indisc.) Section 1334. I do find
11 that the adversary and the request for injunctive relief
12 constitutes a core proceeding under 28 USC Section 157. I
13 further find that I have the requisite constitutional authority
14 under the guidance given by our Supreme Court to enter, to the
15 extent it is a final order, and I'm not sure it is, but it may
16 practically be a final order, I do find that I have the
17 requisite constitutional authority to enter final order.

18 I want to go through a couple of the arguments
19 because, again, I spent a lot of time reading all of the
20 relevant wording. And there are certainly the arguments that I
21 simply -- they need to be addressed and I simply think that
22 they just have no foundation in logic or law or fact. I want
23 to start with the argument that (indisc.) that there remains
24 intact, and I wrote it down as a quote, that there's this
25 (indisc.) ensuring that there is sound value or so secure as to

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1 reasonably assure repayment. That is so out of context in this
2 program that it's a frivolous argument. The entire --
3 everything said by our President, everything put out by our
4 administration, everything put out by our Congress reflects
5 that this was an emergency reaction to a series of events that
6 had never before been experienced. This isn't a loan program.
7 This is a support program. It is phrased the way it is to try
8 and ensure that the money ends up in the right hands and used
9 for the right purposes. It is intended to protect tax-paying
10 citizens from the effects of government shutdowns, stay-at-home
11 orders, and simply the public not being able to engage in
12 ongoing commerce. To suggest that this is a program that
13 enjoys underwriting and scrutiny in terms of who receives the
14 money is to simply ignore the obvious. The SBA's own rules
15 (indisc.) effectively look at the form, make the loans. You
16 make the loans, and so long as they're used for the right
17 purposes, there's no need to pay it back. That is not a
18 traditional loan program. There is no collateral valuation,
19 there is no credit worthiness test. And, again, to make that
20 argument is simply frivolous.

21 I also want to talk about the 525 argument. And I
22 take a quote out of the briefs. It says that issues under 525
23 (indisc.) the gatekeeper role of the governments or a
24 government entity in determining who may pursue certain
25 livelihoods. All of the cases cited have dealt with the

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1 government engaging in regulated commerce. There were
2 commercial alternatives, there were private sector
3 opportunities. Practically speaking, this program isn't
4 designed to be a commercial product; it is a support product.
5 The only entity that would ever engage in this type of activity
6 is the government because, again, it's a support for citizens.
7 I can think of no greater example of the government performing
8 its gatekeeping role as to who can engage in commerce and
9 pursue certain livelihoods than this particular program;
10 because if we didn't have this program, there would be no
11 ambulance services, there would be no nail salons, there would
12 be no convenience stores. Society would be in a very difficult
13 (indisc.) so I do think the requirements of Section 525(a) are
14 absolutely in play. I do think that the choice of the words in
15 the form -- and, again, I made the example with Mr. Holzer, and
16 I am bothered by the use of the words. I disagree with
17 Mr. Holzer that, well, of course everybody knows what that
18 means, it's simply if you're a debtor. Couldn't be further
19 from the truth. Congress knew how to say we don't give these
20 loans to debtors. They did it within the CARES Act itself.
21 And then to have a form that simply says if an owner or a
22 business is presently involved in a bankruptcy, I have zero
23 idea what that means. It means if you have filed a proof of
24 claim in the General Motors bankruptcy umpteen years ago and
25 haven't yet received a final distribution on your claim, you

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1 have to check that box "no." That's silly. It's even sillier
2 in light of the purpose of this program.

3 I also have found but I've not been cited to any
4 legitimate basis for including that language in the form. I
5 take umbrage of the fact that if I look at question one and I
6 look at the list and I think just rules of normal construction,
7 and I realize that this is not a statute but it's a form that
8 is derived from a statute, it says if a business or owner is
9 presently suspended, debarred, proposed to be debarred declared
10 ineligible, voluntarily excluded from participation in this
11 transaction by any (indisc.) department or agency all conduct
12 which society frowns upon, involves potentially wrongful acts,
13 involves potentially criminal conduct. And then as an add-on,
14 it says: "Or presently involved in any bankruptcy." Plain
15 meaning: as a creditor, as a landlord, as a partner in another
16 business, as a shareholder in another business. It's entirely
17 inappropriate that those words were added into that form in
18 that list in that manner. And I see no authority anywhere for
19 including those words in that form. It serves no purpose. I
20 do find that by including the words "or presently involved in
21 any bankruptcy," they are intended to be discriminatory. They
22 are intended to be discriminatory toward debtors for reasons
23 offered that somehow we lose control of the money, again I find
24 to be completely frivolous. I cannot imagine anything less
25 controlling than to simply give out money with no underwriting,

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1 with no oversight, and then complain that if I have a Federal
2 judge who makes sure that the debtor complies with the law,
3 ensures that the debtors file monthly operating reports, ensure
4 that copies of bank statements are filed on the docket every
5 month, that they somehow lost control. I simply don't buy it.
6 I find the arguments to lack any good faith.

7 I am worried about the argument that I cannot enjoin
8 the administrator of the SBA. I agree I can't tell the SBA
9 administrator what loans to guarantee, what loans to grant. I
10 simply do not accept that when I have evidence of bankruptcy
11 discrimination that I can do nothing about it. And if I am
12 wrong about that, I am very certain that my Article Three
13 colleagues will tell me that I am wrong, and I will accept that
14 criticism. But this can't be what Congress intended. This
15 can't be the way that we are supposed to treat our fellow man
16 in this time. It's inconceivable to me that this distinction
17 could be drawn. The people that need the most help and who
18 have sought protection under our laws are the people who are
19 the targets of discrimination in a government support program;
20 can't possibly be.

21 So I am going to grant the TRO. I am going to enjoin
22 the administrator of the SBA and all those acting in concert
23 with her, which includes PlainsCapital Bank, in the following
24 manner. I am requiring that the application form for the
25 paycheck protection program submitted by Hidalgo County

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1 Emergency Service Foundation be considered in accordance with
2 the program without the words in question one: "or presently
3 involved in any bankruptcy." They are stricken from
4 consideration. The application shall be considered on its
5 merits and in accordance with the law with those six words
6 stricken. It is my hope that my government that I serve will
7 realize the error that it has made and that it will act
8 appropriately and ensure that all of our citizens have access
9 to the support they needed.

10 Mr. Holzer, I want you to prepare a revised TRO in
11 accordance with the ruling that I've made on the record
12 pursuant to 7052. Also want to go through in accordance with
13 Rule 65, I am required to state, and I am incorporating my
14 comments on the record, into the form of order to be submitted
15 pursuant to 7052. I have stated the reasons why the temporary
16 restraining order should issue. I have specifically stated its
17 terms. I have specifically described in reasonable detail the
18 limits of the TRO and those acts that are required under the
19 TRO. I will find that pursuant to Bankruptcy Rule 7065, there
20 is no security required. I am also required to set a hearing
21 for issuance of a preliminary injunction. I don't know that it
22 will be necessary because this may all become moot by then.
23 And I recognize, Mr. Kincheloe, that at a preliminary
24 injunction hearing, you may tell me that the law has changed.
25 But as I sit here today, the CFR that you showed me, I'm not

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1 aware it's actually governing law; is that correct?

2 **MR. KINCHELOE:** That's correct, your Honor. It has
3 not been published in the register.

4 **THE COURT:** All right, thank you. Let's see,
5 Mr. Kincheloe, Mr. Holzer, can you look at your collective
6 schedules?

7 **MR. HOLZER:** Have it in front of me, Judge.

8 **THE COURT:** All right, today's the 24th. My guess is
9 it's probably, and please tell me if you think I'm wrong, it's
10 probably a better use of everyone's time if we simply go as
11 close to the 14 days as possible to see what actually happens.
12 It may very well be that without waiving any right of review or
13 appeal that the SBA may have, it may make sense to extend the
14 original time. But obviously we're not going to decide that
15 today. Let me ask the parties, does it make sense to set this
16 -- I'm issuing this at 10:00 o'clock on Friday, can we set this
17 for 9:30 on Friday, May the 8th; does that make sense?

18 **MR. KINCHELOE:** Yes, your Honor. I was going to ask
19 for May 8th so perfect.

20 **THE COURT:** Okay, fair enough. And, Mr. Holzer, does
21 that work for your calendar?

22 **MR. HOLZER:** It does, your Honor.

23 **THE COURT:** All right, thank you. What I would like
24 for you to do is once you finish drafting the TRO, I'd like for
25 you to send it to Mr. Kincheloe to review as to form only.

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1 Mr. Kincheloe, consistent with my normal practice, by agreement
2 as to form only, you're not waiving any right of review or
3 complaint that you may have, you're simply acknowledging that
4 the paper is consistent with the ruling that I've made on the
5 record. Is that enough of a (indisc.) that you feel
6 comfortable looking at the document?

7 **MR. KINCHELOE:** Absolutely, your Honor. And I'll
8 remain at my computer until I receive it from Mr. Holzer so
9 there's no delay.

10 **THE COURT:** Terrific, thank you. Gentlemen, I very
11 much appreciate the argument. Yes, sir.

12 **MR. HOLZER:** Just a clarification, and I'm trying to
13 think practically about the next two weeks, I understand your
14 ruling and I think I'll be able to get the TRO drafted
15 correctly, but is my client authorized to resubmit an
16 application form striking out that language about the
17 bankruptcy and checking the "no" box in question one?

18 **THE COURT:** Yes. What I would envision, so that
19 there is -- I don't want anyone at the bank to have an issue, I
20 don't want anyone within the SBA to have an issue, is that what
21 I would suggest that we do until this -- until we have an order
22 to the contrary is that your client's authorized to strike
23 through that language, check the box assuming that it (indisc.)
24 and it satisfies all of the other requirements of question one,
25 and then simply attach a copy of the TRO so that it's in the

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1 file and everyone understands exactly what the issues are. I
2 would hate for someone to --

3 **(Automated telephone recording played)**

4 **THE COURT:** I don't -- I have 50 people on the
5 telephone so I'm not going to try to spend the time to figure
6 out who that was. You're absolutely authorized to strike
7 through the question. I can't remember where I stopped.
8 Attach a copy of the TRO, that way there is absolutely no
9 chance for error as to why the application was submitted the
10 way it was. And if the Debtor doesn't need -- I want to make
11 it very clear, if the Debtor doesn't meet the requirements,
12 then I'm not changing that. All I'm simply requiring is the
13 application be considered consistent with the (indisc.)
14 practices and governing (indisc.) as all other applications
15 with simply (indisc.) those six words stricken.

16 **MR. HOLZER:** Understood, your Honor. Thank you.

17 **THE COURT:** All right, Mr. Kincheloe, anything else
18 that I -- any lack of clarification or any issues that we need
19 to talk about?

20 **MR. KINCHELOE:** One issue, your Honor.

21 **THE COURT:** Certainly.

22 **MR. KINCHELOE:** (Indisc.) carry out instructions I
23 need to ask the Court if it will entertain an oral motion for
24 stay pending appeal.

25 **THE COURT:** Of course. And that's denied.

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1 **MR. KINCHELOE:** Thank you, your Honor.

2 **THE COURT:** All right, anything else, folks? I very
3 much appreciate the argument. Mr. Holzer, I appreciate the way
4 in which you conducted yourself on behalf of the Debtor. And,
5 Mr. Kincheloe, you know that I think you're the greatest thing
6 ever and I very much appreciate what you do for our country.

7 **MR. KINCHELOE:** Thank you, your Honor.

8 **THE COURT:** Thank you, gentlemen.

9 **MR. HOLZER:** (Indisc.) have a good weekend.

10 **THE COURT:** (Indisc.)

11 **MR. KINCHELOE:** You, too, your Honor.

12 **(This proceeding was adjourned at 10:04 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written over a horizontal line.

Signed

April 25, 2020

Dated

TONI HUDSON, TRANSCRIBER

EXCEPTIONAL REPORTING SERVICES, INC

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Exhibit A

(Weekly Cash Flow Budget)

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

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Preliminary Draft - Subject to Change
Privileged and ConfidentialAstria Health
Weekly Cash Flow Budget

(\$ in thousands)

Week	52 (A)		53 (P)	54 (P)	55 (P)	56 (P)	57 (P)	58 (P)	59 (P)	60 (P)	61 (P)	62 (P)	63 (P)
	Actual	+ / -											
Week-ending date	5/1		5/8	5/15	5/22	5/29	6/5	6/12	6/19	6/26	7/3	7/10	7/17
Beginning operating cash balance	9,979	9,979	8,913	17,406	18,283	18,749	17,515	17,769	17,330	19,125	19,630	20,140	20,058
Collections													
Yakima / Toppenish	935	691	(244)	775	775	935	775	775	775	775	925	775	775
Topp Behavioral Adjustment	-	-	-	-	-	-	-	-	-	-	-	-	-
Sunnyside	2,500	1,922	(578)	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350
Elective Procedures Change	(1,156)	1,156	(1,191)	(1,191)	(485)	(325)	(485)	(485)	168	168	328	168	523
Provider Tax									100	90	70		
ARMC Rent				1,500					532				
ARMC Pass Through				250					89				
COVID Grant			8,694										
DIP Loan Borrowing													
Total Collections	2,279	2,612	334	3,684	2,640	2,960	2,640	2,640	4,014	3,383	3,673	3,293	3,648
Disbursements													
Payroll, taxes, and other -Y/T	237	357	(120)	237	507	404	540	270	540	270	540	270	540
Payroll & Other ASH	730	906	(176)	730	324	1,380	387	980	387	980	387	980	387
Other Op Ex	94	82	12	35	29	100	29	29	29	29	100	29	29
Purchased services	302	592	(290)	439	302	632	332	439	302	632	332	439	302
Contract labor	255	9	246	125	125	125	125	125	125	125	125	125	125
Rent	60	107	(47)	60	70	200	60	40	70	200	60	40	70
Medical professionals	-	57	(57)	-	125	-	-	-	125	-	-	-	125
Utilities	82	17	65	82	82	82	82	82	82	82	82	82	82
Prop Tax and Ins	-	391	(391)	31	70		246	100			86	100	
Supplies, pharma., and dietary	325	330	(5)	455	460	460	460	465	460	460	465	460	460
Corporate Overhead	214	204	10	-	-	157	-	-	-	-	157	-	-
Provider Tax	-	-	-	-	-	-	-	-	-	-	200	200	900
CRO Fees	145	145	-		145					145			
UMR Payments	150	94	56	150	150	125	125	100	100	100	100	100	100
Medicaid Repayment ASH													
Professional Fees				450	-	-	-	450	-	-	-	550	-
Cash Out for Loan Payoff													
DIP Fees and Expenses													
DIP Interest	385	389	(4)	-	-	385	-	-	-	-	385	-	-
UST Fees	-	-	-	-	-	-	-	-	-	-	-	-	-
Total Disbursements	2,979	3,679	(700)	2,807	2,174	4,195	2,386	3,080	2,220	2,878	3,164	3,375	3,120
WEEKLY NET CASH FLOW	(700)	(1,066)	(366)	877	466	(1,235)	255	(440)	1,795	505	510	(82)	529
ENDING CASH (ACTUAL)	9,279	8,913	17,406	18,283	18,749	17,515	17,769	17,330	19,125	19,630	20,140	20,058	20,587

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Exhibit B

(First Interim Rule)

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

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20811

Rules and Regulations

Federal Register

Vol. 85, No. 73

Wednesday, April 15, 2020

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA-2020-0015]

RIN 3245-AH34

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule announces the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new product, titled the "Paycheck Protection Program," to the U.S. Small Business Administration's (SBA's) 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted under the Coronavirus Disease 2019 (COVID-19) Emergency Declaration (COVID-19 Emergency Declaration) issued by President Trump on March 13, 2020. This interim final rule outlines the key provisions of SBA's implementation of sections 1102 and 1106 of the Act in formal guidance and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before May 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA-2020-0015 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding

and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III below.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a full understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Temporary New Business Loan Program: Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses

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affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the "Paycheck Protection Program." Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The following outlines the key provisions of the PPP.

1. General

SBA is authorized to guarantee loans under the PPP through June 30, 2020. Congress authorized a program level of \$349,000,000,000 to provide guaranteed loans under this new 7(a) program. The intent of the Act is that SBA provide relief to America's small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program. For example, for loans made under the PPP, SBA will not require the lenders to comply with section 120.150 "What are SBA's lending criteria?." SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria; remedies for borrower violations or fraud are separately addressed in this interim final rule. The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10).

2. What do borrowers need to know and do?

a. Am I eligible?

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

i. You are:

A. A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act; or

B. A tax-exempt nonprofit organization described in section

501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; and

ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, and you were in operation on February 15, 2020.

You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

SBA intends to promptly issue additional guidance with regard to the applicability of affiliation rules at 13 CFR 121.103 and 121.301 to PPP loans.

b. Could I be ineligible even if I meet the eligibility requirements in (a) above?

You are ineligible for a PPP loan if, for example:

i. You are engaged in any activity that is illegal under Federal, state, or local law;

ii. You are a household employer (individuals who employ household employees such as nannies or housekeepers);

iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or

iv. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

The Administrator, in consultation with the Secretary of the Treasury (the Secretary), determined that household employers are ineligible because they are not businesses. 13 CFR 120.100.

c. How do I determine if I am ineligible?

Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible. (SOP 50 10 can be found at <https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs>.)

d. I have determined that I am eligible. How much can I borrow?

Under the PPP, the maximum loan amount is the lesser of \$10 million or an amount that you will calculate using a payroll-based formula specified in the Act, as explained below.

e. How do I calculate the maximum amount I can borrow?

The following methodology, which is one of the methodologies contained in the Act, will be most useful for many applicants.

i. Step 1: Aggregate payroll costs (defined in detail below in f.) from the last twelve months for employees whose principal place of residence is the United States.

ii. Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.

iii. Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

iv. Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

v. Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan (because it does not have to be repaid).

The examples below illustrate this methodology.

i. Example 1—No employees make more than \$100,000

Annual payroll: \$120,000

Average monthly payroll: \$10,000

Multiply by 2.5 = \$25,000

Maximum loan amount is \$25,000

ii. Example 2—Some employees make more than \$100,000

Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000

Multiply by 2.5 = \$250,000

Maximum loan amount is \$250,000

iii. Example 3—No employees make more than \$100,000, outstanding EIDL loan of \$10,000.

Annual payroll: \$120,000
Average monthly payroll: \$10,000
Multiply by 2.5 = \$25,000
Add EIDL loan of \$10,000 = \$35,000
Maximum loan amount is \$35,000

iv. Example 4—Some employees make more than \$100,000, outstanding EIDL loan of \$10,000

Annual payroll: \$1,500,000
Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000
Average monthly qualifying payroll: \$100,000
Multiply by 2.5 = \$250,000
Add EIDL loan of \$10,000 = \$260,000
Maximum loan amount is \$260,000

f. What qualifies as “payroll costs?”

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation.

g. Is there anything that is expressly excluded from the definition of payroll costs?

Yes. The Act expressly excludes the following:

- i. Any compensation of an employee whose principal place of residence is outside of the United States;
- ii. The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
- iii. Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee’s and employer’s share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
- iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Pub. L. 116–127).

h. Do independent contractors count as employees for purposes of PPP loan calculations?

No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower’s PPP loan calculation.

i. What is the interest rate on a PPP loan?

The interest rate will be 100 basis points or one percent.

The Administrator, in consultation with the Secretary, determined that a one percent interest rate is appropriate. First, it provides low cost funds to borrowers to meet eligible payroll costs and other eligible expenses during this temporary period of economic dislocation caused by the coronavirus. Second, for lenders, the 100 basis points offers an attractive interest rate relative to the cost of funding for comparable maturities. For example, the FDIC’s weekly national average rate for a 24-month CD deposit product for the week of March 30, 2020 is 42 basis points for non-jumbo and 44 basis points for jumbo (<https://www.fdic.gov/regulations/resources/rates/>). Third, the interest rate is higher than the yield on Treasury securities of comparable maturity. For example, the yield on the Treasury two-year note is approximately 23 basis points. This higher yield combined with the fact that the loans are 100 percent guaranteed by the SBA and the fact that lenders will receive a substantial processing fee from the SBA provide ample inducement for lenders to participate in the PPP.

j. What will be the maturity date on a PPP loan?

The maturity is two years. While the Act provides that a loan will have a maximum maturity of up to ten years from the date the borrower applies for loan forgiveness (described below), the Administrator, in consultation with the Secretary, determined that a two year loan term is sufficient in light of the temporary economic dislocations caused by the coronavirus. Specifically, the considerable economic disruption caused by the coronavirus is expected to abate well before the two year maturity date such that borrowers will be able to re-commence business operations and pay off any outstanding balances on their PPP loans.

k. Can I apply for more than one PPP loan?

No. The Administrator, in consultation with the Secretary, determined that no eligible borrower may receive more than one PPP loan. This means that if you apply for a PPP

loan you should consider applying for the maximum amount. While the Act does not expressly provide that each eligible borrower may only receive one PPP loan, the Administrator has determined, in consultation with the Secretary, that because all PPP loans must be made on or before June 30, 2020, a one loan per borrower limitation is necessary to help ensure that as many eligible borrowers as possible may obtain a PPP loan. This limitation will also help advance Congress’ goal of keeping workers paid and employed across the United States.

l. Can I use e-signatures or e-consents if a borrower has multiple owners?

Yes, e-signature or e-consents can be used regardless of the number of owners.

m. Is the PPP “first-come, first-served?”

Yes.

n. When will I have to begin paying principal and interest on my PPP loan?

You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment. The Act authorizes the Administrator to defer loan payments for up to one year. The Administrator determined, in consultation with the Secretary, that a six-month deferment period is appropriate in light of the modest interest rate (one percent) on PPP loans and the loan forgiveness provisions contained in the Act.

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and

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any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act's overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act, which provides a loan amount 75 percent of which is equivalent to eight weeks of payroll (8 weeks/2.5 months = 56 days/76 days = 74 percent rounded up to 75 percent). Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program, and will also help to ensure that the finite appropriations available for PPP loan forgiveness are directed toward payroll protection. SBA will issue additional guidance on loan forgiveness.

p. Do independent contractors count as employees for purposes of PPP loan forgiveness?

No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan forgiveness.

q. What forms do I need and how do I submit an application?

The applicant must submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation, as described above. The lender must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

r. How can PPP loans be used?

The proceeds of a PPP loan are to be used for:

- i. payroll costs (as defined in the Act and in 2.f.);
- ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- iii. mortgage interest payments (but not mortgage prepayments or principal payments);
- iv. rent payments;
- v. utility payments;
- vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or

vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

However, at least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness. While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed. As with the similar limitation on the forgiveness amount explained earlier, the Administrator, in consultation with the Secretary, has determined that 75 percent is an appropriate percentage that will align this element of the program with the loan amount, 75 percent of which is equivalent to eight weeks of payroll. This limitation on use of the loan funds will help to ensure that the finite appropriations available for these loans are directed toward payroll protection, as each loan that is issued depletes the appropriation, regardless of whether portions of the loan are later forgiven.

s. What happens if PPP loan funds are misused?

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

t. What certifications need to be made?

On the Paycheck Protection Program application, an authorized representative of the applicant must certify in good faith to all of the below:¹

i. The applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

ii. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.

iii. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; I understand that if the funds are knowingly used for unauthorized purposes, the Federal Government may hold me legally liable such as for charges of fraud. As explained above, not more than 25 percent of loan proceeds may be used for non-payroll costs.

iv. Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight week period following this loan will be provided to the lender.

v. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.

vi. During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not and will not receive another loan under this program.

vii. I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

¹ A representative of the applicant can certify for the business as a whole if the representative is legally authorized to do so.

viii. I acknowledge that the lender will confirm the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those submitted to the Internal Revenue Service. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

3. What do lenders need to know and do?

a. Who is eligible to make PPP loans?

i. All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.

ii. The Act provides that the authority to make PPP loans can be extended to additional lenders determined by the Administrator and the Secretary to have the necessary qualifications to process, close, disburse, and service loans made with the SBA guarantee. Since SBA is authorized to make PPP loans up to \$349 billion by June 30, 2020, the Administrator and the Secretary have jointly determined that authorizing additional lenders is necessary to achieve the purpose of allowing as many eligible borrowers as possible to receive loans by the June 30, 2020 deadline.

iii. The following types of lenders have been determined to meet the criteria and are eligible to make PPP loans unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action with their primary Federal regulator that addresses unsafe or unsound lending practices:

I. Any federally insured depository institution or any federally insured credit union;

II. Any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C. 2002(a) that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, BSA) as a federally regulated financial institution, or functionally equivalent requirements that are not altered by this rule; and

III. Any depository or non-depository financing provider that originates, maintains, and services business loans or other commercial financial receivables and participation interests; has a formalized compliance program; applies the requirements under the BSA as a federally regulated financial

institution, or the BSA requirements of an equivalent federally regulated financial institution; has been operating since at least February 15, 2019, and has originated, maintained, and serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 U.S.C. 1867(c) and is in good standing with the appropriate Federal banking agency.

iv. Qualified institutions described in 3.a.iii.I. and II. will be automatically qualified under delegated authority by the SBA upon transmission of CARES Act Section 1102 Lender Agreement (SBA Form 3506) unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action by their primary Federal regulator that addresses unsafe or unsound lending practices.

b. What do lenders have to do in terms of loan underwriting?

Each lender shall:

i. Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration;

ii. Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;

iii. Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and

iv. Follow applicable BSA

requirements:

I. Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP. PPP loans for existing customers will not require re-verification under applicable BSA requirements, unless otherwise indicated by the institution's risk-based approach to BSA compliance.

II. Entities that are not presently subject to the requirements of the BSA, should, prior to engaging in PPP lending activities, including making PPP loans to either new or existing customers who are eligible borrowers under the PPP, establish an anti-money laundering (AML) compliance program equivalent to that of a comparable federally regulated institution. Depending upon

the comparable federally regulated institution, such a program may include a customer identification program (CIP), which includes identifying and verifying their PPP borrowers' identities (including *e.g.*, date of birth, address, and taxpayer identification number), and, if that PPP borrower is a company, following any applicable beneficial ownership information collection requirements. Alternatively, if available, entities may rely on the CIP of a federally insured depository institution or federally insured credit union with an established CIP as part of its AML program. In either instance, entities should also understand the nature and purpose of their PPP customer relationships to develop customer risk profiles. Such entities will also generally have to identify and report certain suspicious activity to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). If such entities have questions with regard to meeting these requirements, they should contact the FinCEN Regulatory Support Section at FRC@fincen.gov. In addition, FinCEN has created a COVID-19-specific contact channel, via a specific drop-down category, for entities to communicate to FinCEN COVID-19-related concerns while adhering to their BSA obligations. Entities that wish to communicate such COVID-19-related concerns to FinCEN should go to www.FinCEN.gov, click on "Need Assistance," and select "COVID19" in the subject drop-down list.

Each lender's underwriting obligation under the PPP is limited to the items above and reviewing the "Paycheck Protection Application Form." Borrowers must submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

c. Can lenders rely on borrower documentation for loan forgiveness?

Yes. The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. The Administrator will hold harmless any lender that relies on such borrower documents and attestation from a borrower. The Administrator, in

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consultation with the Secretary, has determined that lender reliance on a borrower's required documents and attestation is necessary and appropriate in light of section 1106(h) of the Act, which prohibits the Administrator from taking an enforcement action or imposing penalties if the lender has received a borrower attestation.

d. What fees will lenders be paid?

SBA will pay lenders fees for processing PPP loans in the following amounts:

- i. Five (5) percent for loans of not more than \$350,000;
- ii. Three (3) percent for loans of more than \$350,000 and less than \$2,000,000; and
- iii. One (1) percent for loans of at least \$2,000,000.

e. Do lenders have to apply the "credit elsewhere test"?

No. When evaluating an applicant's eligibility lenders will not be required to apply the "credit elsewhere test" (as set forth in section 7(a)(1)(A) of the Small Business Act (15 U.S.C. 636) and SBA regulations at 13 CFR 120.101).

4. What do both borrowers and lenders need to know and do?

a. What are the loan terms and conditions?

Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes including but not limited to:

- i. The guarantee percentage is 100 percent.
- ii. No collateral will be required.
- iii. No personal guarantees will be required.
- iv. The interest rate will be 100 basis points or one percent.
- v. All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

b. Are there any fee waivers?

- i. There will be no up-front guarantee fee payable to SBA by the Borrower;
- ii. There will be no lender's annual service fee ("on-going guaranty fee") payable to SBA;
- iii. There will be no subsidy recoupment fee; and
- iv. There will be no fee payable to SBA for any guarantee sold into the secondary market.

c. Who pays the fee to an agent who assists a borrower?

Agent fees will be paid by the lender out of the fees the lender receives from

SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:

- i. One (1) percent for loans of not more than \$350,000;
- ii. 0.50 percent for loans of more than \$350,000 and less than \$2 million; and
- iii. 0.25 percent for loans of at least \$2 million.

The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.

d. Can PPP loans be sold into the secondary market?

Yes. A PPP loan may be sold on the secondary market after the loan is fully disbursed. A PPP loan may be sold on the secondary market at a premium or a discount to par value. SBA will issue guidance regarding any advance purchase for loans sold in the secondary market.

e. Can SBA purchase some or all of the loan in advance?

Yes. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. The expected forgiveness amount is the amount of loan principal the lender reasonably expects the borrower to expend on payroll costs, covered mortgage interest, covered rent, and covered utility payments during the eight week period after loan disbursement. At least 75 percent of the expected forgiveness amount shall be for payroll costs, as provided in 2.o. To submit a PPP loan or pool of PPP loans for advance purchase, a lender shall submit a report requesting advance purchase with the expected forgiveness amount to the SBA. The report shall include: the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application; the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation; a detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why alternative assumptions were not used; any information obtained from the

borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which should include the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation; and any additional information the Administrator may require to determine whether the expected forgiveness amount is reasonable. The Administrator, in consultation with the Secretary, determined that seven weeks is the minimum period of time necessary for a lender to reasonably determine the expected forgiveness amount for a PPP loan or pool of PPP loans, since the PPP is a new program and the likelihood that many borrowers will be new clients of the lender. The expected forgiveness amount may not exceed the total amount of principal on the PPP loan or pool of loans. The Administrator will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the Administrator receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable.

5. Additional Information

All loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 and bb-3, and SBA regulation at 13 CFR 113.3-1h, which provides that nothing in SBA nondiscrimination regulations shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities. SBA intends to promptly issue additional guidance with regard to religious liberty protections under this program.

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at www.sba.gov.

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)*E.O. 12866 and E.O. 13563*

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act ("PRA"). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act

Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable,

unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1, p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,
Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION**13 CFR Part 121**

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the "Paycheck Protection Program," to the SBA's 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

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Exhibit C

(Congressional Letters to the SBA)

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

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MAINE

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United States Senate

WASHINGTON, DC 20510-1904

April 24, 2020

COMMITTEES:
SPECIAL COMMITTEE
ON AGING,
CHAIRMAN
APPROPRIATIONS
HEALTH, EDUCATION,
LABOR, AND PENSIONS
SELECT COMMITTEE
ON INTELLIGENCE

Ms. Jovita Carranza
Administrator
U.S. Small Business Administration
409 34d St., SW
Washington, DC 20416

Dear Administrator Carranza:

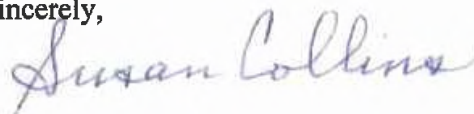
I am writing to express my concerns regarding the ability of financially distressed hospitals to access badly needed relief for payroll for their employees through the Paycheck Protection Program (PPP). While hospitals are not prohibited from participating in the program, those that have previously been or are currently under bankruptcy protection in order to restructure debt and maintain viability have been unable to access PPP funds, due to an interpretation of underlying Small Business Administration 7(a) program rules.

Hospitals are critical infrastructure and their employees are essential in the COVID-19 response effort. Many hospitals are experiencing substantial increases in expenses associated with preparing for and responding to the pandemic. They are simultaneously facing sharp declines in revenue associated with declining patient volumes due to the cancellation of routine and elective procedures, in order to protect the public health and conserve limited supplies of Personal Protective Equipment, consistent with current guidance from the Centers for Medicare and Medicaid Services.

It is my understanding that waiver authorities do exist for SBA to allow loans to be made to entities with defaulted debt to the federal government, when the applicant shows good cause. Given the critical importance of maintaining health care infrastructure and keeping essential hospital workers employed to care for patients throughout the nation in these unprecedented times, I ask that the SBA give every appropriate consideration, in accordance with all applicable laws and regulations, to exercise this waiver authority and allow financially distressed hospitals to access PPP loans.

Thank you for your consideration of this urgent request. I look forward to your response. If you have any questions, or need additional information, please do not hesitate to contact me or have your staff contact Mark LeDuc in my office at 202-224-3364.

Sincerely,



Susan M. Collins
United States Senator

ANGUS S. KING, JR.
MAINE

133 HART SENATE OFFICE BUILDING
(202) 224-5344
Website: <https://www.King.Senate.gov>

United States Senate

WASHINGTON, DC 20510

April 17, 2020

COMMITTEES:
ARMED SERVICES
ENERGY AND
NATURAL RESOURCES
INTELLIGENCE
RULES AND ADMINISTRATION

The Honorable Jovita Carranza
Administrator
Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

Thank you for speaking with me last Friday regarding the urgent need for the Small Business Administration ("SBA") to clarify that rural hospitals currently undergoing Chapter 11 reorganization are eligible for Paycheck Protection Program ("PPP") loans. As we discussed, there appears to be no legal basis to deny PPP loans to such hospitals. I urge you to revise the PPP Borrower Application form immediately so that it includes hospitals undergoing Chapter 11 reorganization as eligible recipients of PPP loans.

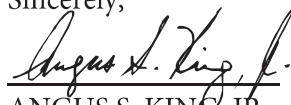
I write today because after our urgent call last Friday and follow-up by my staff, the SBA has thus far failed to change its Borrower Application form. Yesterday, PPP appropriations were exhausted. By not changing the PPP Borrower Application form in a timely manner, the SBA denied Penobscot Valley and Calais Memorial Hospitals in Maine the PPP funding that they desperately require during their time of maximum need, leaving their operations at risk.

Aside from the loss of essential medical resources at this time of critical need, the closure of Calais Memorial or Penobscot Valley Hospital would have economic effects on two rural communities in Maine that echo far beyond the facilities' walls. Rural hospitals are the backbone of small-town economies, contributing to the tax base and employing hundreds. Calais Regional Hospital is the largest employer in Calais, Maine, employing more than 200 people, with an annual economic impact of \$55 million; and Penobscot Valley Hospital employs approximately 200 people, with an annual economic impact of \$38 million.

Current law does not prevent either hospital from receiving PPP funds. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This choice denies critical funding to rural hospitals that are reorganizing their debts in a responsible way.

Rural hospitals and the communities that depend upon them need your help today. As Congress considers providing the SBA with additional PPP funding, I urge you to change the PPP Borrower Application form immediately so that rural hospitals undergoing Chapter 11 reorganizations may receive PPP loans and eventual loan forgiveness. Thank you for your work to support the Nation during this difficult time.

Sincerely,



ANGUS S. KING, JR.
United States Senator

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In Maine call toll-free 1-800-432-1599
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Congress of the United States
Washington, DC 20510

April 24, 2020

The Honorable Jovita Carranza
Administrator Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

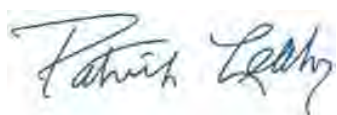
We are writing to urge you to reconsider the blanket exclusion of organizations undergoing Chapter 11 reorganization from participation in the Paycheck Protection Program (PPP). Specifically, we ask you to consider the advisability of allowing essential health organizations, such as critical access hospitals and federally qualified health centers, to participate. These hospitals in Vermont and across the country are on the front lines of the COVID-19 pandemic response and we need the critical services they provide now more than ever before. We should be making all resources available to our health care providers to help them keep the lights on in their time of need.

In rural and underserved areas in Vermont and throughout the country, these facilities are not only essential medical providers, but are the economic backbone of our communities. It is particularly important right now to keep access to care affordable and available for patients in rural areas during the COVID-19 pandemic. If Vermont were to lose any of our critical access hospitals during this uncertain time, it would have a devastating effect on the state's COVID response and rural economy.

Eligibility criteria for PPP set in statute does not specifically exclude entities undergoing Chapter 11 bankruptcy. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This decision denies the potential for critical funding to hospitals, health centers, and other essential services that are reorganizing their debt in a responsible way. Availability of PPP assistance to these entities will allow them to continue to provide vital services, pay their workforce, and mitigate the risk of closure. To achieve this outcome, SBA should ensure PPP assistance is used for these purposes and not compensating secured and unsecured creditors.

We urge you to amend the Borrower Application without delay to ensure that critical care in our communities remains available. Thank you for your consideration.

Sincerely,



PATRICK LEAHY
United States Senator



BERNARD SANDERS
United States Senator



PETER WELCH
United States Congressman

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Exhibit D

(Lenders Application)

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

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Paycheck Protection Program
Lender Application Form - Paycheck Protection Program Loan Guaranty

OMB Control No.: 3245-0407
 Expiration Date: 09/30/2020

The purpose of this form is to collect identifying information about the Lender, the Applicant, the loan guaranty request, sources and uses of funds, the proposed structure (which includes pricing and the loan term), and compliance with SBA Loan Program Requirements. This form reflects the data fields that will be collected electronically from lenders; no paper version of this form is required or permitted to be submitted. As used in this application, "Paycheck Protection Program Rule" refers to the rules in effect at the time you submit this application that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Instructions for Lenders

All Paycheck Protection Program (PPP) loans are processed by all Lenders under delegated authority from SBA. This application must be submitted and signed electronically in accordance with program requirements, and the information requested is to be retained in the Lender's loan file.

A. Lender Information			
Lender Name: _____		Lender Location ID: _____	
Address: _____	City: _____	St: _____	Zip: _____
Lender Contact: _____	Ph: () - _____	Cell or Ext: () - _____	
Contact Email: _____		Title: _____	

B. Applicant Information	
Applicant	Check One: <input type="checkbox"/> Sole Proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other
	Applicant Legal Name: _____ DBA: _____ Applicant Address: _____ Applicant Primary Contact: _____
	Business Tax ID: _____ City, State, Zip: _____ Phone: () - _____

C. Loan Structure Information							
Amount of Loan Request:	\$	Guarantee %:	100%	Loan Term in # of Months:	24	Payment:	Deferred 6 mos.
Applicant must provide documentation to Lender supporting how the loan amount was calculated in accordance with the Paycheck Protection Program Rule and the CARES Act, and Lender must retain all such supporting documentation in Lender's file.							
Interest Rate:	1%						

D. Loan Amount Information	
Average Monthly Payroll multiplied by 2.5	\$
Refinance of Eligible Economic Injury Disaster Loan, net of Advance (if Applicable; see Paycheck Protection Program Rule)	\$
Total	\$

E. General Eligibility (If the answer is no to either, the loan cannot be approved)	
<ul style="list-style-type: none"> The Applicant has certified to the Lender that (1) it was in operation on February 15, 2020 and had employees for whom the Applicant paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC, (2) current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant, (3) the funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, and (4) the Applicant has not received another Paycheck Protection Program loan. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has certified to the Lender that it (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, meets the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry. 	<input type="checkbox"/> Yes <input type="checkbox"/> No

F. Applicant Certification of Eligibility (If not true, the loan cannot be approved)	
<ul style="list-style-type: none"> The Applicant has certified to the Lender that the Applicant is eligible under the Paycheck Protection Program Rule. 	<input type="checkbox"/> True

G. Franchise/License/Jobber/Membership or Similar Agreement (If applicable and no, the loan cannot be approved)	
<ul style="list-style-type: none"> The Applicant has represented to the Lender that it is a franchise that is listed in the SBA's Franchise Directory. 	<input type="checkbox"/> Yes <input type="checkbox"/> No

H. Character Determination <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has represented to the Lender that neither the Applicant (if an individual) nor any individual owning 20% or more of the equity of the Applicant is subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or is presently incarcerated, or on probation or parole. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has represented to the Lender that neither the Applicant (if an individual) nor any individual owning 20% or more of the equity of the Applicant has within the last 5 years, for any felony: 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment). 	<input type="checkbox"/> Yes <input type="checkbox"/> No
I. Prior Loss to Government/Delinquent Federal Debt <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has certified to the Lender that neither the Applicant nor any owner (as defined in the Applicant's SBA Form 2483) is presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has certified to the Lender that neither the Applicant nor any of its owners, nor any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
J. U.S. Employees <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has certified that the principal place of residence for all employees included in the Applicant's payroll calculation is the United States. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
K. Fees <i>(If yes, Lender may not pass any agent fee through to the Applicant or offset or pay the fee with the proceeds of this loan)</i>	
<ul style="list-style-type: none"> Is the Lender using a third party to assist in the preparation of the loan application or application materials, or to perform other services in connection with this loan? 	<input type="checkbox"/> Yes <input type="checkbox"/> No

SBA Certification to Financial Institution under Right to Financial Privacy Act (12 U.S.C. 3401)

By signing SBA Form 2483, Borrower Information Form in connection with this application for an SBA-guaranteed loan, the Applicant certifies that it has read the Statements Required by Law and Executive Orders, which is attached to Form 2483. As such, SBA certifies that it has complied with the applicable provisions of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) and, pursuant to that Act, no further certification is required for subsequent access by SBA to financial records of the Applicant/Borrower during the term of the loan guaranty.

Lender Certification

On behalf of the Lender, I certify that:

- The Lender has complied with the applicable lender obligations set forth in paragraphs 3.b(i)-(iii) of the Paycheck Protection Program Rule.
- The Lender has obtained and reviewed the required application (including documents demonstrating qualifying payroll amounts) of the Applicant and will retain copies of such documents in the Applicant's loan file.

I certify that:

- Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant.

Authorized Lender Official: _____
Signature

Date: _____

Type or Print Name: _____

Title: _____

NOTE: According to the Paperwork Reduction Act, you are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated burden for completing this form, including time for reviewing instructions, gathering data needed, and completing and reviewing the form is 25 minutes per response. Comments or questions on the burden estimates should be sent to U.S. Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Rm. 10202, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

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Exhibit E

(Second Interim Rule)

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

1
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2104



Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

E.O. 12866 and E.O. 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act (“PRA”). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act

Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable,

unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1, p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,
Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA's 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

20818 Federal Register / Vol. 85, No. 73 / Wednesday, April 15, 2020 / Rules and Regulations

Comment Date: Comments must be received on or before May 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0019 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small

businesses nationwide adversely impacted by the COVID–19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 2, 2020, SBA issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Act. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III of the Initial Rule.

This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)). Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a better understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be submitted on or before May 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Affiliate Rules for Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. Additional information about the PPP is available in the Initial Rule.

1. Affiliation Rules Generally

Are affiliates considered together for purposes of determining eligibility?

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.¹ Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management,² and identity of interest. 13 CFR 121.301.

How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a

¹ Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv)), as added by the Act, waives the affiliation rules contained in § 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681). This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities.

² In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern. Prior to the Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. Specifically, section 1102 of the Act provides that the provisions applicable to affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in § 121.103 currently do not apply to PPP borrowers, because § 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rule contained in 13 CFR 121.301.

2. Faith-Based Organizations

This rule exempts otherwise qualified faith-based organizations from the SBA's affiliation rules, including those set forth in 13 CFR part 121, where the application of the affiliation rules would substantially burden those organizations' religious exercise. This exemption is required, or at a minimum authorized, by the Religious Freedom Restoration Act (RFRA) (Pub. L. 103-141), which provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government can "demonstrate[] that application of the burden" to the person is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1.

A substantial burden under RFRA includes both government action that compels a person to violate his sincere religious beliefs or suffer a penalty, *see, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), and the imposition of a substantial burden through "indirect" measures. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981). Notably, the government imposes a substantial burden on religious exercise when it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such

a benefit because of conduct mandated by religious belief." *Id.* at 718. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), a State denied the plaintiff unemployment benefits because she would not work on Saturday, the Sabbath of her faith. *Id.* at 400-01. Even though no "sanctions directly compell[ed]" her to work on Saturday, the Supreme Court held that the State's denial of benefits "puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Id.* at 404. As the Court observed, the State's framework "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* Consistent with these precedents, RFRA explicitly contemplates that "the denial of government funding, benefits, or exemptions" may violate its protections. 42 U.S.C. 2000bb-4.

SBA is aware of the existence of faith-based organizations that would qualify for relief under the CARES Act but for their affiliation with other entities as an aspect of their religious practice. Supreme Court precedent has long recognized that the organizational structure of faith-based entities may itself be a matter of significant religious concern and that faith-based organizations are therefore guaranteed the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Moreover, an assessment of the extent to which questions concerning religious polity rest upon theological or other religious foundations presents particular difficulties, for the First Amendment "forbids civil courts" from "the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969). A number of faith-based organizations understand their affiliation with other religious entities as a part of their exercise of religion, as a mandate given the "hierarchical or connectional" structure of their church, *Jones v. Wolf*, 443 U.S. 595, 597 (1979), or as an expression of their sincere religious belief. *Cf.* 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* section 8.19 (Westlaw rev. ed. 2017) ("Religious organizations, such as parishes or mission centers, normally tend to found the civil-

property-holding structures that most closely mirror their own ecclesiology or polity."). Either affiliation decision falls within the definition of "religious exercise" that applies to RFRA, which "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. 2000cc-5(7)(A); 2000bb-2(4) ("the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title").

As applied to these faith-based organizations, the affiliation rules would impose a substantial burden. The affiliation rules would deny an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities).

The Administrator has also concluded that she does not have a compelling interest in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions. This conclusion is reinforced by the fact that the affiliation rules already contain numerous exemptions, *see generally* 13 CFR 121.103(b), ranging from "[b]usiness concerns owned and controlled by Indian Tribes, Alaska Native Corporations, [and] Native Hawaiian Organizations," *id.* § 121.103(b)(2)(i) to "member shareholders of a small agricultural cooperative." *Id.* § 121.103(b)(7). In light of these exemptions, it is difficult to maintain that denying relief to these faith-based organizations is necessary to further a compelling government interest, let alone the least restrictive means of doing so. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.") (cleaned up); *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (applying same principle under RFRA). SBA accordingly must exempt faith-based organizations that would otherwise be disqualified from the PPP based on features of those organizations' affiliations that are a matter of sincere religious exercise as defined in 42 U.S.C. 2000bb-2.

This action is also supported by 15 U.S.C. 634(b)(6), which authorizes the Administrator to "make such rules and regulations as he deems necessary to

carry out the authority vested in him by or pursuant to this chapter.” As relevant here, the CARES Act expanded eligibility for the covered loans during the covered period for nonprofit organizations that employ not more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator for the industry in which the nonprofit organization operates. 15 U.S.C. 636(a)(36)(D)(i). That expansion posed unique concerns for the Administrator, who is tasked with applying the “provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, . . . with respect to a nonprofit organization and a veterans organizations in the same manner as with respect to a small business concern.” *Id.* 636(a)(36)(D)(vi). Although these rules may easily be applied to faith-based organizations in many cases, their application to certain faith-based organizations presents significant challenges, in particular because of the large number of faith-based organizations who would now be eligible for the PPP but for their religious exercise.

As discussed above, carrying the affiliation rules over to all faith-based organizations without modification would raise concerns under RFRA. Moreover, application of the affiliation rules, which, for example, provide for assessment of whether one faith-based organization “controls or has the power to control” another organization, 13 CFR 121.103(a)(1), could involve SBA in questions of church governance concerning “the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity),” in violation of the First Amendment. *Serbian E. Orthodox Diocese for the U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1979) (internal quotation marks omitted). Finally, affiliation rules developed in the context of for-profit enterprises present significant administrative difficulties where faith-based organizations are concerned. For example, “the notion of corporate subsidiarity or affiliation in civil law is entirely foreign to the polity of religious organizations,” and there is a significant risk that civil authorities will “mischaracterize or misinterpret the polity of a religious body.” 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* sections 8.19, 8.21 (discussing examples of judicial mischaracterizations). Consistent with these concerns, it is also notable that other areas of federal law

approach issues analogous to affiliation differently for religious organizations. *See, e.g.*, 26 U.S.C. 512 (b)(12).

For these reasons, in addition to the RFRA mandate, the Administrator has determined that it is appropriate to exercise the authority granted under 15 U.S.C. 634(b)(6) to exempt from application of SBA’s affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise.

Accordingly, the SBA’s affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization’s determination.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA’s website at www.sba.gov.

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the

need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule’s designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act (“PRA”). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form) and SBA Form 2484 (Paycheck Protection Program Lender’s Application for 7(a) Loan Guaranty) SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until October 31, 2020.

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business

Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1, p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Authority delegations (Government agencies), Intergovernmental relations, Investigations, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Small Business

Administration amends 13 CFR part 121 as set forth below:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by adding paragraph (b)(10) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(10)(i) The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization under this subpart if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. In addition, the eligibility criteria set forth in 15 U.S.C. 636(a)(36)(D) are satisfied for any faith-based organization having not more than 500 employees (including individuals employed on a full-time, part-time, or other basis) that pays Federal payroll taxes using its own Internal Revenue Service Employer Identification Number (EIN) or that would support a deduction under the second sentence of 26 U.S.C. 512(b)(12) if the organization generated unrelated business taxable income. For purposes of this paragraph (b)(10), the term “faith-based organization” includes, but is not limited to, any organization associated with a church or convention or association of churches within the meaning of 26 U.S.C. 414(e)(3)(D). The term “organization” has the meaning given in 26 U.S.C. 414(m)(6)(A). The terms “church” and “convention or association of churches” have the same meaning that they have in 26 U.S.C. 414.

(ii) No specific process or filing is necessary to claim the benefit of the exemption in paragraph (b)(10)(i) of this section. In applying for a loan under the Paycheck Protection Program (PPP), a faith-based organization may make all necessary certifications with respect to common ownership or management or other eligibility criteria based upon

affiliation, if the organization would be an eligible borrower but for application of SBA affiliation rules and if the organization falls within the terms of the exemption described in paragraph (b)(10)(i) of this section. If a faith-based organization indicates any relationship that may pertain to affiliation, such as ownership of, ownership by, or common management with any other organization, on or in connection with a loan application, and if the faith-based organization applying for a loan falls within the terms of the exemption described in paragraph (b)(10)(i) of this section with respect to that relationship, the faith-based organization may indicate on a separate sheet that it is entitled to the exemption. That sheet may be identified as addendum A, and no further listing of the other organization or description of the relationship to that organization is required. See appendix A to this part for a sample “Addendum A”, but the format need not be used as long as the substance is the same.

* * * * *

■ 3. Add appendix A to part 121 to read as follows:

Appendix A to Part 121—Paycheck Protection Program Sample Addendum A

[Sample]

ADDENDUM A

✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 CFR 121.103(b)(10), which says that “[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.”

Jovita Carranza,
Administrator.

[FR Doc. 2020–07673 Filed 4–10–20; 4:15 pm]

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Exhibit F

(Third Interim Rule)

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

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DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
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601 Union St., Suite 5000
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Where:

\dot{m}_{SD} = dry air mass flow rate of infiltration air for single-duct portable air conditioners, in pounds per minute (lb/m).

\dot{m}_{95} and \dot{m}_{83} = dry air mass flow rate of infiltration air for dual-duct portable air conditioners, as calculated based on testing according to the test conditions in Table 1 of this appendix, in lb/m.

V_{co-SD} , V_{co-95} , and V_{co-83} = average volumetric flow rate of the condenser outlet air during cooling mode testing for single-duct portable air conditioners; and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in cubic feet per minute (cfm).

V_{ci-95} and V_{ci-83} = average volumetric flow rate of the condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in cfm.

ρ_{co-SD} , ρ_{co-95} , and ρ_{co-83} = average density of the condenser outlet air during cooling mode testing for single-duct portable air conditioners, and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in pounds mass per cubic foot (lb_m/ft³).

ρ_{ci-95} and ρ_{ci-83} = average density of the condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in lb_m/ft³.

ω_{co-SD} , ω_{co-95} , and ω_{co-83} = average humidity ratio of condenser outlet air during cooling mode testing for single-duct portable air conditioners, and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in pounds mass of water vapor per pounds mass of dry air (lb_w/lb_{da}).

ω_{ci-95} and ω_{ci-83} = average humidity ratio of condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in lb_w/lb_{da}.

For single-duct and dual-duct portable air conditioners, calculate the sensible component of infiltration air heat contribution according to:

$$Q_{s-95} = \dot{m} \times 60 \times [(c_{p-da} \times (T_{ia-95} - T_{indoor})) + (c_{p-wv} \times (\omega_{ia-95} \times T_{ia-95} - \omega_{indoor} \times T_{indoor}))]$$

$$Q_{s-83} = \dot{m} \times 60 \times [(c_{p-da} \times (T_{ia-83} - T_{indoor})) + (c_{p-wv} \times (\omega_{ia-83} \times T_{ia-83} - \omega_{indoor} \times T_{indoor}))]$$

Where:

Q_{s-95} and Q_{s-83} = sensible heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

\dot{m} = dry air mass flow rate of infiltration air, \dot{m}_{SD} or \dot{m}_{95} when calculating Q_{s-95} and \dot{m}_{SD} or \dot{m}_{83} when calculating Q_{s-83} , in lb/m.

c_{p-da} = specific heat of dry air, 0.24 Btu/lb_m-°F.

c_{p-wv} = specific heat of water vapor, 0.444 Btu/lb_m-°F.

T_{indoor} = indoor chamber dry-bulb temperature, 80 °F.

T_{ia-95} and T_{ia-83} = infiltration air dry-bulb temperatures for the two test conditions in Table 1 of this appendix, 95 °F and 83 °F, respectively.

ω_{ia-95} and ω_{ia-83} = humidity ratios of the 95 °F and 83 °F dry-bulb infiltration air, 0.0141 and 0.01086 lb_w/lb_{da}, respectively.

ω_{indoor} = humidity ratio of the indoor chamber air, 0.0112 lb_w/lb_{da}.

60 = conversion factor from minutes to hours.

Calculate the latent heat contribution of the infiltration air according to:

$$Q_{L-95} = \dot{m} \times 60 \times H_{fg} \times (\omega_{ia-95} - \omega_{indoor})$$

$$Q_{L-83} = \dot{m} \times 60 \times H_{fg} \times (\omega_{ia-83} - \omega_{indoor})$$

Where:

Q_{L-95} and Q_{L-83} = latent heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

\dot{m} = mass flow rate of infiltration air, \dot{m}_{SD} or \dot{m}_{95} when calculating Q_{L-95} and \dot{m}_{SD} or \dot{m}_{83} when calculating Q_{L-83} , in lb/m.

H_{fg} = latent heat of vaporization for water vapor, 1061 Btu/lb_m.

ω_{ia-95} and ω_{ia-83} = humidity ratios of the 95 °F and 83 °F dry-bulb infiltration air, 0.0141 and 0.01086 lb_w/lb_{da}, respectively.

ω_{indoor} = humidity ratio of the indoor chamber air, 0.0112 lb_w/lb_{da}.

60 = conversion factor from minutes to hours.

The total heat contribution of the infiltration air is the sum of the sensible and latent heat:

$$Q_{infiltration-95} = Q_{s-95} + Q_{L-95}$$

$$Q_{infiltration-83} = Q_{s-83} + Q_{L-83}$$

Where:

$Q_{infiltration-95}$ and $Q_{infiltration-83}$ = total infiltration air heat in cooling mode, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

Q_{s-95} and Q_{s-83} = sensible heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

Q_{L-95} and Q_{L-83} = latent heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

* * * * *

[FR Doc. 2020-07733 Filed 4-17-20; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0020]

RIN 3245-AH36

Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). This interim final rule supplements the First PPP Interim Final Rule with guidance for individuals with self-employment income who file a Form 1040, Schedule C. This rule also addresses eligibility issues for certain business concerns and requirements for certain pledges of PPP loans. This interim final rule supplements SBA’s implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective Date: This rule is effective April 20, 2020.

Applicability Date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before May 20, 2020.

ADDRESSES: You may submit comments, identified by number SBA-2020-0020 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov.

Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, small businesses need to be informed on whether they are eligible to apply for a loan, how to apply for a loan, and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately determine their eligibility and apply for the loan with a full understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 20, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Additional Paycheck Protection Program Eligibility Criteria and Requirements for Certain Pledges of Loans

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811) and a second interim final rule (85 FR 20817) posted April 3, 2020.

1. Individuals With Self-Employment Income Who File a Form 1040, Schedule C

a. I have income from self-employment and file a Form 1040, Schedule C. Am I eligible for a PPP Loan?

You are eligible for a PPP loan if: (i) You were in operation on February 15, 2020; (ii) you are an individual with self-employment income (such as an independent contractor or a sole proprietor); (iii) your principal place of residence is in the United States; and (iv) you filed or will file a Form 1040 Schedule C for 2019. However, if you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to \$100,000 annualized, on a PPP loan application filed by or on behalf of the partnership. Partnerships are eligible for PPP loans under the Act, and the Administrator has determined, in consultation with the Secretary of the Treasury (Secretary), that limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of June 30, 2020. This limitation will allow lenders to more quickly process applications and lower the burdens of applying for partnerships/partners. The Administrator has further determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Rent, mortgage interest, utilities, and other debt service are generally incurred at the partnership level, not partner level, so it is most natural to provide the funds for these expenses to the partnership, not individual partners. In addition, you should be aware that participation in the PPP may affect your eligibility for state-administered unemployment compensation or unemployment assistance programs, including the programs authorized by Title II, Subtitle A of the CARES Act, or CARES Act Employee Retention Credits. SBA will issue additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020.

b. How do I calculate the maximum amount I can borrow and what documentation is required?

How you calculate your maximum loan amount depends upon whether or not you employ other individuals. If you have no employees, the following methodology should be used to calculate your maximum loan amount:

i. Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000. If this amount is zero or less, you are not eligible for a PPP loan.

ii. Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).

iii. Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.

iv. Step 4: Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

Regardless of whether you have filed a 2019 tax return with the IRS, you must provide the 2019 Form 1040 Schedule C with your PPP loan application to substantiate the applied-for PPP loan amount and a 2019 IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes you are self-employed. You must provide a 2020 invoice, bank statement, or book of record to establish you were in operation on or around February 15, 2020.

If you have employees, the following methodology should be used to calculate your maximum loan amount:

i. Step 1: Compute 2019 payroll by adding the following:

a. Your 2019 Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value), up to \$100,000 annualized, if this amount is over \$100,000, reduce it to \$100,000, if this amount is less than zero, set this amount at zero;

b. 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c—column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips; subtract any amounts paid to any individual employee in excess of \$100,000 annualized and any amounts

paid to any employee whose principal place of residence is outside the United States; and

c. 2019 employer health insurance contributions (health insurance component of Form 1040 Schedule C line 14), retirement contributions (Form 1040 Schedule C line 19), and state and local taxes assessed on employee compensation (primarily under state laws commonly referred to as the State Unemployment Tax Act or SUTA from state quarterly wage reporting forms).

ii. Step 2: Calculate the average monthly amount (divide the amount from Step 1 by 12).

iii. Step 3: Multiply the average monthly amount from Step 2 by 2.5.

iv. Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

You must supply your 2019 Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020.

d. How can PPP loans be used by individuals with income from self-employment who file a 2019 Form 1040, Schedule C?

The proceeds of a PPP loan are to be used for the following.

i. Owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above.

ii. Employee payroll costs (as defined in the First PPP Interim Final Rule) for employees whose principal place of residence is in the United States, if you have employees.

iii. Mortgage interest payments (but not mortgage prepayments or principal payments) on any business mortgage obligation on real or personal property (e.g., the interest on your mortgage for the warehouse you purchased to store business equipment or the interest on an auto loan for a vehicle you use to perform your business), business rent payments (e.g., the warehouse where you store business equipment or the vehicle you use to perform your business), and business utility payments (e.g., the cost of electricity in the warehouse you rent or gas you use

driving your business vehicle). You must have claimed or be entitled to claim a deduction for such expenses on your 2019 Form 1040 Schedule C for them to be a permissible use during the eight-week period following the first disbursement of the loan (the “covered period”). For example, if you did not claim or are not entitled to claim utilities expenses on your 2019 Form 1040 Schedule C, you cannot use the proceeds for utilities during the covered period.

iv. Interest payments on any other debt obligations that were incurred before February 15, 2020 (such amounts are not eligible for PPP loan forgiveness).

v. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020 (maturity will be reset to PPP’s maturity of two years). If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

The Administrator, in consultation with the Secretary, determined that it is appropriate to limit self-employed individuals’ (who file a Form 1040 Schedule C) use of loan proceeds to those types of allowable uses for which the borrower made expenditures in 2019. The Administrator has determined that this limitation on self-employed individuals who file a Form 1040 Schedule C is consistent with the borrower certification required by the Act; specifically, that the PPP loan is necessary “to support the ongoing operations” of the borrower. The Administrator and the Secretary thus believe that this limitation is consistent with the structure of the Act to maintain existing operations and payroll and not for business expansion. This limitation on the use of PPP loan proceeds will also help to ensure that the finite appropriations available for these loans are directed toward maintaining existing operations and payroll, as each loan that is made depletes the appropriation. Finally, although the Act makes businesses in operation on February 15, 2020 eligible for PPP loans, the Administrator, in consultation with the Secretary, has determined that self-employed individuals will need to rely on their 2019 Form 1040 Schedule C, which provides verifiable documentation on expenses between January 1, 2019 and December 31, 2019.

For individuals with income from self-employment from 2019 for which they have filed or will file a 2019 Form 1040 Schedule C, expenses incurred between January 1, 2020 and February 14, 2020 may not be considered because of the lack of verifiable documentation on expenses in this period. SBA will issue additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020.

e. Are there any other restrictions on how I can use PPP loan proceeds?

Yes. At least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs (but not for forgiveness purposes), the amount of any refinanced EIDL will be included. The rationale for this 75 percent floor is contained in the First PPP Interim Final Rule.

f. What amounts shall be eligible for forgiveness?

The amount of loan forgiveness can be up to the full principal amount of the loan plus accrued interest. The actual amount of loan forgiveness will depend, in part, on the total amount spent over the covered period on:

i. Payroll costs including salary, wages, and tips, up to \$100,000 of annualized pay per employee (for eight weeks, a maximum of \$15,385 per individual), as well as covered benefits for employees (but not owners), including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums);

ii. owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above, with forgiveness of such amounts limited to eight weeks' worth (8/52) of 2019 net profit, but excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116-127) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA;

iii. payments of interest on mortgage obligations on real or personal property incurred before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C (business mortgage payments);

iv. rent payments on lease agreements in force before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C (business rent payments); and

v. utility payments under service agreements dated before February 15, 2020 to the extent they are deductible on Form 1040 Schedule C (business utility payments).

The Administrator, in consultation with the Secretary, has determined that it is appropriate to limit the forgiveness of owner compensation replacement for individuals with self-employment income who file a Schedule C to eight weeks' worth (8/52) of 2019 net profit. This is most consistent with the structure of the Act and its overarching focus on keeping workers paid, and will prevent windfalls that Congress did not intend.

Congress determined that the maximum loan amount is based on 2.5 months of the borrower's payroll during the one-year period preceding the loan.

Congress also determined that the maximum amount of loan forgiveness is based on the borrower's eligible payments—i.e., the sum of payroll costs and certain overhead expenses—over the eight-week period following the date of loan disbursement. For individuals with self-employment income who file a Schedule C, the Administrator, in consultation with the Secretary, has determined that it is appropriate to limit loan forgiveness to a proportionate eight-week share of 2019 net profit, as reflected in the individual's 2019 Form 1040 Schedule C. This is because many self-employed individuals have few of the overhead expenses that qualify for forgiveness under the Act. For example, many such individuals operate out of either their homes, vehicles, or sheds and thus do not incur qualifying mortgage interest, rent, or utility payments. As a result, most of their receipts will constitute net income. Allowing such a self-employed individual to treat the full amount of a PPP loan as net income would result in a windfall. The entire amount of the PPP loan (a maximum of 2.5 times monthly payroll costs) would be forgiven even though Congress designed this program to limit forgiveness to certain eligible expenses incurred in an eight-week covered period. Limiting forgiveness to eight weeks of net profit from the owner's 2019 Form 1040 Schedule C is consistent with the structure of the Act, which provides for loan forgiveness based on eight weeks of expenditures. This limitation will also help to ensure that the finite appropriations are directed toward payroll protection, consistent with the Act's central objective. Finally, 75 percent of the amount forgiven must be attributable to payroll costs for the reasons specified in the First PPP Interim Final Rule.

g. What documentation will I be required to submit to my lender with my request for loan forgiveness?

In addition to the borrower certification required by Section 1106(e)(3) of the Act, to substantiate your request for loan forgiveness, if you have employees, you should submit Form 941 and state quarterly wage unemployment insurance tax reporting forms or equivalent payroll processor records that best correspond to the covered period (with evidence of any retirement and health insurance contributions). Whether or not you have employees, you must submit evidence of business rent, business mortgage interest payments on real or personal property, or business utility payments during the covered period if you used loan proceeds for those purposes.

The 2019 Form 1040 Schedule C that was provided at the time of the PPP loan application must be used to determine the amount of net profit allocated to the owner for the eight-week covered period. The Administrator, in consultation with the Secretary, determined that for purposes of loan forgiveness it is appropriate to require self-employed individuals to rely on the 2019 Form 1040 Schedule C to determine the amount of net profit allocated to the owner during the covered period for the reasons described in Paragraph 1.d. above.

2. Clarification Regarding Eligible Businesses

a. Are eligible businesses owned by directors or shareholders of a PPP Lender permitted to apply for a PPP Loan through the Lender with which they are associated?

The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans. Consequently, there is no meaningful risk of underwriting bias or below-market rates and terms. The Administrator also recognizes that many directors and equity holders of PPP Lenders are owners of unrelated businesses. For those reasons, the Administrator, in consultation with the Secretary, has determined that SBA regulations (including 13 CFR 120.110 and 120.140) shall not apply to prohibit an otherwise eligible business owned (in whole or part) by an outside director or holder of a less than 30 percent equity interest in a PPP Lender from obtaining a PPP loan from the PPP Lender on whose board the director serves or in which the equity owner

holds an interest, provided that the eligible business owned by the director or equity holder follows the same process as any similarly situated customer or account holder of the Lender. Favoritism by the Lender in processing time or prioritization of the director's or equity holder's PPP application is prohibited. The Administrator cautions, however, that Lenders should comply with all other applicable state and federal regulations concerning loans to associates of the Lender. Lenders should also consult their own internal policies concerning lending to individuals or entities associated with the Lender.

The foregoing paragraph does not apply to a director or owner who is also an officer or key employee of the PPP Lender. Officers and key employees of a PPP Lender may obtain a PPP Loan from a different lender, but not from the PPP Lender with which they are associated. SBA also reminds Lenders that the "Authorized Lender Official" for each PPP Loan is subject to the limitations described in the Lender Application Form, which states in relevant part: "Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant [Borrower]."

b. Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.110(g) is met or the following two conditions are satisfied: (a) The business's legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business's total revenue in 2019. Businesses that received illegal gaming revenue are categorically ineligible. The Administrator, in consultation with the Secretary, believes this test appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity with the policy aim of making the PPP Loan available to a broad segment of U.S. businesses and their employees.

3. Requirements for Certain Pledges of PPP Loans

Do the requirements for loan pledges under 13 CFR 120.434 apply to PPP loans pledged for borrowings from a Federal Reserve Bank (FRB) or advances by a Federal Home Loan Bank (FHLB)?

No. Pursuant to SBA regulations at 13 CFR 120.435(d) and (e), a pledge of 7(a) loans to a FRB or FHLB does not require SBA's prior written consent or notice to SBA. SBA, in consultation with Treasury, has determined that for purposes of loans made under the PPP, the additional requirements set forth in 120.434 shall also not apply. This would mean, for example, that SBA would not have to approve loan documents or require a multi-party agreement among SBA, the lender, and others.

4. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary

to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act. Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 120

Community development, Environmental protection, Equal employment opportunity, Exports, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated above, the Small Business Administration amends 13 CFR part 120 as set forth below.

PART 120—BUSINESS LOANS

- 1. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), and note, 650, 657t, and note, 657u, and note, 687(f), 696(3) and (7), and note, and 697(a) and (e), and note.

- 2. Revise § 120.435 to read as follows:

§ 120.435 Which loan pledges do not require notice to or consent by SBA?

(a) Notwithstanding the provisions of § 120.434(e), 7(a) loans may be pledged for the following purposes without notice to or consent by SBA:

- (1) Treasury tax and loan accounts;
- (2) The deposit of public funds;
- (3) Uninvested trust funds;
- (4) Borrowings from a Federal Reserve Bank; or
- (5) Advances by a Federal Home Loan Bank.

(b) For purposes of the Paycheck Protection Program (PPP), the other provisions of § 120.434 shall also not apply to PPP loans pledged under paragraph (a)(4) or (5) of this section.

Jovita Carranza,
Administrator.

[FR Doc. 2020-08257 Filed 4-17-20; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2019-1074; Product Identifier 2019-NM-191-AD; Amendment 39-19900; AD 2020-07-21]

RIN 2120-AA64

Airworthiness Directives; Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Yaborã Indústria Aeronáutica S.A. Model ERJ-170 airplanes and Model ERJ 190-100 STD, -100 LR, -100 ECJ, -100 IGW, -200 STD, -200 LR, and -200 IGW airplanes. This AD was prompted by a determination that certain main landing gear (MLG) aft pintle pins repaired using a sulphamate nickel plating have a life limit that is less than the certified life limit. This AD requires a one-time records review or a general visual inspection (GVI) of the MLG aft pintle pins to determine if certain repairs were done, and replacement of certain MLG aft pintle pins with serviceable MLG aft pintle pins, as specified in an Agência Nacional de Aviação Civil (ANAC) Brazilian AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 26, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 26, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, nº 209, Jardim Esplanada, CEP 12242-431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203-6600; email pac@anac.gov.br; internet www.anac.gov.br/en/. You may find this IBR material on the ANAC website at <https://sistemas.anac.gov.br/certificacao/DA/DAE.asp>. You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available in the AD docket on

the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-1074.

Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-1074; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3221; email krista.greer@faa.gov.

SUPPLEMENTARY INFORMATION:

Discussion

The ANAC, which is the aviation authority for Brazil, has issued Brazilian AD 2019-11-07, effective November 18, 2019 (“Brazilian AD 2019-11-07”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170-100 LR, -100 STD, -100 SE, and -100 SU airplanes; Model ERJ 170-200 LR, -200 SU, -200 STD, and -200 LL airplanes; and Model ERJ 190-100 STD, -100 LR, -100 ECJ, -100 IGW, -100 SR, -200 STD, -200 LR, and -200 IGW airplanes. Model ERJ 190-100 SR airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD, therefore, does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170-100 LR, -100 STD, -100 SE, and -100 SU airplanes; Model ERJ 170-200 LR, -200 SU, -200 STD, and -200 LL airplanes; and Model ERJ 190-100 STD, -100 LR, -100 ECJ, -100 IGW, -200 STD, -200 LR, and -200 IGW airplanes. The NPRM published in the **Federal Register** on January 17, 2020 (85 FR 2909). The NPRM was prompted by a determination that certain MLG aft pintle pins repaired using a sulphamate

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Exhibit G

(Toppenish Application)

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

1
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2104

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Business Name: SHC MEDICAL CENTER TOPPENISH dba ASTRIA TOPPENISH HOSPITAL
Loan Application #: 10556

IMPORTANT INFORMATION ABOUT PROVIDING KNOW YOUR CUSTOMER (KYC) IDENTIFYING INFORMATION

To help the government fight the funding of terrorism and money laundering activities, U.S. Federal law requires all financial institutions to maintain a sufficient KYC program. This requires Banner Bank to obtain, verify, and record information that identifies each person who maintains a customer relationship with Banner Bank. Persons include individuals and legal entities, such as corporations, limited liability companies, partnerships, or trusts.

What this means for you:

- When you open or maintain an account with Banner Bank, we will ask for information such as your name, physical address, date of birth (for individuals), and other information that will allow us to identify you and understand your account relationship.
- We may also ask to see your driver's license or other identifying documents.
- We may also obtain information from a consumer reporting agency, public database, or other source.

Important Information for our California Residents:

To learn about specific privacy rights for California residents, please review the California Consumer Privacy Act Notice at www.bannerbank.com/privacy-policy. A printed copy is available upon request.

Your cooperation will be truly appreciated!

Additional Applicant Questions:

	YES	NO
Do you receive income from the production, distribution, or sale of Marijuana?		X
Do you intend to accept or transact using Cryptocurrency (such as Bitcoin)?		X

KYC Customer Notice

Member FDIC



DocuSign Envelope ID: 3D3FB801-F15D-4C29-A5AA-AA8686A7C0F8



Paycheck Protection Program Borrower Application Form

 OMB Control No.: 3245-0407
 Expiration Date: 09/30/2020

Check One: <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input checked="" type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other		DBA or Tradename if Applicable	
Business Legal Name			
SHC MEDICAL CENTER TOPPENISH DBA ASTRIA TOPPENISH HOSPITAL			
Business Address		Business TIN (EIN, SSN)	Business Phone
502 W. 4TH AVE		81-4670687	(509) 837-1641
Toppenish, WA 98948		Primary Contact	Email Address
		Sandra Cortez	Sandra.cortez@astria-health
Average Monthly Payroll:	\$ 1,130,622.00	x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request:	\$ 2,826,556.00
Purpose of the loan (select more than one):		<input checked="" type="checkbox"/> Payroll <input checked="" type="checkbox"/> Lease / Mortgage Interest <input checked="" type="checkbox"/> Utilities <input type="checkbox"/> Other (explain):	

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address
N/A 501(c)3				

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input checked="" type="checkbox"/>

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

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Paycheck Protection Program Borrower Application Form

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

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

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

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

- CR The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.
- CR Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
- CR The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.
- CR The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.
- CR I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.
- CR During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.
- CR I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects; I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- CR I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Cary Rowan
Signature of Authorized Representative of Applicant

4-17-2020

Date

Cary Rowan
Print Name

CFO
Title

DocuSign Envelope ID: 3D3FB801-F15D-4C29-A5AA-AA8686A7C0F8



Paycheck Protection Program Borrower Application Form

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to "purpose of the loan," payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating "Average Monthly Payroll," most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as "principals":

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to: Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503.

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies' function. *See*, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

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

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial

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Paycheck Protection Program Borrower Application Form

institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guaranty, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

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

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

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

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

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Exhibit H

(Astria Home Health Application)

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

1
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2104

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Business Name: YAKIMA HMA HOME HEALTH LLC dba ASTRIA HOME HEALTH & HOSPICE-YAKIMA
Loan Application #: 10549

IMPORTANT INFORMATION ABOUT PROVIDING KNOW YOUR CUSTOMER (KYC) IDENTIFYING INFORMATION

To help the government fight the funding of terrorism and money laundering activities, U.S. Federal law requires all financial institutions to maintain a sufficient KYC program. This requires Banner Bank to obtain, verify, and record information that identifies each person who maintains a customer relationship with Banner Bank. Persons include individuals and legal entities, such as corporations, limited liability companies, partnerships, or trusts.

What this means for you:

- When you open or maintain an account with Banner Bank, we will ask for information such as your name, physical address, date of birth (for individuals), and other information that will allow us to identify you and understand your account relationship.
- We may also ask to see your driver's license or other identifying documents.
- We may also obtain information from a consumer reporting agency, public database, or other source.

Important Information for our California Residents:

To learn about specific privacy rights for California residents, please review the California Consumer Privacy Act Notice at www.bannerbank.com/privacy-policy. A printed copy is available upon request.

Your cooperation will be truly appreciated!

Additional Applicant Questions:

Do you receive income from the production, distribution, or sale of Marijuana?	NO
Do you intend to accept or transact using Cryptocurrency (such as Bitcoin)?	NO

KYC Customer Notice

Member FDIC



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Paycheck Protection Program Borrower Application Form

 OMB Control No.: 3245-0407
 Expiration Date: 09/30/2020

Check One: <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input checked="" type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other		DBA or Tradename if Applicable	
Business Legal Name			
Yakima HMA Home Health, LLC			
Business Address		Business TIN (EIN, SSN)	Business Phone
7 S 10th Avenue		27-0173556	() 837 - 1641
Yakima, WA 98902575		Primary Contact	Email Address
		Sandra Cortez	sandra.cortez@astria.health

Average Monthly Payroll:	\$ 188,190.00	x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request:	\$ 471,975.00	Number of Employees:	24
Purpose of the loan (select more than one):					
<input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Lease / Mortgage Interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain):					

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address
Yakima Home Care Holdings, LLC		100%	81-3825537	1806 Yakima Valley Hwy, Sunnyside, WA 98944

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A. Owned by Astria Health	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input checked="" type="checkbox"/>

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

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Paycheck Protection Program Borrower Application Form

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

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

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

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

- CR The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.
- CR Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
- CR The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.
- CR The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.
- CR I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.
- CR During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.
- CR I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- CR I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Cary Rowan

Signature of Authorized Representative of Applicant

: Cary Rowan

Print Name

4-17-2020

Date

CFO

Title

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Paycheck Protection Program Borrower Application Form

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to "purpose of the loan," payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating "Average Monthly Payroll," most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as "principals":

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to: Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503.

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

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

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial

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Paycheck Protection Program Borrower Application Form

institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

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

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

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Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

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Exhibit I

(April 21, 2020 E-mail from Ms. Ibarra)

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

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DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2104

Sandra L. Cortez

From: Cece Ibarra <CIbarra@bannerbank.com>
Sent: Tuesday, April 21, 2020 12:33 PM
To: Sandra L. Cortez
Subject: {[*EXTERNAL*]}Loans

Hi Sandra,

Did you get an email on the loans? It looks like the bankruptcy is going to prevent you from qualify for the loans this would apply to any entity that was included in the bankruptcy. But an email should come if it hasn't already. Sorry ☹️ I personally think that if someone deserves this loan is the Hospitals. But that's an SBA rule.



www.bannerbank.com

Cece Ibarra
Vice President
Sunnyside Branch Manager
NMLS# 610014
Office: 509-837-8008
E-mail cibarra@bannerbank.com

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please do not read, copy or re-transmit this communication and destroy any copies. Transmission or use of this information by an unintended recipient is unauthorized, may be illegal, and shall not be deemed a waiver of any privilege (including attorney-client privilege).

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Exhibit J

(Fourth Interim Rule)

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

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DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2104



23450

Federal Register / Vol. 85, No. 82 / Tuesday, April 28, 2020 / Rules and Regulations

SMALL BUSINESS ADMINISTRATION

[Docket Number SBA–2020–0021]

13 CFR Parts 120 and 121

RIN 3245–AH37

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility**AGENCY:** U.S. Small Business Administration.**ACTION:** Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). The Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, and April 14, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. SBA requests public comment on this additional guidance.

DATES: *Effective date:* This rule is effective April 28, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before May 28, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0021 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the

final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:**I. Background Information**

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public’s exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America’s small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the

30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders’ and borrowers’ need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on several important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 28, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility*Overview*

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), and a third interim final rule (the Third PPP Interim Final Rule) (85 FR 21747) (collectively, the PPP Interim Final Rules).

1. Requirements for Promissory Notes and Authorizations

This guidance is substantively identical to previously posted FAQ guidance.

a. Are lenders required to use a promissory note provided by SBA or may they use their own?

Lenders may use their own promissory note or an SBA form of promissory note. See FAQ 19 (posted April 8, 2020).

b. Are lenders required to use a separate SBA Authorization document to issue PPP loans?

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form—Paycheck Protection Program Loan Guaranty)¹ to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. See FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

2. Clarification Regarding Eligible Businesses

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan. The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.² However, in addition to applying any applicable affiliation rules, all borrowers should

carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

c. Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

d. Part III.2.b. of the Third PPP Interim Final Rule (85 FR 21747, 21751) is revised to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

3. Business Participation in Employee Stock Ownership Plans

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business’s participation in an ESOP (as defined in 15 U.S.C. 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that was used to buy stock) to the plan for the benefit of the company’s employees. The plan maintains an account for each employee participating in the plan. Shares of stock vest over time before an

employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

4. Eligibility of Businesses Presently Involved in Bankruptcy Proceedings

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

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

The Administrator, in consultation with the Secretary, 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. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant’s representation concerning the applicant’s or an owner of the applicant’s involvement in a bankruptcy proceeding.

5. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate

¹ This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

² However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

6. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9.

Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator.

[FR Doc. 2020–09098 Filed 4–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0095; Product Identifier 2019–NM–192–AD; Amendment 39–19904; AD 2020–08–12]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–8 and 747–8F series airplanes. This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the skin lap joints at certain stringers are subject to widespread fatigue damage (WFD). This AD requires modifying the left and right side lap joints of the fuselage skin, repetitive post-modification inspections for cracking, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 2, 2020. The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 2, 2020.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet <https://www.myboeingfleet.com>. You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2020–0095.

Examining the AD Docket

You may examine the AD docket on the internet at <https://>

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Exhibit K

(May 6, 2020 Notice to Toppenish)

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

1
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BUSH KORNFIELD LL
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May 6, 2020

Cary Rowan

502 W. 4TH AVE
TOPPENISH, WA 98948

RE: Your Application for a SBA Paycheck Protection Program (PPP) Loan

Dear Cary Rowan

Thank you for your application for a Small Business Administration (SBA) Paycheck Protection Program (PPP) loan. We regret to inform you that we are unable to approve your request because:

Borrower does not meet SBA eligibility criteria

If you have any questions regarding this notice please contact us at:

Banner Bank
10 S. First Avenue
PO Box 907
Walla Walla, WA 99362

800-272-9933 (Monday – Friday, 7am – 7pm Pacific Time)

Sincerely,

Banner Bank SBA Lending Team

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

Loan Application #10556
PPPA-420

Banner Bank • PO Box 907 • Walla Walla, WA 99362 • 800-272-9933
• Equal Housing Lender • Member FDIC





Certificate Of Completion

Envelope Id: 612138D9F97F485EB2B3B0795DE71D33		Status: Delivered
Subject: Important Information About Your PPP Loan Application		
Source Envelope:		
Document Pages: 1	Signatures: 0	Envelope Originator:
Certificate Pages: 4	Initials: 0	Banner SBA PPP Loan Applications
AutoNav: Enabled		BannerSBAPPPLoanApplications@bannerbank.com
EnvelopeId Stamping: Enabled		IP Address: 12.129.12.97
Time Zone: (UTC-08:00) Pacific Time (US & Canada)		

Record Tracking

Status: Original	Holder: Banner SBA PPP Loan Applications	Location: DocuSign
5/6/2020 7:38:10 PM	BannerSBAPPPLoanApplications@bannerbank.com	

Signer Events

Signature	Timestamp
Cary Rowan	Sent: 5/6/2020 7:38:11 PM
cary.rowan@astria.health	Viewed: 5/7/2020 7:09:24 AM
Security Level: Email, Account Authentication (None)	

Electronic Record and Signature Disclosure:
 Accepted: 5/7/2020 7:09:24 AM
 ID: aafbe7bb-799a-4eb0-ab8f-7bc2574f24dd

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	Status	Timestamp
Agent Delivery Events	Status	Timestamp
Intermediary Delivery Events	Status	Timestamp
Certified Delivery Events	Status	Timestamp
Carbon Copy Events	Status	Timestamp
Witness Events	Signature	Timestamp
Notary Events	Signature	Timestamp
Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	5/6/2020 7:38:11 PM
Certified Delivered	Security Checked	5/7/2020 7:09:24 AM
Payment Events	Status	Timestamps
Electronic Record and Signature Disclosure		

ELECTRONIC RECORD AND SIGNATURE DISCLOSURE

From time to time, Banner Bank (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through the DocuSign system. Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to this Electronic Record and Signature Disclosure (ERSD), please confirm your agreement by selecting the check-box next to 'I agree to use electronic records and signatures' before clicking 'CONTINUE' within the DocuSign system.

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At any time, you may request from us a paper copy of any record provided or made available electronically to you by us. You will have the ability to download and print documents we send to you through the DocuSign system during and immediately after the signing session and, if you elect to create a DocuSign account, you may access the documents for a limited period of time (usually 30 days) after such documents are first sent to you. After such time, if you wish for us to send you paper copies of any such documents from our office to you, you will be charged a \$0.00 per-page fee. You may request delivery of such paper copies from us by following the procedure described below.

Withdrawing your consent

If you decide to receive notices and disclosures from us electronically, you may at any time change your mind and tell us that thereafter you want to receive required notices and disclosures only in paper format. How you must inform us of your decision to receive future notices and disclosure in paper format and withdraw your consent to receive notices and disclosures electronically is described below.

Consequences of changing your mind

If you elect to receive required notices and disclosures only in paper format, it will slow the speed at which we can complete certain steps in transactions with you and delivering services to you because we will need first to send the required notices or disclosures to you in paper format, and then wait until we receive back from you your acknowledgment of your receipt of such paper notices or disclosures. Further, you will no longer be able to use the DocuSign system to receive required notices and consents electronically from us or to sign electronically documents from us.

All notices and disclosures will be sent to you electronically

Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through the DocuSign system all required notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. Thus, you can receive all the disclosures and notices electronically or in paper format through the paper mail delivery system. If you do not agree with this process, please let us know as described below. Please also see the paragraph immediately above that describes the consequences of your electing not to receive delivery of the notices and disclosures electronically from us.

How to contact Banner Bank:

You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

To contact us by email send messages to: bannerbank@bannerbank.com

To advise Banner Bank of your new email address

To let us know of a change in your email address where we should send notices and disclosures electronically to you, you must send an email message to us at bannerbank@bannerbank.com and in the body of such request you must state: your previous email address, your new email address. We do not require any other information from you to change your email address.

If you created a DocuSign account, you may update it with your new email address through your account preferences.

To request paper copies from Banner Bank

To request delivery from us of paper copies of the notices and disclosures previously provided by us to you electronically, you must send us an email to bannerbank@bannerbank.com and in the body of such request you must state your email address, full name, mailing address, and telephone number. We will bill you for any fees at that time, if any.

To withdraw your consent with Banner Bank

To inform us that you no longer wish to receive future notices and disclosures in electronic format you may:

- i. decline to sign a document from within your signing session, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;
- ii. send us an email to bannerbank@bannerbank.com and in the body of such request you must state your email, full name, mailing address, and telephone number. We do not need any other information from you to withdraw consent.. The consequences of your withdrawing consent for online documents will be that transactions may take a longer time to process..

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The minimum system requirements for using the DocuSign system may change over time. The current system requirements are found here: <https://support.docusign.com/guides/signer-guide-signing-system-requirements>.

Acknowledging your access and consent to receive and sign documents electronically

To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclosures that we will provide to you, please confirm that you have read this ERSD, and (i) that you are able to print on paper or electronically save this ERSD for your future reference and access; or (ii) that you are able to email this ERSD to an email address where you will be able to print on paper or save it for your future reference and access. Further, if you consent to receiving notices and disclosures exclusively in electronic format as described herein, then select the check-box next to 'I agree to use electronic records and signatures' before clicking 'CONTINUE' within the DocuSign system.

By selecting the check-box next to 'I agree to use electronic records and signatures', you confirm that:

- You can access and read this Electronic Record and Signature Disclosure; and
- You can print on paper this Electronic Record and Signature Disclosure, or save or send this Electronic Record and Disclosure to a location where you can print it, for future reference and access; and
- Until or unless you notify Banner Bank as described above, you consent to receive exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you by Banner Bank during the course of your relationship with Banner Bank.

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HONORABLE WHITMAN L. HOLT

Hearing Date: May 19, 2020

Time: 11 a.m.

**Location: U.S. Bankruptcy Court,
 402 E. Yakima Avenue,
 Second Floor Courtroom,
 Yakima, WA**

Telephonic Access

Phone Number: 1-877-402-9757

Conference Code: 7036041

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Attorneys for Defendants

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

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
 Possession.¹

Chapter 11

Lead Case No. 19-01189-11

Jointly Administered

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

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).

MOTION FOR TRO

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1 Astria Health, *et al.*,

2 Plaintiffs,

3 v.

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

6 Defendants.

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND
REQUEST FOR HEARING AND
BRIEFING SCHEDULE WITH
RESPECT TO THE DEBTORS'
REQUEST FOR A PRELIMINARY
INJUNCTION; DECLARATION OF
JOHN M. GALLAGHER IN
SUPPORT THEREOF**

7
8 Astria Health and the related debtors and debtors-in-possession (collectively,
9 the “Debtors”) in the above-captioned Chapter 11 bankruptcy cases (collectively,
10 the “Chapter 11 Cases”), hereby file this motion (the “Motion”) requesting that the
11 Court grant temporary injunctive relief under §§ 105 and 106 of the United States
12 Bankruptcy Code, 11 U.S.C. §§ 101-1530 *et seq.* (the “Bankruptcy Code”)² and
13 Bankruptcy Rule 7065(b), enjoining Defendant United States Small Business
14 Administration (the “SBA”) acting through Defendant Jovita Carranza in her
15 capacity as the Administrator of the SBA(the “Administrator”, and together with
16 the SBA, the “Defendants”), and all agents, servants, employees, and any parties
17 acting in concert with any of the foregoing (the “Restrained Parties”), from:

18
19 ² Unless specified otherwise, all chapter, “§” and section references are to the
20 Bankruptcy Code, 11 U.S.C. § 101-1532 and all “ Bankruptcy Rule” references are
21 to the Federal Rules of Bankruptcy Procedure.

MOTION FOR TRO

2

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1 (A) Denying or causing a commercial lender to deny an application of the
 2 Debtors under the Paycheck Protection Program (“PPP”) on the basis that the
 3 applicant is a debtor in bankruptcy or based on the words “presently involved in
 4 any bankruptcy” on the Administrator’s PPP application form;

5 (B) Refusing to guaranty a forgivable PPP loan sought by the Debtors on
 6 the basis that the applicant is a debtor in bankruptcy or because of a “yes” in
 7 response to Question 1 on the official form of application for PPP; and

8 (C) Authorizing, guarantying, or disbursing funds appropriated for loans
 9 under PPP without reserving sufficient funds or guaranty authority to provide the
 10 Debtors with access to PPP funds if the Debtors are eligible once the words
 11 “presently involved in any bankruptcy” are stricken from the official PPP
 12 application form.

13 The Debtors further request that the temporary restraining order remain in
 14 effect for no fewer than fourteen (14) calendar days and that the Court set an
 15 expedited hearing and briefing schedule with respect to the Debtors’ request for a
 16 preliminary injunction substantially similar to the temporary restraining order
 17 requested by this Motion.

INTRODUCTION

This adversary proceeding arises out of Banner Bank's denial, at the direction of the SBA acting through the Administrator, of two of the Debtors' applications for loans under the Paycheck Protection Program ("PPP") because the applicants are debtors in bankruptcy. The denial of the Debtors' PPP applications solely based on the Debtors' status as debtors in bankruptcy is a violation of § 525(a). As explained herein, the first tranche of PPP funding was quickly exhausted, and Congress recently enacted legislation making additional PPP funds available on a first come, first serve basis. The PPP funds will further the Debtors' reorganization efforts and, thus, the Debtors have commenced this adversary proceeding to ensure their PPP applications will be processed before the second tranche of PPP funds is exhausted.

If the goal of the PPP is to help small businesses survive economic hardships caused by the Novel Coronavirus ("Covid-19") pandemic through funding payroll costs, rent, interest and utilities during the initial shelter-in-place period, then it is illogical to require those businesses -- particularly hospitals on the "front lines" of treating patients -- to be excluded because they are in bankruptcy. In the words of Bankruptcy Judge Jones from the United States Bankruptcy Court for the Southern District of Texas on April 24, 2020: "But this can't be what Congress intended. This can't be the way we are supposed to treat our fellow man in this time. It's inconceivable to me that this distinction [between a borrower in bankruptcy and one

MOTION FOR TRO

1
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1 not in bankruptcy] could be drawn.” See *Hildago Country Emergency Service*
 2 *Foundation v. Carranza*, hearing transcript, attached hereto as **Exhibit A**, at p. 32,
 3 lines 14-17.

4 Accordingly, the Debtors request that the Court enter a temporary restraining
 5 order to permit the Debtors to submit their applications for PPP funds without being
 6 discriminated against on the basis of their status as chapter 11 debtors and to ensure
 7 PPP does not run out of money before the applications can be processed. To be
 8 clear, the Debtors do not request the Court determine that the Debtors are entitled to
 9 funds under PPP or that any application of the Debtors meets the relevant criteria
 10 for participation in PPP. Rather, the Debtors seek a chance to participate in this
 11 important government program so that they can have the same assistance in
 12 surviving the financial devastation caused by the Covid-19 pandemic that other
 13 companies outside of bankruptcy have, without depletion of available funds that
 14 have been spent during the time while the Debtors have been unable to access PPP
 15 due to discrimination in violation of § 525(a).

16 **JURISDICTION, VENUE, AND STATUTORY BASIS FOR RELIEF**

17 This Court has jurisdiction over this adversary proceeding pursuant to 28
 18 U.S.C. §§ 157(a) and 1334(B), pursuant to which all cases under the Bankruptcy
 19 Code and all proceedings arising in or related to cases arising under the Bankruptcy
 20 Code are automatically referred to this Court.

21 Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a

1 core proceeding. 28 U.S.C. § 157(b)(2). This Motion is brought pursuant to Rule
 2 65 of the Federal Rules of Civil Procedure, which is applicable to this adversary
 3 proceeding pursuant of Bankruptcy Rule 7065. The Debtors consent to entry of
 4 final orders by this Court in this adversary proceeding.

5 **STATEMENT OF FACTS**

6 **A. General Background**

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

12 2. Astria Health, a Washington nonprofit corporation, is the direct or
 13 indirect corporate member of several entities that make it the largest non-profit
 14 healthcare system based in Eastern Washington. The Astria system is
 15 headquartered in the heart of Yakima Valley, Washington, with hospitals in
 16 Yakima, Sunnyside, and Toppenish, Washington.

17 3. Currently, the Astria system includes two operating hospitals: a 38-bed
 18 critical access hospital in Sunnyside, Washington; and a 63-bed hospital in
 19 Toppenish, Washington (SHC Medical Center - Toppenish or “Toppenish”). The
 20 Debtors also operate several related clinics and related healthcare businesses such
 21 as Yakima HMA Home Health, LLC doing business as Astria Home Health &

1 Hospice-Yakima (“Astria Home Health”), which provides at-home medical care
2 and medical care to those living in assisted living facilities.

3 4. On May 24, 2019, the Office of the United States Trustee (the “U.S.
4 Trustee”) appointed an Official Committee of Unsecured Creditors (the
5 “Committee”) in these Chapter 11 Cases. [Lead Docket No. 135]. No trustee or
6 examiner has been appointed.

7 5. Additional background facts on the Debtors, including an overview of
8 the Debtors’ business, information on the Debtors’ capital structure, and events
9 leading up to these Chapter 11 Cases, are contained in the *Declaration of John M.*
10 *Gallagher in Support of Emergency First Day Motions* [Lead Docket No. 21].

11 **B. Facts Relevant to the Motion**

12 6. A significant portion of the Debtors’ revenue is derived from
13 outpatient procedures offering a wide range of medical services to patients. Based
14 on recommendations from the federal Centers for Disease Control³ and an order by

15 _____
16 ³ See, e.g., Centers for Disease Control and Prevention, Coronavirus Disease 2019
17 (COVID-19) Healthcare Facility Guidance, *available at*
18 [https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-](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)
19 [hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F](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)
20 [2019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html) (last visited on May 14,
21 2020).

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1 the Governor of the State of Washington,⁴ as a result of the Covid-19 pandemic the
 2 Debtors have postponed nonessential elective medical procedures. Declaration of
 3 John M. Gallagher in Support of the Motion (the “Gallagher Declaration”), ¶ 4.
 4 Only essential urgent and emergency procedures, that if delayed would cause harm,
 5 are still being provided. *Id.* This has and continues to have a significant negative
 6 impact on the Debtors’ cash position.⁵ *Id.*

7
 8 ⁴ See Proclamation by the Governor of the State of Washington 20-24 entitled
 9 *Restrictions on Non Urgent Medical Proceedings*, available at
 10 [https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-](https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-19%20non-urgent%20medical%20procedures%20(tmp).pdf)
 11 [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
 12 14, 2020) (prohibiting all hospitals from “providing health care services, procedures
 13 and surgeries that, if delayed, are not anticipated to cause harm to the patient within
 14 the next three months”).

15 ⁵ The Debtors are not alone in suffering significant financial impact from foregoing
 16 elective surgeries and other repercussions of the pandemic. “Hospitals across the
 17 U.S. are losing more than \$1 billion in daily revenue as they experience significant
 18 declines in patient volume during the COVID-19 pandemic, according to a [report](#)
 19 from Crowe, a public accounting, consulting and technology company.” Ayla
 20 Ellison, *US hospitals losing \$1.4B in revenue per day*, Becker’s Hospital CFO
 21 Report, available at <https://www.beckershospitalreview.com/finance/us-hospitals->

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1 7. On or about March 27, 2020, Congress enacted and the President
2 signed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES
3 Act”), Public Law 116-136.⁶

4 8. The CARES Act included stimulus funds designed to assist businesses,
5 including 501(c)(3) nonprofits, and to ensure that American workers continue to be
6 paid despite the economic impact of Covid-19 and social distancing measures.

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

12 [losing-1-4b-in-revenue-per-](#)
13 [day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=20](#)
14 [04C5404478F9G](#) (last visited on May 14, 2020).

15 ⁶ A full text of the CARES Act can be found at
16 <https://www.govtrack.us/congress/bills/116/hr748/text> (last visited on May 14,
17 2020).

18 ⁷ Funds not used in conformity with this ratio would be required to be repaid, but at
19 a low, fixed interest rate, with payments deferred for up to a year. *See* § 1102(g) of
20 the CARES Act.
21

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1 10. A qualified borrower may receive PPP funds equal to two and a half
2 (2.5) times its average monthly payroll, up to a limit of \$10 million. A borrower
3 need not exhaust its other credit options prior to receiving PPP funds.

4 11. A party can obtain funds under PPP by applying with any federally
5 insured participating lender using an application form created by the SBA, and the
6 SBA guaranties the loan.

7 12. The entire purpose of the program is to provide grants to companies in
8 order to ensure that workers can be paid. The CARES Act specifically waives all
9 underwriting considerations under § 7(a) of the Small Business Act, including but
10 not limited to, underwriting requirements, collateral review, or loan covenants.
11 There is no evaluation of risk because there is no expectation of repayment,
12 provided funds are used for permitted purposes. All small businesses have a right
13 to apply for PPP funds.

14 13. Section 1114 of the CARES Act grants the SBA emergency rule
15 making authority and charges the SBA to issue regulations to carry out certain of
16 the programs contemplated in the CARES Act, including PPP.

17 14. On April 2, 2020, the SBA and the Administrator issued an interim
18 final rule (the “First Interim Rule”) providing guidance on, *inter alia*, the eligibility
19 requirements to receive funds under PPP. The First Interim Rule adopts the
20 eligibility standards contained in 13 CFR § 120.110, as further described in the
21 SBA’s Standard Operating Procedure 50-10, subpart B, Chapter 2 (the “SOP 50-

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10”). *See* First Interim Rule, 2(c) (“Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA’s Standard Operating Procedure”).

15. The SOP 50-10 provides that in order to be eligible for a small business loan, an applicant must: “be an operating business;” “be organized for profit;”⁸ “be located in the United States (including its territories and possessions);” “be small under SBA size requirements;” and “demonstrate the need for desired credit.” *See* SOP 50-10, pp. 91-104.

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

17. The First Interim Rule also 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).”

18. The First Interim Rule contains no explicit or implicit exclusion for debtors. The SBA and the Administrator published the First Interim Rule on April

⁸ The CARES Act has been extended to 501(c)(3) nonprofits.

1 15, 2020.⁹

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

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

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

17 ⁹ Available at [https://www.sba.gov/sites/default/files/2020-](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf)
18 [04/PPP%20Interim%20Final%20Rule_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) (last visited on May 14, 2020).

19 ¹⁰ Available at [https://www.sba.gov/sites/default/files/2020-](https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf)
20 [04/PPP%20Borrower%20Application%20Form.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf) (last visited on May 14, 2020).
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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”).

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

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

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

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1 motivated by this concern. On April 20, 2020, the SBA and the Administrator
2 published the Third Interim Rule.

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

12 26. As early as April 3, 2020, the Debtors considered submitting an
13 application for PPP funds; however, they were informed such application would be
14 denied because of their status as debtors in bankruptcy. Gallagher Declaration, ¶ 5.

15 27. PPP funds are available on a first come, first served basis. The first
16 tranche of PPP funding was completely exhausted on April 16, 2020. Congress
17 subsequently provided more funds, but the PPP ends June 30, 2020 or when the
18 Program funds are exhausted, whichever comes first.¹¹

19 _____
20 ¹¹ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill.*

21 *What's In It For Small Businesses?, available at*

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28. In anticipation of additional PPP funding, on April 17, 2020, Debtors Toppenish and Astria Home Health submitted PPP applications (the “Toppenish Application” and the “Astria Home Health Application”, respectively, and together the “Applications”) to their commercial lender, Banner Bank. Copies of the Applications are attached as **Exhibit B**.

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

30. Based on an average monthly payroll of \$188,790.00 for its 24 employees, the Astria Home Health Application requests a total of \$471,975.00, to be used solely for payroll purposes.

31. The Debtors sized their request for PPP funds to ensure that the funds would be treated as a grant and be forgivable. Gallagher Declaration, ¶ 9. To the extent any portion of the funds requested by the Debtors would exceed the amount to be forgiven, the Debtors intend to immediately repay that amount. *Id.* The Debtors also intend to use the PPP funds in such a manner that they would be eligible for forgiveness under the PPP. *Id.*

<https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a> (last visited on May 14, 2020).

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1 32. The Debtors truthfully answered “yes” to question 1 on the
2 Applications.

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

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

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

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

1 disbursed, the applicant is ineligible to receive a PPP loan.” The stated basis for
 2 this rule is that the Administrator “determined that providing PPP loans to debtors
 3 in bankruptcy would present an unacceptably high risk of an unauthorized use of
 4 funds or non-repayment of unforgiven loans.” A copy of this Fourth Interim Rule
 5 is attached hereto as **Exhibit D**. The SBA and the Administrator published the
 6 Fourth Interim Rule on April 28, 2020.¹²

7 37. After receiving no official denial from Banner Bank or the SBA, on or
 8 about April 30, 2020, the Debtors’ President and Chief Executive Officer, John
 9 Gallagher (“Mr. Gallagher”), spoke to Ms. Ibarra, who again stated that it was the
 10 SBA’s rule that entities like the Debtors who were in bankruptcy were ineligible for
 11 PPP funds. Gallagher Declaration, ¶ 12. Ms. Ibarra also informed Mr. Gallagher
 12 that denial letters were not being sent because the focus was on processing eligible
 13 applications. *Id.*

14 38. On May 6, 2020, the Debtors received an official notice (the “May 6,
 15 2020 Notices”) that Banner Bank was unable to approve the Debtors’ Applications

16
 17
 18 ¹² Available at [https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-](https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf)
 19 [Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf](https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf)
 20 (last visited on May 14, 2020).
 21

1 because the Debtors “do[] not meet SBA eligibility criteria.”¹³ A true and correct
 2 copy of the May 6, 2020 Notice is attached hereto as **Exhibit E**.

3 39. Toppenish and Astria Home Health are eligible borrowers under PPP
 4 and seek to ensure adequate funds are available under the second tranche of PPP
 5 funding once their discrimination claim under § 525(a) is resolved and the Debtors’
 6 request for PPP funding is processed and the deadline for any and all administrative
 7 and judicial remedies has expired.

8 40. The Debtors understand that Banner Bank is willing to advance funds
 9 through the PPP if the Applications (or a subsequently amended applications) can
 10 be processed and approved as meeting SBA’s criteria. Gallagher Declaration, ¶ 15.

11 41. The Fourth Interim Rule had not been proposed at the time Toppenish
 12 and Astria Home Health submitted their Applications or when the SBA and the

13 _____
 14 ¹³ The Debtors actually received two identical notices, both for Toppenish. The
 15 Debtors believe this was in error and that Banner Bank intended that one of the
 16 notices be in regards to Astria Home Health. The Debtors have asked for
 17 confirmation from Banner Bank that the second notice was intended for Astria
 18 Home Health, but as of the date of filing have received no answer. Nevertheless, the
 19 Debtors were informed orally that the Astria Home Health Application was denied.
 20 Gallagher Declaration, ¶¶ 12, 13. The Debtors will supplement this filing with an
 21 exhibit of the notice as soon as they receive it.

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

8 42. Access to the PPP funds is important to further the Debtors’
 9 restructuring efforts. Also, the second tranche of PPP funds is expected to be
 10 depleted quickly and will not be replenished once exhausted. Thus, if a temporary
 11 restraining order is not entered to ensure the Debtors’ access to the second tranche
 12 of PPP funds, those funds most likely will no longer be available to the Debtors
 13 once the adversary proceeding concludes. This would cause irreparable harm to the
 14 Debtors’ ability to obtain PPP funds and would negatively impact their ability to
 15 maintain healthcare offerings to the surrounding community and reorganize.
 16 Gallagher Declaration, ¶ 15.

17 43. On or about the same date that this Motion was filed, the Debtors filed
 18 a Verified Complaint against the SBA and the Administrator seeking preliminary
 19 and permanent injunctions and declaratory relief. The contents of the Verified
 20 Complaint are incorporated by reference herein. The Debtors’ President and Chief
 21 Executive Officer, John Gallagher, signed the verification included with the

1 Verified Complaint.

2 44. On the same date that this Motion was filed, the Debtors served a copy
3 of the Verified Complaint and this Motion on the SBA and the Administrator, her
4 district director for the District of Washington, and the federal government as
5 follows:

6 Jovita Carranza
U.S. Small Business Administration
409 3rd Street S.W.
7 Washington, D.C. 20416

8 Kerrie Hurd
U.S. Small Business Administration
2401 4th Ave., Suite 450
9 Seattle, WA 98121

10 William D. Hyslop
U.S. Attorney
Eastern District of Washington
11 Attn: First Assistant, AUSA, Joseph H. Harrington
Attn: Civil Chief, AUSA Timothy M. Durkin
12 Attn: Civil Process Clerk
Office of the U.S. Attorney
13 402 E Yakima Ave, Suite 210
Yakima, WA 98901

14 Attorney General of the United States
Attn: Civil Process
15 U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
16 Washington, D.C. 20530-0001

17 45. Additionally, a copy of the Verified Complaint and this Motion were
18 sent by e-mail to the following individuals:

19 Ruth Harvey
Director
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21 **MOTION FOR TRO**

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5 **RELIEF REQUESTED**

6 The Debtors request entry of a temporary restraining order granting the relief
7 requested in the form of the order filed with this Motion and as described in the
8 introductory paragraph to this Motion. This relief is requested pursuant to Rule 65
9 of the Federal Rules of Civil Procedure, which is applicable to this adversary
10 proceeding pursuant to Bankruptcy Rule 7065.

11 **BASIS FOR RELIEF**

12 Under Rule 65 of the Federal Rules of Civil Procedure, the Court has
13 authority to issue a temporary restraining order until such time as a hearing can be
14 held on a motion for a preliminary injunction.

15 The court may issue a temporary restraining order on an *ex parte* basis if:

16 (A) specific facts in an affidavit or a verified complaint clearly
show that immediate and irreparable injury, loss, or damage will result
17 to the movant before the adverse party can be heard in opposition; and

18 (B) the movant's attorney certifies in writing any efforts made to
give notice and the reasons why it should not be required.

19 Fed. R. Civ. P. 65(b)(1); Fed. R. Bankr. P. 7065.

20 Rule 65(b)(2) provides as follows:

21 Every temporary restraining order issued without notice must
state the date and hour it was issued; describe the injury and state why

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1 it is irrenarable: state whv the order was issued without notice: and he
 2 promptly filed in the clerk's office and entered in the record. The
 3 order expires at the time after entry—not to exceed 14 days—that the
 4 court sets, unless before that time the court, for good cause, extends it
 5 for a like period or the adverse party consents to a longer extension.
 6 The reasons for an extension must be entered in the record.

7 “The standard to obtain a temporary restraining order is the same as that to
 8 obtain a preliminary injunction.” *Zango, Inc. v. PC Tools Pty Ltd.*, 494 F. Supp. 2d
 9 1189, 1194 (W.D. Wash. 2007) (citing *Graham v. Teledyne-Continental Motors,*
 10 *Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (9th Cir.1986)).

11 Under the traditional standard, the Court may issue a preliminary injunction
 12 if it determines that the following four factors weigh in the Debtors' favor: (1) the
 13 moving party will probably prevail on the merits; (2) the moving party will suffer
 14 immediate and irreparable injury if the relief is denied; (3) the balance of potential
 15 harm favors the moving party; and, depending on the nature of the case, (4) the
 16 public interest favors granting relief. *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*,
 17 4 F.3d 819, 822 (9th Cir. 1993) (citing *Cassim v. Bowen*, 824 F.2d 791, 795 (9th
 18 Cir. 1987); *Zepeda et al. v. United States Immigration & Naturalization Serv.*, 753
 19 F.2d 719, 727 (9th Cir. 1983)). The Ninth Circuit has also adopted an “alternative
 20 standard” where a party is entitled to a preliminary injunction if it demonstrates
 21 either: (1) a combination of probable success on the merits and the possibility of
 irreparable injury; or (2) that serious questions are raised and the balance of
 hardships tips sharply in its favor. *Rent-A-Center, Inc. v. Canyon Television and*
Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir. 1991). These two tests are not

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1 mutually exclusive, but are alternate tests in a single continuum. *Sterling Savings*
 2 *Assoc. v. Ryan*, 751 F. Supp. 871, 876 (E.D. Wa. 1990).

3 The Debtors satisfy either test here and the Court should grant the temporary
 4 restraining order requested by this Motion. As of this filing, at least four
 5 bankruptcy courts have granted temporary restraining orders in favor of debtors that
 6 were denied access to funds under PPP—and similar requests are pending before
 7 different bankruptcy courts.¹⁴ *See Hidalgo County Emergency Service Foundation*,
 8 Adv. No. 20-2006, [Dkt. 11] (Bankr. S.D. Tex. Apr. 24, 2020); *In re Penobscot*
 9 *Valley Hosp.*, Adv. No. 20-1005 (MAF) [Dkt. 18] (Bankr. D. Me. May 1, 2020); *In*
 10 *re Calais Reg'l Hosp.*, Adv. No. 20-1006 (MAF) [Dkt. 21] (Bankr. D. Me. May 1,
 11 2020); *n re Roman Catholic Church of the Archdiocese of Santa Fe*, 2020 Bankr.

12 ¹⁴ The Debtors note that three courts have denied motions for temporary restraining
 13 orders in favor of debtors that were denied access to funds under PPP. *See Cosi*,
 14 *Inc. v. U.S. Small Bus. Admin. (In re Cosi, Inc.)*, No. 20-50591 (BLS) [minute
 15 entry] (Bankr. D. Del. Apr. 30, 2020); *Asteria Educ., Inc. v. Carranza (In re Asteria*
 16 *Educ., Inc.)*, No. 20-05024 (CAG) [minute entry] (Bankr. W.D. Tex. Apr. 30,
 17 2020); and *J-H-J, Inc. et al v. Carranza et al (In re J-H-J, Inc.)*, No. 20-05014
 18 [minute entry] (Bankr. W.D. La. May 12, 2020). However, for the reasons
 19 discussed in this Motion, the Debtors contend those decisions were wrongly
 20 decided.

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1 LEXIS 1211, Adv. No. 20-1026 (DTT) [Dkt. 15] (Bankr. D. N.M. May 1, 2020); *In*
 2 *re Springfield Hosp., Inc.*, 2020 Bankr. LEXIS 1205, Adv. No. 20-01003 (CAB)
 3 [Dkt. 20] (Bankr. D. Vt. May 4, 2020).

4 **A. The Debtors Are Likely to Succeed on the Merits.**

5 *i. The Administrator Impermissibly Exceeded the Scope of Her Authority*

6 The Administrator has impermissibly exceeded the scope of her authority by
 7 excluding debtors from participating in PPP, a forgivable loan program. Nothing in
 8 the CARES Act mandates or authorizes exclusion of debtors from PPP—and, in the
 9 absence of clear legislative intent to exclude debtors, the only conclusion to draw
 10 from the bankruptcy text on the PPP application form or the related provision in the
 11 Fourth Interim Rule is that the Administrator is discriminating against debtors.
 12 This is clear from a review of the CARES Act. Congress established PPP by
 13 enacting § 1102 of the CARES Act. In so doing, PPP was created as a forgivable
 14 loan program under § 7(a) of the Small Business Act—but it is functionally a
 15 grant.¹⁵ There is absolutely nothing in § 1102 of the CARES Act or elsewhere in
 16 that legislation prohibiting debtors from accessing funds under PPP. Similarly,

17 _____
 18 ¹⁵ There are no underwriting requirements other than reviewing the contents of the
 19 application form. Creditworthiness or collateral are irrelevant. In fact, as long as
 20 the borrower uses loan proceeds in the prescribed manner—75% to payroll costs—
 21 the loan is forgivable and there is no debt obligation.

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1 there is nothing in the Small Business Act prohibiting debtors from borrowing
2 funds guaranteed by SBA.

3 In contrast, the CARES Act contains other provisions which specifically
4 excludes debtors from certain borrowing programs—but not PPP. For example,
5 § 4003 of the CARES Act establishes a lending program under which the Secretary
6 of the Treasury (not the SBA) can provide direct loans to certain businesses.
7 Congress expressly excluded debtors from this borrowing program by enacting
8 § 4003(c)(3)(D)(i)(V) of the CARES Act. This provision requires borrowers for
9 these loans to certify that “the recipient is not a debtor in a bankruptcy
10 proceeding[.]” **The CARES Act does not contain a similar requirement for**
11 **PPP.**

12 Congress knew when and how to alter the rights of debtors under the CARES
13 Act but chose not to do so with respect to PPP. Despite this, the Administrator has
14 decided—without any basis in law—that anyone “presently involved in any
15 bankruptcy” must be excluded from PPP, when there is likely greater oversight of
16 bankruptcy debtors and how PPP funds would be used than non-debtors. Notably,
17 Senator Susan Collins, who drafted PPP, sent a letter to the Administrator stating
18 her disagreement with the Administrator’s position that hospital-debtors cannot
19 participate in PPP. Senators Angus King, Patrick Leahy, and Bernard Sanders,
20 along with Congressman Peter Welch, have also submitted letters to the
21 Administrator echoing the Debtors’ position. A copy of these letters are attached

1 hereto as **Exhibit F**. While not dispositive of Congressional intent, it is notable that
 2 the Senators' position does not conflict with the one advanced by the Debtors.

3 *ii. Section 525(a) Prevents the Administrator From Denying The Debtors*
 4 *An Opportunity To Have Their PPP Applications Considered*

5 The Administrator's arbitrary, unilateral, and capricious decision to bar the
 6 Debtors' Applications for PPP funds from consideration solely because they are
 7 debtors in bankruptcy, when that is not required under the CARES Act, is a
 8 violation of § 525(a).

9 Congress enacted § 525(a) to prevent ad hoc, unwarranted discrimination
 10 against debtors in bankruptcy by the government. It is a check on the arbitrary
 11 abuse of power by the government. It protects people and companies who access
 12 their right to reorganize or obtain a fresh start through bankruptcy much the same
 13 way that other federal law prohibits the government from discriminating on the
 14 basis of race, gender, sexual orientation or any other protected class.

15 Specifically, § 525(a) provides that "a governmental unit may not deny . . . a
 16 license, permit, charter, franchise, or other similar grant to" a bankruptcy debtor.
 17 The Second Circuit has analyzed the meaning of "other similar grant" in § 525(a)
 18 and found that "[t]he common qualities of the property interests protected under
 19 section 525(a), i.e., 'license[s], permit[s], charter[s], franchise[s], and other similar
 20 grants,' are that these property interests are unobtainable from the private sector and
 21 essential to a debtor's fresh start." *Stolz v. Brattleboro Housing Auth. (In re Stoltz)*,

1 315 F.3d 80, 88-90 (2d Cir. 2002).

2 Here, as recognized by other courts, PPP is a grant or support program, not a
 3 loan program. *See Hidalgo County Emergency Service Foundation*, Adv. No. 20-
 4 2006, [Dkt. 11] (Bankr. S.D. Tex. Apr. 24, 2020); *In re Penobscot Valley Hosp.*,
 5 Adv. No. 20-1005 (MAF) [Dkt. 18] (Bankr. D. Me. May 1, 2020); *In re Calais*
 6 *Reg'l Hosp.*, Adv. No. 20-1006 (MAF) [Dkt. 21] (Bankr. D. Me. May 1, 2020); *In*
 7 *re Roman Catholic Church of the Archdiocese of Santa Fe*, 2020 Bankr. LEXIS
 8 1211, Adv. No. 20-1026 (DTT) [Dkt. 15] (Bankr. D. N.M. May 1, 2020); *In re*
 9 *Springfield Hosp., Inc.*, 2020 Bankr. LEXIS 1205, Adv. No. 20-01003 (CAB) [Dkt.
 10 20] (Bankr. D. Vt. May 4, 2020). The entire purpose of the program is to provide
 11 grants to companies in order to ensure that workers can be paid. There are no
 12 underwriting requirements, collateral review, or loan covenants. While a PPP
 13 disbursement is nominally called a “loan,” § 1106 of the CARES Act provides for
 14 loan forgiveness—treating the PPP disbursement as a grant with no repayment
 15 obligation—as long as the funds are used as the CARES Act requires. The PPP
 16 funds “are unobtainable by the private sector,” *Stolz*, 315 F.3d at 90, because
 17 private lenders do not give money away.

18 PPP funds are also essential to the Debtors’ “fresh start.” *Stolz*, 315 F.3d at
 19 90. The PPP funds are free money which will further the Debtors’ reorganization
 20 efforts without increasing the Debtors’ liabilities. All small businesses have the
 21 right to apply for PPP funds. The Debtors should too, without risk of

1 discrimination.

2 The Debtors only seek PPP funds in an amount that could be forgiven and
3 will immediately return any additional funds. Moreover, the Debtors only seek to
4 use PPP funds in such a manner that the loans will be forgiven. Thus, if the
5 Debtors were granted the PPP funds, the “loan” would essentially be a grant.
6 Because the Debtors are in bankruptcy, they are subjected to substantial reporting
7 requirements and are under significant oversight from this Court; the U.S. Trustee
8 the Committee; the general creditor body; and even the press. Accordingly, the risk
9 of the Debtors’ unauthorized use of PPP funds cannot be greater than for a
10 borrower outside of bankruptcy, where the SBA does not require, much less
11 request, any comparable oversight.

12 To be clear, the Debtors do not seek an order requiring PPP funds to be
13 distributed to them or determining that the Debtors are eligible for PPP funds.
14 What the Debtors seek is the right to have their Applications submitted without
15 being discriminated against on the basis of their status as chapter 11 debtors and, in
16 the meantime, for the status quo to be preserved by requiring the Administrator to
17 reserve sufficient guaranty authority within PPP for the Debtors, should the Debtors
18 otherwise be eligible under PPP. Anything less would leave the Debtors without a
19 remedy.

20 At bottom, the government cannot bar a debtor from applying for a
21 government program solely because of the person’s status as a bankruptcy debtor.

1 It is an impermissible and discriminatory denial of due process with respect to an
 2 important government program that was established to keep small businesses alive
 3 during a difficult time and to ensure that the work-force continues to be paid.
 4 Denying the Debtors access to PPP funds solely because they are chapter 11 debtors
 5 violates § 525(a).

6 *iii. This Court Has the Power to Enjoin the Administrator From*
 7 *Discriminating Against the Debtors In Violation of § 525(a)*

8 Section 106(a) abrogates governmental units' sovereign immunity with
 9 respect to "Sections 105, 106, . . . 525 of [the Bankruptcy Code]." Thus, §§ 105,
 10 106(a) and 525(a) permit the Court to enjoin the Administrator from discriminating
 11 against the Debtors based on their status as chapter 11 debtors.

12 Section 634(b)(1) of the Small Business Act provides that "no attachment,
 13 injunction, garnishment, or other similar process, mesne or final, shall be issued
 14 against the Administrator or [her] property." However, § 634(b)(1) does not
 15 prevent this Court from entering a narrowly tailored temporary restraining order
 16 against the SBA based on the Administrator's discriminatory conduct. The First
 17 Circuit in *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052 (1st Cir. 1987)
 18 examined the meaning of the anti-injunction language in § 634(b)(1) to find that

19 [t]he no-injunction language protects the agency from interference
 20 with its internal workings by judicial orders attaching agency funds,
 21 etc., but does not provide blanket immunity from every type of
 injunction. In particular, it should be interpreted as a bar to judicial
 review of agency actions that exceed agency authority where the
 remedies would not interfere with internal agency operations.

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1 The proposed injunction here would not interfere with the “internal workings” of
 2 the SBA. Instead, it seeks to remedy the Administrator’s discriminatory conduct
 3 which exceeds her authority and violates § 525(a). If the Court accepts the position
 4 that § 634(b)(1) bars injunctive relief against the Administrator in all cases, this
 5 would leave the Court powerless to fashion relief when the government arbitrarily,
 6 capriciously, and unlawfully, discriminates against a person the basis of that
 7 person’s status as a debtor.

8 Other courts have harmonized § 634(b)(1) with § 525(a) to find that they
 9 were authorized to enter injunctive relief. The court in *Springfield Hospital*
 10 explained :

11 Congress enacted § 106 of the Bankruptcy Code in 1978, 20 years
 12 after it enacted § 634 of the Small Business Act in 1958 (and 25 years
 13 after prior similar provisions of that Act were originally enacted in
 14 1953). The language of § 106(a) unequivocally expresses Congress’
 15 intent to abrogate sovereign immunity with respect to Bankruptcy
 16 Code §§ 105, 106, and 525. Congress has not authorized the
 Defendant to take actions that violate Bankruptcy Code § 525(a), and
 the TRO the Plaintiff seeks here would not interfere with the SBA’s
 internal agency operations (see § B.3, *infra*). See also *Penobscot*,
 Bankr. D. Me. Adv. No. 20-ap-01005, at pp. 3–4.

17 *Springfield Hosp., Inc.*, 2020 Bankr. LEXIS 1205, at *5.

18 Similarly, the court in *Hildago* found that it could enter injunctive relief
 19 against the Administrator to remedy a clear violation of § 525(a). The court
 20 explained that it was not ordering the Administrator to issue or guaranty a loan—
 21 just to remedy a clear violation of § 525(a). Thus, the court directed that the debtor

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1 submit its PPP application and that the application be considered without the words
 2 “or presently involved in any bankruptcy” being considered. “They are stricken
 3 from consideration. The application shall be considered on its merits and in
 4 accordance with the law with those six words stricken.” **Exhibit A**, p. 33, lines 3-
 5 6.

6 The Court should grant the Debtors similar relief here and find that it is
 7 authorized under Bankruptcy Code §§ 105, 106, and 525 to enter carefully tailored
 8 injunctive relief against the Administrator, it has constitutional authority to enter a
 9 final judgment, and it is not barred from doing so by 15 U.S.C. § 634(b)(1).

10 **B. Failure to Grant the TRO Will Irreparably Harm the Debtors.**

11 The Debtors concede that “[i]rreparable harm must be shown by the moving
 12 party to be imminent, not remote or speculative, and the alleged injury must be one
 13 incapable of being fully remedied by monetary damages.” *Reuters Ltd. v. United*
 14 *Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (reversing district court, and
 15 granting injunctive relief to permit prohibiting supplier of foreign news
 16 photographs from terminating service provided to plaintiff wire service) (citations
 17 omitted); *see also Rent-A-Ctr., Inc.*, 944 F.2d at 603 (“It is true that economic
 18 injury alone does not support a finding of irreparable harm, because such injury can
 19 be remedied by a damage award.”). In this case, the Debtors Toppenish and Astria
 20 Home Health have had their cash flow negatively impacted by the Covid-19
 21 pandemic and, therefore, access to the PPP funds will allow the Debtors to continue

1 in operation providing medical care to the community in general and COVID-19
 2 patients in particular. The current PPP funds are part of a second tranche of funds
 3 that is expected to be exhausted quickly (the first tranche lasted less than two
 4 weeks) and may not be replenished once exhausted. Thus, if the Court does not
 5 grant the Debtors a temporary restraining order pending resolution of the adversary
 6 proceeding, the PPP funds most likely will no longer be available to the Debtors.
 7 Absent a temporary restraining order, there are no monetary damages that will be
 8 available, because the second tranche of PPP funds will be exhausted. Hence, the
 9 injury is real, imminent and incapable of being remedied by monetary damages.

10 **C. The Balance Of Hardships.**

11 The balance of hardships also favors the Debtors. In this case, there is no
 12 harm to the Administrator if the temporary restraining order is granted and she is
 13 required to implement the PPP without any discrimination to the Debtors and to
 14 have the Debtors' Applications (or any amended applications) processed if the
 15 Debtors would otherwise qualify for PPP. Indeed, Congress has given the Court
 16 authority to order executive branch officers to fulfill their duties, and the Debtors
 17 have requested that the Court do so in Count VI of their Verified Complaint. 28
 18 U.S.C. § 1361.

19 46. On the other hand, Congress created PPP to help small businesses,
 20 such as Toppenish and Astria Home Health, that have been negatively impacted by
 21 Covid-19. If the temporary restraining order is not granted, then there is a

significant and material risk that the second tranche of PPP funding will be exhausted in a matter of days—even before the Court holds a hearing on a preliminary injunction. *See, e.g.,* Robin Saks Frankel, *The Paycheck Protection Program Ran Out Of Funding. What's Next For Small Business Owners?*, FORBES, (April 16, 2020) (noting that the first tranche of PPP funding ran out in 14 days), available at <https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440>; Stephen Gandel, *Round 2 Of Paycheck Protection Program Starts. Better Hurry*, CBS News (April 20, 2020), available at <https://www.cbsnews.com/news/paycheck-protection-program-small-business-lending-round-2/>. As explained, if the second tranche of funding expires and the Debtors are prevented from obtaining PPP funds, this will substantially adversely affect the Debtors' ability to reorganize.

D. The Effect on the Public Interest.

It is also in the public's interest for the Court to grant the Debtors a temporary restraining order. The public interest is protected by ensuring that the Debtors have funds to pay payroll expenses and to continue to operate during the Covid-19 pandemic. This serves several important public interests: (1) Congressional policy favors reorganization; (2) ensuring that the workers at Toppenish and Astria Home Health continue to receive paychecks is consistent with the public interest underlying enactment of the CARES Act and PPP; and (3) as of

1 right now, the world is in a period of time without a vaccine, widespread testing, or
 2 known therapeutics for Covid-19, and the public interest is best served by ensuring
 3 healthcare services continue to be available to the Yakima Valley.

4 **NO BOND IS REQUIRED**

5 Due to the nature of this request, no bond is required. Fed. R. Bankr. P.
 6 7065.

7 **EX PARTE RELIEF**

8 The Debtors submit that they have satisfied the elements of Rule 65(b)(1) of
 9 the Federal Rules of Civil Procedure such that relief can be granted *ex parte*.
 10 However, the Debtors have served a copy of the Verified Complaint and this
 11 Motion as set forth herein. The Debtors request that the Court find such notice
 12 adequate under the circumstances and due to the limited nature of the relief
 13 requested. Fed. R. Bankr. P. 2002(m).

14 **CONCLUSION**

15 The Debtors request that the Court enter an order (1) granting this Motion,
 16 (2) entering a temporary restraining order that consistent with the relief requested in
 17 this Motion, (3) setting a hearing date and briefing schedule for a hearing with
 18 respect to a preliminary injunction, and (4) granting such further relief as the Court
 19 deems proper.
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1 Dated: May 15, 2020

DENTONS US LLP

2 /s/ Samuel R. Maizel
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DECLARATION OF JOHN M. GALLAGHER

I, John M. Gallagher, declare that if called on as a witness, I would and could testify of my own personal knowledge as follows:

1. I am the President and Chief Executive Officer ("CEO") of Astria Health ("Astria"). I am employed by AHM, Inc. ("AHM"), a nondebtor entity that provides management services to Astria and its affiliated debtors and debtors in possession (collectively, the "Debtors") in these chapter 11 cases (the "Chapter 11 Cases").

2. This declaration is prepared in support of the Debtors' *Motion for Temporary Restraining Order and Request for Hearing and Briefing Schedule With Respect to the Debtors' Request for a Preliminary Injunction* (the "Motion").

3. The statements herein are based upon my personal knowledge of the facts and information gathered by me in my capacity as CEO for Astria.

4. A significant portion of the Debtors' revenue is derived from outpatient procedures offering a wide range of medical services to patients. Based on recommendations from the federal Centers for Disease Control and an order by the Governor of the State of Washington, as a result of the Covid-19 pandemic the Debtors have postponed nonessential elective medical procedures, home health, clinic visits, and other nonessential medical services for the time being. Only essential urgent and emergency procedures, that if delayed would cause harm, are

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1 still being provided. This has and continues to have a significant negative impact
2 on the Debtors' cash position.

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

6 6. In anticipation of additional PPP funding, on April 17, 2020, Debtors
7 Toppenish¹⁶ and Astria Home Health submitted PPP applications (the "Toppenish
8 Application" and the "Astria Home Health Application", respectively, and together
9 the "Applications") to their commercial lender, Banner Bank. True and correct
10 copies of the Applications are attached to the Motion as Exhibit B.

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

14 8. Based on an average monthly payroll of \$188,790.00 for its twenty-
15 four (24) employees, the Astria Home Health Application requests a total of
16 \$471,975.00, to be used solely for payroll purposes.

17 9. The Debtors sized their request for PPP funds to ensure that the funds
18 would be treated as a grant and be forgivable. To the extent any portion of the

19 _____
20 ¹⁶ Capitalized terms not otherwise defined herein shall have the meaning afforded
21 in the Motion.

MOTION FOR TRO

34

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

5 10. The Debtors truthfully answered “yes” to question 1 on the
 6 Applications.

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

17 12. After receiving no official denial from Banner Bank or the SBA, on or
 18 about April 30, 2020, I spoke to Ms. Ibarra, who again stated that it was the SBA’s
 19 rule that entities like the Debtors who were in bankruptcy were ineligible for PPP
 20 funds. Ms. Ibarra also informed me that denial letters were not being sent because
 21 the focus was on processing eligible applications.

MOTION FOR TRO

35

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1 13. On May 6, 2020, the Debtors received an official notice (the “May 6,
2 2020 Notice”) that Banner Bank was unable to approve the Debtors Applications
3 because the Debtors “do[] not meet SBA eligibility criteria.” A true and correct
4 copy of the May 6, 2020 Notice is attached to the Motion as Exhibit E.¹⁷

5 14. Toppenish and Astria Home Health are otherwise eligible borrowers
6 under PPP.

7 15. I understand that Banner Bank is willing to advance funds through the
8 PPP if the Applications (or a subsequently amended applications) can be processed
9 and approved as meeting SBA’s criteria.

10 16. Access to the PPP funds is important to further the Debtors’
11 restructuring efforts. Also, the second tranche of PPP funds is expected to be
12 depleted quickly and may not be replenished once exhausted. If the Debtors are
13 unable to obtain PPP funds before the second tranche of PPP funds is exhausted,

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

MOTION FOR TRO

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1 this would negatively impact their ability to maintain healthcare offerings to the
2 surrounding community and reorganize.

3 I declare under penalty of perjury under the laws of the United States of
4 America that the foregoing is true and correct.

5
6 Dated: May 15, 2020

ASTRIA HEALTH

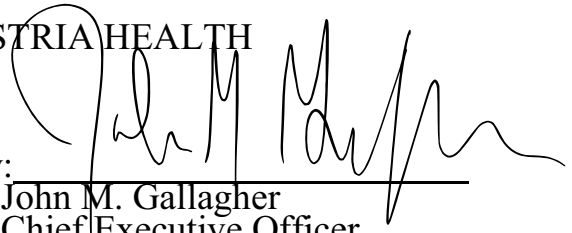
7
8 By: 
9 John M. Gallagher
10 Chief Executive Officer
11
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21

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

HIDALGO COUNTY EMERGENCY	)	CASE NO: 20-02006
SERVICE FOUNDATION,	)	ADVERSARY
)	
Plaintiff,	)	Houston, Texas
)	
vs.	)	Friday, April 24, 2020
)	
JOVITA CARRANZA,	)	(9:01 a.m. to 10:04 a.m.)
)	
Defendant.)	

HEARING

BEFORE THE HONORABLE DAVID R. JONES,
UNITED STATES BANKRUPTCY JUDGE

REMOTE AND TELEPHONIC APPEARANCES:

For Plaintiff: NATHANIEL PETER HOLZER, ESQ.
Jordan Holzer & Ortiz
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Corpus Christi, TX 78401

Also present: DAVID ELLIOTT

For Defendant: RICHARD A. KINCHELOE, ESQ.
United States Attorney's Office
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Court Reporter: Recorded; FTR-Mobile

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 8365
Corpus Christi, TX 78468
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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Houston, Texas; Friday, April 24, 2020; 9:01 a.m.

(Remote and telephonic appearances)

(Call to order)

THE COURT: All right, good morning, everyone. This is Judge Jones. Today is Friday, April the 24th, 2020, which is the docket for Corpus Christi, Texas.

First matter on this morning's docket is Adversary Number 20-2006, Hidalgo County Emergency Services versus the director of the Small Business Administration. Take appearances, please.

Mr. Holzer, I see you there, you want to lead us off, please.

MR. HOLZER: Pete Holzer, your Honor, for the Plaintiff, Hidalgo County Emergency Service Foundation. I believe my co-counsel, Kay Walker, is on the line, and also believe the Chief Restructuring Officer of the Debtor, Mr. Romero, was going to call in.

THE COURT: All right, thank you. Good morning to everyone.

Mr. Kincheloe, and I look at the official title, I said director of the SBA. I see that the title is administrator. I meant nothing by it, my apologies. Do you want to go ahead and make your appearance, please?

MR. KINCHELOE: Thank you, your Honor, Rick Kincheloe for the Defendant.

1 **THE COURT:** All right, thank you. Anyone else wish
2 to make an appearance?

3 **MR. ELLIOTT:** This is David Elliott (indisc.) for
4 Hidalgo County.

5 **THE COURT:** All right, thank you, Mr. Elliott. Good
6 morning to you. Anyone else?

7 **MR. ELLIOTT:** Good morning (indisc.)

8 **THE COURT:** All right, thank you, Mr. Castillo. Let
9 me -- Mr. Holzer and Mr. Kincheloe, let me sort of bring you
10 sort of full circle in my thoughts since yesterday. I spent a
11 good part of the night reading the entirety of the CARES Act.
12 I have come to conclude it is a very long and often complicated
13 document to work your way through, but I spent a lot of time
14 with it. I also have spent significant time reviewing the
15 SBA's final interim (indisc.) I believe the number is 2020-
16 0015. I have also looked at relevant provisions governing --
17 and, again, I will apologize if I don't get the title right,
18 but SBA 7(A) loans. I have also thought a great deal about the
19 jurisdictional issues that are present. And I have gone back
20 and reviewed some recent decisions by my circuit. And I am --
21 it is very clear to me that my circuit has concerns as to just
22 how far the jurisdiction of an Article One court goes. And I
23 don't want to entertain that argument today. And so to the
24 extent that I grant any relief, it will be as to this debtor
25 only in this adversary only. And to the extent that there are

1 what I'm going to call class-like issues, I do not want Rule 23
2 or anything close to Rule 23 to become part of this discussion.
3 I -- for a couple of reasons. Number one, it's my belief that
4 by the time that we were able to work through all of those
5 issues, the Debtor's economic situation might probably have
6 dictated the outcome. And that shouldn't be anyone's goal. I
7 also think that to the extent that there are (indisc.) 23
8 issues in a case like this, they are better left to my Article
9 Three colleagues. I think that's all I wanted to say in terms
10 of what I've done in preparation. Obviously I've read
11 everything. Mr. Kincheloe, I have read your brief. I have had
12 a time -- I have had an opportunity to review the authorities
13 cited in that brief. I've had a chance to do my own research.
14 So I feel like as though I'm fairly well-educated on the
15 applicable law. I think I understand the issue. That doesn't
16 mean that you shouldn't take the opportunity to advance any
17 position that you think. But I am prepared to talk about a
18 number of issues as we work our way through that. Any
19 questions before we get started?

20 **MR. HOLZER:** No, your Honor.

21 **MR. KINCHELOE:** No, your Honor.

22 **THE COURT:** All right, thank you. Mr. Holzer, I
23 think that it is your burden so if you'd like to lead off,
24 please.

25 **MR. HOLZER:** Thank you, your Honor. Pete Holzer for

1 the Plaintiff, Hidalgo County Emergency Services Foundation. I
2 know the Court is up to speed. I'm not going to belabor the
3 facts that have before you in the three sworn declarations.
4 The one of Mr. Romero in the sworn complaint, certain
5 paragraphs of that factual basis. There is a sworn declaration
6 of Mr. Elliott that was filed last night. And then just a few
7 moments ago Mr. Ponce's declaration hit the docket. I don't
8 know if the Court has had a chance to see Mr. Elliott and
9 Mr. Ponce's declarations.

10 **THE COURT:** I've read Mr. Elliott's. I did not see
11 Mister you said Ponce, I've not seen (indisc.) --

12 **MR. HOLZER:** Mr. Ponce.

13 **THE COURT:** Yes, I have not seen that one. I am
14 reading it as you talk. So go ahead.

15 **MR. HOLZER:** I was going to let you finish reading,
16 Judge.

17 **THE COURT:** Pretty short, direct, four paragraphs, I
18 got it.

19 **MR. HOLZER:** Okay, so Mr. Ponce really talks about
20 the background of the company and where it is and touches on
21 the impact of the coronavirus problem.

22 Mr. Elliott is certainly much more specific addressed
23 a few things that may have not been in the complaint that we
24 talked about yesterday, that is the process by which we got to
25 where we are and what we think happened and so forth.

1 So I think what I really want to do is talk sort of
2 in general about some of the issues that Mr. Kincheloe raised
3 in his brief, which is actually quite helpful in my thinking
4 about how things go together and what the administrator does
5 and how the government looks at these kind of issues. I think
6 one very important thing is that despite what we now know from
7 Mr. Kincheloe's brief, we still don't know who, where, why, or
8 how the bankruptcy exclusion came to be -- came about as part
9 of the application form. There's no doubt that it's there in
10 the form. And I do see the I'll call it a tenuous connection
11 that the government makes between the implementing rule and
12 that there's a form, okay, so there is a connection. But it
13 doesn't really tell us -- we just have no understanding and no
14 knowledge or any idea how, who, where, or why this exception
15 language showed up in this application on the PPP loan program.
16 I can speculate, and here's what my speculation is. First of
17 all, I think we're all aware that there are other lawsuits now,
18 a lot of them from what I've read in the papers, where the SBA
19 is being sued about giving these PPP loans to a larger
20 corporation, Fortune 500 companies, that really didn't make any
21 sense to be allowed under the PPP loan program and wound up
22 exhausting it, all these big-monied corporations. And so
23 that's ongoing. That's not really before this Court but it's
24 certainly out there. But it looks to me like what happened in
25 this agency is they took this CARES Act, which I agree, I've

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1 read the whole thing, too, and it's, you know, about what you'd
2 expect from legislation that occurred over just a period of a
3 few days and weeks. There is a section that has loans for
4 large companies and like the airlines and so on and so forth
5 that does have a bankruptcy exclusion, it's a specific one in
6 there. And then there's the paycheck protection loan under --
7 in Section 1100, 1102, that does not. And so it looks to me
8 like what the SBA has done is they then drafted the bankruptcy
9 exclusion in the large company section and they've applied it
10 also to the PPP loan protection. And then conversely they let
11 the --

12 **THE COURT:** (Indisc.)

13 **MR. HOLZER:** -- large companies into the PPP
14 (indisc.) --

15 **THE COURT:** Mr. Holzer, if I could just interrupt you
16 because I want to make sure that the record is clear. The
17 bankruptcy exclusion is actually in the section for midsized
18 businesses defined those companies with more than 500, less
19 than 10,000 employees, can be found at page 193 of the Act. I
20 have read it, I'm familiar with it. I just -- I don't think
21 there necessarily is a section that I read with respect to
22 large-sized businesses. The actual subtitle of the provision
23 are loans for midsized businesses.

24 **MR. HOLZER:** All right, (indisc.) --

25 **THE COURT:** (Indisc.)

1 **MR. HOLZER:** -- then I apologize, Judge. I conflated
2 those two and I've done the same mistake that I'm accusing the
3 SBA of. So I'm not -- I guess the point being, there's no ill
4 will. This is not a intentional ill will, they're out to get
5 the bankrupt companies. I think it's just a mistake in a badly
6 implemented process that they've done here, as evidenced by the
7 lawsuits for the big companies getting into this program and
8 exhausting it. In any event, I think it's an abuse of
9 discretion the way they've handled this and the way they've put
10 this bankruptcy exception. They've conflated these two
11 different programs. And then we're faced with this form that
12 has this exception and bank lenders that look at the form and
13 say, well, here's the exception, it's right here in the form I
14 have to use so I can't give you a loan. So with respect to the
15 abuse of discretion, and we are arguing, Judge, both Section
16 525, 523, I forget the number, is discrimination and a exercise
17 of authority that doesn't comply with the statute. And then so
18 I want to jump down to some cases Mr. Kincheloe has. His brief
19 talks about the Anti-Injunction Act in section -- in the Small
20 Business Act. And I looked at those cases. I have a couple of
21 cases, your Honor, if you need them that explain why in a
22 situation like this, the -- in a situation where the
23 administrator of a government agency exceeds the scope of their
24 authority like they're arguing here, that Anti-Injunction Act
25 doesn't apply. And I would start with the Supreme Court. It's

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1 the case is -- oh, where'd it go? *South Carolina versus Regan*
2 at 465 U.S. 367 from 1984. That case is a holding where the
3 anti-injunction provisions are inapplicable where Congress
4 didn't provide the plaintiff with an alternative legal way to
5 challenge the administration's ruling. And that was a case
6 related to taxes. We have *Canterbury Career School versus*
7 *Riley*, District of New Jersey, 1993, 833 F.Supp. 1097 basically
8 saying the same thing. This is a Secretary of Department of
9 Education has a similar anti-injunction provision in their
10 statute. The court said if the defendant, the Secretary of
11 Department of Education, has exceeded the scope of his
12 authority, then this court has jurisdiction to grant
13 appropriate injunctive relief, notwithstanding the anti-
14 injunction provision. And then, lastly, a case out of this
15 court from Judge Schmidt back in 1992, an unreported case, it's
16 a 1992 Westlaw 551256 pointing out that the Fifth Circuit has
17 left (indisc.) by implication recognizing that injunctive
18 relief is permissible where the government agency exceeds its
19 statutory authority. So with those cases and my arguments, I
20 think the question of whether or not this Court has
21 jurisdiction authority to enter an injunction, I think it does.
22 And I think it's well-supported in the law and under the facts
23 of this case.

24 So I wanted to talk about next a -- what I think is
25 why this statute does exceed the administrator's authority.

1 And it's partly a policy argument. So let's talk about a
2 hypothetical. So let's say you have a loan applicant who's
3 preparing for bankruptcy, hired bankruptcy counsel, hired the -
4 - hired a -- hired bankruptcy lawyer, paid them a retainer,
5 they're working on the schedules, but they haven't filed
6 bankruptcy yet. And so would that company -- would that
7 potential debtor qualify for these loans? Yes, because they
8 could answer that question "no." Let's talk about another
9 company (indisc.) --

10 **THE COURT:** Could they? I mean, Mr. Holzer, could
11 they?

12 **MR. HOLZER:** Could they --

13 **THE COURT:** (Indisc.)

14 **MR. HOLZER:** Could they?

15 **THE COURT:** I mean, if you look at the -- if you
16 compare the wording in the portion of the statute involving
17 midsized debtors, it actually says you aren't eligible if you
18 are a debtor in a case. The words in the form are: "presently
19 involved in a bankruptcy case." What does that mean? Does
20 that mean that if you (indisc.) a claim against someone in
21 bankruptcy, that you're not eligible under the Act? Does it
22 mean that if you consult with a bankruptcy (indisc.)
23 contemplated bankruptcy that you are not eligible for
24 participation (indisc.). What do the words "presently
25 involved" actually mean in your mind?

1 **MR. HOLZER:** Yes, I don't know because you're right,
2 a creditor in a bankruptcy could be presently involved. A
3 (indisc.) --

4 **THE COURT:** What if you're (indisc.) who has a lease,
5 are you presently involved in a bankruptcy case?

6 **MR. HOLZER:** Right. I do think the most natural
7 construction there is that you're a debtor in bankruptcy. I'm
8 not sure that there's any difference in the way I look at that
9 language and the way the government looks at the language. But
10 I do agree with the Court that there is some ambiguity. But
11 that's -- if you look at that language, a company that's
12 preparing to file bankruptcy is not presently involved in a
13 bankruptcy. It's just thinking about it. And if it hasn't
14 already, would it qualify for this loan, could it check the
15 "no" box on that form? I think there's no doubt it could and
16 should and would qualify for a loan. So let's talk about
17 another company that's insolvent and hasn't hired a bankruptcy
18 lawyer, but they're broke, they (indisc.) business, all the
19 employees have gone home, they're out of money, and they have
20 no idea whether they're going to survive, and can they apply
21 for a loan, you know, get the employees (indisc.) and the
22 answer is, yes, they would check that box "no." And so another
23 company that's virtually shut down, it's overdrawn on its bank
24 account, and would they be able to check the "no" box? The
25 answer is of course, they check the "no" box. And so all three

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1 of those hypotheticals are ways where a company who is
2 completely uncreditworthy can get one of these PPP loans. So
3 compare that to a debtor in possession that's operating,
4 complying with all the rules, filing its monthly operating
5 reports, running its business, and not only that, it's a
6 systemically important business, particularly in the time of an
7 active pandemic, and operating, but they don't qualify. It
8 simply makes no sense for the other companies that would
9 qualify to be able to get one of these forgivable loans and for
10 my client (indisc.) that I'm (indisc.) is not.

11 **THE COURT:** Mr. Holzer, let me go back to your
12 example because I'm not sure you really vetted that example
13 out. What if you have a company that is as you said
14 contemplating bankruptcy, and you have an owner in the business
15 who owns one percent of that company and is a creditor in a
16 large oil and gas bankruptcy case that's pending because they
17 own -- that person owns a small royalty interest, could the
18 company check the box or not?

19 **MR. HOLZER:** Haven't though through that one, Judge.
20 I would think they could check the "no" box. But, you know,
21 there's certainly a --

22 **THE COURT:** (Indisc.)

23 **MR. HOLZER:** -- (indisc.) of the language --

24 **THE COURT:** Read the language --

25 **MR. HOLZER:** -- that they would -- yeah.

1 **THE COURT:** Read the language. Is the business or
2 any owner presently involved in any bankruptcy?

3 **MR. HOLZER:** That's right. I think that you're
4 highlighting, your Honor, the flaws in this -- in what this
5 form says and all the ambiguities that are evidence of a poorly
6 instituted program beyond the administrator's authority. All
7 right, so let's see. So that's arbitrary and capricious is
8 what I think and gives you a basis to enter an injunction.

9 Let me just say that I do understand that the limit
10 on the jurisdiction. We never intended to seek relief for
11 anybody but my client, the Plaintiff in this lawsuit. Whether
12 it would be appropriate for a nationwide injunction or even a
13 Southern District injunction is not our concern. I'm only
14 worried about my client. My client only cares about its
15 survival.

16 So I wanted to then go to the question of whether or
17 not this is bankruptcy discrimination. I do agree in reading
18 Mr. Kincheloe's brief, he cited the Exquisito (phonetic) case
19 out of the Fifth Circuit and the Ares (phonetic) case out of I
20 believe it's the Fourth Circuit. And they're both in his brief
21 and those are cases that we came up in our research as well.
22 And I do think they -- those two cases are useful to compare
23 and contrast. Exquisito involved a program that the court
24 said, well, this is really about the jobs, not about a loan.
25 And so the -- so it was discrimination. Ares was more about a

1 loan than anything else and so that was not. So the case law
2 does say that if it's just a loan program, then the anti-
3 injunction -- excuse me, the -- it's not bankruptcy
4 discrimination.

5 So let's look at what we have here. Is this more
6 like the facts in *Exquisito* or more like the facts in *Ares*? I
7 think it's clearly this is more about saving jobs, preventing
8 collapse of the economy. It's not really about a company
9 borrowing money that under the statute it has to show its
10 ability to pay back. And that's in fact if you read the
11 requirements for qualify for a loan, that's just not in there.
12 You just have to say what you're going to use it for and that's
13 what my client needs it for is to pay payroll and help with the
14 rent and the other permissible uses for the funds. It's really
15 more of a grant to protect the economy, save jobs, than it is a
16 straightforward loan. So I would say that the cases that say
17 loans don't apply really don't have any impact here.

18 There's another case Mr. Kincheloe cited in his
19 brief, the *Toth*, T-O-T-H, case, and that also involved an
20 extension of credit which is really not what's happening here.
21 This is a different animal. So with that, Judge, I think I've
22 said everything I wanted to say for now. I think the facts are
23 pretty clear what happened that we qualify, except for this
24 arbitrary inclusion of a bankruptcy exception on the
25 application form, and that it is bankruptcy discrimination and

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1 the Court should grant an injunction.

2 **THE COURT:** All right, thank you. Mr. Kincheloe.

3 **MR. KINCHELOE:** Yes, your Honor, Rick Kincheloe.

4 (Indisc.) start with Mr. Holzer's discussion of he -- the
5 reasons for the exclusion. And I will say I really appreciate
6 Mr. Holzer sending me the cases he was going to discuss before
7 today. It certainly was an extreme professional courtesy.

8 I have received a regulation that I understand is
9 going to be published imminently like Monday. I can broadcast
10 it for the Court if the Court would like to read it because I
11 think it does explain (indisc.) saying about the wording of the
12 application but the regulation that's going to be published
13 does add some color to that. So just this is going to be at 13
14 CFR (indisc.) and 121. And then the bankruptcy exclusion
15 appears here. And so this is that if an applicant is currently
16 a debtor in bankruptcy or if it files bankruptcy before the
17 loan is funded, then it is ineligible. And this -- the second
18 paragraph explains kind of the rationale. There's a concern
19 that the SBA loses control over the funds because they become
20 property of the estate. There's also a concern the Court --
21 your Honor, is the Court done reading? I'll stop sharing so I
22 can go back to video.

23 **THE COURT:** Yeah, no, I read it. Thank you.

24 **MR. KINCHELOE:** Okay.

25 **MR. HOLZER:** Mr. Kincheloe, I'm -- I didn't --

1 **MR. KINCHELOE:** Oh, I --

2 **MR. HOLZER:** -- (indisc.) second page.

3 **MR. KINCHELOE:** The second page --

4 **MR. HOLZER:** (Indisc.)

5 **MR. KINCHELOE:** -- is just -- I can send it to you
6 shortly.

7 **MR. HOLZER:** Okay, that'll be fine.

8 **MR. KINCHELOE:** I don't think it was relevant. But
9 the other concern is the pandemic has created a unique public
10 need with unprecedented unemployment to get loans funded
11 extremely quickly. And in this need for speed, the traditional
12 underwriting is just not going to work. it's going to take too
13 long. And so to avoid that traditional underwriting and to get
14 this -- get these loans out guaranteed by SBA as quickly as
15 (indisc.) could, the decision was made to say if you're in
16 bankruptcy, you're excluded. We certainly had maybe a good --
17 it can be argued whether that's a good or bad decision from
18 public policy standpoint but at least that was the motivation
19 is get these loans out quickly and minimize the amount of
20 underwriting that needs to be done.

21 **THE COURT:** In fact there really is no underwriting
22 that's done, right? I mean, aren't the lenders authorized to
23 simply accept what's on the form and act just on the form, and
24 so long as they rely on the form, then they are protected;
25 isn't that the way that it works?

1 **MR. KINCHELOE:** From the interim rule I've read, yes.
2 But from the --

3 **THE COURT:** (Indisc.)

4 **MR. KINCHELOE:** -- regulation I just posted, I
5 haven't read the entire regulation. I got it maybe five
6 minutes before we started. And so unless something in the
7 regulation changes that, that's my understanding.

8 **THE COURT:** Got it.

9 **MR. KINCHELOE:** Turning to the jurisdictional issue,
10 admittedly the provision in the Small Business Act is unique.
11 I'm not aware of any other provision this broad. And certainly
12 there are other anti-injunctive language that appears in
13 various statutes. You know, the Anti-Injunction Act deals
14 (indisc.) I think that's a little different. The one thing I -
15 - there's a case -- well, it's -- there's so many other cases
16 out there, and one that Mr. Holzer shared, where there's a
17 statute that said except as otherwise provided herein, you
18 can't issue an injunction. And certainly that language seems
19 to suggest that, well, okay, if you violate the statute, we can
20 enjoin you, we just can't enjoin you otherwise. For 634, 15
21 USC 634, I don't see any similar condition. I mean, it just is
22 (indisc.) the Fifth Circuit (indisc.) decision I cite at
23 footnote six which, you know, I suppose we could, you know,
24 dispute whether it's holding or dicta, but it's a pretty
25 blanket assertion, thou shalt not enjoin the SBA. And again we

1 can argue whether Congress made a good or bad policy decision
2 in enacting that but I think that's the law. And so turning to
3 106, honestly 106 waives sovereign immunity for the entire
4 Federal government for purposes of 525. But (a)(4) states that
5 waiver is only to the extent it's consistent with applicable
6 non-bankruptcy law, and so I think we have to turn to this
7 likely unique provision applicable to the SBA administrator and
8 say, courts can't enjoin the SBA. Whether that's a good or bad
9 idea, so be it but that's what it says. And so I think
10 106(a)(4) coupled with 15 USC 634 I think means that there is
11 not a waiver of sovereign immunity for an injunction against
12 the SBA, depriving the Court of jurisdiction.

13 On -- moving to the 525(a) argument, it -- in the
14 Exquisito case, as I read it, it seemed to -- one thing that
15 was distinguishable is there was a preexisting relationship
16 between the SBA and the Air Force. That's one thing that's --
17 is noteworthy. The injunction in that case was not against the
18 SBA, it was against the Air Force. The -- there was a pre-
19 bankruptcy relationship in that case. And the Fifth Circuit
20 kind of thought through it and said, you know what, this
21 program is really designed to train minority-owned businesses
22 and so we view it more in the nature of a franchise. Fine, if
23 you're going to call it a franchise then, yeah, it's covered
24 under 525(a). What the Fifth Circuit has not decided, at least
25 as far as I can find, which the (indisc.) court, the *Toth* court

1 and I believe the (indisc.) Watts (phonetic) court in the Third
2 Circuit, and then the Second Circuit in Goldrich (phonetic) --
3 well, Goldrich dealt with student loans which has been
4 abrogated by 525(c), --

5 **THE COURT:** Right.

6 **MR. KINCHELOE:** -- those courts look at the decision
7 to extend credit, more specifically in the (indisc.) case
8 extend a guarantee of credit. That's something totally
9 different. It doesn't trigger this traditional gatekeeper
10 function of the government. Like, you know, for example, state
11 bar licensing, 525 expresses this desire that we don't want
12 lawyers to file bankruptcy, then they'd be unable to practice
13 law because they filed bankruptcy. No, we want them to be able
14 to continue to engage in the profession. Real estate brokers,
15 any other number of professions, we want them to continue being
16 able to engage in that profession and we don't want the
17 government's gatekeeper role to be influenced by bankruptcy.
18 That doesn't mean the government is not allowed to discriminate
19 in other ways. Again, maybe right, maybe wrong, but 525(a)
20 says it only bars discrimination in the context of licenses,
21 permits, charters, franchises, or other similar grant. The
22 (indisc.) case and the other ones, *Toth* and *Watts*, say that a
23 loan guaranteeing a loan is not really similar to these other
24 claims because it doesn't implicate this gatekeeper function.
25 And because it's not similar, it's not covered by 525(a) so we

1 don't even need to get to the question of whether the
2 government was motivated by the bankruptcy. It's just not
3 covered.

4 On the -- I heard -- as I understand the complaint,
5 there's not an APA claim asserted and so it's just whether
6 statutory authority was exceeded. The language in the CARES
7 Act is very broad. I mean, it's just the language for 1102
8 implementing the PPP loan guarantees (indisc.) may and that
9 leaves a very broad, open-ended grant of authority, leaves a
10 lot of discretion in the administrator which makes sense given
11 the context. I mean, this is imagine probably one of the
12 fastest pieces of legislation ever to make it through House,
13 Senate, and White House. And --

14 **THE COURT:** Well, wouldn't you agree that that
15 discretion has certain boundaries on it? For instance, that
16 discretion shouldn't be allowed to frustrate the purpose of the
17 Act itself, agreed?

18 **MR. KINCHELOE:** (No audible response)

19 **THE COURT:** (Indisc.) there are limits. You simply
20 can't say that you can implement rules and make an argument
21 that says, well, that discretion allows me to implement rules
22 that frustrate the application of the law.

23 **MR. KINCHELOE:** So, your Honor, --

24 **THE COURT:** (Indisc.)

25 **MR. KINCHELOE:** -- I agree that there are limits but

1 I think the use of the word "may," as I read the statute now
2 (indisc.) didn't happen and no one intends for this to happen
3 but if we're just taking the thought experiment to the extreme,
4 I think the use of the word "may," the administrator can say,
5 okay, I've got this authority, I don't have to exercise it.
6 And I think Congress would probably come back and put a shell
7 in there. But I think the way the statute's written, it's
8 pretty broad. Now, there are other limits in the Small
9 Business Act, like the administrator has to ensure that the,
10 you know, loans made under this section are of such sound value
11 or so secured as reasonably to assure repayment. So (indisc.)
12 administrator doesn't do that, the administrator violates the
13 statute. But because Congress prohibited injunctions on the
14 SBA, it really creates this strange space where, yeah, the
15 statute says the administrator has limits but I don't think the
16 statutory -- the statute authorized an injunction against the
17 administrator if the administrator exceeds those limits.

18 **THE COURT:** All right, so let me ask you this. And
19 we're going to come back to that issue in a second. But do I
20 even need to get there? Didn't the SBA effectively delegate
21 the authority to determine who's eligible to the participating
22 financial institutions?

23 **MR. KINCHELOE:** I don't (indisc.)

24 **THE COURT:** Let's take a practical example.

25 Mr. Holzer comes into his local financial institution for a PPE

1 -- I'm sorry, a PPP loan. He fills out the application. Who
2 makes the decision of whether or not he's eligible?

3 **MR. KINCHELOE:** So the -- as I read (indisc.) then
4 the bank has to receive the form, and as long as the bank
5 follows the form and the guidance, it may issue the loan and
6 it's going to be guaranteed by SBA. But it is still SBA who
7 decided those parameters that go into the form.

8 **THE COURT:** I'm not arguing with you on that. I'm
9 just saying who makes the decision of who's eligible and who's
10 not? The bank. Has to be that way. SBA couldn't do it. SBA
11 doesn't have enough employees, it doesn't have enough local
12 offices. It had to delegate part of that process to financial
13 institutions; otherwise, it would have been a program with
14 absolutely no ability to implement. I'm not complaining. I'm
15 just trying to be practical about it.

16 **MR. KINCHELOE:** Right, yeah. So again with the need
17 for speed, the analysis of whether a borrower meets the
18 appropriate criteria is sent to the banks.

19 **THE COURT:** Right. And in fact there really isn't an
20 underwriting function. I mean, if your instruction is
21 (indisc.) this form and you make the decision off the form,
22 there really isn't an underwriting function. There's no
23 evaluation of ability to repay, there's no evaluation of
24 collateral. And you know what I'm doing, I'm undermining your
25 argument that it's consistent with the (indisc.) power of SBA

1 7(A). You know, that just doesn't exist in this program. In
2 fact, let's just be practical. The entire intent of the
3 program is for people not to pay this back. It's a way of
4 getting money from the government to people that are being
5 harmed. And so long as they use it in the right way, they
6 don't have to pay it back. Am I -- tell me where I'm wrong
7 about that.

8 **MR. KINCHELOE:** Your Honor, I (indisc.) agree with
9 the Court that the intent was to get money to people who needed
10 it quickly. And certainly to the extent it's used for the
11 proper purpose, it is intended to be forgiven. And, you know,
12 I think the Court's correct, I mean, the amount of underwriting
13 is virtually nil. I mean, the SBA set up parameters and said
14 banks (indisc.) somebody meets these parameters, that's the
15 amount of underwriting we're going to do. And one of the
16 decisions made by SBA was, well, since we can't really -- we
17 don't have the time to go through and do a traditional credit
18 inquiry, we're going to exclude companies in bankruptcy, you
19 know, together with this purpose of we can't control the money
20 once it goes into the bankruptcy estate (indisc.)

21 **THE COURT:** (Indisc.) said that, I mean, (indisc.)
22 hundred and eighty degrees wrong, I mean, isn't part of my job
23 to ensure that debtors act in accordance with the law? I mean,
24 I would think, I mean, assuming that I'm doing my job, and I
25 try really hard to do my job every day, isn't there actually a

1 greater level of oversight than for someone who's not in
2 bankruptcy who can simply theoretically do what they want to
3 with the money once they get it?

4 **MR. KINCHELOE:** I disagree, your -- I disagree with
5 your Honor's point. It's not a question of oversight. I think
6 it's a question of the way the statute is written, if Hidalgo
7 receives a PPP loan outside of bankruptcy, they are free to
8 choose how to use those funds. Now, --

9 **THE COURT:** Are they?

10 **MR. KINCHELOE:** -- (indisc.) they use -- well, I
11 think they are. But if they use it for certain purposes,
12 they're required to repay it. If they use it for payroll
13 (indisc.) gets forgiven but if let's say company receives a
14 loan, a week later files bankruptcy. Well, all of those funds
15 then become property of the estate, subject to administrative
16 claims. And I don't think there's anything in the CARES Act
17 which would cause the proceeds of a PPP guaranteed loan to be
18 excluded from property of the estate or to be immune from the
19 claim of (indisc.) creditors or priority creditors.

20 **THE COURT:** Okay.

21 **MR. KINCHELOE:** So that's the motivation. Again, the
22 statutory authority is broad. I hear the Court's comment about
23 underwriting and the requirement to make sound loans. This is
24 the administrator's decision. But I go back to the anti-
25 injunction language in the Small Business Act that even to the

1 extent the administrator is wrong, the United States has not
2 waived sovereign immunity for an injunction to be issued
3 against the administrator.

4 **THE COURT:** And tell me why I can't issue -- because
5 it -- there's no doubt that the financial institution is
6 (indisc.) participation with the SBA. I think you just told me
7 they are given follow the form and process these loans. And
8 Rule 65 gives me the ability to issue injunctive relief against
9 anyone acting in participation with the parties, agreed?

10 **MR. KINCHELOE:** Would the Court give me a moment?

11 **THE COURT:** Of course. It would be 65(d)(2).
12 Actually (d)(2)(C).

13 **MR. KINCHELOE:** So, your Honor, I don't think the
14 Court can enjoin the bank. As I read this and I -- the Court
15 knows it way better than I do, but at least my quick reading of
16 the language of the rule is this would be if the Court enjoined
17 the administrator and anyone acting in concert with her, that
18 would capture this. I don't know that this lets the Court
19 enjoin the bank without also enjoining the administrator;
20 because without an injunction against the administrator, the
21 administrator doesn't have to guarantee the loan.

22 **THE COURT:** Well, I think -- I agree with you that I
23 can't order the SBA to guarantee a loan. I 100 percent agree
24 with that. The issue is can I order that the application be
25 considered without those four or five words. And if you're

1 telling me the person making that decision is, what was it,
2 PlainsCapital Bank, Mr. Holzer?

3 **MR. HOLZER:** Yes, your Honor.

4 **THE COURT:** You're telling me that I can't order
5 PlainsCapital Bank to consider the application without giving
6 any consideration for those words in the form?

7 **MR. KINCHELOE:** Then again I don't know that it
8 becomes a can't. I think it becomes a question of should or
9 should not. And with that question of whether or not the Court
10 should enjoin PlainsCapital Bank, I think there is a
11 substantial threat of irreparable injury to the bank because if
12 the bank --

13 **THE COURT:** (Indisc.)

14 **MR. KINCHELOE:** Well, because I think if the bank
15 follows the Court's order, ignores that line, and then issues
16 the loan, I think they are at risk if the SBA says we weren't
17 ordered to guarantee it, we're not guaranteeing it.

18 **THE COURT:** Okay, so you just say that I need to
19 order the SBA to comply with the law if I find discrimination.

20 **MR. KINCHELOE:** No, your Honor.

21 **THE COURT:** Is that it?

22 **MR. KINCHELOE:** I -- that -- your Honor, on that one
23 I think it's a question of can or cannot.

24 **THE COURT:** All right. So you're telling me that I
25 took an oath to uphold the statute, and if I find the statute's

1 been violated by the SBA, that I can do nothing about it?

2 **MR. KINCHELOE:** I think the Court is unable to issue
3 an injunction against the SBA, even if the statute has been
4 violated.

5 **THE COURT:** So tell me what it is I can do.

6 **MR. KINCHELOE:** I don't know, your Honor. For today
7 (indisc.) TRO, I do not think the Court can enter a TRO.

8 **THE COURT:** Got it, okay. Anything else?

9 **MR. HOLZER:** Your Honor, briefly.

10 **THE COURT:** No, I don't need anything else.

11 **MR. HOLZER:** Okay (indisc.)

12 **THE COURT:** Anything else, Mr. Kincheloe?

13 **MR. KINCHELOE:** Yes, your Honor. Just in closing, I
14 do dispute that the public policy considerations weigh in favor
15 of enjoining -- of issuing an injunction allowing this loan to
16 go -- to be made and guaranteed -- and/or guaranteed due to the
17 policy considerations. If the SBA is required to implement
18 traditional underwriting requirements, it is likely to slow
19 down this program and likely to delay proceeds to other
20 applicants.

21 **THE COURT:** Well how can it implement traditional
22 underwriting when it's been told what to do?

23 **MR. KINCHELOE:** Your Honor, I mean --

24 **THE COURT:** Simply because if I were to say that
25 there has been discrimination, that doesn't require the SBA to

1 do anything other than to not discriminate.

2 (Pause)

3 MR. KINCHELOE: Your Honor, I -- sorry, I don't think
4 I understand the Court's point.

5 THE COURT: I got it. Anything else?

6 MR. KINCHELOE: No, your Honor.

7 THE COURT: All right. So I have before me the
8 Debtor's request for a temporary restraining order against the
9 administrator of the SBA. I do find that I have jurisdiction
10 over the matter pursuant to (indisc.) Section 1334. I do find
11 that the adversary and the request for injunctive relief
12 constitutes a core proceeding under 28 USC Section 157. I
13 further find that I have the requisite constitutional authority
14 under the guidance given by our Supreme Court to enter, to the
15 extent it is a final order, and I'm not sure it is, but it may
16 practically be a final order, I do find that I have the
17 requisite constitutional authority to enter final order.

18 I want to go through a couple of the arguments
19 because, again, I spent a lot of time reading all of the
20 relevant wording. And there are certainly the arguments that I
21 simply -- they need to be addressed and I simply think that
22 they just have no foundation in logic or law or fact. I want
23 to start with the argument that (indisc.) that there remains
24 intact, and I wrote it down as a quote, that there's this
25 (indisc.) ensuring that there is sound value or so secure as to

1 reasonably assure repayment. That is so out of context in this
2 program that it's a frivolous argument. The entire --
3 everything said by our President, everything put out by our
4 administration, everything put out by our Congress reflects
5 that this was an emergency reaction to a series of events that
6 had never before been experienced. This isn't a loan program.
7 This is a support program. It is phrased the way it is to try
8 and ensure that the money ends up in the right hands and used
9 for the right purposes. It is intended to protect tax-paying
10 citizens from the effects of government shutdowns, stay-at-home
11 orders, and simply the public not being able to engage in
12 ongoing commerce. To suggest that this is a program that
13 enjoys underwriting and scrutiny in terms of who receives the
14 money is to simply ignore the obvious. The SBA's own rules
15 (indisc.) effectively look at the form, make the loans. You
16 make the loans, and so long as they're used for the right
17 purposes, there's no need to pay it back. That is not a
18 traditional loan program. There is no collateral valuation,
19 there is no credit worthiness test. And, again, to make that
20 argument is simply frivolous.

21 I also want to talk about the 525 argument. And I
22 take a quote out of the briefs. It says that issues under 525
23 (indisc.) the gatekeeper role of the governments or a
24 government entity in determining who may pursue certain
25 livelihoods. All of the cases cited have dealt with the

1 government engaging in regulated commerce. There were
2 commercial alternatives, there were private sector
3 opportunities. Practically speaking, this program isn't
4 designed to be a commercial product; it is a support product.
5 The only entity that would ever engage in this type of activity
6 is the government because, again, it's a support for citizens.
7 I can think of no greater example of the government performing
8 its gatekeeping role as to who can engage in commerce and
9 pursue certain livelihoods than this particular program;
10 because if we didn't have this program, there would be no
11 ambulance services, there would be no nail salons, there would
12 be no convenience stores. Society would be in a very difficult
13 (indisc.) so I do think the requirements of Section 525(a) are
14 absolutely in play. I do think that the choice of the words in
15 the form -- and, again, I made the example with Mr. Holzer, and
16 I am bothered by the use of the words. I disagree with
17 Mr. Holzer that, well, of course everybody knows what that
18 means, it's simply if you're a debtor. Couldn't be further
19 from the truth. Congress knew how to say we don't give these
20 loans to debtors. They did it within the CARES Act itself.
21 And then to have a form that simply says if an owner or a
22 business is presently involved in a bankruptcy, I have zero
23 idea what that means. It means if you have filed a proof of
24 claim in the General Motors bankruptcy umpteen years ago and
25 haven't yet received a final distribution on your claim, you

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1 have to check that box "no." That's silly. It's even sillier
2 in light of the purpose of this program.

3 I also have found but I've not been cited to any
4 legitimate basis for including that language in the form. I
5 take umbrage of the fact that if I look at question one and I
6 look at the list and I think just rules of normal construction,
7 and I realize that this is not a statute but it's a form that
8 is derived from a statute, it says if a business or owner is
9 presently suspended, debarred, proposed to be debarred declared
10 ineligible, voluntarily excluded from participation in this
11 transaction by any (indisc.) department or agency all conduct
12 which society frowns upon, involves potentially wrongful acts,
13 involves potentially criminal conduct. And then as an add-on,
14 it says: "Or presently involved in any bankruptcy." Plain
15 meaning: as a creditor, as a landlord, as a partner in another
16 business, as a shareholder in another business. It's entirely
17 inappropriate that those words were added into that form in
18 that list in that manner. And I see no authority anywhere for
19 including those words in that form. It serves no purpose. I
20 do find that by including the words "or presently involved in
21 any bankruptcy," they are intended to be discriminatory. They
22 are intended to be discriminatory toward debtors for reasons
23 offered that somehow we lose control of the money, again I find
24 to be completely frivolous. I cannot imagine anything less
25 controlling than to simply give out money with no underwriting,

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1 with no oversight, and then complain that if I have a Federal
2 judge who makes sure that the debtor complies with the law,
3 ensures that the debtors file monthly operating reports, ensure
4 that copies of bank statements are filed on the docket every
5 month, that they somehow lost control. I simply don't buy it.
6 I find the arguments to lack any good faith.

7 I am worried about the argument that I cannot enjoin
8 the administrator of the SBA. I agree I can't tell the SBA
9 administrator what loans to guarantee, what loans to grant. I
10 simply do not accept that when I have evidence of bankruptcy
11 discrimination that I can do nothing about it. And if I am
12 wrong about that, I am very certain that my Article Three
13 colleagues will tell me that I am wrong, and I will accept that
14 criticism. But this can't be what Congress intended. This
15 can't be the way that we are supposed to treat our fellow man
16 in this time. It's inconceivable to me that this distinction
17 could be drawn. The people that need the most help and who
18 have sought protection under our laws are the people who are
19 the targets of discrimination in a government support program;
20 can't possibly be.

21 So I am going to grant the TRO. I am going to enjoin
22 the administrator of the SBA and all those acting in concert
23 with her, which includes PlainsCapital Bank, in the following
24 manner. I am requiring that the application form for the
25 paycheck protection program submitted by Hidalgo County

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1 Emergency Service Foundation be considered in accordance with
2 the program without the words in question one: "or presently
3 involved in any bankruptcy." They are stricken from
4 consideration. The application shall be considered on its
5 merits and in accordance with the law with those six words
6 stricken. It is my hope that my government that I serve will
7 realize the error that it has made and that it will act
8 appropriately and ensure that all of our citizens have access
9 to the support they needed.

10 Mr. Holzer, I want you to prepare a revised TRO in
11 accordance with the ruling that I've made on the record
12 pursuant to 7052. Also want to go through in accordance with
13 Rule 65, I am required to state, and I am incorporating my
14 comments on the record, into the form of order to be submitted
15 pursuant to 7052. I have stated the reasons why the temporary
16 restraining order should issue. I have specifically stated its
17 terms. I have specifically described in reasonable detail the
18 limits of the TRO and those acts that are required under the
19 TRO. I will find that pursuant to Bankruptcy Rule 7065, there
20 is no security required. I am also required to set a hearing
21 for issuance of a preliminary injunction. I don't know that it
22 will be necessary because this may all become moot by then.
23 And I recognize, Mr. Kincheloe, that at a preliminary
24 injunction hearing, you may tell me that the law has changed.
25 But as I sit here today, the CFR that you showed me, I'm not

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1 aware it's actually governing law; is that correct?

2 **MR. KINCHELOE:** That's correct, your Honor. It has
3 not been published in the register.

4 **THE COURT:** All right, thank you. Let's see,
5 Mr. Kincheloe, Mr. Holzer, can you look at your collective
6 schedules?

7 **MR. HOLZER:** Have it in front of me, Judge.

8 **THE COURT:** All right, today's the 24th. My guess is
9 it's probably, and please tell me if you think I'm wrong, it's
10 probably a better use of everyone's time if we simply go as
11 close to the 14 days as possible to see what actually happens.
12 It may very well be that without waiving any right of review or
13 appeal that the SBA may have, it may make sense to extend the
14 original time. But obviously we're not going to decide that
15 today. Let me ask the parties, does it make sense to set this
16 -- I'm issuing this at 10:00 o'clock on Friday, can we set this
17 for 9:30 on Friday, May the 8th; does that make sense?

18 **MR. KINCHELOE:** Yes, your Honor. I was going to ask
19 for May 8th so perfect.

20 **THE COURT:** Okay, fair enough. And, Mr. Holzer, does
21 that work for your calendar?

22 **MR. HOLZER:** It does, your Honor.

23 **THE COURT:** All right, thank you. What I would like
24 for you to do is once you finish drafting the TRO, I'd like for
25 you to send it to Mr. Kincheloe to review as to form only.

1 Mr. Kincheloe, consistent with my normal practice, by agreement
2 as to form only, you're not waiving any right of review or
3 complaint that you may have, you're simply acknowledging that
4 the paper is consistent with the ruling that I've made on the
5 record. Is that enough of a (indisc.) that you feel
6 comfortable looking at the document?

7 **MR. KINCHELOE:** Absolutely, your Honor. And I'll
8 remain at my computer until I receive it from Mr. Holzer so
9 there's no delay.

10 **THE COURT:** Terrific, thank you. Gentlemen, I very
11 much appreciate the argument. Yes, sir.

12 **MR. HOLZER:** Just a clarification, and I'm trying to
13 think practically about the next two weeks, I understand your
14 ruling and I think I'll be able to get the TRO drafted
15 correctly, but is my client authorized to resubmit an
16 application form striking out that language about the
17 bankruptcy and checking the "no" box in question one?

18 **THE COURT:** Yes. What I would envision, so that
19 there is -- I don't want anyone at the bank to have an issue, I
20 don't want anyone within the SBA to have an issue, is that what
21 I would suggest that we do until this -- until we have an order
22 to the contrary is that your client's authorized to strike
23 through that language, check the box assuming that it (indisc.)
24 and it satisfies all of the other requirements of question one,
25 and then simply attach a copy of the TRO so that it's in the

1 file and everyone understands exactly what the issues are. I
2 would hate for someone to --

3 **(Automated telephone recording played)**

4 **THE COURT:** I don't -- I have 50 people on the
5 telephone so I'm not going to try to spend the time to figure
6 out who that was. You're absolutely authorized to strike
7 through the question. I can't remember where I stopped.
8 Attach a copy of the TRO, that way there is absolutely no
9 chance for error as to why the application was submitted the
10 way it was. And if the Debtor doesn't need -- I want to make
11 it very clear, if the Debtor doesn't meet the requirements,
12 then I'm not changing that. All I'm simply requiring is the
13 application be considered consistent with the (indisc.)
14 practices and governing (indisc.) as all other applications
15 with simply (indisc.) those six words stricken.

16 **MR. HOLZER:** Understood, your Honor. Thank you.

17 **THE COURT:** All right, Mr. Kincheloe, anything else
18 that I -- any lack of clarification or any issues that we need
19 to talk about?

20 **MR. KINCHELOE:** One issue, your Honor.

21 **THE COURT:** Certainly.

22 **MR. KINCHELOE:** (Indisc.) carry out instructions I
23 need to ask the Court if it will entertain an oral motion for
24 stay pending appeal.

25 **THE COURT:** Of course. And that's denied.

1 **MR. KINCHELOE:** Thank you, your Honor.

2 **THE COURT:** All right, anything else, folks? I very
3 much appreciate the argument. Mr. Holzer, I appreciate the way
4 in which you conducted yourself on behalf of the Debtor. And,
5 Mr. Kincheloe, you know that I think you're the greatest thing
6 ever and I very much appreciate what you do for our country.

7 **MR. KINCHELOE:** Thank you, your Honor.

8 **THE COURT:** Thank you, gentlemen.

9 **MR. HOLZER:** (Indisc.) have a good weekend.

10 **THE COURT:** (Indisc.)

11 **MR. KINCHELOE:** You, too, your Honor.

12 **(This proceeding was adjourned at 10:04 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is positioned above a horizontal line.

Signed

April 25, 2020

Dated

TONI HUDSON, TRANSCRIBER

EXCEPTIONAL REPORTING SERVICES, INC

EXHIBIT B



Business Name: YAKIMA HMA HOME HEALTH LLC dba ASTRIA HOME HEALTH & HOSPICE-YAKIMA
Loan Application #: 10549

IMPORTANT INFORMATION ABOUT PROVIDING KNOW YOUR CUSTOMER (KYC) IDENTIFYING INFORMATION

To help the government fight the funding of terrorism and money laundering activities, U.S. Federal law requires all financial institutions to maintain a sufficient KYC program. This requires Banner Bank to obtain, verify, and record information that identifies each person who maintains a customer relationship with Banner Bank. Persons include individuals and legal entities, such as corporations, limited liability companies, partnerships, or trusts.

What this means for you:

- When you open or maintain an account with Banner Bank, we will ask for information such as your name, physical address, date of birth (for individuals), and other information that will allow us to identify you and understand your account relationship.
- We may also ask to see your driver's license or other identifying documents.
- We may also obtain information from a consumer reporting agency, public database, or other source.

Important Information for our California Residents:

To learn about specific privacy rights for California residents, please review the California Consumer Privacy Act Notice at www.bannerbank.com/privacy-policy. A printed copy is available upon request.

Your cooperation will be truly appreciated!

Additional Applicant Questions:

Do you receive income from the production, distribution, or sale of Marijuana?	NO
Do you intend to accept or transact using Cryptocurrency (such as Bitcoin)?	NO





Paycheck Protection Program Borrower Application Form

OMB Control No.: 3245-0407
Expiration Date: 09/30/2020

Check One: <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input checked="" type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other		DBA or Tradename if Applicable	
Business Legal Name Yakima HMA Home Health, LLC			
Business Address 7 S 10th Avenue Yakima, WA 98902575		Business TIN (EIN, SSN) 27-0173556	Business Phone () - 509 837 1641
		Primary Contact Sandra Cortez	Email Address sandra.cortez@astria.health
Average Monthly Payroll: \$ <u>188,190.00</u>	x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request:	\$ <u>471,975.00</u>	Number of Employees: <u>24</u>
Purpose of the loan (select more than one): <input checked="" type="checkbox"/> Payroll <input type="checkbox"/> Lease / Mortgage Interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain):			

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address
Yakima Home Care Holdings, LLC		100%	81-3825537	1806 Yakima Valley Hwy, Sunnyside, WA 98944

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input checked="" type="checkbox"/>

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	<input type="checkbox"/>	<input checked="" type="checkbox"/>



**Paycheck Protection Program
Borrower Application Form**

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

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

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

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

CR

The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

CR

Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

CR

The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

CR

The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.

CR

I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.

CR

During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

CR

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

CR

I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Cary Rowan

Signature of Authorized Representative of Applicant

: Cary Rowan

Print Name

4-17-2020

Date

CFO

Title



**Paycheck Protection Program
Borrower Application Form**

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to "purpose of the loan," payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating "Average Monthly Payroll," most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as "principals":

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to : Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416., and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503.

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

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

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial



Paycheck Protection Program Borrower Application Form

institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

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

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

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

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.



Business Name: SHC MEDICAL CENTER TOPPENISH dba ASTRIA TOPPENISH HOSPITAL

Loan Application #: 10556

IMPORTANT INFORMATION ABOUT PROVIDING KNOW YOUR CUSTOMER (KYC) IDENTIFYING INFORMATION

To help the government fight the funding of terrorism and money laundering activities, U.S. Federal law requires all financial institutions to maintain a sufficient KYC program. This requires Banner Bank to obtain, verify, and record information that identifies each person who maintains a customer relationship with Banner Bank. Persons include individuals and legal entities, such as corporations, limited liability companies, partnerships, or trusts.

What this means for you:

- When you open or maintain an account with Banner Bank, we will ask for information such as your name, physical address, date of birth (for individuals), and other information that will allow us to identify you and understand your account relationship.
- We may also ask to see your driver's license or other identifying documents.
- We may also obtain information from a consumer reporting agency, public database, or other source.

Important Information for our California Residents:

To learn about specific privacy rights for California residents, please review the California Consumer Privacy Act Notice at www.bannerbank.com/privacy-policy. A printed copy is available upon request.

Your cooperation will be truly appreciated!

Additional Applicant Questions:

	YES	NO
Do you receive income from the production, distribution, or sale of Marijuana?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Do you intend to accept or transact using Cryptocurrency (such as Bitcoin)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

KYC Customer Notice

Member FDIC



DocuSign Envelope ID: 3D3FB801-F15D-4C29-A5AA-AA8686A7C0F8



**Paycheck Protection Program
Borrower Application Form**

OMB Control No.: 3245-0407
Expiration Date: 09/30/2020

Check One: <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input checked="" type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other		DBA or Tradename if Applicable 	
Business Legal Name SHC MEDICAL CENTER TOPPENISH DBA ASTRIA TOPPENISH HOSPITAL			
Business Address 502 W. 4TH AVE Toppenish, WA 98948		Business TIN (EIN, SSN) 81-4670687	Business Phone (509) 837-1641
		Primary Contact Sandra Cortez	Email Address Sandra.cortez@astria-health
Average Monthly Payroll:	\$ 1,130,622.00	x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request:	\$ 2,826,556.00
Number of Employees:		318	
Purpose of the loan (select more than one): <input checked="" type="checkbox"/> Payroll <input checked="" type="checkbox"/> Lease / Mortgage Interest <input checked="" type="checkbox"/> Utilities <input type="checkbox"/> Other (explain):			

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address
N/A 501(c)3				

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input checked="" type="checkbox"/>

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 →	<input type="checkbox"/>	<input checked="" type="checkbox"/>
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DocuSign Envelope ID: 3D3FB801-F15D-4C29-A5AA-AA8686A7C0F8

**Paycheck Protection Program
Borrower Application Form****By Signing Below, You Make the Following Representations, Authorizations, and Certifications****CERTIFICATIONS AND AUTHORIZATIONS**

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

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

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

CR

The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

CR

Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

CR

The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

CR

The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.

CR

I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.

CR

During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

CR

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

CR

I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Cary Rowan

Signature of Authorized Representative of Applicant

Cary Rowan

Print Name

4-17-2020

Date

CFO

Title



Paycheck Protection Program Borrower Application Form

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to "purpose of the loan," payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating "Average Monthly Payroll," most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as "principals":

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to : Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416., and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503.

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Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies' function. *See*, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

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

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial



Paycheck Protection Program Borrower Application Form

institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

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

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

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

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

EXHIBIT C

Sandra L. Cortez

From: Cece Ibarra <Cibarra@bannerbank.com>
Sent: Tuesday, April 21, 2020 12:33 PM
To: Sandra L. Cortez
Subject: {[*EXTERNAL*]}Loans

Hi Sandra,

Did you get an email on the loans? It looks like the bankruptcy is going to prevent you from qualify for the loans this would apply to any entity that was included in the bankruptcy. But an email should come if it hasn't already. Sorry I personally think that if someone deserves this loan is the Hospitals. But that's an SBA rule.



www.bannerbank.com

Cece Ibarra

Vice President
Sunnyside Branch Manager
NMLS# 610014
Office: 509-837-8008
E-mail cibarra@bannerbank.com

This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please do not read, copy or re-transmit this communication and destroy any copies. Transmission or use of this information by an unintended recipient is unauthorized, may be illegal, and shall not be deemed a waiver of any privilege (including attorney-client privilege).

EXHIBIT D

SMALL BUSINESS ADMINISTRATION

[Docket Number SBA-2020-0021]

13 CFR Parts 120 and 121

RIN 3245-AH37

Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility

AGENCY: U. S. Small Business Administration.

ACTION: Interim Final Rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). SBA posted additional interim final rules on April 3, 2020 and April 14, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. This interim final rule supplements SBA’s implementation of section 1102 and 1106 of the Act and requests public comment.

DATES: Effective Date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by number SBA-2020-0021 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being

taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as

possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on several important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP

is available in the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), and a third interim final rule (the Third PPP Interim Final Rule) (85 FR 21747) (collectively, the PPP Interim Final Rules).

1. Requirements for Promissory Notes and Authorizations

This guidance is substantively identical to previously posted FAQ guidance.

- a. Are lenders required to use a promissory note provided by SBA or may they use their own?*

Lenders may use their own promissory note or an SBA form of promissory note.

See FAQ 19 (posted April 8, 2020).

- b. Are lenders required to use a separate SBA Authorization document to issue PPP loans?*

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form - Paycheck Protection Program Loan Guaranty)¹ to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. *See* FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

¹ This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

2. Clarification Regarding Eligible Businesses

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan.

The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.² However, in addition to applying any applicable affiliation rules, all borrowers should carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

c. Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall

² However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

- d. Part III.2.b. of the Third PPP Interim Final Rule (85 FR 21747, 21751) is revised to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

3. *Business Participation in Employee Stock Ownership Plans*

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. § 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that

was used to buy stock) to the plan for the benefit of the company's employees.

The plan maintains an account for each employee participating in the plan.

Shares of stock vest over time before an employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

4. *Eligibility of Businesses Presently Involved in Bankruptcy Proceedings*

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

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

The Administrator, in consultation with the Secretary, 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. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a

borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

5. *Limited Safe Harbor with Respect to Certification Concerning Need for PPP*

Loan Request

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

6. *Additional Information*

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal Register at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in response to an emergency that makes

timely compliance impracticable, within 180 days of publication of the final rule. 5

U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator.

EXHIBIT E



May 6, 2020

Cary Rowan

502 W. 4TH AVE
TOPPENISH, WA 98948

RE: Your Application for a SBA Paycheck Protection Program (PPP) Loan

Dear Cary Rowan

Thank you for your application for a Small Business Administration (SBA) Paycheck Protection Program (PPP) loan. We regret to inform you that we are unable to approve your request because:

Borrower does not meet SBA eligibility criteria

If you have any questions regarding this notice please contact us at:

Banner Bank
10 S. First Avenue
PO Box 907
Walla Walla, WA 99362

800-272-9933 (Monday – Friday, 7am – 7pm Pacific Time)

Sincerely,

Banner Bank SBA Lending Team

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

Loan Application # 10556
PPPA-420

Banner Bank • PO Box 907 • Walla Walla, WA 99362 • 800-272-9933
• Equal Housing Lender • Member FDIC



EXHIBIT F

SUSAN M. COLLINS
MAINE

413 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510-1904
(202) 224-2623
(202) 224-2693 (FAX)

United States Senate

WASHINGTON, DC 20510-1904

April 24, 2020

COMMITTEES:
SPECIAL COMMITTEE
ON AGING,
CHAIRMAN
APPROPRIATIONS
HEALTH, EDUCATION,
LABOR, AND PENSIONS
SELECT COMMITTEE
ON INTELLIGENCE

Ms. Jovita Carranza
Administrator
U.S. Small Business Administration
409 34d St., SW
Washington, DC 20416

Dear Administrator Carranza:

I am writing to express my concerns regarding the ability of financially distressed hospitals to access badly needed relief for payroll for their employees through the Paycheck Protection Program (PPP). While hospitals are not prohibited from participating in the program, those that have previously been or are currently under bankruptcy protection in order to restructure debt and maintain viability have been unable to access PPP funds, due to an interpretation of underlying Small Business Administration 7(a) program rules.

Hospitals are critical infrastructure and their employees are essential in the COVID-19 response effort. Many hospitals are experiencing substantial increases in expenses associated with preparing for and responding to the pandemic. They are simultaneously facing sharp declines in revenue associated with declining patient volumes due to the cancellation of routine and elective procedures, in order to protect the public health and conserve limited supplies of Personal Protective Equipment, consistent with current guidance from the Centers for Medicare and Medicaid Services.

It is my understanding that waiver authorities do exist for SBA to allow loans to be made to entities with defaulted debt to the federal government, when the applicant shows good cause. Given the critical importance of maintaining health care infrastructure and keeping essential hospital workers employed to care for patients throughout the nation in these unprecedented times, I ask that the SBA give every appropriate consideration, in accordance with all applicable laws and regulations, to exercise this waiver authority and allow financially distressed hospitals to access PPP loans.

Thank you for your consideration of this urgent request. I look forward to your response. If you have any questions, or need additional information, please do not hesitate to contact me or have your staff contact Mark LeDuc in my office at 202-224-3364.

Sincerely,



Susan M. Collins
United States Senator

Congress of the United States
Washington, DC 20510

April 24, 2020

The Honorable Jovita Carranza
Administrator Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

We are writing to urge you to reconsider the blanket exclusion of organizations undergoing Chapter 11 reorganization from participation in the Paycheck Protection Program (PPP). Specifically, we ask you to consider the advisability of allowing essential health organizations, such as critical access hospitals and federally qualified health centers, to participate. These hospitals in Vermont and across the country are on the front lines of the COVID-19 pandemic response and we need the critical services they provide now more than ever before. We should be making all resources available to our health care providers to help them keep the lights on in their time of need.

In rural and underserved areas in Vermont and throughout the country, these facilities are not only essential medical providers, but are the economic backbone of our communities. It is particularly important right now to keep access to care affordable and available for patients in rural areas during the COVID-19 pandemic. If Vermont were to lose any of our critical access hospitals during this uncertain time, it would have a devastating effect on the state's COVID response and rural economy.

Eligibility criteria for PPP set in statute does not specifically exclude entities undergoing Chapter 11 bankruptcy. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This decision denies the potential for critical funding to hospitals, health centers, and other essential services that are reorganizing their debt in a responsible way. Availability of PPP assistance to these entities will allow them to continue to provide vital services, pay their workforce, and mitigate the risk of closure. To achieve this outcome, SBA should ensure PPP assistance is used for these purposes and not compensating secured and unsecured creditors.

We urge you to amend the Borrower Application without delay to ensure that critical care in our communities remains available. Thank you for your consideration.

Sincerely,



PATRICK LEAHY
United States Senator



BERNARD SANDERS
United States Senator



PETER WELCH
United States Congressman

ANGUS S. KING, JR.
MAINE

133 HART SENATE OFFICE BUILDING
(202) 224-5344
Website: <https://www.King.Senate.gov>

United States Senate

WASHINGTON, DC 20510

April 17, 2020

COMMITTEES:
ARMED SERVICES
ENERGY AND
NATURAL RESOURCES
INTELLIGENCE
RULES AND ADMINISTRATION

The Honorable Jovita Carranza
Administrator
Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

Thank you for speaking with me last Friday regarding the urgent need for the Small Business Administration ("SBA") to clarify that rural hospitals currently undergoing Chapter 11 reorganization are eligible for Paycheck Protection Program ("PPP") loans. As we discussed, there appears to be no legal basis to deny PPP loans to such hospitals. I urge you to revise the PPP Borrower Application form immediately so that it includes hospitals undergoing Chapter 11 reorganization as eligible recipients of PPP loans.

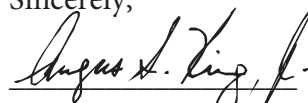
I write today because after our urgent call last Friday and follow-up by my staff, the SBA has thus far failed to change its Borrower Application form. Yesterday, PPP appropriations were exhausted. By not changing the PPP Borrower Application form in a timely manner, the SBA denied Penobscot Valley and Calais Memorial Hospitals in Maine the PPP funding that they desperately require during their time of maximum need, leaving their operations at risk.

Aside from the loss of essential medical resources at this time of critical need, the closure of Calais Memorial or Penobscot Valley Hospital would have economic effects on two rural communities in Maine that echo far beyond the facilities' walls. Rural hospitals are the backbone of small-town economies, contributing to the tax base and employing hundreds. Calais Regional Hospital is the largest employer in Calais, Maine, employing more than 200 people, with an annual economic impact of \$55 million; and Penobscot Valley Hospital employs approximately 200 people, with an annual economic impact of \$38 million.

Current law does not prevent either hospital from receiving PPP funds. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This choice denies critical funding to rural hospitals that are reorganizing their debts in a responsible way.

Rural hospitals and the communities that depend upon them need your help today. As Congress considers providing the SBA with additional PPP funding, I urge you to change the PPP Borrower Application form immediately so that rural hospitals undergoing Chapter 11 reorganizations may receive PPP loans and eventual loan forgiveness. Thank you for your work to support the Nation during this difficult time.

Sincerely,



ANGUS S. KING, JR.

United States Senator

AUGUSTA
4 Gabriel Drive, Suite 3
Augusta, ME 04330
(207) 622-8292

BANGOR
202 Harlow Street, Suite 20350
Bangor, ME 04401
(207) 945-8000

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227 Main Street
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14 PO Box 875
15 Ben Franklin Station
16 Washington, District of Columbia 20044
17 Telephone: (202) 307-1104

18 UNITED STATES BANKRUPTCY COURT
19 EASTERN DISTRICT OF WASHINGTON

20 In Re:

21 ASTRIA HEALTH, et al.¹

22 Debtors and Debtors in Possession,

23 ASTRIA HEALTH, et al.,

24 Plaintiffs,

25 v.

Lead Case No. 19-01189-11

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

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

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

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28 DEFENDANTS BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION FOR TRO AND REQUEST FOR PRELIMINARY



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

6 Defendants.

AND REQUEST FOR
PRELIMINARY INJUNCTION (ECF
No. 1)

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

17 Plaintiffs’ motion for temporary restraining order and request for preliminary
18 injunctive relief raises broad challenges to the SBA’s implementation and
19 administration of the CARES Act Paycheck Protection Program (“PPP”), a \$659
20 billion loan guarantee program that must extend hundreds of thousands of loans to
21 small businesses and non-profits across the nation in a matter of days. Plaintiff’s
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25 ² Plaintiffs’ Complaint includes additional claims for relief not sought in the Motion.
26 These additional claims are without merit and are not addressed herein. However,
27 Defendant reserves the right to address the claims in subsequent briefing if the Court so
requires.

1 Motion is a request that this Court set aside foundational legal principles of property
2 and commercial law so as to grant plaintiffs' desire for an unsecured and federally
3 guaranteed DIP loan. With non-binding precedent, plaintiffs ask this Court to make
4 near-immediate findings that the legal nature of the PPP funds is not a loan. Moreover,
5 plaintiffs seek to have this Court address an incorrect and non-core Administrative
6 Procedure Act (APA) claim that the SBA exceeded its authority and acted arbitrarily
7 and capriciously – an assertion that is wholly unsupported by long-standing case law
8 interpreting the APA.
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11 Specifically, plaintiffs ask the Court to overturn the SBA's stated, explicit
12 policy of excluding bankrupt entities from the PPP. Granting plaintiffs the injunctive
13 relief they seek risks disrupting the administration of the PPP in the middle of loan
14 distribution during a global pandemic. Such a drastic result would only be justified by
15 a strong showing that plaintiffs' claims are likely to succeed on the merits, that
16 plaintiffs will be irreparably harmed absent relief and that the requested injunction is
17 in the public interest. Plaintiffs cannot meet the high bar required for the extraordinary
18 relief they seek.
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22 Plaintiff cannot demonstrate that it is likely to succeed on its claims because its
23 claims are facially invalid. First, the injunctive relief plaintiffs seeks against the SBA
24 is barred by sovereign immunity. Second, plaintiffs' anti-discrimination claim under
25 11 U.S.C. § 525 fails because, by its plain terms, Section 525 does not apply to loans
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1 or loan guarantees. Third, plaintiffs cannot obtain a preliminary injunction through its
2 APA claims because those claims are not “core” for bankruptcy court jurisdiction, and
3 thus the bankruptcy court lacks jurisdiction to order relief on those claims.

4 Additionally, plaintiffs’ APA claims fail on their merits because the SBA acted
5 wholly within its delegated authority in implementing the PPP. The bankruptcy
6 exclusion was addressed in two separate agency rules. Congress, through the CARES
7 Act and the Small Business Act, explicitly delegated authority to the Administrator to
8 issue those rules. Accordingly, the agency is clearly entitled to deference and its
9 regulatory implementation of PPP should not be overridden by plaintiffs’ preferred
10 operation of PPP.
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14 Plaintiffs also fail to proffer all but the barest conclusory assertions – a single
15 statement that the COVID-19 pandemic has negatively impacted their cash flow – to
16 support their claim for irreparable harm, which is far from sufficient to support its
17 claim for injunctive relief. Further, although the impact of COVID-19 in the Yakima,
18 Washington region and the need for available healthcare resources is incontestable,
19 awarding an injunction here would be against the broader public interest. In
20 implementing the PPP, the SBA made a policy decision to limit PPP loans to those
21 who had not filed for bankruptcy; in essence indicating a preference for what is a
22 limited source of funding. Plaintiff asks the Court to *replace* the SBA’s stated policy
23 with plaintiffs’ policy preference. Doing so would eviscerate Congress’ choice to vest
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1 the SBA with the authority to implement the PPP and oversee its own lending
2 program.

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

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

2 Miss.).³

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

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

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

3 II. BACKGROUND

4 A. The Small Business Administration

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

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B. Section 7(a) Lending

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

C. Section 7(a) Loan Underwriting

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

1 organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c);
2 meet the size standards for a “small” business set forth under the statute and SBA
3 rules (usually stated in terms of number of employees, or average annual receipts), *see*
4 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate
5 that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. §
6 632(h); 13 C.F.R. §§ 120.100(e), 120.101.
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9 Further factors are described in greater detail in SBA Standard Operating
10 Procedures (“SOP”) and on the official application form for 7(a) loans. *See* SOP 10-
11 50-05 (*see* Request for Judicial Notice (“RJN”) filed contemporaneously with this
12 opposition, Exhibit 1); SBA Form 1919 (*see* RJN, Exhibit 2). Among other
13 considerations, SOP 50-10-05 specifies that lenders may consider “bankruptcy
14 history.” (*See* RJN, Exhibit 1 at 37.) Official Form 1919 also considers whether the
15 applicant has “ever filed for bankruptcy protection.” (*See* RJN, Exhibit 2.) By
16 regulation, requirements listed on this form, and other official SBA forms, comprise
17 part of the “Loan program requirements.” 13 C.F.R. § 120.10. Third-party lenders, in
18 turn, agree to abide by these Loan program requirements when joining the Section
19 7(a) lending program. 13 C.F.R. § 120.10; *see also* SBA Forms 3506 and 3507
20 (addressing new PPP lenders).
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D. The CARES Act.

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

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

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

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

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

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

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

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

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

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

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

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

13 III. ARGUMENT

14 A. LEGAL STANDARD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14
15 Plaintiffs' claims under the APA are not "core" bankruptcy proceedings. "[A]
16 proceeding is non-core if it 'does not invoke a substantive right created by the federal
17 bankruptcy law and is one that could exist outside of bankruptcy.'" *In re Murray*,
18 2011 WL 3862158, at *2 (Bankr. E.D. Wis. Sept. 1, 2011) (quoting *In re U.S. Brass*
19 *Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997)). Although bankruptcy courts have
20 jurisdiction pursuant to 28 U.S.C. § 1334(b) to hear matters that are related to a case
21 arising under Chapter 11, they possess authority only to enter findings of fact and
22 conclusions of law if the matters being heard are non-core proceedings. 28 U.S.C. §
23 157(c)(1).
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1 Plaintiffs' APA claims do not arise in or under Title 11, but rather arise from
2 plaintiffs' assertion that the SBA failed to properly implement the CARES Act. As
3 such, the bankruptcy court may, at most, issues findings of facts and conclusions of
4 law, which must then be reviewed by the district court before any order may be
5 entered. Thus, this Court lacks jurisdiction to award injunctive relief on the APA
6 claims. *Aimtree Co. v. AT & T Corp. (In re Aimtree Co.)*, 202 B.R. 154, 156 (D. Kan.
7 1996) (noting "bankruptcy court lacked statutory authority to enter an injunction in
8 this 'non-core' proceeding").
9

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

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

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

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

6 The SBA was delegated broad authority to implement its lending programs and
7 the bankruptcy exclusion falls within this authority. The SBA Administrator is
8 explicitly empowered to “make such rules and regulations as [she] deems necessary to
9 carry out the authority vested in [her],” and in addition to “take any and all actions ...
10 [that] [she] determines ... are necessary or desirable in making ... loans.” 15 U.S.C.
11 §§ 634(b)(6), (7). The CARES Act did not amend or otherwise limit this authority.
12
13 Instead, Congress explicitly included the PPP in the Section 7(a) lending program,
14 thus vesting the Administrator with broad discretion over the PPP. Indeed, rather than
15 curtailing the Administrator’s discretion over the PPP, the CARES Act expanded it,
16 by giving the Administrator authority to issue new regulations and rules to implement
17 the PPP without complying with typical notice and comment requirements. CARES
18 Act § 1114.
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22 The Administrator exercised this explicit delegation of authority by issuing two
23 rules addressing the bankruptcy exclusion. The First Interim Final Rule incorporated
24 the PPP application form and the bankruptcy exclusion provided on that form. *See*
25 First Interim Final Rule, 85 Fed. Reg. at 20815. The Fourth Interim Final Rule further
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1 addresses ineligibility of entities in active bankruptcy and describes the policy reasons
2 animating that agency decision. *See* Fourth Interim Final Rule, 85 Fed. Reg. at 23451.
3 Issuing these rules was well within the authority Congress delegated to the SBA.
4

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

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

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

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21 “The APA does not allow the court to overturn an agency decision because it
22 disagrees with the decision or with the agency's conclusions...”. *River Runners for*
23 *Wilderness, supra*, 593 F.3d at 1070 (citing *Vt. Yankee Nuclear Power Corp. v.*
24 *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460
25 (1978)); *see e.g. Or. Env'tl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir.1987)
26
27

1 (“The court “may not substitute its judgment for that of the agency concerning the
 2 wisdom or prudence of [the agency's] action.”). “Thus, ‘[e]ven when an agency
 3 explains its decision with ‘less than ideal clarity,’ a reviewing court will not upset the
 4 decision on that account ‘if the agency's path may be reasonably discerned.’” *San Luis*
 5 *& Delta-Mendota Water Auth.*, *supra*, 776 F.3d at 994 (quoting *Ala. Dep't of Env't'l*
 6 *Conservation v. E.P.A.*, 540 U.S. 461, 497, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004)).
 7 “The action . . . need be only a reasonable, not the best or most reasonable, decision.”
 8 *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).⁶

11 Here, SBA is entitled to such deference. When confronted with the same facts
 12 and circumstances as plaintiffs’ TRO in this matter, Judge Shannon in *Cosi, Inc.*
 13

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

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

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

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

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

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

24 ...

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

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

3 ...

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

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

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

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

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

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

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

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

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

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

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

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

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

1 provides that “[e]xcept as otherwise provided in this paragraph, the [SBA] may
2 guarantee [PPP] covered loans under the same terms, conditions, and processes as a
3 loan made under this subsection,” *i.e.*, Section 7(a). 15 U.S.C. § 636(a)(36)(B)
4 (emphasis added). As also explained above, the 7(a) loan program has had pre-
5 existing underwriting standards and procedures that specifically reference a potential
6 borrower’s bankruptcy history.
7

8
9 In contrast, Title IV of the CARES Act is Economic Stabilization and
10 Assistance To Severely Distressed Sectors of The United States Economy, and
11 Subtitle A of Title IV is the Coronavirus Economic Stabilization Act of 2020. This
12 portion of the CARES Act is an entirely new law, and is not an amendment to any
13 existing law. This new law authorizes “the Secretary” of the Treasury to make “loans,
14 loan guarantees, and other investments in support of eligible businesses, States, and
15 municipalities that do not, in the aggregate, exceed \$500,000,000,000.” CARES Act §
16 4003(a). Under this program, Congress authorizes available funds for entities that
17 include passenger air carriers, cargo air carriers, and businesses critical to maintaining
18 national security. CARES Act § 4003(a)(1)-(3). Section 4003(c)(3) is entitled “Federal
19 Reserve Programs or Facilities” and subsection (D) is entitled “Assistance for Mid-
20 Sized Businesses.” It is within that narrow subsection that a borrower must certify it
21 “is not a debtor in a bankruptcy proceeding” to be eligible. CARES Act §
22 4003(c)(3)(D)(i)(V).
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Thus, for a separate department (Treasury) in this narrow new loan program, Congress left the Secretary of the Treasury no discretion regarding the eligibility of mid-sized businesses in bankruptcy for Federal Reserve programs. In stark contrast, for the SBA and its pre-existing 7(a) loan program, recognizing the SBA's experience in crafting such a program, Congress provided significant discretion to the SBA to decide how applicants in bankruptcy should be treated. The text in CARES Act § 4003(c)(3)(D)(i)(V) is completely irrelevant to the PPP.

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

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

1. The PPP Authorizes Loans, Not Grants

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

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

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

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

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

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

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

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

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

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

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

8
9 The PPP is in no way like the archetypal driver’s license in *Perez*, nor the other
10 items enumerated in Section 525(a). The PPP does not provide a right to engage in a
11 specific activity or profession, like a license, permit, charter or franchise. 11 U.S.C. §
12 525(a); *see Ayes*, 473 F.3d at 109 (the enumerated items in 525(a) “implicate
13 ‘government’s role as a gatekeeper in determining who may pursue certain
14 livelihoods’ . . . and show that Congress intended § 525(a)’s protections to be limited
15 to situations sufficiently similar to *Perez*”) (quoting *Toth*, 136 F.3d at 480). The PPP
16 operates to provide emergency funding to certain eligible small businesses.
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19 Business that are excluded from funding are not prohibited from operating, as
20 with a refusal to provide a license, permit, charter or franchise. And, unlike a driver’s
21 license, where the state is the sole entity to provide licensing, the PPP is not the sole
22 source of funding. Indeed, entities in active bankruptcy may be eligible for other relief
23 under the CARES Act itself, including Emergency EIDL grants. *See* CARES Act §
24 1110.
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1 Several bankruptcy courts have already held that the PPP program does not run
2 afoul of Section 525. In *Cosi, Inc.*, Judge Shannon of the Bankruptcy Court for the
3 District of Delaware, held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **E. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM**

2 Plaintiffs fail to allege facts demonstrating that it would be irreparably injured
3 in the absence of injunctive relief. Instead, plaintiffs allege only the barest conclusory
4 statements. This does not suffice.
5

6 “To establish a likelihood of irreparable harm, conclusory or speculative
7 allegations are not enough.” *Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585
8 Fed. Appx. 390, 391 (9th Cir. 2014); *Am. Passage Media Corp. v. Cass Commc’ns,*
9 *Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (finding irreparable harm not established by
10 statements that “are conclusory and without sufficient support in facts”). “It is also
11 well settled that simple economic loss usually does not, in and of itself, constitute
12 irreparable harm.” Wright, Miller & Kane, *Federal Practice & Procedure* §2948.1, at
13 152–53 (2d ed.1995). At best, plaintiffs have alleged a speculative, “possible” injury,
14 which is not enough to demonstrate an entitlement to preliminary injunctive relief.
15 *Winter v. NRDC*, 555 U.S. 7, 22 (2008); *GEFT Outdoors v. City of Westfield*, 922
16 F.3d 357, 364 (7th Cir. 2019).
17

18 No one disputes that a PPP loan, with a low interest rate and potential for
19 forgiveness, is beneficial to businesses. But that does not demonstrate irreparable
20 harm. A PPP loan is money, and its value can be estimated, whether by comparison to
21 the terms of a market-rate loan, or by assuming full or partial forgiveness. While there
22 is no doubt of the unprecedented impact of the pandemic on many businesses,
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1 including plaintiffs, these unsupported assertions do not meet the standard of
2 irreparable harm in the Ninth Circuit.

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

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

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

F. THE PUBLIC INTEREST WEIGHS AGAINST ENJOINING THE SBA.

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

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

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

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

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

G. PLAINTIFFS MAY NOT SEEK RELIEF ON BEHALF OF OTHERS.

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

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

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IV. CONCLUSION

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

RESPECTFULLY SUBMITTED: May 26, 2020.

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Hearing Date: June 3, 2020

Time: 11 a.m.

**Location: U.S. Bankruptcy Court,
402 E. Yakima Avenue,
Second Floor Courtroom,
Yakima, WA**

Telephonic Access

Phone Number: 1-877-402-9757

Conference Code: 7036041

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

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
Possession.¹

Chapter 11

Lead Case No. 19-01189-11

Jointly Administered

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

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).

**REPLY IN SUPPORT OF
MOTION FOR TRO**

1 60



1 Astria Health, *et al.*,

2 Plaintiffs,

3 v.

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

6 Defendants.

**REPLY TO DEFENDANTS BRIEF
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER (ECF NO.
2) AND REQUEST FOR
PRELIMINARY INJUNCTION
(ECF NO. 1); DECLARATION OF
JOHN M. GALLAGHER IN
SUPPORT THEREOF**

7
8 Astria Health and the related debtors and debtors-in-possession (collectively,
9 the “Debtors”) in the above-captioned Chapter 11 bankruptcy cases (collectively,
10 the “Chapter 11 Cases”), hereby file this reply (the “Reply”) to the opposition [Adv.
11 Pro. Docket No. 14] (the “Opposition”) filed by Defendant United States Small
12 Business Administration (the “SBA”) acting through Defendant Jovita Carranza in
13 her capacity as the Administrator of the SBA (the “Administrator”, and together
14 with the SBA, the “Defendants”) to the Debtors’ motion [Adv. Pro. Docket No. 2]
15 (the “Motion”) requesting that the Court grant preliminary injunctive relief under
16 §§ 105 and 106 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1530 *et*

21 **REPLY IN SUPPORT OF
MOTION FOR TRO**

2

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1 *seq.* (the “Bankruptcy Code”)² and Bankruptcy Rule 7065(b), enjoining the
 2 Defendants, and all agents, servants, employees, and any parties acting in concert
 3 with any of the foregoing (the “Restrained Parties”), from:

4 (A) Denying or causing a commercial lender to deny an application of the
 5 Debtors under the Paycheck Protection Program (“PPP”) on the basis that the
 6 applicant is a debtor in bankruptcy or based on the words “presently involved in
 7 any bankruptcy” on the Administrator’s PPP application form;

8 (B) Refusing to guaranty a forgivable PPP loan sought by the Debtors on
 9 the basis that the applicant is a debtor in bankruptcy or because of a “yes” in
 10 response to Question 1 on the official form of application for PPP; and

11 (C) Authorizing, guarantying, or disbursing funds appropriated for loans
 12 under PPP without reserving sufficient funds or guaranty authority to provide the
 13 Debtors with access to PPP funds if the Debtors are eligible once the words
 14 “presently involved in any bankruptcy” are stricken from the official PPP
 15 application form.

16
 17 _____
 18 ² Unless specified otherwise, all chapter, “§” and section references are to the
 19 Bankruptcy Code, and all “ Bankruptcy Rule” references are to the Federal Rules of
 20 Bankruptcy Procedure. Capitalized terms not otherwise defined herein shall have
 21 the meaning ascribed to them in the Motion.

**REPLY IN SUPPORT OF
 MOTION FOR TRO**

3

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INTRODUCTION

This adversary proceeding arises out of Banner Bank's denial, at the direction of the SBA acting through the Administrator, of the Debtors' Applications for loans under the PPP because the applicants are debtors in bankruptcy. The Defendants do not deny this is the sole reason for such denial. *See* Opposition at 15 ("Here, the status quo is that plaintiffs are excluded from the PPP program because they are in bankruptcy."). The denial of the Debtors' PPP applications solely based on the Debtors' status as debtors in bankruptcy is a violation of § 525(a) and the Administrative Procedures Act (the "APA"). As explained herein, the first tranche of PPP funding was quickly exhausted, and Congress set a June 30, 2020 deadline for funding the second tranche. Thus, Debtors will be irreparably harmed if they are unable to obtain preliminary injunctive relief in time to have their Applications considered without reference to their status as debtors in these Chapter 11 Cases. The Novel Coronavirus ("Covid-19") pandemic has and will continue to have a negative impact on the Debtors' cash flow. PPP funds will further the Debtors' reorganization efforts and preserve the Debtors' ability to offer quality healthcare to the greater Yakima Valley community.

This adversary proceeding is wholly in line with the goals of PPP, which is to help small businesses survive economic hardships caused by the Covid-19 pandemic through funding payroll costs, rent, interest and utilities during the initial

1 shelter-in-place period and afterwards. It is illogical to require those
 2 businesses—particularly hospitals on the “front lines” of treating patients—to be
 3 excluded solely because they are in bankruptcy.

4 Accordingly, the Debtors request that the Court now enter a preliminary
 5 injunction to permit the Debtors to submit their applications for PPP funds without
 6 being discriminated against on the basis of their status as Chapter 11 debtors and to
 7 ensure PPP does not run out of money before the applications can be processed.
 8 Again, the Debtors do not request the Court determine that the Debtors are entitled
 9 to funds under PPP or that any application of the Debtors meets the relevant criteria
 10 for participation in PPP. Rather, the Debtors seek a chance to participate in this
 11 important government program so that they can have the same assistance in
 12 surviving the financial devastation caused by the Covid-19 pandemic that other
 13 companies outside of bankruptcy have, all before the deadline.

14 Defendants’ Opposition falls woefully short of providing the necessary
 15 rebuttal required for this Court to deny the Debtors’ Motion. First, the anti-
 16 injunction provision in 15 U.S.C § 634(b)(1) does not bar relief here. Second, PPP
 17 must be treated differently than other “loans” under § 7(a) because there is no
 18 underwriting process or creditworthiness assessment required by the CARES Act.
 19 Third, Defendants’ should not be granted deference because their actions are
 20 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with
 21

law. Fourth, this Court has authority to consider more than the limited administrative record before the Defendants because of Ninth Circuit exceptions to the general rule. Fifth, PPP is a grant within the meaning of § 525(a). Sixth, the Debtors will be irreparably harmed if this Court does not grant the requested injunctive relief. For all of the reasons set forth in the Motion and herein, as well as what is in the record and the arguments that will be presented at hearing, the Debtors request this Court overrule the Opposition in its entirety and grant the Debtors' Motion.

JURISDICTION, VENUE, AND STATUTORY BASIS FOR RELIEF

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(B), pursuant to which all cases under the Bankruptcy Code and all proceedings arising in or related to cases arising under the Bankruptcy Code are automatically referred to this Court.

Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Motion is brought pursuant to Rule 65 of the Federal Rules of Civil Procedure, which is applicable to this adversary proceeding pursuant of Bankruptcy Rule 7065. The Debtors consent to entry of final orders by this Court in this adversary proceeding.

STATEMENT OF ADDITIONAL FACTS

1. On May 15, 2020, the Debtors filed the Motion and a Verified

1 Complaint against the SBA and the Administrator seeking preliminary and
 2 permanent injunctions, declaratory relief, and writ of mandamus under 28 U.S.C.
 3 § 1361. The contents of the Verified Complaint are incorporated by reference
 4 herein. The Debtors' President and Chief Executive Officer, John Gallagher,
 5 signed the verification included with the Verified Complaint.

6 2. On May 19, 2020, the Parties submitted an agreed proposed order
 7 [Adv. Pro. Docket No. 8], which this Court entered on May 20, 2020 [Adv. Pro.
 8 Docket No. 13], which set forth a schedule for proceeding with the Debtors' request
 9 for a preliminary injunction and which reserved PPP funds until the same is
 10 resolved.

11 3. On May 19, 2020, at the initial hearing on the Motion, the Court
 12 provided a number of facts regarding the state of the greater Yakima Valley
 13 community and the nation related to Covid-19 and PPP, of which facts the Court
 14 will take judicial notice, unless such conditions improve by the time of the June 3,
 15 2020 hearing. *See* Transcript of May 19, 2020 hearing on Motion, at 11-13,
 16 attached hereto as **Exhibit 1**. The Debtors incorporate such facts herein.

17 4. On or about May 22, 2020, Defendants adopted a new rule regarding
 18 forgiveness under § 1106 of the CARES Act (the "Forgiveness Rule") whereby
 19 Defendants have determined that if they denied an application in the first instance,
 20 presumably, for example, because an applicant was in bankruptcy proceedings, then
 21

1 even if the applicant is permitted to receive the funds as an eligible participant
 2 later—for example, related to court order striking reference to such in the
 3 application—at no point in the future the will the SBA forgive that PPP loan.³ See
 4 Forgiveness Rule at 7-8 (“If SBA determines . . . that the borrower was ineligible
 5 for the PPP loan based on . . . SBA rules or guidance available at the time of the
 6 borrower’s loan application, or the terms of the borrower’s PPP loan
 7 application . . . [,] the loan will not be eligible for loan forgiveness.”), a true and
 8 correct copy of which is attached hereto as **Exhibit 2**. Thus, Defendants seemingly
 9 continue to discriminate against debtors by writing out of PPP the loan forgiveness
 10 aspect.

11 **RELIEF REQUESTED**

12 The Debtors request entry of a preliminary injunction granting the Motion. ⁴

13 ³ To the extent Defendants will not allow loan forgiveness based solely on the
 14 Defendants’ initial denial of eligibility that was based solely on the Debtors’ status
 15 as debtors in these Chapter 11 Cases, the Debtors reserve their right to request
 16 further relief from this Court.

17 ⁴ Defendants cite *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir.
 18 2019) (Opposition at 47) for the proposition that the Debtors’ requested injunctive
 19 relief goes far beyond the minimum necessary to preserve plaintiffs’ claims,
 20 implying the Debtors have requested nationwide injunctive relief. However, (i) the
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BASIS FOR RELIEF

Under the traditional standard, the Court may issue a preliminary injunction if it determines that the following four factors weigh in the Debtors' favor: (1) the moving party will probably prevail on the merits; (2) the moving party will suffer immediate and irreparable injury if the relief is denied; (3) the balance of potential harm favors the moving party; and, depending on the nature of the case, (4) the public interest favors granting relief. *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (citing *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987); *Zepeda et al. v. United States Immigration & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983)). The Ninth Circuit has also adopted an "alternative standard" where a party is entitled to a preliminary injunction if it demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Rent-A-Center, Inc. v. Canyon Television and*

Debtors' only request that the Refrained Parties refrain from using the discriminatory behavior to impact them (see A, B, and C on page 3 of this Reply and the Motion), and (ii) *E. Bay Sanctuary Covenant* simply found that "[t]he nationwide scope of the injunction [wa]s not supported by the record as it stands." *Id.* at 1029. It is premature to address the Debtors' claims for a writ of mandamus. See Verified Complaint, Count VI.

1 *Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991). These two tests are not
 2 mutually exclusive, but are alternate tests in a single continuum. *Sterling Savings*
 3 *Assoc. v. Ryan*, 751 F. Supp. 871, 876 (E.D. Wa. 1990).

4 Counter to these tests, Defendants claim the Debtors' burden is "doubly
 5 demanding" requiring the Debtors to establish that the law and facts clearly favor
 6 their position because they are seeking a mandatory injunction, which is one that
 7 requires the enjoined party to take action. Opposition at 15. However, the
 8 distinction between mandatory and prohibitory injunctions has been criticized.
 9 *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997) (The
 10 distinction between mandatory and prohibitory injunctions is often more semantical
 11 than substantive). The standards for any injunctive relief require irreparable harm,
 12 which is clearly present here. That harm (the inability of the Debtors to apply for
 13 governmental assistance to sustain the payroll for its nurses and other staff in the
 14 midst of a global pandemic and the economic trauma caused by the Debtors
 15 following Washington State guidelines requiring the cessation of elective surgeries)
 16 is sufficiently "compelling" to satisfy the standard for a mandatory injunction even
 17 if the Court applies that standard. And following the SBA's argument even further,
 18 suggesting that the Motion be treated as a mandatory injunction, the Bankruptcy
 19 Code's anti-discrimination provision in § 525 provides a clear, nondiscretionary
 20 duty which should have been followed by the Administrator. Finally, because the
 21

1 “status quo” to be preserved is the last uncontested position of the parties,⁵ a
 2 prohibitory injunction can compel acts necessary to return to that status quo without
 3 being characterized as a mandatory injunction. As a result, the mandatory versus
 4 prohibitory character of injunctions, at least on these facts, is of little import.
 5 Moreover, Defendants misconstrue the Debtors’ demands. The Debtors simply
 6 request that the Restrained Parties *refrain from* certain actions, *i.e.*, considering the
 7 ⁵ Defendants argue the Motion seeks relief that goes “beyond” the status quo, which
 8 they describe as being “the plaintiffs are excluded from the PPP program because
 9 they are in bankruptcy.” Opposition at 15. However the status quo to be preserved
 10 is not necessarily the status quo at the moment the Court hears the motion. Rather
 11 it is the last “uncontested status that preceded the pending controversy.” *Litton*
 12 *Sys., Inc. v. Sundstrand Corp.*, 750 F.2d 952, 961 (Fed. Cir. 1984) (*citing Tanner*
 13 *Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)); *accord*
 14 *Washington Capitals Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir.
 15 1969). Here, the “last uncontested status” is the moment when the Debtors
 16 submitted their Applications. That is the status quo the Debtors seek restored. If
 17 the Debtors’ application is still pending, and Defendants and Banner Bank are
 18 compelled to preserve sufficient funds to allow the Debtors’ Applications to be
 19 granted when the Court finally rules that § 525 precludes discrimination against the
 20 Debtors solely because they are in bankruptcy, the status quo will be preserved.

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**REPLY IN SUPPORT OF
 MOTION FOR TRO**

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1 Debtors' status as debtors in these Chapter 11 Cases. *See* A, B, and C on page 3 of
 2 this Reply and the Motion. In any event, the Debtors contend there is clear support
 3 for their position, and nothing binding in the Ninth Circuit to the contrary.

4 As set forth in the Motion and incorporated herein, the Debtors satisfy these
 5 requirements here and the Court should grant the preliminary injunction requested
 6 by the Motion. As of this filing, at least eight (8) bankruptcy cases in which the
 7 court has granted injunctive relief in favor of debtors that were denied access to
 8 funds under PPP, as further described herein—and similar requests are pending
 9 before different bankruptcy courts.⁶

10 ARGUMENT

11 Defendants do not dispute that they discriminated against the Debtors solely
 12 on the basis that the Debtors are debtors in bankruptcy. Opposition at 15.⁷ Rather,

13 ⁶ The Debtors note that some courts have denied motions for temporary restraining
 14 orders and/or preliminary injunctions in favor of debtors that were denied access to
 15 funds under PPP. *See* Opposition at 5 (collecting cases). However, for the reasons
 16 discussed in the Motion and herein, the Debtors contend those decisions were
 17 wrongly decided.

18 ⁷ Additionally, Debtor's Memorandum Of Law In Support Of Count III In The
 19 Debtor's Complaint For Violation Of 11 U.S.C. § 525(a), *In re Springfield Hosp.,*
 20 *Inc.*, Adv. No. 20-01003 [Dkt. 48] (Bankr. D. Vt. May 29, 2020), confirms that
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1 the dispute revolves around whether Defendants are permitted to do so under
 2 § 525(a) and the APA, and whether this Court has power to enforce the Debtors
 3 rights under the Bankruptcy Code, the CARES Act, and 28 U.S.C. § 1361. None of
 4 Defendants' arguments withstand scrutiny.

5 In support of their claim that the Debtors have no likelihood of success on the
 6 merits, Defendants essentially argue they are permitted to discriminate against the
 7 Debtors here because they have always discriminated against debtors in their other
 8 § 7(a) loans, as demonstrated by, among other things, SBA Form 1919's use of
 9 similar questions about the applicant's bankruptcy status. *See* Opposition at 9.
 10 Furthermore, they argue that the Court should give deference to their decision to
 11 discriminate against the Debtors solely on the basis that they are debtors in these
 12 Chapter 11 Cases. Additionally, they argue that § 525 does not apply here because
 13 PPP funds are not grants since Congress and Defendants labeled PPP funds "loans."
 14 *See* Opposition at 31-32. Finally, Defendants argue that the Debtors have made *no*
 15 showing of irreparable harm and that the public interest weighs against enjoining
 16 Defendants since litigating this is a waste of time and will "short-circuit" the entire
 17 when that debtor was permitted to submit an application for PPP funds after that
 18 court issued a temporary restraining order striking "or presently involved in any
 19 bankruptcy" from the official form, the SBA approved that debtor as an eligible
 20 applicant. *Id.* at 5-6.

1 government's "rapidly-evolving political and administrative landscape or
 2 responding to COVID-19." See Opposition at 42, 44. These arguments fall flat,
 3 and the Debtors can satisfy each of the preliminary injunction requirements.

4 **A. Section 634(b)(1)'s Anti-Injunction Provision Does Not Bar Relief.**

5 Defendants have argued that 15 U.S.C. § 634(b)(1) prevents bankruptcy
 6 courts from enjoining them from discriminating against a debtor.⁸⁹ Importantly,
 7 Bankruptcy Code § 525(a) bars discriminatory conduct—and Defendants' position

8 ⁸ To the extent Defendants make the form-over-substance argument that the
 9 Debtors failed to use the magic language required when alleging Congress waived
 10 Defendants' sovereign immunity (Opposition at 15), the Debtors respond (i) there is
 11 no magic language, (ii) the Verified Complaint satisfies the requisite standard for
 12 alleging the federal government has waived sovereign immunity (*see* Verified
 13 Complaint at ¶ 9, n.2 and n.3; *see also* Motion at 29-31) (stating authority to sue
 14 Defendants under § 106 and 15 U.S.C. § 634(b) and providing other support),
 15 (iii) for the avoidance of doubt, the Debtors allege the federal government has
 16 waived sovereign immunity, and (iv) if necessary, the Debtors will amend their
 17 Verified Complaint to include the magic language.

18 ⁹ Assuming *arguendo* 15 U.S.C. § 634(b)(1) generally prohibits issuing an
 19 injunction against the Defendants, such immunity is expressly waived under 11
 20 U.S.C. § 106(a).

1 would leave this Court powerless to fashion relief when the government arbitrarily,
 2 unilaterally, capriciously, and unlawfully, discriminates against a person on the
 3 basis of that person's status as a debtor.

4 Defendants' position is based on an incorrect reading of 15 U.S.C.
 5 § 634(b)(1)—both based on its plain text and when harmonized with the
 6 Bankruptcy Code. Section 634(b)(1) says:

7 In the performance of, and with respect to, the functions, powers, and
 8 duties vested in [her] by this chapter the Administrator may—

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

12 15 U.S.C. § 634(b)(1).

13 There are four reasons why this statute does not prevent the Court from
 14 granting the Motion. First, 15 U.S.C § 634(b)(1) was enacted in 1953, and
 15 subsequently amended in 1958, P.L. 85-536, § 5, long before the *Perez* decision
 16 (the impetus for § 525) or the enactment of §§ 105, 106, and 525 of the Bankruptcy
 17 Code. At that time, injunctive relief was generally not available against the federal
 18 government, but 15 U.S.C § 634(b)(1) was not intended to grant the SBA any
 19 greater immunity from injunctive relief than any other agency. *Cavalier Clothes,*
 20 *Inc., v. U.S.*, 810 F.2d 1108, 1112 (Fed. Cir. 1987) (reversing and remanding order
 21 denying injunctive relief for claims involving SBA). Much like the task before the

1 Court now, the *Cavalier Clothes* Court had to harmonize 15 U.S.C § 643(b)(1) with
 2 a later-enacted statute that specifically authorized injunctive relief against the
 3 government—but which did not name the SBA. In doing so, the *Cavalier Clothes*
 4 Court reasoned as follows:

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

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

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

19 The Federal Circuit and Claims Court are not alone in holding that 15 U.S.C
 20 § 634(b)(1) does not bar injunctive relief against the SBA. The First Circuit
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engaged in a similar deep analysis of 15 U.S.C § 634(b)(1) and ultimately reached the same conclusion:

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

Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1057 (1st Cir. 1987); *see also Hartshorne Mining LLC v. Carranza*, (*In re Hartshorne Holdings LLC*), 20-ap-04012 (W.D. Ky. Bankr.), slip opinion at *2 (Dkt 20)(collecting adversary proceedings that found debtors were “entitled to a TRO prohibiting the Administrator from applying bankruptcy eligibility rule to PPP”).¹⁰

The Court’s task here is the same as in *Cavalier Clothes, Related Industries*, and *Ulstein*. These decisions provide a clear path to harmonize 15 U.S.C § 634(b)(1) with §§ 105(a), 106(a), and 525(a) of the Bankruptcy Code. Section 634(b)(1) provides a general limitation on the availability of injunctive relief,

¹⁰ Defendants may argue that the same result is achieved through declaratory relief, to which the Debtors are clearly entitled, but such a declaration would be a dead letter without an injunction to enforce it. *See Camelot Banquet Rooms, Inc. v. United States Small Bus. Admin.*, No. 20-C-0601, 2020 WL 2088637 (E.D. Wis. May 1, 2020).

1 whereas the later-enacted provisions of the Bankruptcy Code bar discrimination
 2 against debtors, expressly provide this Court with authority to enter any order
 3 necessary to remedy such discrimination, and waive sovereign immunity with
 4 respect to those orders. This is patently clear from §§ 105(a), 106(a)(1)-(3), and
 5 525(a). The situation before the Court is exactly like the one addressed in *Cavalier*
 6 *Clothes, Related Industries*, and *Ulstein*. The Court should reach the same result
 7 here.

8 Second, Defendants are not shielded from injunctive relief if they are acting
 9 outside the scope of their lawful authority. Section 634(b)(1) is limited to those
 10 circumstances in which Defendants are acting “[i]n the performance of, and with
 11 respect to, the functions, powers, and duties vested in [them] by this chapter[.]”
 12 Defendants have no authority to act outside the scope of their legal authority. They
 13 have no authority to engraft discriminatory provisions onto the CARES Act in
 14 violation of § 525(a) of the Bankruptcy Code. “It should be clear . . . that when the
 15 Administrator acts beyond the scope of [her] authority 15 U.S.C. § 634(b) does not
 16 preclude injunctive action.” *Dubrow v. Small Bus. Admin.*, 345 F.Supp. 4, 7 (C.D.
 17 Cal. 1972) (injunctive relief available if administrator acts outside scope of
 18 authority but determining actions were not outside authority); *see also Elk Assoc.*
 19 *Funding Corp. v. Small Bus. Admin.*, 858 F.Supp.2d 1, 22-3 (D.D.C. 2012) (“courts
 20 [of this circuit] have strongly intimated that injunctive relief is available, at a
 21

1 minimum, when the SBA exceeds its statutory authority”).

2 Third, the text of 15 U.S.C § 634(b)(1) bars injunctive relief “against the
3 Administrator or [her] property[.]” No more, no less. The key words are “or [her]
4 property[.]” It is not “SBA’s” property or “agency” property or “government”
5 property. Section 634(b)(1) could plausibly be read to provide protection to an
6 individual serving as administrator of the SBA and to protect that person and her
7 personal property in her individual capacity. If there was a risk of attachment of the
8 Administrator’s bank account or injunctive relief as to the Administrator personally,
9 then who would ever serve in that position?

10 Fourth and finally, even if 15 U.S.C § 634(b)(1) bars injunctive relief against
11 the Administrator for official duties, §§ 105(a), 106(a), and Bankruptcy Rule 7065
12 authorize the Court to bind the Administrator’s “agents, servants, employees, and
13 attorneys; and . . . other persons who are in active concert or participation with
14 anyone described in Rule 65(d)(2)(A) or (B).” In other words, the Court has the
15 authority to enjoin every single person who works for the Administrator and is
16 helping her to implement an unlawful and discriminatory policy and practice
17 toward the Debtors, *i.e.*, the Refrained Parties.

18 **B. PPP Must Be Treated Differently Than Other “Loans” Under § 7(a)**
19 **Because There Is No Underwriting Process or Creditworthiness**
20 **Assessment Required.**

21 Defendants’ arguments that they are simply using the time-honored policies

1 of other § 7(a) loans wholly ignore the fact that PPP is not like all other “loans”
 2 under § 7(a). Chiefly, there are no underwriting requirements, as the Administrator
 3 clearly stated on the record. *See* Third Interim Rule (“The Administrator
 4 recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans
 5 are uniform for all borrowers, and the standard underwriting process does not apply
 6 because no creditworthiness assessment is required for PPP Loans.”). Defendants
 7 act as though that statement was never made and is not part of the record. Indeed,
 8 their Opposition is completely devoid of any reference to this statement.

9 Moreover, Defendants’ position is based on a contradiction of the Third
 10 Interim Rule, stating “the 7(a) loan program has had pre-existing underwriting
 11 standards and procedures that specifically reference a potential borrower’s
 12 bankruptcy history.” Opposition at 30, lines 4-8. The fact that Defendants
 13 implemented “pre-existing underwriting standards and procedures” in PPP, which
 14 altered the eligibility requirements set by Congress, *is exactly the problem*—it is
 15 unreasonable and contrary to the CARES Act. *See* 5 U.S.C. § 706(2)(A).

16 Assuming *arguendo* Defendants must follow 15 U.S.C. § 636(a)(6)’s
 17 requirement that “[a]ll loans made under this subsection shall be of such sound
 18 value or so secured as reasonably to assure repayment,” (15 U.S.C. § 636(a)(6)),
 19 when the repayment liability is \$0.00, then a “loan” of funds to *literally anyone* is
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1 reasonably assured to provide repayment of such liability.¹¹ Thus, reference to
 2 how Defendants generally treat § 7(a) loans is irrelevant since such treatment
 3 pertains to the standard underwriting process not applicable to PPP. It is illogical to
 4 consider whether debtors in bankruptcy would present an unacceptably high risk for
 5 non-repayment of their \$0.00 liability under PPP.

6 Moreover, the “sound value” requirement, *i.e.*, ensuring the funds are used
 7 for designated purposes, is undeniably satisfied for Chapter 11 debtors because all
 8 Chapter 11 debtors—unlike non-debtor PPP applicants—are subjected to
 9 substantial reporting requirements and are under significant oversight from the
 10 bankruptcy court, the Office of the United States Trustee, an official committee of
 11 unsecured creditors, the general creditor body, and even the press, all preventing the
 12 debtors from “running around like free-range chickens.” To say otherwise is
 13 dubious, and thus, excluding the Debtors under these arguments is arbitrary and
 14 capricious and not in accordance with the law.

15
 16
 17 ¹¹ As with any grant for which a law-abiding citizens applies, Debtors assume they
 18 are capable of following the guidelines surrounding the intended purpose of PPP
 19 such that they will be forgiven, and have promised to do so in the Verified
 20 Complaint, Motion, and herein.

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**REPLY IN SUPPORT OF
 MOTION FOR TRO**

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C. Defendants’ Should Not Be Granted Deference Because Their Actions are Arbitrary, Capricious, An Abuse of Discretion, and Otherwise Not In Accordance with Law.

The APA has provided this Court with authority to set aside Defendants’ decisions because they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 15 U.S.C. § 706(2)(A). 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) (“review must be sufficiently probing to ensure that the agency has not relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”) (citation omitted). In short, Defendants’ decision to exclude the Debtors from PPP based solely on their status as debtors in these Chapter 11 Cases was unreasonable, in violation of the APA.

Contrary to Defendants’ analysis (Opposition at 23), developing a bright line rule based on an arbitrary and capricious metric is still arbitrary and capricious. Defendants are not saved because they drafted a bright line rule. Had the rule been drafted so as to consider debtors who would use the funds for their intended purpose and only to the extent they are forgivable, then the rule would not have

1 been arbitrary and capricious, an abuse of discretion, or otherwise not in accordance
2 with the law.

3 Citing the *Chevron* deference doctrine does not provide the protections
4 Defendants claim. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).
5 Defendants argue that the CARES Act is silent on whether debtors may be eligible
6 for PPP and that under the *Chevron* doctrine, this “requires” Defendants to enact
7 rules and formulate policy “to fill any gap left, implicitly or explicitly, by
8 Congress,”—and that Defendants’ rules are entitled to deference. Opposition at 20.
9 This analysis fails on several grounds.

10 First, *Chevron* deference does not apply because the applicable “interim final
11 rules” relied upon by Defendants are not entitled to deference under the *Chevron*
12 standard. The Supreme Court has limited *Chevron* deference, in the context of the
13 “administrative implementation of a particular statutory provision [to] when it
14 appears that Congress delegated authority to the agency generally to make rules
15 carrying the force of law, and that the agency interpretation claiming deference was
16 promulgated in the exercise of that authority. Delegation of such authority may be
17 shown in a variety of ways, as by an agency’s power to engage in adjudication or
18 notice-and-comment rulemaking, or by some other indication of a comparable
19 congressional intent.” *United States v. Mead*, 533 U.S. 218, 226-27 (2001). Here
20 Defendants have promulgated these rules without any notice and comment
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1 rulemaking, or adjudication or any other indication of comparable congressional
 2 intent. Therefore, the rules and the implementation of the rules relied upon here are
 3 not entitled to *Chevron* deference. *Mead*, 533 U.S. at 227; *Reno v. Koray*, 515 U.
 4 S. 50, 61 (1995) (internal agency guideline that is not “subject to the rigors of the
 5 [APA], including public notice and comment” is entitled only to “some deference”
 6 (internal quotation marks omitted)).

7 Second, as the Supreme Court clearly articulated in the 2015 decision *King v.*
 8 *Burwell*, 135 S. Ct. 2480 (2015), the two-step framework in *Chevron* begins not
 9 with the assumption that anything not expressly said by Congress can be “filled in”
 10 by the agency, but rather if the statute is ambiguous. This first step is important
 11 because the *Chevron* deference “is premised on the theory that a statute’s ambiguity
 12 constitutes an implicit delegation from Congress to fill in the statutory
 13 gaps.” *Burwell*, 135 S. Ct. 2488 (quoting *FDA v. Brown & Williamson Tobacco*
 14 *Corp.*, 529 U.S. 120, 159 (2000)); see also *Smiley v. Citibank (South Dakota), N.*
 15 *A.*, 517 U. S. 735, 740-41 (1996) (“We accord deference to agencies under *Chevron*
 16 . . . because of a presumption that Congress, when it left ambiguity in a statute
 17 meant for implementation by an agency, understood that the ambiguity would be
 18 resolved, first and foremost, by the agency, and desired the agency (rather than the
 19 courts) to possess whatever degree of discretion the ambiguity allows.”) (emphasis
 20 added). In *Burwell*, the Supreme Court noted that in “extraordinary cases” courts
 21

1 should consider carefully whether “Congress has intended such an implicit
 2 delegation.” Burwell, 135 S. Ct. at 2488-89. Here there is no ambiguity in the
 3 statute regarding whether debtors in bankruptcy could qualify. To the contrary,
 4 Congress was explicit in addressing the eligibility requirements for PPP
 5 funds. Moreover, even if there was ambiguity (which there is not), the
 6 circumstances of a global pandemic, causing the Congress to authorize trillions of
 7 dollars of relief funds to an national economy reeling from the virtual shutdown of
 8 large swaths of the nation is the “extraordinary case” where the Court should
 9 consider carefully whether Congress intended to exclude from the PPP hospitals
 10 like the Debtors—and their nurses and other employees—which are on the front
 11 lines of a national emergency.

12 Finally, whether there are any gaps to fill is the wrong question; the correct
 13 question is whether § 1102 of the CARES Act unambiguously addresses eligibility
 14 requirements for PPP funds. Without a doubt, it does—and there is nothing
 15 ambiguous about those requirements. The CARES Act does not allow Defendants’
 16 rules to discriminate against debtors in violation of § 525. Indeed, as mentioned in
 17 the Motion, Congress specifically added in prohibitions against debtors accessing
 18 certain other CARES Act benefits, and its *silence* in adding similar prohibitions in
 19 PPP *means something*. Defendants’ attempt to disregard Debtors’ reference to
 20 § 4003 of the CARES Act (Opposition at 29) ignores the fact that Congress knew
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1 when and how to alter the rights of debtors under the CARES Act but chose not to
 2 do so with respect to PPP. *Russello v. United States*, 464 U. S. 16, 23 (1983)
 3 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))
 4 (“[W]here Congress includes particular language in one section of a statute but
 5 omits it in another section of the same Act, it is generally presumed that Congress
 6 acts intentionally and purposely in the disparate inclusion or exclusion.”).

7 Additionally, there is no requirement that the Court grant deference to
 8 Defendants’ label that PPP is a “loan.” As seen from the so-called “duck test,”
 9 labels or nomenclature is not definitive. *See generally, Hussain v. Obama*, 718
 10 F.3d 964, 968 (D.C. Cir. 2013) (“WHEREAS it looks like a duck, and WHEREAS
 11 it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE
 12 HOLD that it is a duck.”) (internal citations and quotations omitted); *BMC Indus.,*
 13 *Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1337 (11th Cir. 1998) (using the duck test
 14 in another context).¹² The Debtors seek access to a program in which the

15 ¹² The SBA’s reliance on the use of the term “loan” even though PPP is clearly not
 16 a loan in any traditional sense of the word, is akin to Humpty Dumpty’s thoughts on
 17 use of particular words: “When I use a word,” Humpty Dumpty said in rather a
 18 scornful tone, “it means just what I choose it to mean—neither more nor less.”
 19 “The question is,” said Alice, “whether you can make words mean so many
 20 different things.” “The question is,” said Humpty Dumpty, “which is to be master
 21

1 government provides a grant, nominally through a “guaranty,” that the Debtors will
 2 never have to repay. Although Defendants insist that PPP is a loan program, that
 3 interpretation is inconsistent with the clear intent of Congress. In order for an
 4 agency interpretation to be granted deference, it must be consistent with the
 5 congressional purpose. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). All small
 6 businesses have the right to apply for PPP. The Debtors should too, without risk of
 7 discrimination. The Debtors have said under oath in their Verified Complaint that
 8 they only seek funds in an amount that could be forgiven and that they would
 9 immediately return any additional funds. While the Debtors need cash now to
 10 survive, they do not want to increase liabilities. Again, Chapter 11 debtors are
 11 subject to extensive supervision, transparent reporting in the form of monthly
 12 operating reports with bank account activity filed on the docket, and other reporting
 13 and public accountability that is completely absent with respect to non-debtor PPP
 14 participants. Indeed, there may even be a greater risk of loan guaranties being
 15 triggered with non-debtor entities.

16
 17
 18 —that’s all.” Lewis Carroll, *Through the Looking Glass*, chapter 6, *available at*
 19 [http://www.alice-in-wonderland.net/resources/chapters-script/alice-in-wonderland-](http://www.alice-in-wonderland.net/resources/chapters-script/alice-in-wonderland-quotes/)
 20 [quotes/](http://www.alice-in-wonderland.net/resources/chapters-script/alice-in-wonderland-quotes/) (last visited on May 31, 2020).

D. This Court has Authority to Consider More Than the Limited Administrative Record Before the Defendants.

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.¹³

Fence Creek Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010).

Here, these exceptions weigh in favor of this Court considering all of the Debtors’ arguments and taking judicial notice of the state of the world amidst the Covid-19 pandemic. The Court should also consider the *lack of* administrative record in this case, *i.e.*, no empirical studies, analysis of past cases in which the SBA suffered losses as a result of bankruptcy cases, academic commentary, or

¹³ 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 literature about the risks associated with debtors in bankruptcy. Indeed, as a court
 2 reviewing an alleged APA violation, the Court “must consider whether the decision
 3 was based on a consideration of the relevant factors and whether there has been a
 4 clear error of judgment.” *San Luis*, 747 F.3d at 601 (also recognizing the above-
 5 mentioned exceptions to the general rule). Here, there was clear error, and *Chevron*
 6 deference is inappropriate. Specifically, the Administrator has contradicted herself,
 7 and deference cannot prevail. Moreover, Defendants’ decision is based on the
 8 premise that debtors in bankruptcy are bad. This premise is false.

9 Strangely, although Defendants argue the Court is limited to the
 10 administrative record, they simultaneously continue to *change* the administrative
 11 record. *See, e.g.*, Third Interim Rule; Fourth Interim Rule; Forgiveness Rule. But
 12 the Supreme Court has, for more than seven (7) decades, recognized that the
 13 amount of “deference” to which an administrative interpretation should be accorded
 14 is in part based upon “its consistency with earlier and later pronouncements” of an
 15 agency. *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). The inconsistency of
 16 the Administrator’s rationale is telling. Defendants then cite the *Cosi* court for the
 17 proposition that we “now have a further developed record and a request by the SBA
 18 for deference to its considered judgment, as articulated in the interim rule,”
 19 implying this Court should “believe that [it is] dealing with a different, or at least,
 20 altered landscape than was presented to the Texas Court [the *Hidalgo* Court].” *See*

1 Opposition at 28 (citing *Cosi, Inc. v. SBA*, Adv. No. 20-50591 (BLS) (Bankr. D.
 2 Del.)). However, that is a boldfaced attempt to do exactly what the Defendants are
 3 not permitted to do—create an explanation post hoc with the assumption that there
 4 is somehow a relationship between the initial decision to exclude debtors and the
 5 explanation provided after the fact. The landscape cannot change in that fashion.
 6 Despite the admonition from this Court that Defendants should produce a witness
 7 from the SBA to explain the decision-making that occurred from the start,
 8 contemporaneously with the decision (*see* Transcript of May 19, 2020 hearing on
 9 Motion, at 7), Defendants instead rely on what is clearly post hoc explanation.

10 However, the Supreme Court has held that

11 “[d]eference to what appears to be nothing more than an agency’s
 12 convenient litigating position would be entirely inappropriate.” *Bowen*
 13 *v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13, 109 S. Ct. 468,
 14 473–74, 102 L. Ed. 2d 493 (1988). When there is “an appearance that
 15 the agency’s interpretation is no more than a ‘post hoc rationalization
 16 advanced by an agency seeking to defend past agency action against
 17 attack,’ *id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) . . .
 18 deference is inappropriate.”

19 *Price v. Stevedoring Services of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012).

20 Thus, this Court should disregard Defendants’ reference to the
 21 Administrator’s statement in the Fourth Interim Rule that states, “The administrator
 in consultation with the secretary determined that providing PPP loans to debtors in
 bankruptcy would present an unacceptably high risk of unauthorized use of funds

1 for non-repayment of unforgiven loans.”¹⁴

2 This rule makes no sense. PPP requires applicants to certify that “the
3 uncertainty of economic conditions makes necessary the loan request to support the
4 ongoing operations of the eligible recipient.” CARES Act § 1102(G)(i)(I).
5 *Literally every* PPP applicant must certify that they are concerned they are going
6 out of business under the current economic conditions. Claiming that every debtor
7 in any Chapter 11 is more risky than a restaurant, bar, indoor gym, live music
8 venue, barbershop, etc. that was not in bankruptcy before the Covid-19 crisis is
9 pure speculation. Defendants’ conclusion that a Chapter 11 debtor is more likely to
10 misuse PPP funds is also specious. Moreover, a blanket statement that that debtors
11 in bankruptcy are somehow a higher risk is arbitrary and capricious. There are a
12 multitude of reasons why a debtor would file for bankruptcy, *e.g.*, a freak accident
13 resulting in millions of dollars of liabilities. One cannot say that such a debtor is at
14 a higher risk.

15 Additionally, Defendants’ rule incentivizes businesses that are on the verge

16 ¹⁴ Notably, this adversary proceeding has nothing to do with loans that will be
17 *unforgiven*, and assuming from the outset that all loans will be unforgiven is
18 contrary to the intent of Congress. Moreover, the Debtors have carefully
19 constructed their Applications to only request funds that will be forgiven, and have
20 promised to return any amount above that immediately.

of needing Chapter 11 protection to simply wait out Defendants' rule.

If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application.

Fourth Interim Rule. It is not difficult to see how side-step this rule. As commentary demonstrates, Defendants' bright line rule is arbitrary:

The Four Hypotheticals

To demonstrate the point that the current SBA position is adverse to the interests of the federal government, allow us to posit four hypotheticals for your consideration. It is undeniable that more bankruptcy proceedings will come from the economic morass that COVID-19 has wrought, and that surge in bankruptcy filings is already starting. Hence, the hypotheticals below (with the exception of Hypothetical Four) are all actually happening in real time.

- Hypothetical One: Borrower files bankruptcy (either a chapter 11 or an SBRA case) applies to a Section 7(a) Lender for a PPP II Loan, and is denied based on the pendency of the bankruptcy proceeding.
- Hypothetical Two: Borrower applies for a PPP II Loan, is approved by a Section 7(a) Lender, then files a bankruptcy proceeding before the loan is funded. The Section 7(a) Lender then promptly withdraws the approval of the PPP II Loan based on the bankruptcy filing. Timing is, indeed, everything.
- Hypothetical Three: The unfortunate Borrower in Hypothetical Two, realizing its mistake, obtains dismissal of the filed bankruptcy proceeding, then refiles its PPP II Loan application.
- Hypothetical Four: Borrower applies for a PPP II Loan, the loan is approved by a Section 7(a) Lender, and the PPP II Loan is funded. Borrower then commences a bankruptcy proceeding.

1 The SBA takes the position that PPP Loans are not available in
 2 Hypotheticals One and Two, nor in Hypothetical Three so long as the
 bankruptcy case is pending, but the SBA would have no issue at all in
 3 Hypothetical Four.

4 Salerno, Weidner, Simpson & Ebner, “This DIP Loan Should be Brought to You by
 5 Someone who CARES! (Or ‘You Can’t Get There from Here),” AM. BANKR.
 INSTITUTE (April 27, 2020).

6 Importantly, the Debtors are not asking the Court to replace its decision-
 7 making with that of the Defendants. *See* Opposition at 28. Rather, the Debtors are
 8 asking the Court to find that the Defendants made an arbitrary and capricious
 9 decision based on the information before them—and indeed in contradiction of
 10 logic, *i.e.*, there are no underwriting requirements for a debtor with a liability of
 11 \$0.00. Congress did not intend for the Defendants to impose this restriction, as
 12 demonstrated by the numerous letters written to the Defendants. *See, e.g. Exhibit*
 13 **F** attached to the Motion. While not dispositive of Congressional intent, it is
 14 notable that the Senators’ position does not conflict with the one advanced by the
 15 Debtors.

16 **E. All of the Debtors’ Claims are Core.**

17 Defendants specifically argue this Court cannot issue a final ruling on the
 18 Debtors’ APA claims “because the SBA has not filed a claim in this case, [meaning
 19 there] is not a compulsory counterclaim that must be adjudicated in the claims
 20 resolution process.” Opposition at 19 (emphasis added) (citing *Stern v. Marshall*,
 21

1 564 U.S. 462, 499 (2011)). However, under Stern and 28 U.S.C. § 157(b)(2)(C)
 2 (citing counterclaims generally), because the United States is one party and has
 3 filed proofs of claim in these Chapter 11 Cases (*see, e.g.*, Proofs of Claim Nos. 7
 4 (filed by the U.S. Department of Health & Human Services (“DHHS”) for
 5 \$415,571.68 against Sunnyside Home Health), 18 (filed by DHHS for \$53,721.90
 6 against Astria Home Health), 66 (filed by the Internal Revenue Services (the “IRS”)
 7 for \$4,150.79 filed against Toppenish), and 90 (filed by the IRS for \$254,498.49
 8 against SHC Medical Center -Yakima), all of Debtors’ claims may be resolved by
 9 this Court as “core” under the argument of *permissible* counterclaims. *See, e.g., In*
 10 *re HAL, Inc.*, 122 F.3d 851 (9th Cir. 1997), *aff’g*, 196 B.R. 159 (B.A.P. 9th Cir.
 11 1996) (“[F]ederal government agencies, with the exception of those acting in a
 12 distinctly private capacity, are a single entity for purposes of setoff under § 553.”);
 13 *In re Chateaugay Corp.*, 94 F.3d 772, 779 (2d Cir. 1996) (holding that there is a
 14 common law right to offset tax refunds against claims of other federal agencies); *In*
 15 *re Turner*, 84 F.3d 1294 (10th Cir. 1996) (en banc), vacating panel decision at 59
 16 F.3d 1041 (10th Cir. 1995) (“We are convinced that the presence or absence of a
 17 bankruptcy proceeding does not affect the United States’ status as a unitary
 18 creditor.”); *In re Moore*, 350 B.R. 650, 554 (Bankr. W.D. Va. 2006) (HUD and IRS
 19 one entity for setoff purposes); *In re Huff*, 317 B.R. 679, 681-82 (Bankr. W.D. Pa.
 20 2004) (same re USDA, Dept. of Treasury and IRS); *In re Bourne*, 262 B.R. 745,

749 (Bankr. E.D. Tenn. 2001) (same re IRS and HUD); *In re Nuclear Imaging Systems, Inc.*, 260 B.R. 724, 733-34 (Bankr. E.D. Pa. 2000) (same re IRS and the Health Care Financing Administration).

Even if this Court determines that Defendants' APA violations are not "core" proceedings under a *Stern* analysis, the Court is permitted to make findings and recommendations for the district court. Furthermore, Defendants do not dispute, and thus concede, that the § 525 claims are core. Thus, without question, the Court may proceed on these claims on a final basis.

F. PPP is a Grant Within the Meaning of § 525(a) of the Bankruptcy Code.

PPP is a grant within the meaning of § 525(a) of the Bankruptcy Code, and there is no binding or controlling caselaw in the Ninth Circuit or elsewhere that prevents this Court from considering PPP as such. Furthermore, there is considerable support for this position in legislative history, in the Second Circuit, and elsewhere in federal law—and a growing number of bankruptcy courts across the nation concur. *See Hidalgo County Emergency Service Foundation*, Adv. No. 20-2006, [Dkt. 11, 18, 33] (Bankr. S.D. Tex. Apr. 24, 2020) (SBA has appealed [Dkt. 37]); *In re Penobscot Valley Hosp.*, Adv. No. 20-1005 (MAF) [Dkt. 18] (Bankr. D. Me. May 1, 2020) (further trial/decision pending); *In re Calais Reg'l Hosp.*, Adv. No. 20-1006 (MAF) [Dkt. 21, 37] (Bankr. D. Me. May 1, 2020) (trial concluded and matter taken under advisement); *In re Roman Catholic Church of the*

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

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

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

15 2 C.F.R. § 182.650; *see also* 31 U.S.C. § 6304.

16 When considering whether PPP is a grant within the meaning of § 525(a),
 17 *i.e.*, whether PPP is an “other similar grant,” this Court should adopt the analysis
 18 presented by the Second Circuit. *See In re Stoltz*, 315 F.3d 80, 84 (2d Cir. 2002)
 19 (finding a public housing lease to be a grant within the meaning of § 525(a)). Here,
 20 that involves this Court finding that the Defendants construe § 525(a) too narrowly.

1 Indeed, Congress delegated authority to this Court to determine the contours of
 2 “other similar grants.” *See* H.R. REP. 95-595, 165, 1978 U.S.C.C.A.N. 5963, 6126
 3 (“The doctrine is a developing doctrine, and its precise ultimate contours are not yet
 4 clear. More case law will undoubtedly develop the extent of the discrimination that
 5 is contrary to bankruptcy policy.”); *see also In re Stoltz*, 315 F.3d at n.4 (“The
 6 omission of a statutory definition for the term ‘other similar grant’ is unsurprising
 7 in light of the antidiscrimination provision’s legislative history, which indicates that
 8 ‘. . . the section is not exhaustive . . . and delegates to the judiciary the
 9 responsibility ‘to mark the contours of the anti-discrimination provision’”).

10 Of relevance, “[t]he common qualities of the property interests protected
 11 under section 525(a), *i.e.*, ‘license[s], permit[s], charter[s], franchise[s], and other
 12 similar grants,’ are that these property interests are unobtainable from the private
 13 sector and essential to a debtor’s fresh start.” *In re Stoltz*, 315 F.3d 80, 90 (2d Cir.
 14 2002).¹⁵ Here, the Debtors cannot obtain PPP funds from the private sector and the

15 ¹⁵ Defendants erroneously cite *Ayes v. U.S. Dep’t of Veterans Affairs*, 473 F.3d 104
 16 (4th Cir. 2006) and *In re Exquisito Servs., Inc.*, 823 F.2d 151 (5th Cir. 1987) to
 17 support their opposition (*see* Opposition at 34), but the Fourth and Fifth Circuits are
 18 in *agreement* with the Second Circuit. Notably, in *Ayes*, the court recognized the
 19 home-loan guaranty there was “undoubtedly a ‘grant.’” *Ayes* at 108. The only
 20 reason those plaintiffs failed is they could not establish that the grant they sought, a
 21

1 funds are essential to the Debtors' fresh start, thus meeting the criteria as an "other
2 similar grant" within the meaning of § 525(a).

3 The Second Circuit is not alone in this viewpoint. Bankruptcy courts have
4 used § 525(a) to remedy abusive government action on many occasions and in
5 many contexts, just as the Court should do now. As a bankruptcy court in Virginia
6 concluded:

7 The enumerations in § 525(a) are not intended to be an exhaustive list,
8 rather the section was drafted to permit further development of
9 prohibited discriminatory treatment. *See Collier on Bankruptcy*
10 ¶ 525.01. When read as a starting point, and not as an exclusive and
circumscribed list, the enumerations in § 525(a) can be viewed as
examples of prohibited discriminatory treatment and not the only
instances thereof.

11 *In re Stinson*, 285 B.R. 239, 246 (Bankr. W.D. VA. 2002); *see also* 1 Collier
12 Pamphlet Edition 2020, p. 515 (Richard Levin & Henry J. Sommer, eds., Matthew
13 Bender) ("[T]he section is not exhaustive. The enumeration of various forms of
14 discrimination against former bankrupts is not intended to permit other forms of
15 home-loan guaranty, could not be obtained from the private sector, meaning it was
16 not a "similar" grant. *Id.* at 105-06. Likewise, *Exquisito* found the program at
17 issue, the Small Business Administration's § 8(a) program, to be a franchise
18 "within the scope of 11 U.S.C. § 525(a)." *Exquisito* at 154. The only reason that
19 plaintiff was denied relief is he could not demonstrate that the discrimination
20 against him was *solely* because of filing under Chapter 11. *Id.*

1 discrimination.”). Indeed,

2 [t]he legislative history to § 525(a) generally supports an expansive
3 application of the discrimination provisions. [] Section 525(a)’s list of
4 discriminatory practices is illustrative, not exhaustive. Those courts
5 supporting the notion that § 525 should be broadly construed focus on
6 the Bankruptcy Code’s fresh start policy. Certain courts sought to
7 limit § 525 to situations analogous to those enumerated in the statute,
8 requiring “proof that the discrimination was caused *solely* by the
9 debtor’s status” However, the Supreme Court’s decision in
10 *NextWave, supra*, with its expansive definition of the term “solely
11 because,” undermines those cases advocating a narrow reading of
12 § 525.

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

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

18 If a state has chosen to enact a program of home financing for its
19 citizens, § 525 prohibits that state from exempting debtors or
20 bankrupts from those benefits solely because of bankruptcy and
21 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.

Id. at 666-67.

A bankruptcy court in Massachusetts applied § 525(a) to bar discrimination
by a governmental unit that had prohibited a school reorganizing in chapter 11 from
receiving veterans’ benefits to pay the tuition of eligible veteran students. *In re The*

1 *Bible Speaks*, 69 B.R. 368, 371 (Bankr. D. Mass. 1987). After reviewing the
 2 definitions of the terms “license” and “franchise” in Black’s Law Dictionary, which
 3 are broad,¹⁶ the court reasoned as follows:

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

14 *Id.*

15 Thus, in determining the contours of § 525(a), this Court should consider
 16 these cases, as well as legislative history stating,

17 The purpose of [§ 525] is to prevent an automatic reaction against an
 18 individual for availing himself of the protection of the bankruptcy
 19 laws. Most bankruptcies are caused by circumstances beyond the
 20 debtor’s control. To penalize a debtor by discriminatory treatment as
 21 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.

¹⁶ According to the court:

Black's Law Dictionary defines a “license” as “[p]ermission to do a
 particular thing, to exercise a certain privilege or to carry on a
 particular business or to pursue a certain occupation.” BLACK'S LAW
 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.

Id.

**REPLY IN SUPPORT OF
 MOTION FOR TRO**

40

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1 In the final analysis, Defendants are not outside of the bounds of § 525(a) in
 2 this instance, and thus are not permitted to base their denial of PPP funds solely on
 3 the Debtors' status as debtors in the Chapter 11 Cases, even if they believe the
 4 CARES Act would otherwise allow them to do so (which it does not). "[W]hen
 5 two statutes are capable of co-existence, it is the duty of the courts, absent a clearly
 6 expressed congressional intention to the contrary, to regard each as effective."
 7 *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304, 123 S. Ct. 832, 840,
 8 154 L. Ed. 2d 863 (2003) (internal citations and quotations omitted). Coexistence
 9 here entails reading the CARES Act eligibility requirements as precluding
 10 Defendants' additional eligibility requirement regarding not being a debtor in
 11 bankruptcy. As in *NextWave*, since § 525 and the CARES Act circumscribe the
 12 Defendants' permissible action, discrimination against the Debtors in PPP is not in
 13 accordance with law. *Id.* Because "[t]he Administrative Procedure Act requires
 14 federal courts to set aside federal agency action that is 'not in accordance with law,'
 15 5 U.S.C. § 706(2)(A)—which means, of course, *any* law, and not merely those laws
 16 that the agency itself is charged with administering" (*NextWave*, 537 U.S. at 300
 17 (emphasis in original) (also citing the APA's prohibition against arbitrary and
 18 capricious actions by an agency)), this Court must set aside Defendants' actions.

19 **G. The Debtors Will Be Irreparably Harmed Without Preliminary**
 20 **Injunctive Relief.**

21 As recognized by the Supreme Court, the Debtors must demonstrate that

1 irreparable injury is “likely” if the requested injunctive relief is not granted. *Winter*
 2 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21, 129 S. Ct. 365, 375, 172 L. Ed. 2d
 3 249 (2008). Defendants argue that the Debtors have made “no” showing of
 4 irreparable harm. Respectfully, this is absurd.

5 First, failure to get a review on the merits of the Applications is the primary
 6 irreparable harm here. Absent injunctive relief, the Debtor will be irreparably
 7 harmed by Defendants’ continued discrimination in violation of § 525(a), and the
 8 Debtors will be permanently excluded from PPP and denied PPP funds if their
 9 Applications are not allowed to proceed without discrimination before the PPP door
 10 closes permanently on June 30, 2020. *See Vietnamese Fishermen’s As’n v. Knights*
 11 *of the Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) (“Victims of
 12 discrimination suffer irreparable injury, regardless of pecuniary damage.”). There
 13 is no evidence, moreover, that the approximately \$3.3 million in lost PPP funds will
 14 be remedied by another round of PPP lending or a similar grant program enacted
 15 after June 30, 2020, which will result in the Debtors’ permanent exclusion from
 16 PPP. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S. Ct. 2561, 2568 (1975)
 17 (“[C]ertainly” suffering “a substantial loss of business and perhaps even bankruptcy
 18 . . . meets the standards for injunctive relief, for otherwise a favorable result might
 19 well be useless.”); *see also Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2d
 20 Cir. 1995) (“Major disruption of a business can be as harmful as its termination and
 21

1 thereby constitute irreparable injury.”); *In re Estate of Ferdinand Marcos Human*
 2 *Rights Litigation*, 25 F.3d 1467, 1480 (9th Cir. 1994) (“[A] district court has
 3 authority to issue a preliminary injunction where the plaintiff can establish that
 4 money damages will be an inadequate remedy due to impending insolvency”);
 5 *Tri-State Generation and Transmission Assoc., Inc. v. Shoshone River Power, Inc.*,
 6 805 F.2d 351, 355 (10th Cir. 1986) (“A threat to trade or business viability may
 7 constitute irreparable harm.”); *Rosso-Lino Beverage Distribs, Inc. v. Coca-Cola*
 8 *Bottling Co. of N.Y.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (loss of an ongoing
 9 business constitutes irreparable harm.); *John B. Hull, Inc. v. Waterbury Petroleum*
 10 *Prods., Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978) (possibility of going out of business
 11 as irreparable harm); *Janmort Leasing Inc. v. Econo-Car Int’l, Inc.*, 975 F. Supp.
 12 1282, 1294 (E.D.N.Y. 1979) (loss of business is irreparable harm); *Psychiatric*
 13 *Care Day Hosp. Ctr. v. Shalala*, 876 F. Supp. 260, 262 (N.D. Ala. 1994) (holding
 14 that irreparable harm existed where the probable result of the suspension of
 15 Medicare payments was the closing of the business but injunctive relief would be
 16 denied because plaintiff had not shown that public interest would be served by
 17 granting it); *Brennan Petroleum Prods Co., Inc. v. Pasco Petroleum Co., Inc.*, 373
 18 F. Supp. 1312, 1316 (D. Ariz. 1974) (“Where the complained of action results not
 19 only in a contemporaneous loss of profits but in a loss of goodwill or the ability to
 20 compete as effectively in the marketplace, [injunctive] relief should be granted”).
 21

1 Additionally, the Debtors have proffered that Covid-19 has and will continue
 2 to negatively impact their cash flow. Motion at 31. The Debtors supported this
 3 claim with facts like they are not conducting certain nonessential elective
 4 procedures at this time and a significant portion of the Debtors' revenue is derived
 5 from these outpatient procedures. Motion at ¶¶ 4 and 6. The irreparable harm here
 6 goes beyond the Debtors' bank account numbers.¹⁷ It is what the Debtors will *do*

7 ¹⁷ Defendants argue that “[i]t is also well settled that simple economic loss usually
 8 does not, in and of itself, constitute irreparable harm.” Opposition at 41 (citing
 9 Wright, Miller & Kane, Federal Practice & Procedure §2948.1, at 152–53 (2d
 10 ed.1995)). While that may be the general rule, it is not the rule when there is a
 11 limited pot of money. Irreparable harm may be found where the monetary loss
 12 would be irrecoverable even if the moving party prevails on the merits. *See U.S. v.*
 13 *Cal-Almond Inc.*, 102 F.3d 999, 1002-03 (9th Cir. 1996) (finding that irreparable
 14 injury was present where the aggrieved party was required to pay money which it
 15 might not recover once the action was resolved); *Enterprise Intern., Inc. v. Corp.*
 16 *Estatel Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985) (“The absence of
 17 an available remedy by which the movant can later recover monetary damages,
 18 however, may also be sufficient to show irreparable injury.”); *Transamerica Ins.*
 19 *Finance Corp. v. North American Trucking Association, Inc.*, 937 F. Supp. 630, 636
 20 (W.D. Ky. 1996) (finding irreparable harm where monetary loss would be
 21

1 with the funds that matters. Here, these funds will be used for payroll purposes—to
 2 ensure the Debtors are able to pay their employees market wages in the midst of the
 3 Covid-19 pandemic, where the *world* writ large is struggling to pay pre-Covid-19
 4 salaries and wages. Without these funds, the Debtors ability to maintain certain
 5 levels of staff at well-deserved, pre-Covid-19 salaries and wages will be hampered.
 6 In turn, as specifically mentioned in the Motion, failure to obtain PPP funds would
 7 negatively impact the Debtors’ ability to maintain healthcare offerings to the
 8 surrounding community and would impact the Debtors’ ability to reorganize.
 9 Motion at ¶ 42. These are palpable injuries for healthcare providers, their
 10 employees, and their patients, and they are occurring right now for the Debtors.

11 Moreover, these harms are not vague or speculative or something that will
 12 occur in the far-flung future. See Opposition at 41-43 (citing *Titaness Light Shop,*
 13 *LLC v. Sunlight Supply, Inc.*, 585 F. App’x 390, 391 (9th Cir. 2014);¹⁸ *Am. Passage*
 14 *Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985)). Unlike
 15 in *Titaness*, which discusses harms to “goodwill” and “reputation,” the harms
 16 described by the Debtors here are more concrete than that. Similarly, *Am. Passage*
 17 *Media Corp.* is wholly inapplicable to the case at bar. There, plaintiffs’ alleged
 18 irrecoverable even if moving party prevailed); *Placid Oil Co. v. U.S. Department of*
 19 *Interior*, 491 F. Supp. 895, 906 (N.D. Tex. 1980) (same).

20 ¹⁸ Note, this case was not selected for publication.

1 irreparable harm was the inability to compete rather than the injuries caused by the
2 inability to compete. Here, the Debtors have alleged specific injuries.

3 Finally, Defendants imply that the Debtors' could not possibly have lasting
4 impact on their cash flow now that "the restrictions on nonessential elective
5 medical procedures in Washington have been lifted (subject to extensive safety
6 protocols)." *See* Opposition at 42. There is no basis for this absurd proposition,
7 and indeed many, including the government, believe (i) "getting back to pre-
8 COVID-19 [patient] volumes could take between two and six months,"¹⁹ (ii) there
9 could be another wave of illness due to Covid-19 in the fall if precautions are not
10 heeded,²⁰ and (iii) the economic impact of the Covid-19 pandemic will ripple into

11 ¹⁹ Deloitte, "Resuming Deferred Procedures Will be Complex as Health Systems
12 Work to Mitigate Concerns, Deloitte Survey Finds," (May 27, 2020), Cision PR
13 Newswire, *available at* [https://www.prnewswire.com/news-releases/resuming-](https://www.prnewswire.com/news-releases/resuming-deferred-procedures-will-be-complex-as-health-systems-work-to-mitigate-concerns-deloitte-survey-finds-301066103.html)
14 [deferred-procedures-will-be-complex-as-health-systems-work-to-mitigate-](https://www.prnewswire.com/news-releases/resuming-deferred-procedures-will-be-complex-as-health-systems-work-to-mitigate-concerns-deloitte-survey-finds-301066103.html)
15 [concerns-deloitte-survey-finds-301066103.html](https://www.prnewswire.com/news-releases/resuming-deferred-procedures-will-be-complex-as-health-systems-work-to-mitigate-concerns-deloitte-survey-finds-301066103.html).

16 ²⁰ *See, e.g.,* Dr. Anthony Fauci, as quoted in "The COVID-19 Pandemic: Fauci Says
17 Second Wave 'Not Inevitable'; GSK to Produce 1 Billion Doses of Coronavirus
18 Vaccine Booster; and More," *see* [https://www.docwirenews.com/home-page-editor-](https://www.docwirenews.com/home-page-editor-picks/the-covid-19-pandemic-fauci-says-second-wave-not-inevitable-gsk-to-produce-1-billion-doses-of-coronavirus-vaccine-booster-and-more/)
19 [picks/the-covid-19-pandemic-fauci-says-second-wave-not-inevitable-gsk-to-](https://www.docwirenews.com/home-page-editor-picks/the-covid-19-pandemic-fauci-says-second-wave-not-inevitable-gsk-to-produce-1-billion-doses-of-coronavirus-vaccine-booster-and-more/)
20 [produce-1-billion-doses-of-coronavirus-vaccine-booster-and-more/](https://www.docwirenews.com/home-page-editor-picks/the-covid-19-pandemic-fauci-says-second-wave-not-inevitable-gsk-to-produce-1-billion-doses-of-coronavirus-vaccine-booster-and-more/) (last visited
21

the next several years or even decades.²¹

CONCLUSION

To be clear, the Debtors do not seek an order requiring PPP funds to be distributed to them or determining that the Debtors are eligible for PPP funds. What the Debtors seek is the right to have their Applications submitted without being discriminated against on the basis of their status as Chapter 11 debtors, all before the June 30, 2020 deadline, should the Debtors otherwise be eligible under PPP. Anything less would leave the Debtors without a remedy.

May 30, 2020) (“ . . . it could happen, but it is not inevitable.”); *see also* Carrie Porterfield, “Here’s Why Experts Expect A Second Coronavirus Wave,” FORBES (May 9, 2020, 6:55 P.M.) <https://www.forbes.com/sites/carlieporterfield/2020/05/09/heres-why-experts-expect-a-second-coronavirus-wave/#4239caaf15c3>.

²¹ *See, e.g.*, Congressional Research Services, “Global Economic Effects of Covid-19,” at 4 (updated May 1, 2020), *available at* <https://fas.org/sgp/crs/row/R46270.pdf> (last visited May 30, 2020) (“[T]he pandemic has also set in motion a major economic crisis that will burden our societies for years to come.”) (citing Organization for Economic Cooperation and Development Secretary General Angel Gurría).

1 The Court should grant the Debtors requested relief here because (i) it is
 2 authorized under Bankruptcy Code §§ 105, 106, and 525 to enter the carefully
 3 tailored injunctive relief against Defendants, (ii) it has constitutional authority to
 4 enter a final judgment, and (iii) it is not barred from doing so by 15 U.S.C.
 5 § 634(b)(1).

6 For all the reasons stated here, in the Motion, and in the record, the Debtors
 7 request that the Court enter an order (1) granting the Motion, (2) entering a
 8 preliminary injunction that is consistent with the relief requested in the Motion, and
 9 (3) granting such further relief as the Court deems proper.

10 Dated: June 1, 2020

DENTONS US LLP

/s/ Samuel R. Maizel

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EXHIBIT 1

(May 19, 2020 Hearing Transcript)

In Re: Astria Health

5/19/2020

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:	)	Lead Case No.
ASTRIA HEALTH	)	19-01189-11
)	
	)	Adv. Pro. Case No.
	)	20-80016 - WLH
)	
V.)	
UNITED STATES SMALL)	
BUSINESS)	
ADMINISTRATION and)	
JOVITA CARRANZA, in)	
her capacity)	
As Administrator for)	
the United States)	
Small Business)	
Administration,)	
Defendants.)	

VERBATIM TRANSCRIPTION OF PROCEEDINGS
From audio recording
May 19, 2020

TAKEN BEFORE THE HONORABLE WHITMAN HOLT

ORIGINAL

TRANSCRIBED BY:
Andie Evered, CCR 2393

In Re: Astria Health

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1

APPEARANCES

2

3 Samuel Maizel, Sam Alberts, Attorneys for Debtor
4 Christine M Tobin-Presser, Attorney for Debtor
5 David H Leigh, Attorney for Med One Capital Funding
6 Kim Lehmann, Attorney for 1199 NW

7 Richard J Hyatt, Attorney for TIAA Commercial
8 Finance Inc

9 Michael Shinn, Attorney for V.K. Powell
10 Construction, LLC

11 Kevin O'Rourke, Attorney for JMB Capital Partners
12 Lending LLC

13 Robert Hersh, Attorney for JMB Capital Partners
14 Lending LLC

15 Dina L Yunker, Attorney for State of Washington

16 Jane Pearson, Attorney for the Creditors Committee

17 Boris Mankovetskiy, Attorney for Creditors Committee

18 Ian Hammel, Attorney for UMB Bank, N.A., Lapis

19 Advisers, LP

20 Thomas Buford, Sarah Schrag, Attorneys for the
21 Debtor

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23

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1 PROCEEDINGS

2

3 COURT DEPUTY: Thank you everyone. The
4 next matter is of 20-80016 in the matter of Astria
5 Health versus the United States Small Business
6 Administration.

7 THE COURT: Good morning, everyone.

8 Mr. Maizel, are you going to be taking
9 lead for the Debtors on this?

10 MR.MAIZEL: Yes, sir.

11 THE COURT: Okay. Mr. Donovan, you're
12 appearing for the Defendants?

13 MR. DONOVAN Yes, Your Honor.

14 THE COURT: Okay. So, I've read the
15 complaints, the moving papers for the TRO and it's
16 supporting declarations. I entered an order
17 yesterday scheduling an initial hearing today on
18 the TRO. I read earlier this morning an agreed
19 order regarding scheduling and reservations of the
20 PPP funds was uploaded, which I reviewed. It
21 looks like this set the briefing schedule, a
22 consensual briefing schedule, a further hearing on
23 June 3rd, 2020, at 11:00 AM, and an agreement by
24 the SBA to reserve some portion of PPP funds for
25 the Debtors in the event that they prevail.

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1 The Court's fine with the schedule that's
2 been outlined and thinks it's appropriate.

3 Mr. Maizel, anything you'd like to
4 elaborate on about scheduler or generally?

5 MR.MAIZEL: No, Your Honor. Just that
6 Mr. Donovan and I have been working
7 collaboratively to try to put this on some orderly
8 track for the Court and the parties.

9 We've worked out the terms of a letter
10 that Mr. Donovan says the SBA will send us shortly
11 confirming their agreement to reserve the funds
12 pending a final decision by the Court, which will
13 then will put a notice on and file that in the
14 adversary proceeding for -- so it will be a matter
15 of record. And we've agreed to a scheduling, a
16 briefing schedule, so that we can fully brief it
17 out. And then -- with the understanding that the
18 hearing on June 3rd would be the preliminary
19 injunction hearing.

20 THE COURT: Okay. Thank you, Mr. Maizel.
21 Mr. Donovan?

22 MR. DONOVAN: I think Mr. Maizel
23 summarized it appropriately and correctly. I
24 don't have anything else.

25 THE COURT: Okay. So we will get this

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1 order entered.

2 Mr. Donovan, I've a few things I'd like to
3 share with you. It's my view -- I'm not a judge
4 who likes to play hide-the-ball with people. So I
5 just have some -- some thoughts. I'm not deciding
6 anything today, but I thought I'd give you some
7 guidance that may be informative in terms of how
8 you approach your briefing and how we (inaudible)
9 the hearing on the 3rd, if that's all right?

10 MR. DONOVAN: Of course, Your Honor.

11 THE COURT: So the first point is that the
12 Court obviously is not approaching this on a blank
13 slate. I, thankfully, am not the first judge who
14 has to deal with issues.

15 I've read all the decisions that have been
16 written about this so far. I have to say, I find
17 the decisions that bankruptcy Judge David Duma in
18 New Mexico and bankruptcy Judge Colleen Brown in
19 Vermont wrote to be pretty compelling. So what
20 I'd like you to focus on in your briefing, you
21 know -- and you can feel free to brief whatever
22 you want -- but the most helpful thing to me would
23 be, if it's your position that there were some
24 (inaudible) are controlling and binding on me
25 Ninth Circuit authority that provides a basis for

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1 me not to follow those decisions. It's just, you
2 know, again, in the interest of not hiding the
3 ball, I thought these were well done, persuasive
4 opinions. You know, my inclination, again not
5 deciding anything, is that I'm likely going to
6 follow them. But, obviously, if there was
7 contrary Ninth Circuit Court of Appeals case law,
8 I would focus on that.

9 The second thing I'll say is one thing
10 that I found extremely troublesome about all of
11 this is kind of the seemingly -- and, again, I'm
12 not deciding this today -- but the seemingly
13 arbitrary and capricious nature of this bankruptcy
14 exclusion, which was not in any way suggested by
15 Congress, and it looks like just kind of one fine
16 day dropped out of the sky on this form. My
17 assumption is that there's an actual human being
18 somewhere, I don't know, deep in the labyrinth of
19 VSBA who made that decision.

20 And, again, I'm not going to tell you how
21 to litigate your case, but you may want to have
22 that person available on the phone or submit a
23 declaration explaining how they got to that
24 result. Because I just, again, not hiding with
25 ball, I need to understand the deliberative

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1 process that went into reaching this exclusion.
2 And the materials that are available in the public
3 record don't really get me -- get me there at all.
4 And, again, I assume there was some -- you know,
5 the SBA like -- like a corporation or anything
6 else, it doesn't have (inaudible); it doesn't act.
7 It's not (inaudible) in out the world. There are
8 human beings who are decision makers. And, if
9 possible, if this person exists and is willing to
10 testify, it would be very helpful for me to hear,
11 you know, from a specific person, how this
12 conclusion was reached.

13 I'll share with you when -- when I was in
14 fifth, sixth and seventh grade, I'd often get low
15 marks on math tests. And the reason wasn't
16 because I was bad at math, I was actually
17 perfectly fine at math. But the reason was
18 because I didn't like what my teachers would
19 always say about showing my work. And just,
20 again, in candor, I think there's a very serious
21 showing your work problem here with what the SBA
22 has done. There was no rulemaking or any proposed
23 thing at all before; just one fine day, the form
24 dropped out of the sky. And, then, we've got some
25 very cursory public comment after the form came

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1 out trying to justify it, I guess. But, I don't
2 see -- I mean my general rule (inaudible) -- and
3 if I'm wrong, you can tell me in your briefs -- is
4 that for me to give deference of much weight at
5 all to administrative agency rulemaking, there
6 needs to be a developed administrative record upon
7 which a conclusion was reached.

8 So I would expect to see things like
9 empirical studies or an analysis of SBA precedence
10 of past cases in which the SBA suffered losses as
11 a result of bankruptcy cases, or academic
12 commentary or literature about the risks of
13 (inaudible) the bank of companies. Which. Those
14 articles exist. I don't think they really support
15 the SBA's position, but I mean there's -- there's
16 a world of literature about the risk of lending
17 the bank of companies that I would expect to see
18 in the administrative record. I mean right now we
19 just have four or five sentences without any
20 citations or analysis in a public commentary that
21 the other judges have noted in their opinions. I
22 mean some of those sentences very dubious. Like
23 the idea that debtors in bankruptcy are running
24 around, you know, like free-range chickens that
25 aren't under intense supervision of judges or the

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1 Department of Justice or the US Trustee Program,
2 creditors and the like, I mean is -- is dubious.
3 I'll just put it that way.

4 So what would be very helpful for me in
5 disagreeing with these other judges would be to
6 see if it exists. And, again, have the person who
7 compiled it kind of show your work, right? We're
8 going back to sixth grade. I want to see the
9 analysis. I want to see the articles. I want to
10 see this study that was done to reach this
11 conclusion. Because if that work wasn't done, or
12 if people didn't review the literature and didn't
13 review the precedent about what's happened in the
14 past, that's an arbitrary and capricious decision,
15 and that's a discriminatory decision, and it
16 really rests on nothing more than this idea that
17 people in bankruptcy and entities on bankruptcy
18 are bad, and that we shouldn't be lending to them.
19 And I think, as an empirical matter, you know,
20 that's highly, highly, highly questionable.

21 And, again, I'm not deciding today that it
22 was an arbitrary and capricious decision. But I
23 am telling you I'm not seeing the work done. This
24 is, you know, seventh grade where people are
25 reaching with conclusions without working through

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1 their steps. If the steps were done, I want to
2 know about them and I -- I'd appreciate if you
3 could put that in your briefing and maybe even an
4 evidentiary presentation on the 3rd.

5 The final thing I'll tell you just, you
6 know, again to be candid about how I'm approaching
7 this is one of the things that I consider in
8 issuing a TRO or preliminary injunction is the
9 public interest. And the Court is going to be
10 taking judicial notice of the following facts on
11 June 3rd, I want you to be aware of this. And,
12 you know, I'm keeping my fingers crossed that all
13 these facts change between now and then, but if
14 they don't or if they get worse, I'm going to be
15 taking judicial notice of the following:

16 First, COVID-19 cases are increasing at an
17 inexplicably high rate in Yakima County. For
18 whatever reason, Yakima County is doing much worse
19 than the rest of Washington State at this point in
20 the process.

21 The COVID-19 situation is problematic for
22 the nation, but it's particularly problematic for
23 Yakima County.

24 Second, I'm going to take judicial notice
25 of the fact that many of the new cases are in the

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1 lower valley, including around the Sunnyside and
2 Toppenish areas.

3 Third, I'm going to be taking judicial
4 notice of the fact that there's limited access to
5 healthcare for all the residents of the lower
6 valley, including around Sunnyside and Toppenish,
7 other than at the Astria hospitals.

8 Fourth, I'm going to be taking judicial
9 notice of the fact that these PPP funds would be
10 used to pay frontline medical staff, including
11 nurses. And I'll further be taking judicial
12 notice of the fact that these people are correctly
13 being recognized in the local press and national
14 press as heroes for what they're doing and the way
15 they're risking their lives to treat people with
16 these virus and this disease and to deal with this
17 situation.

18 And, again, Mr. Donovan, not hiding the
19 ball, maybe there's a more compelling public
20 interest case that could be made, but I have a
21 very hard time thinking of it. I mean, I guess,
22 maybe if there were a debtor that had access to
23 all of the nation's nuclear launch codes, that
24 would be a more compelling case. But assuming the
25 facts of which the Court's prepared to take

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1 judicial notice don't change, we're in a 99 plus
2 percentile public interest case.

3 Again, I have a hard time conceiving of --
4 of a stronger public interest case than these
5 particular debtors have.

6 Again, I'm not deciding that today, but I
7 don't want you to feel surprised on June 3rd, and
8 particularly if the facts on the ground getting
9 worse. And they'd been training in the month of
10 May for whatever reason, I'm going to be taking
11 judicial notice of all of those facts and I'm
12 going to be taking that heavily into account when
13 weighing the fourth factor in terms of whether a
14 preliminary injunction issue -- a preliminary
15 injunction should be issued here.

16 Do you have any questions about any of
17 that?

18 MR. DONOVAN: No, Your Honor. I could
19 give you some preliminary responses, but I think
20 it would probably be best served if I put it in
21 the briefing next week.

22 I was going to, if you permit me one
23 second here, to point you to a briefing that was
24 filed in the, I believe the Eastern district of
25 California on Friday by the SBA, if you just

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1 permit me one second here. I'm sorry, Your Honor.

2 THE COURT: Of course.

3 MR. DONOVAN: Yeah, it was filed on Friday
4 in the Eastern Central District of California,
5 excuse me. The adversary case is NAI Capital Inc.
6 Versus SBA. The adversary number is 1:20-01051.
7 The SBA filed an opposition to a similar type of
8 motion TRO and preliminary injunction motion.

9 I think if Your Honor would like to peruse
10 that, I think you can at least see some of the
11 early responses to some of your questions, in
12 terms of at least of the (inaudible) process, the
13 foundation that SBA relied on with -- in terms of
14 developing the regulations because they relied on
15 their 7A lending program, which has been in
16 existence for a very long time and has always had
17 the bankruptcy exclusion in -- in that. So,
18 they've -- I think the answer to your first
19 response, which I will brief further, is that they
20 fell back into their tried and true lending method
21 that has been a regulation for a very long time
22 through their 7A program. But, if Your Honor
23 would like me to review that filing, I think it,
24 at least, can maybe start to answer some of your
25 questions and we'll give you a fulsome brief

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1 answering these specific ones of yours next week.

2 THE COURT: Okay. Thank you, Mr. Donovan.

3 I may take a look at that and I may wait. I
4 recognize I'm, you know, coming relatively strong
5 on you, but I'm -- I'm aware that other -- there's
6 a majority -- an emerging majority view among
7 several bankruptcy judges, but I'm aware there's,
8 there's a minority view to this as well, and that,
9 you know, the SBA has prevailed in some of these
10 cases. I'm not sure if any of those involve
11 hospitals of the sort that we have here, but, you
12 know, certainly, like I said, I haven't made my
13 mind up about this, just about the administrative
14 process. I love lawyers. You know, some of my
15 best friends are lawyers. I used to be a lawyer,
16 but lawyers are very good at coming up with kind
17 of post hoc rationalizations for things.

18 So the most compelling thing -- and this
19 may be what the SBA has done in the central
20 district case -- would be to have someone who is
21 actually involved on the front end and in the
22 process, what in the corporate world we call a
23 business person, you know, detailing what they did
24 contemporaneously at the time rather than legal
25 argument, trying to justify something on a post

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1 hoc basis.

2 You know, again, no disrespect to lawyers,
3 but arguments about lawyers rationalizing things
4 aren't evidence of what happened in the trenches
5 at the time. But, again, that's ultimately, you
6 know, up to you in terms of what you think will be
7 compelling and -- and, you know, make the case for
8 why a preliminary injunction is improper
9 (inaudible) proceeding.

10 So you know, and, again, I haven't decided
11 anything, but I just, in fairness to you as an
12 advocate, wanted you to have some perspective
13 about how I'm thinking about this, at least -- at
14 least today. Maybe my mind will be changed by the
15 end of the day on -- on the 3rd.

16 All right. Well, we will get your agreed
17 scheduling order entered.

18 Thank you, Mr. Donovan and Mr. Maizel, the
19 both of you, for working professionally to reach
20 agreement on a process here. I look forward to
21 reading the further briefing and we'll hear from
22 both of you on June 3rd.

23 MR. DONOVAN: Thank you, Your Honor.

24 MR. MAIZEL: Thank you, Your Honor.

25 THE COURT: I hope everyone has a nice

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1 Memorial Day weekend and stay safe.

2 We're adjourned for the day. Thank you.

3 MR. DONOVAN: Thank you.

4 MR. MAIZEL: Thank you.

5 (Whereupon, hearing adjourned)

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CERTIFICATION

I, Andie Evered, do here by declare
under penalty of perjury under the laws of the
State of Washington that the following is true and
correct;

1. That I am an authorized
transcriptionist;

2. This transcript is a true and correct
record of the proceedings to the best of my
ability.

3. I am in no way related to or employed
by any party in this matter; and

4. I have no financial interest in the
litigation.

Dated in Bend, Oregon, this 22nd day of
May 2020.



Andie Evered, CCR

State of Washington CCR #2393



EXHIBIT 2

(Forgiveness Rule)

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0032]

RIN 3245-AH46

DEPARTMENT OF THE TREASURY

RIN 1505-AC69

**Business Loan Program Temporary Changes; Paycheck Protection Program –
Requirements – Loan Forgiveness**

AGENCY: U.S. Small Business Administration; Department of the Treasury.¹

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, April 30, 2020, May 5, 2020, May 8, 2020, May 13, 2020, May 14, 2020, May 18, 2020, and May 20, 2020, and the Department of the Treasury (Treasury) posted an additional

¹ Four provisions of this interim final rule are an exercise of rulemaking authority by Treasury either jointly with SBA or by Treasury alone: (1) the *de minimis* exemption provided with respect to certain offers of rehire, (2) the additional reference period option provided for seasonal employers, (3) the *de minimis* exemption from the full-time equivalent employee reduction penalty when an employee is, for example, fired for cause, and (4) the *de minimis* exemption from the full-time equivalent employee reduction penalty when the borrower eliminates reductions by June 30, 2020. Otherwise, all provisions in this rule are an exercise of rulemaking authority by SBA alone.

interim final rule on April 27, 2020. This interim final rule supplements the previously posted interim final rules in order to help PPP borrowers prepare and submit loan forgiveness applications as provided for in the CARES Act, help PPP lenders who will be making the loan forgiveness decisions, inform borrowers and lenders of SBA's process for reviewing PPP loan applications and loan forgiveness applications, and requests public comment.

DATES: Effective date: [INSERT DATE OF FILING AT THE OFFICE OF THE FEDERAL REGISTER].

Applicability date: This interim final rule applies to loan forgiveness applications submitted under the Paycheck Protection Program.

Comment date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by number SBA-2020-0032 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program, and requires SBA to issue guidance and regulations implementing section 1106 within 30 days after the date of enactment of the CARES Act. On April 2, 2020, SBA posted its first PPP interim final rule (85 FR 20811) (the First Interim Final Rule) covering in part loan forgiveness. On April 8, 2020 and April 26, 2020, SBA also posted Frequently

Asked Questions relating to loan forgiveness. On April 14, 2020, SBA posted an interim final rule covering in part loan forgiveness for individuals with self-employment income. On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116-139), which provided additional funding and authority for the Paycheck Protection Program.

As described below, this interim final rule provides borrowers and lenders guidance on requirements governing the forgiveness of PPP loans.

II. Comments and Immediate Effective Date

The intent of the CARES Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning loan forgiveness requirements as rapidly as possible because borrowers can seek loan forgiveness as early as eight-weeks following the date of disbursement of their PPP loans. Because the first PPP loans were disbursed after April 3, providing borrowers with certainty on loan forgiveness requirements and other program requirements will enhance their ability to carry out the purposes of the CARES Act in keeping their workers employed and paid, while at the same time taking necessary steps to maximize eligible loan forgiveness amounts. An immediate effective date also is necessary for PPP lenders who generally will make the loan forgiveness determinations as provided in the CARES Act. Specifically, an immediate effective date is necessary for lenders so that they will have both a degree of certainty and sufficient time to develop their systems and policies and procedures in order to timely review and process loan

forgiveness applications, which borrowers are permitted to begin submitting at the end of their covered period.

This interim final rule supplements previous regulations and guidance on the discrete issues related to loan forgiveness. This interim final rule is effective without advance notice and public comment because section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the CARES Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the ground that it would be contrary to the public interest. Specifically, SBA has determined that advance notice and public comment would delay the ability of PPP borrowers to understand with certainty which payroll costs and nonpayroll costs that are incurred or paid during the covered period are eligible for forgiveness. By providing a high degree of certainty to PPP borrowers through this interim final rule, PPP borrowers will be able to take immediate steps to maximize their loan forgiveness amounts, for example, by either rehiring employees or not laying off employees during the covered period. This rule is being issued to allow for immediate implementation of the forgiveness component of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of this interim final rule, including section III below. These comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Loan Forgiveness

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and Treasury in the Federal Register (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321, 85 FR 26324, 85 FR 27287, 85 FR 29842, 85 FR 29845, 85 FR 29847, 85 FR 30835) as well as an SBA interim final rule posted on May 20, 2020.

1. General

Section 1106(b) of the CARES Act provides that, subject to several important limitations, borrowers shall be eligible for forgiveness of their PPP loan in an amount equal to the sum of the following costs incurred and payments made during the covered period (as described in section III.3. below):

- (1) Payroll costs;²

² Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation. See 15 U.S.C. 636(a)(36)(A)(viii); 85 FR 20811, 20813.

- (2) Interest payments on any business mortgage obligation on real or personal property that was incurred before February 15, 2020 (but not any prepayment or payment of principal);
- (3) Payments on business rent obligations on real or personal property under a lease agreement in force before February 15, 2020; and
- (4) Business utility payments for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

This interim final rule uses the term “nonpayroll costs” to refer to the payments described in (2), (3), and (4). As set forth in the First Interim Final Rule (85 FR 20811), eligible nonpayroll costs cannot exceed 25 percent of the loan forgiveness amount.

2. Loan Forgiveness Process

What is the general process to obtain loan forgiveness?

To receive loan forgiveness, a borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) to its lender (or the lender servicing its loan). As a general matter, the lender will review the application and make a decision regarding loan forgiveness. The lender has 60 days from receipt of a complete application to issue a decision to SBA. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its

decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender as required by section 1110(e)(6) of the CARES Act. If SBA determines in the course of its review that the borrower was ineligible for the PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be eligible for loan forgiveness. The lender is responsible for notifying the borrower of the forgiveness amount. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the two-year maturity of the loan. If the amount remitted by SBA to the lender exceeds the remaining principal balance of the PPP loan (because the borrower made scheduled payments on the loan after the initial deferment period), the lender must remit the excess amount, including accrued interest, to the borrower.

The general loan forgiveness process described above applies only to loan forgiveness applications that are not reviewed by SBA prior to the lender's decision on the forgiveness application. In a separate interim final rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, SBA will describe its procedures for reviewing PPP loan applications and loan forgiveness applications.

3. Payroll Costs Eligible for Loan Forgiveness

a. When must payroll costs be incurred and/or paid to be eligible for forgiveness?

In general, payroll costs paid or incurred during the eight consecutive week (56 days) covered period are eligible for forgiveness. Borrowers may seek forgiveness for payroll costs for the eight weeks beginning on either:

- i. the date of disbursement of the borrower's PPP loan proceeds from the Lender (i.e., the start of the covered period); or
- ii. the first day of the first payroll cycle in the covered period (the "alternative payroll covered period").

Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs incurred during the borrower's last pay period of the covered period or the alternative payroll covered period are eligible for forgiveness if paid on or before the next regular payroll date; otherwise, payroll costs must be paid during the covered period (or alternative payroll covered period) to be eligible for forgiveness. Payroll costs are generally incurred on the day the employee's pay is earned (i.e., on the day the employee worked). For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

The Administrator of the Small Business Administration (Administrator), in consultation with the Secretary of the Treasury (Secretary), recognizes that the eight-week covered period will not always align with a borrower's payroll cycle. For administrative convenience of the borrower, a borrower with a bi-weekly (or more frequent) payroll cycle may elect to use an alternative payroll covered period that begins on the first day of the first payroll cycle in the covered period and continues for the following eight weeks.

If payroll costs are incurred during this eight-week alternative payroll covered period, but paid after the end of the alternative payroll covered period, such payroll costs will be eligible for forgiveness if they are paid no later than the first regular payroll date thereafter.

The Administrator, in consultation with the Secretary, determined that this alternative computational method for payroll costs is justified by considerations of administrative feasibility for borrowers, as it will reduce burdens on borrowers and their payroll agents while achieving the paycheck protection purposes manifest throughout the CARES Act, including section 1102. Because this alternative computational method is limited to payroll cycles that are bi-weekly or more frequent, this computational method will yield a calculation that the Administrator does not expect to materially differ from the actual covered period, while avoiding unnecessary administrative burdens and enhancing auditability.

Example: A borrower has a bi-weekly payroll schedule (every other week). The borrower's eight-week covered period begins on June 1 and ends on July 26. The first day of the borrower's first payroll cycle that starts in the covered period is June 7. The borrower may elect an alternative payroll covered period for payroll cost purposes that starts on June 7 and ends 55 days later (for a total of 56 days) on August 1. Payroll costs paid during this alternative payroll covered period are eligible for forgiveness. In addition, payroll costs incurred during this alternative payroll covered period are eligible for forgiveness as long as they are paid on or before the first regular payroll date occurring after August 1. Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once.

- b. Are salary, wages, or commission payments to furloughed employees; bonuses; or hazard pay during the covered period eligible for loan forgiveness?*

Yes. The CARES Act defines the term “payroll costs” broadly to include compensation in the form of salary, wages, commissions, or similar compensation. If a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the covered period. The Administrator, in consultation with the Secretary, has determined that this interpretation is consistent with the text of the statute and advances the paycheck protection purposes of the statute by enabling borrowers to continue paying their employees even if those employees are not able to perform their day-to-day duties, whether due to lack of economic demand or public health considerations. This intent is reflected throughout the statute, including in section 1106(d)(4) of the Act, which provides that additional wages paid to tipped employees are eligible for forgiveness. The Administrator, in consultation with the Secretary, has also determined that, if an employee’s total compensation does not exceed \$100,000 on an annualized basis, the employee’s hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are thus a similar form of compensation.

- c. Are there caps on the amount of loan forgiveness available for owner-employees and self-employed individuals’ own payroll compensation?*

Yes, the amount of loan forgiveness requested for owner-employees and self-employed individuals’ payroll compensation can be no more than the lesser of 8/52 of 2019

compensation (i.e., approximately 15.38 percent of 2019 compensation) or \$15,385 per individual in total across all businesses. See 85 FR 21747, 21750.

In particular, owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health care contributions made on their behalf. Schedule C filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit.³ General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. No additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners, as such expenses are paid out of their net self-employment income.

4. Nonpayroll Costs Eligible for Loan Forgiveness

a. When must nonpayroll costs be incurred and/or paid to be eligible for forgiveness?

A nonpayroll cost is eligible for forgiveness if it was:

- i. paid during the covered period; or
- ii. incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.

Example: A borrower's covered period begins on June 1 and ends on July 26. The borrower pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing date. The borrower may seek loan forgiveness for its May and June electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the

³ See 85 CFR 21747, 21749 (April 20, 2020).

portion of its July electricity bill through July 26 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.

The Administrator, in consultation with the Secretary, has determined that this interpretation provides an appropriate degree of borrower flexibility while remaining consistent with the text of section 1106(b). The Administrator believes that this simplified approach to calculation of forgivable nonpayroll costs is also supported by considerations of administrative convenience for borrowers, and the Administrator notes that the 25 percent cap on nonpayroll costs will avoid excessive inclusion of nonpayroll costs.

b. Are advance payments of interest on mortgage obligations eligible for loan forgiveness?

No. Advance payments of interest on a covered mortgage obligation are not eligible for loan forgiveness because the CARES Act's loan forgiveness provisions regarding mortgage obligations specifically exclude "prepayments." Principal on mortgage obligations is not eligible for forgiveness under any circumstances.

5. *Reductions to Loan Forgiveness Amount*

Section 1106 of the CARES Act specifically requires certain reductions in a borrower's loan forgiveness amount based on reductions in full-time equivalent employees or in employee salary and wages during the covered period, subject to an important statutory exemption for borrowers who have rehired employees and restored salary and wage levels by June 30, 2020 (with limitations). In addition, SBA and Treasury are adopting a regulatory exemption to the reduction rules for borrowers who have offered to rehire employees or restore employee hours, even if the employees have not accepted. The

instructions to the loan forgiveness application and the guidance below explains how the statutory forgiveness reduction formulas work.

- a. Will a borrower's loan forgiveness amount be reduced if the borrower laid-off or reduced the hours of an employee, then offered to rehire the same employee for the same salary and same number of hours, or restore the reduction in hours, but the employee declined the offer?*

No. Employees whom the borrower offered to rehire are generally exempt from the CARES Act's loan forgiveness reduction calculation. This exemption is also available if a borrower previously reduced the hours of an employee and offered to restore the employee's hours at the same salary or wages. Specifically, in calculating the loan forgiveness amount, a borrower may exclude any reduction in full-time equivalent employee headcount that is attributable to an individual employee if:

- i. the borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
- ii. the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
- iii. the offer was rejected by such employee;
- iv. the borrower has maintained records documenting the offer and its rejection; and
- v. the borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer.⁴

⁴ Further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on SBA's website.

The Administrator and the Secretary determined that this exemption is an appropriate exercise of their joint rulemaking authority to grant *de minimis* exemptions under section 1106(d)(6).⁵ Section 1106(d)(2) of the CARES Act reduces the amount of the PPP loan that may be forgiven if the borrower reduces full-time equivalent employees during the covered period as compared to a base period selected by the borrower. Section 1106(d)(5) of the CARES Act waives this reduction in the forgiveness amount if the borrower eliminates the reduction in full-time equivalent employees occurring during a different statutory reference period⁶ by not later than June 30, 2020. The Administrator and the Secretary believe that the additional exemption set forth above is consistent with the purposes of the CARES Act and provides borrowers appropriate flexibility in the current economic climate. The Administrator, in consultation with the Secretary, have determined that the exemption is *de minimis* for two reasons. First, it is reasonable to anticipate that most laid-off employees will accept the offer of reemployment in light of current labor market conditions. Second, to the extent this exemption allows employers to cure FTE reductions attributable to terminations that occurred before February 15, 2020 (the start of the statutory FTE reduction safe harbor period), it is reasonable to anticipate those reductions will represent a relatively small portion of aggregate employees given the historically strong labor market conditions before the COVID-19 emergency.

- b. What effect does a reduction in a borrower's number of full-time equivalent (FTE) employees have on the loan forgiveness amount?*

⁵ Section 1106(d)(6) is the sole joint rulemaking authority exercised in this interim final rule. All other provisions of this interim final rule are an exercise of rulemaking authority by SBA, except as expressly noted otherwise.

⁶ Section 1106(d)(5) specifies that this reference period is between February 15, 2020 and 30 days after the date of enactment of the CARES Act or April 26, 2020 (the safe harbor period).

In general, a reduction in FTE employees during the covered period or the alternative payroll covered period reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTE employees. The borrower must first select a reference period: (i) February 15, 2019 through June 30, 2019; (ii) January 1, 2020 through February 29, 2020; or (iii) in the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.⁷ If the average number of FTE employees during the covered period or the alternative payroll covered period is less than during the reference period, the total eligible expenses available for forgiveness is reduced proportionally by the percentage reduction in FTE employees. For example, if a borrower had 10.0 FTE employees during the reference period and this declined to 8.0 FTE employees during the covered period, the percentage of FTE employees declined by 20 percent and thus only 80 percent of otherwise eligible expenses are available for forgiveness.

This formula implements section 1106(d)(2) of the CARES Act, which expressly requires that the loan forgiveness amount be reduced by the amount resulting from multiplying the amount that the borrower would otherwise receive by the quotient of the average FTE employees in the relevant reference period divided by the average FTE employees in the covered period.

c. What does “full-time equivalent employee” mean?

Full-time equivalent employee means an employee who works 40 hours or more, on average, each week. The hours of employees who work less than 40 hours are calculated

⁷ This decision to permit seasonal employers to use, as a reference period, any consecutive 12-week period between May 1, 2019 and September 15, 2019 is an exercise of the Secretary’s rulemaking authority under section 1109 of the CARES Act. This reference period is consistent with the interim final rule on seasonal employers issued by Treasury. See 85 FR 23917 (April 30, 2020).

as proportions of a single full-time equivalent employee and aggregated, as explained further below in subsection d.

The CARES Act does not define the term “full-time equivalent employee,” and the Administrator, in consultation with the Secretary, has determined that full-time equivalent is best understood to mean 40 hours or more of work each week. The Administrator considered using a 30 hour standard, but determined that 40 hours or more of work each week better reflects what constitutes full-time employment for the vast majority of American workers.

d. How should a borrower calculate its number of full-time equivalent (FTE) employees?

Borrowers seeking forgiveness must document their average number of FTE employees during the covered period (or the alternative payroll covered period) and their selected reference period. For purposes of this calculation, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1.0. For example, an employee who was paid 48 hours per week during the covered period would be considered to be an FTE employee of 1.0.

For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency in one of two ways. First, the borrower may calculate the average number of hours a part-time employee was paid per week during the covered period. For example, if an employee was paid for 30 hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.75. Similarly, if an employee was paid for ten hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.25. Second, for administrative convenience, borrowers may elect to use a full-time equivalency of 0.5 for

each part-time employee. The Administrator recognizes that not all borrowers maintain hours-worked data, and has decided to afford such borrowers this flexibility in calculating the full-time equivalency of their part-time employees.

Borrowers may select only one of these two methods, and must apply that method consistently to all of their part-time employees for the covered period or the alternative payroll covered period and the selected reference period. In either case, the borrower shall provide the aggregate total of FTE employees for both the selected reference period and the covered period or the alternative payroll covered period, by adding together all of the employee-level FTE employee calculations. The borrower must then divide the average FTE employees during the covered period or the alternative payroll covered period by the average FTE employees during the selected reference period, resulting in the reduction quotient.

The Administrator, in consultation with the Secretary, determined that because the Act does not define the term FTE employee, this approach to measurement of FTE is a reasonable and appropriate exercise of the Administrator's rulemaking authority, as it balances the need for a reasonable measurement of FTE employee headcount with the need to limit borrower compliance burdens and ensure administrative feasibility.

- e. What effect does a borrower's reduction in employees' salary or wages have on the loan forgiveness amount?*

Under section 1106(d)(3) of the CARES Act, a reduction in an employee's salary or wages in excess of 25 percent will generally result in a reduction in the loan forgiveness amount, unless an exception applies. Specifically, for each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of

\$100,000 in any pay period in 2019, the borrower must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions that are in excess of 25 percent of base salary or wages between January 1, 2020 and March 31, 2020 (the reference period), subject to exceptions for borrowers who restore reduced wages or salaries (see g. below). This reduction calculation is performed on a per employee basis, not in the aggregate.

Example: A borrower reduced a full-time employee's weekly salary from \$1,000 per week during the reference period to \$700 per week during the covered period. The employee continued to work on a full-time basis during the covered period with an FTE of 1.0. In this case, the first \$250 (25 percent of \$1,000) is exempted from the reduction. Borrowers seeking forgiveness would list \$400 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by eight weeks).

The provision implements section 1106(d)(3) of the CARES Act, which provides that “the amount of loan forgiveness shall be reduced by the amount of any reduction in total salary or wages of any employee [who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000] during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.”

- f. How should borrowers seeking loan forgiveness account for the reduction based on a reduction in the number of employees (Section 1106(d)(2)) relative to the reduction relating to salary and wages (Section 1106(d)(3))?*

To ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction.

The Act does not address the intersection between the FTE employee reduction provision in section 1106(d)(2) and the salary/wage reduction provision in section 1106(d)(3). To help ensure uniformity across all borrowers in applying the FTE reduction provision and the salary/wage reduction provision, the Administrator, in consultation with the Secretary, has determined that the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction. This approach will help ensure that borrowers are not doubly penalized for reductions.

Example: An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE employee of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE employee of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.

The Administrator considered applying the salary/wage reduction provision in addition to the FTE reduction in situations similar to the example above because section 1106(d)(3) refers to reductions in "total salary or wages" in excess of 25 percent. However, the Administrator determined that, based on the structure of section 1106(d)(2) and section 1106(d)(3), Congress intended to distinguish between an FTE reduction on the one hand and a reduction in hourly wages or salary on the other hand. This interpretation

harmonizes the two loan forgiveness reduction provisions in a logical manner consistent with the statute.

- g. If a borrower restores reductions made to employee salaries and wages or FTE employees by not later than June 30, 2020, can the borrower avoid a reduction in its loan forgiveness amount?*

Yes. Section 1106(d)(5) of the CARES Act provides that if certain employee salaries and wages were reduced between February 15, 2020 and April 26, 2020 (the safe harbor period) but the borrower eliminates those reductions by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages under section 1106(d)(3) of the CARES Act. Similarly, if a borrower eliminates any reductions in FTE employees occurring during the safe harbor period by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in FTE employees.⁸

This provision implements section 1106(d)(5) of the CARES Act, which gives borrowers an opportunity to cure reductions in FTEs, salary/wage reductions in excess of 25 percent, or both, using the applicable methodology set forth in section 1106(d)(5). The Act provides that the reduction in FTEs or the reduction in salary/hourly wages must be eliminated “not later than June 30, 2020.” This does not change or affect the requirement

⁸ In light of the flexibility the Act provides to borrowers with respect to their selection of the reference time period for any potential reduction in loan forgiveness, and the statutory authority for SBA and the Department of the Treasury to grant *de minimis* exemptions from this requirement, if the borrower meets the requirements for the FTE reduction safe harbor, it will not be subject to any loan forgiveness reduction based on a reduction in FTE employees.

that at least 75 percent of the loan forgiveness amount must be attributable to payroll costs.

- h. Will a borrower's loan forgiveness amount be reduced if an employee is fired for cause, voluntarily resigns, or voluntarily requests a schedule reduction?*

No. When an employee of the borrower is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period or the alternative payroll covered period (FTE reduction event), the borrower may count such employee at the same full-time equivalency level before the FTE reduction event when calculating the section 1106(d)(2) FTE employee reduction penalty. The Administrator and the Secretary have decided to exempt such employees from the calculation of the FTE reduction penalty.

Section 1106 is silent concerning how to account for employees who are fired for cause, voluntarily resign, or voluntarily request a reduced schedule. The Administrator and the Secretary have determined that such an exemption is *de minimis*, because a limited number of borrowers will face an FTE reduction event during the covered period or the alternative payroll covered period. Further, borrowers should not be penalized for changes in employee headcount that are the result of employee actions and requests. Borrowers that avail themselves of this *de minimis* exemption shall maintain records demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction. The borrower shall provide such documentation upon request.

6. Documentation Requirements

What must borrowers submit for forgiveness of their PPP loans?

The loan forgiveness application form details the documentation requirements; specifically, documentation each borrower must submit with its Loan Forgiveness Application (SBA Form 3508 or a lender equivalent), documentation each borrower is required to maintain and make available upon request, and documentation each borrower may voluntarily submit with its loan forgiveness application. Section 1106(e) of the Act requires borrowers to submit to their lenders an application, which includes certain documentation, and section 1106(f) provides that the borrower shall not receive forgiveness without submitting the required documentation. For purposes of administrative convenience for both lenders and borrowers, the Administrator, in consultation with the Secretary, has determined that requiring borrowers to submit certain documentation, maintain certain documentation, and choose whether to submit additional documentation will reduce initial reporting burdens on borrowers and reduce initial recordkeeping burdens on lenders.

7. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D), based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose a new reporting requirement on borrowers who request forgiveness of their PPP loan. SBA has developed Form 3508, Paycheck Protection Program – Loan Forgiveness Application, for use in collecting the information required to determine whether a borrower is eligible for loan forgiveness. SBA obtained approval of Form 3508 from the Office of Management and Budget (OMB) as a modification to the existing PPP collection of information (OMB Control Number (3245-0407)). This collection of information

was approved under emergency procedures to facilitate immediate implementation of the PPP and expires on October 31, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal Register at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in response to an emergency

that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator
Small Business Administration.

Michael Faulkender,
Assistant Secretary for Economic Policy
Department of the Treasury.

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF WASHINGTON

3 In Re:) Lead Case No.
4 ASTRIA HEALTH) 19-01189-11
5)
6) Adv. Pro. Case No.
7) 20-80016 - WLH
8)
9 V.)
10 UNITED STATES SMALL)
11 BUSINESS)
12 ADMINISTRATION and)
13 JOVITA CARRANZA, in)
14 her capacity as)
15 Administrator for)
16 the United States)
17 Small Business)
18 Administration,)
19 Defendants.)
20
21
22
23
24

25 VERBATIM TRANSCRIPTION OF PROCEEDINGS
From audio recording
June 3, 2020

TAKEN BEFORE THE HONORABLE WHITMAN HOLT



25 TRANSCRIBED BY:
Andie Evered, CCR 2393

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APPEARANCES

2

3 Samuel Maizel, Sam Alberts, Attorneys for Debtor
Jim Day, Attorney for Debtor

4 Boris Mankovetskiy, Attorney for Creditors Committee
Ian Hammel, Attorney for UMB Bank, N.A., Lapis

5 Advisers, LP

Sarah Schrag, Attorneys for the Debtor

6 Jane Pearson, the Unsecured Creditors Committee

Geoffrey Miller for the plaintiffs

7 John Gallegos

Andrew Sherman

8 Gary Dyer

Mark Sacks

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

MR. ALBERTS: Good morning, Your Honor.

COURT CLERK: Jim Day also for the plaintiffs.

MR. DAY: Good morning, Your Honor.

COURT CLERK: Sam Maizel for the plaintiffs.

MR. MAIZEL: Good morning, Your Honor.

COURT CLERK: Jeffery Miller for the plaintiffs.

MR. MILLER: Good morning, Your Honor.

COURT CLERK: Sarah Schrag for the plaintiffs.

MS. SCHRAG: Good morning, Your Honor.

COURT CLERK: John Gallegos (phonetic).

Mr. GALLEGOS: Good morning, Your Honor.



1 COURT CLERK: Michael Lane for Astria
2 Health.

3 MR. LANE: Good morning, Your Honor.

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

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

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

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

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

14 MS. PEARSON: Good morning, Your Honor.

15 COURT CLERK: And Andrew Sherman.

16 MR. SHERMAN: Good morning, Your Honor.

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

19 MR. DYER: Good morning, Your Honor.

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

22 MR. SACKS: Good morning, Your Honor.

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

25 MR. DONOVAN: Good morning, Your Honor.



1 COURT CLERK: This is being recorded.

2 Please proceed.

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

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

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

25 Whoever is arguing for the debtors, please



1 go ahead.

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



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

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

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



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

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

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



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



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

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

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

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



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



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

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



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

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

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



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

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

25 Your Honor, it's also interesting in



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



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

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



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

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

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

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



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

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



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



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



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

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



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

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

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

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



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

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



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

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



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

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



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

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

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

25 (Audio compromised in this section)



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

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

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



1 then have a handful of questions for you.

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

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

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



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

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

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



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

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



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

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

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



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

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



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

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

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

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



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



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

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

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

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



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

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

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



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

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

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



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

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



1 as anything really akin to a grant, even though
2 there is the possibility that the loan itself will
3 be forgetful. So what I see as a grant is a loan
4 followed by the possibility of (inaudible) loan.
5 But at any event, I don't see it as a grant.
6 That's at 115 to 116 of that transcript, which we
7 will get you, Your Honor.

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

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



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

4 And I think that should be pretty obvious.

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

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

25 THE COURT: No, please go ahead.



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

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



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

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

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



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

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

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

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

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



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

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



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

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

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

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



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

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



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

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

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



1 get it quickly.

2 THE COURT: No problem.

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

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



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

4 (Crosstalk).

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

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



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

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

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

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



1 Honor.

2 THE COURT: I'm not missing something?

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



1 (Crosstalk)

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

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

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



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

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

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

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



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

14 (Crosstalk).

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

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

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

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



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

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

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



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

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

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



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

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



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

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

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

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

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

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



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

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

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



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

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

24 THE COURT: Right. Okay.

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



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

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



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

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

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

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

18 THE COURT: Okay. I understand.

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



1 Authority case, even when the Agency explains a
2 decision with less than ideal clarity, or if you,
3 the Court, will not upset the decision on the
4 account of the agency's passing reasonably certain
5 what Your Honor read. You may not like the level
6 of clarity you're getting from the Agency here,
7 but is the Agency decision reasonable? I think it
8 certainly is.

9 And if we look at the State Farm case in
10 the Supreme Court, it tells you how to determine
11 if something is arbitrary and capricious.

12 So what does it tell you? First, has the
13 Agency relied on factors as Congress has not
14 intended it to consider? Certainly not here. Has
15 the Agency entirely failed to consider an
16 important aspect of the problem? I mean,
17 arguably, this is unfair, but they've considered
18 the aspect of the problem. What are --

19 (Crosstalk)

20 THE COURT: Where do I see that? Where is
21 that consideration? Show me.

22 MR. SACKS: It's -- the question is
23 whether they failed to an important aspect of the
24 problem. So we'd have to identify what that
25 aspect of the problem would be. I don't think



1 we've done that. The only issue, here, is who was
2 entitled to get a loan in a first come first serve
3 basis from an infinite pool of money and how does
4 the Government ensure those loans are sound, which
5 Congress has mandated the supply of PPP loans as
6 well. And the Agency considered that, the
7 conditions that are relevant there. Unauthorized
8 use (inaudible) for and a potential risk of
9 non-repayment. There --

10 (Crosstalk)

11 THE COURT: -- consideration is evidenced
12 by -- again, by defendants.

13 MR. SACKS: Yes. And I guess I'll try not
14 to -- I have to keep repeating myself. I'm not
15 hiding the ball here. There's nothing else that I
16 haven't told you that -- that you should be
17 considering here. And -- and -- and I won't try
18 to belabor this point. I think -- I think the law
19 is very clear of the standard for what and what
20 not -- what is not arbitrary and capricious. And,
21 we cite that extensively in our brief. And before
22 -- interim final rule clearly meets that standard
23 and surpasses that standard, because it gives two
24 reasoned explanations for why a PPP loan to a
25 debtor is different than a PPP loan to a



1 non-debtor. And, that's what court after court
2 has recognized. That it may be unfair, it may not
3 apply to all debtors, but (inaudible) applies to
4 some, and that shows the agency's decision was
5 reasoned and not arbitrary and capricious. It
6 doesn't have to be the best addition. It doesn't
7 have to be the decision Your Honor would make.
8 But under these extreme and unique circumstances
9 of six days to loan billions of dollars and the
10 Government having to make difficult choices about
11 who is entitled to a limited pool of money, the
12 Agency made a bright line decision. And that
13 decision was not arbitrary or capricious. It may
14 be unfair, it's certainly difficult for some
15 debtors, but it's not arbitrary or capricious.

16 THE COURT: Okay. I under I understand
17 your position.

18 MR. SACKS: Okay. Let me, if I can, try
19 to address a few of the other APA points that the
20 client has raised. Let me address briefly the
21 issue of section 4003 of the CARES Act, because
22 what the clients are telling you, essentially, is
23 that because that provision of the CARES Act
24 contains a specific exclusion for entities in
25 bankruptcy, you need to consider the action the



1 (inaudible) from the PPP to be determinative. And
2 they rely on the standard, (inaudible) certainly
3 correct. Can the statutory construction, that
4 something mentioned one place in the statute but
5 omitted elsewhere, is generally deemed to be
6 purposeful. But, that's not the case here. And
7 let me briefly try to explain why this is the
8 point Your Honor has an interest in. The reason
9 for that is that we don't have one uniform statute
10 here. The PPP, as you know, was placed into the 7
11 (a) loan program. It's now an amended part of the
12 15 USC 636. The new program is actually 4003,
13 which will have this new, unique statutory
14 designation, which is one by treasury and not the
15 SBA. It is something that has never existed
16 before; it's a program to give money to small and
17 medium businesses. And the only way to look at
18 4003 in comparison to the PPP is this: As you
19 know the PPP, Congress expanded the size
20 eligibility for businesses that can receive PPP to
21 500 people. Well, Congress and section 4003 made
22 a new program for 500 and above, up to, I think,
23 10,000. So that's really how you need to look at
24 those two statutes in concert. But, because 4003
25 was new, Congress chose to explicitly include a



1 bankruptcy exclusion there, wherein the 7(a)
2 lending program, bankruptcy is already a
3 consideration in the lending, and that is true as
4 well for the 7(a) program. So that (inaudible)
5 construction is absolutely valid and generally
6 applies on the surface. And it may be appealing
7 here, but you can't reach that conclusion unless
8 you look closely at the two statutes. But once
9 you do, you simply can't discern anything about
10 the PPP from the inclusion of that language in the
11 4003.

12 Your Honor, if you give me a second, I
13 jumped around a bit and I'm just looking at my own
14 notes to see if anything else I wanted to cover,
15 if you don't mind.

16 THE COURT: Sure. Why don't we take just
17 a quick couple minute break.

18 MR. SACKS: Thank you.

19 THE COURT: You can get organized and
20 we'll be back in about two minutes.

21 (Whereupon, a recess was taken)

22 THE COURT: Are you ready to continue?

23 MR. SACKS: I am. I have two final points
24 on the APA issue and then I'll move on to
25 irreparable harm, unless Your Honor has questions.



1 The first (inaudible) is important to
2 understand the exact language of the statutes
3 here. The CARES Act requirement about sound value
4 is a "shall" requirement. That's in 15 USC 636 a
5 6. The CARES Act obligation for the Agency to
6 make PPP loans is a "may" requirement. It says
7 the administrator may guarantee covered loans
8 under the same terms and conditions as 7(a).
9 That's in CARES Act section 1102, subsection a 2.
10 That shall/may distinction is a giant one that
11 tells the Court a lot about Congress's decision to
12 delegate, to the SBA, the authority to decide in
13 these -- in the may guarantee language, who
14 they're going to guarantee loans to and who
15 they're not.

16 Let me also address some -- some, I think,
17 significant issues about the HEROES Act, which,
18 again, was the bill passed by the House on May
19 15th and what it says.

20 The plaintiffs point you to four letters,
21 I believe by members of Congress, who suggest -- I
22 haven't looked at them too closely, but I think it
23 suggests that the -- the House, because the
24 Congress did not mean the PPP to exclude -- to
25 (inaudible) to have those excluded. Those --



1 first of all, they're hearsay and since this is an
2 evidentiary hearing, a PI should not be permitted.
3 But, nonetheless, they're not legislative history
4 and no court would say they are legislative
5 history. The HEROES Act, which would have been
6 the PPP, and which the House passed, has a
7 specific amendment in section 9000 1 (c) which
8 says during the coverage period of the PPP, any
9 nonprofit organization that is a critical access
10 hospital shall be eligible to receive a covered
11 loan regardless of the status of such a hospital
12 that the debtor in a case under Chapter 11 of
13 Title 11. So again, this is only the House and
14 only a bill passed for the House, but the House
15 recognized that if someone in bankruptcy whose
16 going to get a PPP loan, that the Congress would
17 have to amend the PPP to permit that. And I think
18 that is further significant (inaudible) that when
19 the SBA acted within its delegated authority, it
20 was doing so.

21 So let me now turn to the irreparable harm
22 issue, if I could. And I want to start with what
23 I think is important. And that really is the very
24 highest standard that plaintiff must meet to have
25 a showing of irreparable harm in its favor.



1 Let me -- let me cite to you
2 Judge Saltzman on this. I think that what is - I
3 think that is what the case law requires. There's
4 got to be some sort of showing of immediate and
5 irreparable harm. There was no allegation, for
6 example, that not receiving the funds would cause
7 the debtor to be unable to organize, would lead to
8 a conversion or a dismissal of the case, would
9 lead the debtor shutting down. None of that is in
10 the record. And, to me, that is a sort of
11 irreparable harm if the case law looks to when
12 deciding whether a temporary restraining order is
13 appropriate. Another recent case Your Honor
14 doesn't have, and we'll upload this to you as
15 well, in the Hartshorn case out of the Western
16 District of Kentucky. This is the case where the
17 Court granted a TRO in favor of the debtor and set
18 a PI hearing. After a PI hearing the Court issued
19 an order denying relief (inaudible) based on the
20 fact the debtors had not proved irreparable harm.

21 The Court said the debtors have not proved
22 directly that -- irreparable harm if they are
23 denied the PPP funds they have requested because
24 they have not shown that the PPP funds are
25 necessary to stave off economic destruction or an



1 inability to continue with their DIP operation
2 going forward. All the judges recognized it, that
3 irreparable harm is requires certain and actual
4 evidence of immediate harm. A PI is an
5 extraordinary remedy and it was only justified in
6 those types of cases. That's the standard that a
7 plaintiff must meet to prevail on this factor of
8 the four-factor test.

9 Now, the question then becomes what is in
10 the record, here, from the plaintiffs that show
11 whether they have met this factor or not? And I
12 submit to you, Your Honor -- and course Your Honor
13 knows this bankruptcy. You've been overseeing it
14 for a year. You know, this -- I think at least
15 that's the case -- but you know this -- the -- the
16 evidence here far better than I do from just
17 trying to review some facts and pleadings. But, I
18 certainly can review what the plaintiffs have
19 said, and they don't say anything in their initial
20 motion, in the declaration attached to that
21 motion, and in their reply that supports an
22 argument that they met that very high standard of
23 irreparable harm.

24 Let me submit that I think what Mr. Maizel
25 told you was that, "We want this money. We need



1 this money. And there's irreparable harm here is
2 if you move on our favor, we won't get it." With
3 all due respect, Your Honor, that is insufficient
4 to find irreparable harm. Simply wanting the
5 money is not enough. If that was the case, every
6 plaintiff in every one of these cases who didn't
7 get a loan would automatically prove irreparable
8 harm. That certainly hasn't been what happened.
9 Of course, the Courts have held plaintiffs to a
10 higher standard. And this court should do --
11 without a higher standard, the standard, that the
12 courts have set out for what is irreparable harm.

13 So let's take a look, again, at some of
14 the language that the plaintiffs have used in
15 their pleadings and why that language here is
16 insufficient. Let me see if I can go to that
17 here. In the reply, the harm is the inability of
18 the debtors to apply for governmental assistance
19 to sustain the payroll for its nurses and other
20 staff in the midst of a global pandemic and the
21 economic trauma caused by the debtors following
22 Washington State guidelines requiring the
23 cessation of elective surgeries; that's at 10.
24 There's also similar language at 44 and 45 of the
25 reply. Essentially, what you're hearing there, is



1 we will use this money to keep paying our nurses.
2 We don't dispute that they intend to do that. But
3 the question is, are they unable to pay their
4 nurses without this money? And if so, is the
5 hospital going to cease operations or is it going
6 to cause their bankruptcy to crater? There is
7 zero evidence of that.

8 I believe the record shows they have
9 continued to maintain their payroll and their
10 staff and continue to pay their nurses. Would
11 this money help do that? Perhaps. But is there
12 irreparable harm if they don't get that money
13 (inaudible) in that vein? No, there's not.

14 The economic trauma caused by this
15 cessation of elective surgeries and the other
16 issues that are having (inaudible), we don't
17 dispute or deny any of that. We understood
18 everything the Court took judicial notice of on
19 May 19th, but that does not translate into the
20 immediate and irreparable harm facing the debtor.
21 In fact, not long ago, I believe they filed a
22 motion for emergency relief in the Court to ask
23 them to close their hospital in Yakima. And in
24 doing so, you know, the (inaudible) point that
25 that will help the rest of the debtors in



1 bankruptcy successfully reorganize and get out of
2 bankruptcy. There's been no suggestion in recent
3 status reports, or any other pleadings, that a
4 failure to obtain this loan will have a
5 significant detrimental effect. And, in fact,
6 Judge Saltzman would say it would have to crater
7 the reorganization. There is none of that here.

8 Arguing that the debtors would not be
9 harmed by not getting the money is not the same
10 thing as arguing that they would not suffer
11 irreparable harm for the standard courts --
12 particularly courts in the Ninth Circuit, require
13 for a showing on that prong to get preliminary
14 conjunctive relief, which is what the plaintiffs
15 seek in this case.

16 And again, going back to what Mr. Maizel
17 said in his statement, there is no dispute about
18 hospitals facing challenges nationwide. But that
19 is absolutely not relevant to the question of
20 irreparable harm. That is to (inaudible)
21 individual to the plaintiff. It's their burden to
22 show that through declarations, through financial
23 records, through efforts to obtain loans
24 elsewhere -- all of those things -- they support a
25 finding of irreparable harm here. They come



1 nowhere close under their particular circumstances
2 of showing that here.

3 Now let's go on to the remaining prong.

4 And there's not been one judge yet --

5 THE COURT: Can I ask you one question on
6 irreparable harm, Mr. Sacks?

7 MR. SACKS: Yes, your honor.

8 THE COURT: One thing that goes into the
9 analysis here is whether the plaintiff would have
10 an adequate remedy without getting a preliminary
11 injunction. And let's say I don't issue the
12 preliminary injunction and the June 30th deadline
13 passes or the money runs out, although I think
14 that there may be a lot of money still left. But,
15 you know, for whatever reason they can't get to
16 the money, the money's gone, what's the SBA's view
17 about whether it's liable for damages at that
18 point? I mean is the SBA then -- you know, let's
19 say we then have a trial, right? So the PPP
20 money's gone, the milk spilt out of the cart and
21 we have a trial on the merits and I conclude that
22 the debtor should have gotten a PPP loan. Can
23 they get a money judgment against the SBA?

24 MR. SACKS: That's a complicated question,
25 Your Honor, and one that we're still researching.



1 I would say that the June 30th cutoff for the
2 appropriated funds is a congressional deadline.
3 And so I don't believe the Court would have the
4 power to offer that. Because if you force the
5 executive branch to pay out of -- out of money
6 that has no longer than appropriated, then we're
7 looking at an (inaudible) act violation here. So,
8 I don't believe there could be a basis for that.
9 Is there's an alternative basis, a source of funds
10 for this court to award damages? I'm not sure.
11 Judge Fegone, in a case that he just resolved,
12 asked for briefing and testimony on the issue of
13 damages. It was something that he was
14 considering. Obviously, he decided the Government
15 won, but -- but that is, at this point, an
16 unresolved question, I would say. But I -- I
17 certainly don't want to guarantee that there is a
18 legal basis for the plaintiff to obtain damages
19 here. But I will submit it that even if that's
20 the case and we can conclude today there is no
21 basis to obtain damages after June 30th and they
22 don't get the loan, that is not enough to prove
23 irreparable harm. It's harm, sure. This is money
24 they wanted that they don't get. But it's not
25 irreparable.



1 THE COURT: Okay. I understand. Thank
2 you thinking.

3 MR. SACKS: So turning to the public
4 interest prong. I don't believe there's been a
5 court yet that has determined the government's
6 arguments were the better here. There's a court
7 (inaudible) all of the courts that have granted --
8 denied injunctive relief, which is close to 20
9 now, have found the public interest weighs in
10 favor of the plaintiffs in this case. And, I
11 really won't dispute that here. We briefed what
12 we think are the relevant factors the Court should
13 consider. But, every court has (inaudible) that.
14 And so those issues about -- about, you know,
15 COVID and (inaudible) of the pandemic and the
16 impact on nurses and doctors, all of those are
17 completely valid concerns and arguably relevant to
18 the public interest factor and we're not going to
19 tell the Court not to consider that. But in the
20 grand scheme of looking at how these factors
21 should be weighed, with all respect, there is
22 simply no likelihood (inaudible) from 525 or the
23 ADA, and there's no reparable harm. And those two
24 issues drive any comparison, the other factors,
25 underground. They just can't rise, no matter how



1 significant the public interest. Even accepting
2 your 99 or 100 percent analysis, it's not enough
3 to overcome those other two factors to support
4 injunctive relief here. So, I believe that's all
5 I have, Your Honor. Thank you.

6 THE COURT: Thank you, Mr. Sacks. And I
7 appreciate your candor on that public interest
8 point. So you've preserved, I guess, your
9 position on this and I thank you for your candor
10 and not arguing something you reasonably know
11 you're going to lose. So I appreciate that.

12 Mr. Maizel, I'd like to hear your response
13 to the point Mr. Sacks made about irreparable harm
14 and the Judge Saltzman case, and (inaudible) the
15 case standard and the -- the harm that will befall
16 these debtors if they don't get the PPP money.

17 You're free to also address, you know,
18 anything else you'd like, but that's really the --
19 the one point I'd specifically like you to respond
20 to.

21 MR. MAIZEL: Your Honor, we've covered a
22 lot of ground here today and I appreciate the
23 Court's patience and I appreciate Mr. Sacks
24 arguments.

25 I take one second and digress. I actually



1 had Mr. Sacks' roll. He's been arguing these
2 cases all over the country for weeks now. And
3 actually my first foray in a bankruptcy court was
4 the equivalent of Mr. Sacks representing the
5 Medicare program in bankruptcy courts around the
6 country in the mid-1990s. I had exactly his role
7 in a different context. But, it is telling that
8 Mr. Sacks, having this role, arguing these cases
9 around the country, is incapable today of
10 providing an administrative record to support his
11 argument. The fact that they are now still
12 compiling it, given that the record apparently
13 only consists of six days of deliberations, it's
14 hard to fathom how after, now, almost two months
15 to compile the record, six days of deliberations,
16 they're incapable of producing the Court with any
17 evidence to support the reasoned decision-making
18 the claim is represented in those two phrases in a
19 single sentence.

20 Your Honor, I'll very -- just quickly
21 respond to a couple of the other points, and then
22 I will get to the point of irreparable harm. With
23 regard to sovereign immunity, section 106 (a)(1)
24 waives sovereign immunity as to the 525 claims.
25 It's clear section 106 (a)(4) only requires



1 compliance with procedural requirements for
2 enforcing orders against the Government.
3 And with regard to 15 USC section 634 (b), we cite
4 three cases. The first circuit, the DC circuit
5 and the federal circuit, all recognizing that the
6 subsequent law clearly that the -- the law he
7 relies on for the sovereign immunity argument well
8 predates the bankruptcy codes clear waivers of
9 sovereign immunity. And virtually -- and I think
10 most courts have recognized that in this context.

11 With regard to the 525 (a) argument, yes,
12 we all know the history of 525. It did come out
13 of the Perez case. It did deal with a driver's
14 license. But it is really -- you know, it's not
15 meaningful to site Perez anymore because courts
16 have widely expanded the application. First of
17 all, the language itself widely expands the
18 application beyond the context of a driver's
19 license and courts have widely expanded it beyond
20 that. It's interesting that he refers to the Ayes
21 case, in the Fourth Circuit and then says that
22 that case is different because there was a
23 government gatekeeping role and the Court had said
24 you can get a private -- you can get a loan from
25 private sector, of course.



1 As judges in this context have recognized
2 repeatedly, there is no private -- you can't get a
3 loan from the private sector which is intended to
4 be forgiven and not repaid. And the government's
5 gatekeeping role here is exactly clear. And that
6 is exactly -- ties into the language of Stoltz and
7 why the language installed directs our analysis
8 here to 525 (a) applying. In the Chevron
9 analysis -- look, I mean, his discussion of the
10 Chevron analysis, as he described it, is
11 interesting, but it seems to ignore the Supreme
12 Court's jurisprudence over the last 30 years,
13 which has significantly restricted the application
14 of Chevron. We cite both the Mead case but also
15 Burwell from only four or five years ago, which is
16 the Affordable Care Act case where the Court
17 expressly lays out the application of Chevron and
18 talks about the need for ambiguity for Chevron --
19 for ambiguity to be present before there is an
20 application of Chevron. That's the Supreme Court
21 jurisprudence and government counsel can keep
22 going back to the 1984 decision, but this court
23 has to look at more recent decisions of the U.S.
24 Supreme Court, which clearly apply a much more
25 limiting interpretation to the applicability of



1 Chevron. When you look at those rules, when you
2 look at those cases, it's clear, here, that
3 Chevron deference is simply inapplicable.

4 The Government counsel says that, you
5 know -- if you look at their two sentence --
6 they're one sentence two phrase rule, that shows
7 you that their decision is neither arbitrary or
8 capricious because it shows that they came up with
9 a post litigation rationalization of their
10 decision.

11 It is, again, telling that the first and
12 second rules have no such discussion. The third
13 rule has a discussion, which seems directly
14 contrary to this. And the fourth rule, after
15 Mr. Sacks and others have been repeatedly required
16 to litigate this particular issue, now explains --
17 it doesn't even explain, Your Honor. As the Court
18 pointed out there, no evidence of deliberation,
19 there's no record. Although the Court asked them
20 to provide a record, there is no record to support
21 the decision making here. There is simply blanket
22 statements that the administrator has decided,
23 with apparently no evidence to support it, that
24 debtors who are under the supervision of a federal
25 court, under the supervision of an arm of the



1 United States Department of Justice and have to
2 publicly disclose all their distributions every
3 month in public records, are somehow more likely
4 to misuse the funds and less likely to repay them
5 if they're unforgiven -- which is interesting and
6 I'll come back to that in a minute -- since
7 there's no record to support any of that decision
8 making.

9 It's also interesting that government
10 counsel repeatedly refers to how they put this --
11 Congress placed this program into the existing
12 7(a) program and -- and therefore incorporated the
13 -- incorporated by reference the existing credit
14 worthiness obligation. Which is, of course,
15 completely inconsistent with the precise
16 eligibility rules that Congress did articulate.
17 But more importantly, it's important, as
18 government counsel conceded and I think this court
19 noted, the 7(a) program does not contain any such
20 express prohibition against loaning to debtors.

21 So if Congress, and it's a normal rule
22 (inaudible) construction that Congress, if it
23 intended legislation to change judicially-created
24 concepts or regulatory concepts, it makes that
25 intent specific. That, of course, is the well,



1 ,oft repeated, language from Midlantic National
2 Bank versus the New Jersey Department of
3 Environmental Protection, a Supreme Court decision
4 from 1986. That means that Congress placed --
5 when it is presumed that when Congress placed this
6 PPP into the 7(a) program, it would have done so
7 with the knowledge that the program did not
8 exclude debtors in bankruptcy.

9 And so if the Government counsel wants to
10 rely on the fact that it incorporated -- Congress
11 chose to incorporate this program into the 7(a)
12 program and therefore incorporated this credit
13 worthiness, then it must concede that it would,
14 then, have also expected the administrator to
15 continue the existing rules governing 7(a), which
16 do not exclude debtors in bankruptcy. Which, of
17 course, the administrator completely turned upside
18 down in the PPP program.

19 I'm just trying to run through, Your
20 Honor, the issues. It is interesting that the
21 Government counsel argues, now, that because
22 Congress excused the SBA from full rulemaking,
23 which would've created a rule with the force of
24 law subject to Chevron deference, that somehow the
25 exigencies of the situation and Congress's



1 decision to excuse that rulemaking, means that
2 this court should now apply Chevron deference,
3 even though it's clearly contrary to Supreme Court
4 guidance. And I suggest that the exigencies of
5 the situation, or the fact that the SBA chose not
6 to go through formal rulemaking, doesn't relieve
7 this court of its oversight responsibilities. And
8 in exercising those oversight responsibilities, it
9 has to apply the right rules of review. And that,
10 here, is clearly not Chevron, it is Skidmore. And
11 as we've described before, Skidmore is a much less
12 deferential standard for the SBA's application
13 here.

14 It is interesting, also, that the SBA
15 argues that because -- it is -- it's rulemaking is
16 not unfair, not arbitrary or capricious, because
17 here it decided it -- it decided with apparently
18 no evidence available at least, that the debtors
19 in bankruptcy were more likely to misuse the funds
20 and the debtors in bankruptcy we're less likely to
21 be available to repay it. And they -- and counsel
22 for the Government relied on some language from
23 Judge Saltzman and other cases where they have
24 said, you know, the rules of the -- the rules for
25 distribution of assets might apply or DIP lenders



1 liens might attach. Let me put that to rest here,
2 Your Honor. First of all, the debtor has
3 explained that it will use the proceeds only for
4 purposes consistent with the act, so to make it
5 forgivable. But also will make it clear on the
6 record that the debtor will take these funds, if
7 it's awarded the funds, and put them in a separate
8 account, will not put them in DIP general account,
9 will label that account PPP funds. We will
10 provide an appendix to the monthly operating
11 report, explaining, you know, as we must with
12 regard to the monthly operating report, showing
13 where every distribution of the PPP funds has been
14 made. We will make sure that any order from the
15 Court granting our relief in this matter expressly
16 says that the funds, one, can only be used in
17 accordance with the limits of the PPP. Two, must
18 be held in a separate account. Three, will be
19 reflected in the monthly operating report in an
20 appendix. And perhaps most importantly, given the
21 comments of some of the judges, we have the
22 agreement of Lapis -- and their counsel was on the
23 phone. I don't know if they've lasted this
24 long -- but they were on the phone and they have
25 agreed expressly that their liens, both



1 pre-petition and DIP lending liens, will not
2 attach to the proceeds of the PPP loan. That
3 would also be included in an order, and we would
4 get a stipulation from the -- from Lapis to that
5 effect. That should extinguish any issue with
6 regard to where the funds go. And, the Unsecured
7 Creditors Committee has also agreed to that
8 disposition. They were on the phone earlier; I
9 don't know if they're still on.

10 THE COURT: I understand and appreciate
11 that. Thank you, Mr. Maizel.

12 MR. MAIZEL: So then, Your Honor, the
13 Government argues that the rule itself is the
14 record. That it explains -- and says with
15 remarkable ingenuity that -- it describes that by
16 saying that although it's -- the explanation may
17 be with less than ideal clarity. Well, Your
18 Honor, I think your questions indicated your
19 concerns about the lack of a record which are
20 well-grounded here. There is no way to determine
21 if the agency's decision here was reasonable
22 because all you have is the rule itself, which
23 they claim is to show you the decision-making
24 process. There are no factors here to indicate
25 that the rule is not arbitrary and capricious.



1 And in fact, Your Honor, I think the Court could
2 take judicial notice of the offers we've made that
3 address the issues of the misuse of the funds,
4 that the funds would be escrowed and only used for
5 PPG purposes so that they would be available to be
6 repaid if the loan were not forgiven, and to make
7 sure that the funds are not misused or used
8 inappropriately. So, that, I think undermines the
9 arguments -- the issues raised by the rule to the
10 extent of rule is anything except post hoc
11 rationalization.

12 It is disappointing that the judge in
13 Maine found that the SBA made reasonable choices.
14 I have no idea what the record looks like in those
15 cases. It is hard to fathom how the judge in
16 Maine could have reached those -- could have made
17 that statement given that there's no evidence, at
18 least if the record looks like it does in this
19 case, to support either assertion. There are no
20 -- there's simply no reasoned explanation; there
21 is no reason provided for the decisions.

22 Your Honor, the last point I'd make before
23 out -- I'm sorry, a couple. The argument -- it is
24 interesting the Government counsel argues that you
25 should ignore the fact that Congress was able to



1 include express language in section 403 of the
2 statute, which the Government argues you shouldn't
3 treat the statute as if it was passed at all at
4 one time even though it's not clear that would
5 make a difference, but here, of course it was.
6 They said you shouldn't treat that as a uniform
7 statute. So you should ignore the rule of
8 statutory construction that says Congress, where
9 it includes specific language in one provision and
10 doesn't include it in another, that decision by
11 Congress means something. They want you to ignore
12 that because they say just, you know, don't --
13 don't treat it as if -- as if it means anything.
14 You should ignore it because it deals with
15 different issues, I think, is to reduce their
16 argument to its base. But it is interesting, with
17 regard to 525(a) and 525(c), they're making
18 exactly the opposite argument. And that statute
19 clearly was amended at different times under
20 different circumstances. So with regard to a
21 statute which was uniformly passed recently, where
22 they -- congress included specific language, the
23 Government wants you to ignore the rule of
24 statutory construction, but they rely on it with
25 regard to section 525. It is difficult to



1 understand how they can expect to have it both
2 ways.

3 The argument about "may versus shall" is
4 an old Chestnut trotted out by lawyers repeatedly.
5 It's interesting. The Supreme Court has -- I mean
6 the cases are all over on this, actually. The
7 Supreme Court in Gutierrez D. Martinez versus
8 Lamagano 515 U.S. 417 at 432 note 9, 1995
9 decision, expressly mentions, after going through
10 the history of the convoluted discussions of this
11 shall be mandatory; this may be. You know, they
12 specifically say shall sometimes means may.
13 And -- and what the cases teach us is that you've
14 got to look at context. That you can't draw a
15 bright line with regard to shall versus may. And
16 in fact -- in fact, federal guidelines direct
17 people writing regulations and statutes not to use
18 shall anymore for that express reason. So for
19 example, the Federal Registered Documents Drafting
20 Handbook at section three says don't use shall,
21 use must because shall is unclear. If you want to
22 impose a legal obligation, use the word must. And
23 the Federal Plain Language Guidelines, page 25,
24 which implement the Federal Plain Language Act of
25 2010 -- yes, there is a Federal Plain Language Act



1 from 2010 -- they make the same point. They say
2 if you want to impose a legal obligation use must,
3 not shall. And that is because courts have
4 grappled with the use of shall versus may for many
5 years unsuccessfully.

6 The referenced to the HEROES Act, I don't
7 know what to do with that, Your Honor. It is a
8 piece of unpassed legislation. We have no idea
9 where it's going or what will happen to it, and I
10 doubt we can rely on it.

11 All right, let's get to the issue of a
12 reparable harm. We are in the context of a
13 preliminary injunction. We've asked the Court to
14 do -- to preserve the status quo so we can get a
15 ruling on the merits of the 525 argument after a
16 trial. And we -- I mean in that context, I don't
17 believe that we have to show that we would be put
18 out of business -- which is a pretty high standard
19 -- that we would be put out of business by not
20 getting these particular funds. I think what is
21 clear is the irreparable harm is here. These
22 funds, this program, will not be available after
23 June 30th. So if we don't get the Court to
24 preserve the status quo, which is the last
25 uncontested position of the parties under Ninth



1 Circuit law, then we will have no chance that a
2 remedy the Court could grant us -- if it found
3 that there was discrimination of a 525 in
4 violation of federal law -- would be meaningless
5 because the program will be gone. And so in that
6 context, Your Honor, is that -- that program will
7 be gone.

8 That is the irreparable harm. And I don't believe
9 -- in any event we've cited a bunch of cases that
10 take a much broader definition of irreparable harm
11 than the Government seeks here or that Judge
12 Saltzman implied.

13 I don't believe that irreparable harm
14 requires us to show that it is this or death. And
15 I think that's an incredibly high standard, which
16 is simply not supported by the case law. We
17 support -- we've cited a bunch of cases to the
18 contrary.

19 And in the context of a preliminary
20 injunction, here, where the program -- where there
21 is no dispute from the Government that this
22 program will go away before the Court could rule
23 if we don't get a preliminary injunction requiring
24 them to just escrow the funds necessary to satisfy
25 our loan application, if it's granted, and to hold



1 our application in abeyance pending a ruling on
2 whether it is in violation of federal law to
3 discriminate on this basis. I think that is
4 sufficient irreparable harm under the case law,
5 Your Honor.

6 THE COURT: Okay. Thank you, Mr. Maizel.
7 Have you covered everything you wanted to cover?

8 MR. MAIZEL: Yes, Your Honor. I think so.
9 Thank you.

10 THE COURT: I appreciate it. I appreciate
11 both you and Mr. Sacks' arguments of both counsel
12 today and your advocacy. I understand both sides.
13 If you give me two or three minutes, I just want
14 to dot some I's and cross some T's and I'll come
15 back with an oral ruling for everyone. Give me
16 just a couple of minutes.

17

18 (Whereupon a recess was taken)

19 THE COURT: All right. Mr. Maizel, are
20 you still on?

21 MR. MAIZEL: Yes, Your Honor.

22 THE COURT: Mr. Sacks?

23 MR. SACKS: Yes, Your Honor.

24 THE COURT: Okay. I guess it's now
25 afternoon; we started in the morning and I'll say



1 good afternoon to both of you.

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

14 During the break, the Court read the
15 recent decision issued today by bankruptcy judge
16 (inaudible) in the district of Maine, so the
17 Court's reviewed that decision as well.

18 The Court's now prepared to rule on the
19 debtors' request. In doing so, the Court utilizes
20 the familiar four factors, which largely collapsed
21 to three in this context, regarding whether a
22 preliminary injunction should issue. Although the
23 debtors contested to some extent, I agree with the
24 articulation of the legal standard as set forth on
25 pages 14 to 15 of the government's brief and am



1 applying that heightened standard today. Turning
2 to the factors: Factor one is whether the moving
3 parties or the debtors will probably, or very
4 likely, prevail on the merits. I'm going to break
5 this into two parts and discuss, first, section
6 525, and then second, the Administrative
7 Procedures Act issue.

8 Regarding section 525, the debtors contend
9 that the exclusion of entities in bankruptcy from
10 PPP funding violates bankruptcy code section
11 225(a). Section 225(a) bars bankruptcy-related
12 discrimination involving, "A license, permit,
13 charter, franchise, or other similar grant." The
14 parties disagree about whether PPP funding fits
15 within this phrase. In answering this question,
16 the Court is bound by the text of the statute.
17 The statutory text of the bankruptcy code reflects
18 an area of issues considered by Congress, and the
19 code is not for you to ignore the plain meaning of
20 the text even if the policy outcome is
21 unfavorable. Many recent Supreme court opinions
22 make this crystal clear. See, for example, Puerto
23 Rico versus Franklin, California, Tax Free Trust
24 136 Supreme Court Reporter in 1938 at pages 1946
25 to 49, a 2016 decision in which the Court held



1 that Puerto Rican municipalities were
2 categorically precluded from any form of
3 bankruptcy relief because of the plain text
4 section 903 of the bankruptcy code, a decision
5 that Congress subsequently addressed by passing
6 the (inaudible) litigation. Baker Box LLP versus
7 (inaudible) LLP 135 Supreme Court Reporter 2158 at
8 page 2169, 2015, in which the Court held that the
9 plain text of the bankruptcy code prevents fees on
10 fees in defending professional fee applications
11 and noted that perhaps that's a bad policy
12 decision, but policy decisions are left to
13 Congress. Rabax (phonetic) Gateway Hotel, LLC
14 versus Amalgamated Bank 566, U.S. Reporter, 639 at
15 page 649, a 2012 decision authored by Justice
16 Scalia, noting that the pros and cons of credit
17 bidding in bankruptcy are left strictly to
18 Congress. Pole versus United States, 566, U.S.
19 506 at pages 522 to 23, a 2012 decision, authored
20 by Justice (inaudible) finding that Chapter 12
21 debtors cannot protect tax on the sale of a family
22 farm in the context that's attracted to Chapter 12
23 case from administrative priority, a decision that
24 Congress subsequently overruled through
25 legislation. Moreover, as Justice Keegan recently



1 explained all of the bankruptcy code generally,
2 "aims to make reorganizations possible, it does
3 not commit to anything and everything that might
4 accomplish that goal." And Mission Products
5 Holding, Inc., versus Technology 139 Supreme Court
6 Reporter 1652 at page 1665. That's the decision
7 from last year, 2019.

8 This court is also duty-bound to apply the
9 statute Congress has provided and simply cannot
10 rewrite the text or advance a desirable result in
11 a particular case. Keeping those foundational
12 principles in mind, the Court cannot conclude that
13 the debtors are likely to prevail on the theory
14 that section 525 is violated here.

15 First, the Court agrees with the
16 Government that PPP loans are properly classified
17 as just that, loans. To be (inaudible) these are
18 highly unusual loans that may openly and
19 functionally provide free money, but that doesn't
20 matter. They're not loans in the first instance.
21 There's a borrower, a lender, a promissory note, a
22 promise to repay, and the like.

23 As other -- as many other courts have
24 noted, we certainly are not "market terms," but
25 there can be many loans in society that are not



1 done on market terms or even economically rational
2 terms. But nevertheless, are loans. For example,
3 private equity sponsors sometimes lend troubled
4 portfolio companies money on highly favorable
5 terms, terms no (inaudible) lender would ever
6 offer. Sometimes this leads to bankruptcy fights
7 about re-characterization, but the equity sponsors
8 win most of those fights. Why? Because there was
9 a loan, even if it is an off-market or friendly
10 loan. (Inaudible), I might loan money to my
11 brother or a good friend on off-market terms,
12 perhaps even on terms that will result in total
13 forgiveness of the loan, such as performing
14 charitable work or donating the money to a worthy
15 cause. The point is that in these contexts, there
16 is still some sort of extension of credit with a
17 corresponding obligation.

18 I ultimately agree with the various other
19 bankruptcy judges who have concluded that's the
20 better way to classify PPP loans. Moreover, even
21 if I could conclude the PPP loans -- or I could
22 construe PPP loans as a form of financial grant, I
23 still not -- I still do not think the debtors are
24 likely to succeed on their section 525 argument.
25 I agree with bankruptcy Judge Brendan Shannon from



1 Delaware, that section 525 (a) does not apply to,
2 "money grants." The statute's use of the word
3 similar to modify the word grant has to be given
4 meaning, and it plainly functions to limit grants
5 to those that are in the permits licenses and the
6 like. To be sure, many things could fall with
7 (inaudible) increase. The ability to use the FCC
8 spectrum, specified real property (inaudible) and
9 the (inaudible) real property as in the Stoltz
10 case, perhaps patents or trademarks. But an
11 affirmative money grant is different in kind from
12 what are essentially forms of permission or access
13 that are uniquely granted by the Government.
14 Access to money, even free money, is not subject
15 to governmental controls or unattainable
16 elsewhere. For example, private parties also give
17 money grants. Every time I turn on and listen to
18 NPR, there's a long list of different foundations
19 that have issued free money grants to -- to NPR,
20 demonstrating that free money is, at least in some
21 instances, is available from parties other than
22 the Government.

23 The limited reach of section 525 (a) is
24 illustrated perhaps most clearly by contrasting
25 section 525 (a) with section 525 (c). Section



1 525 (c) prevents discriminatory treatment
2 involving, among other things, "a student grant."
3 A student grant being a Pell grant or University
4 grant is, of course, free money. But if section
5 525 (a) already encompassed an economic grant,
6 then there would be no need to include student
7 grants in section 525. The Court must interpret
8 the statute as a whole and avoid a reading that
9 would render any provisions superfluous. The
10 interpretation that best does that is Judge
11 Shannon's exclusion of "money grants" from the
12 scope of 525 (a). So even if it is not truly a
13 loan, and is some variety of grant, section 525
14 (a) just doesn't stretch far enough to encompass
15 PPP funding.

16 To the extent there's any ambiguity in
17 section 525, itself, I agree with the SBA's point,
18 that the legislative history plainly states that
19 the purpose of the provision is to codify the
20 result of *Perez versus Candle* 402 U.S. 637, a 1971
21 Supreme Court decision. The *Perez* case is about
22 denial of the driver's license due to nonpayment
23 of a debt owed the State in a bankruptcy case.
24 The Supreme Court held it improperly limited the
25 debtor's fresh start because of the basic need for



1 driver's licenses and the exclusive control of the
2 State over such licensing. This is consistent
3 with section 525 (a) applying to permit the grants
4 of access or privileges controlled by the
5 Government, but not consistent with expanding into
6 affirmative economics payments.

7 As I said, I'm ultimately constrained by
8 the statute that Congress gave me, and I don't
9 think that statute gets the debtors where they
10 need to go in order to ultimately prevail on this
11 issue.

12 Since I'm not sure where this litigation
13 is going after my ruling today, I do note that if
14 section 525 were applicable, there's zero doubt
15 that the SBA cannot claim sovereign immunity
16 protection. Bankruptcy code section 106 (a) very
17 plainly waives sovereign immunity regarding the
18 entirety of section 525, and section 106 (a) is
19 consistently interpreted and applied in a
20 comprehensive fashion by the Ninth Circuit Court
21 of Appeals, perhaps more so than in any other
22 circuit. See, for example, Huntsinger (phonetic)
23 versus United States 902 F 3rd, 963, Ninth Circuit
24 from 2018, the Valley (phonetic) versus United
25 States in re DBSI, Inc., 1869 F 3rd 1004, a Ninth



1 Circuit decision from 2017.

2 The Court now turns to address the
3 Administrative Procedures Act issue. The debtors
4 argue that the SBA's bankruptcy exclusion can be
5 classified under the Administrative Procedures
6 Act, which allows judicial nullification of agency
7 action when that action is, among other things,
8 arbitrary, capricious and abusive discretion, or
9 otherwise not in accordance with law -- with law 5
10 USC section 7062A. Before turning to the
11 substance of this APA argument, the Court first
12 addresses threshold issues raised by the
13 Government; I first talk about bankruptcy
14 jurisdiction and power. There's federal subject
15 matter jurisdiction under 28, USC 1334 (b). This
16 is a civil proceeding, "Arising under Title 11,"
17 in part the last, including the APA claims or
18 claims, "Arising in a bankruptcy case. And then
19 the question, (inaudible) related to the Chapter
20 11 cases." To the extent that there's any doubt,
21 although I don't believe there is, I note that the
22 Court can exercise supplemental jurisdiction under
23 28 USC section 1367, over any ancillary issues
24 related to bankruptcy. See Montana versus Golden
25 in re Pegasus Gold Corp, 394, F 3rd 1189 at pages



1 1194 to 95, Ninth Circuit, 2005.

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

11 The next question relates to the
12 allocation of decisional power between this court
13 and the district court. This is the article three
14 issue discussing Stern versus Marshall. To be
15 clear, this has nothing to do with jurisdiction,
16 but rather only relates to whether I can enter a
17 final judgment or need to do a report and
18 recommendation to the district court. Stern
19 itself makes this point, C 564, U.S. 462 at page
20 480. And the Ninth Circuit Court of Appeals just
21 recently underscored the exact same point in a
22 case called Hanky versus Grubstiene (phonetic) in
23 re Point Center Financial, Inc., 2020 US app Lexis
24 13743 at pages star 15 to 16; that's a Ninth
25 Circuit opinion from April 29th of this year



1 that's been designated for publication.

2 The APA claim is statutorily "core" under
3 28 USC section 157 B 2 B A, because it's a matter
4 concerning the administration of this bankruptcy
5 estate. Thus, as a statutory matter, I have both
6 subject matter jurisdiction and the power to
7 finally resolve the claim. That now turns to the
8 Stern question. Does this create a constitutional
9 issue? The Court's, the answer to that is no.
10 This is a dispute within the final adjudicatory
11 power of this court. The entire dispute "at issue
12 stems from the bankruptcy itself," which means
13 this court can properly exercise the judicial
14 power needed to resolve it. See Stern at page
15 499. To be sure that the claim at issue in Stern
16 was quoting the State tort action that exists
17 without regard to any bankruptcy proceedings. The
18 same is not true here. It's not sensible to say
19 that a claim challenging the SBA's exclusion of
20 bankrupt entities for PPP loans could ever exist
21 "without regard to any bankruptcy proceeding" is
22 contemplated and in Stern. Such an action
23 couldn't ever be brought in any other context or
24 court because the plaintiff wouldn't have standing
25 and wouldn't have suffered any harm. This dispute



1 exists only because of the bankruptcy filing and
2 the fact that we're in a bankruptcy case. It
3 depends on and flows entirely from a bankruptcy
4 and could never exist outside of the bankruptcy
5 context. The analysis in Stern versus Marshall
6 makes clear that any claims in stemming from the
7 bankruptcy itself are properly within the
8 adjudicatory powers of the bankruptcy judge. And
9 that's what we have before me today.

10 The Court next addresses the
11 anti-injunctive provisions cited by the SBA as a
12 defense. The Court agrees with the distinction
13 drawn by several other bankruptcy and district
14 judges about why section 634 B 1 of the Small
15 Business Act is not violated in this context.
16 Those courts cogently frame a distinction based on
17 the decision in Olstein (phonetic) Marine Limited
18 versus United States, 833 F 2nd 1052, a First
19 Circuit decision from 1987. And the Court has not
20 been pointed to any contrary Ninth Circuit Court
21 of Appeals case law. The debtors here seek to
22 enforce the law against the SBA. They seek no
23 relief that would interfere with the SBA's
24 internal workings and therefore do not run afoul
25 of the statute. As such, the Court now has



1 (inaudible) incorporates by reference the analysis
2 contained in Diamond DB Diamond Club of
3 (inaudible) LLC versus United States SBA 2020 U.S.
4 district Lexis 82213 at pages star 19 to 23, a May
5 11th, 2020, decision by the Eastern District of
6 Michigan. Also Springfield Medical Care Systems
7 versus Kuranda (phonetic) in re Springfield
8 Medical Care Systems, 2020 bankruptcy Lexis 11238
9 at pages star 1669, a bankruptcy court for the
10 District of Vermont decision from May, 2020.

11 I think the analysis in these decisions is
12 sufficient to resolve this issue, but to the
13 extent there's some lingering doubts, the Court
14 does believe that the debtors have a compelling
15 plain textual argument that the scope of the
16 statutory bar is limited to the property of the
17 SBA administrator in her personal capacity, not
18 against the Government more generally, although it
19 doesn't appear any court had directly endorsed
20 this conclusion. Even so, that plain textual
21 statutory interpretation is an alternative basis
22 supporting the Court's ruling today.

23 The Court now turns to the substance of
24 the APA claim. Under the Administrative
25 Procedures Act and the Supreme Court's Chevron



1 decision, which I note is subject to some serious
2 questions, but at least as of today remains
3 binding, courts adopt a deferential standard of
4 review regarding decisions in rulemaking by
5 administrative agencies. The level of Chevron
6 deference, however, is reduced when, as is the
7 case here, at the Agency action was not subject to
8 formal process see *Reno versus Corey* 515 U.S. 50
9 at page 61. That's a Supreme Court decision from
10 1995. I'd say see, also, a case called *Crozlick*
11 (phonetic) versus *Republic Title Co.* 314, F 3rd
12 875 at page 8 -- 881. This is the Seventh Circuit
13 decision by 2002, written by then circuit Judge
14 Richard Posner. And his decision explains that
15 Chevron deference requires, "something more than a
16 formal -- something more formal, more deliberate
17 than a simple announcement," because, "a simple
18 announcement is too far removed from the process
19 by which courts interpret statutes to earn
20 deference." The decision further ultimately
21 provides no difference when, "the simple
22 announcement is all we have here. One fine day,
23 the policy statement simply appeared in the
24 federal register." Regardless, courts will find
25 an action to be arbitrary and capricious, "if an



1 agency has relied on factors, which Congress has
2 not intended to consider entirely failed to
3 consider an important aspect of the problem,
4 offered an explanation for its decision that runs
5 counter to the evidence before the Agency, or
6 (inaudible) possible that it could not be ascribed
7 to a difference in view or the product of agency
8 expertise." That's from Motor Vehicle
9 Manufacturer Association v. United States versus
10 State Farm Mutual Auto Insurance Company, 463 U.S.
11 29 at page 43, 1983 Supreme Court decision.
12 Moreover, the Agency must articulate a rational
13 connection between the facts found and the
14 conclusions made. See, for example, Latino Issues
15 Forum versus United States, EPA 558 at 3rd, 936 at
16 page 941, Ninth Circuit 20 -- 2009. Although a
17 court is not entitled to substitute its own
18 judgment for the agency's judgment, the Court must
19 ultimately act as a rubber stamp and is obligated
20 to, "ensure that agency decisions are founded on a
21 reasoned devaluation of relevant facts and
22 circumstances." See, for example, Arizona Cattle
23 Growers Association versus United States Fish and
24 Wildlife Bureau of Land Management 273 F 3rd, 1229
25 at page 1236, a 2001 decision from the Ninth



1 Circuit.

2 The Court should not go beyond the
3 agency's administrative record, which means, "the
4 basis for the decision must come from the Agency.
5 The reviewing court may not substitute regions for
6 agency action that are not contained in the
7 record." That's also Arizona Cattle Growers
8 Association, the same page.

9 Here, the SBA's decision to categorically
10 exclude all bankrupt debtors from PPP loan
11 eligibility falls far short of the standards.
12 Among other problems, first, there essentially is
13 no administrative record supporting the ultimate
14 conclusion whatsoever. The entirety of the SBA's
15 discussion regarding this matter is encapsulated
16 in paragraph four of the SBA's interim final --
17 fourth interim final rule, which flatly states
18 that, "the administrator determined that providing
19 PPP loans to debtors in bankruptcy would prevent
20 -- present an unacceptably high risk of an
21 unauthorized use of funds or non repayment of
22 unforgiven loans." That's it. A nonexistent
23 record, by definition, cannot be sufficient to
24 support any conclusion. This is the problem I
25 described at the last hearing as a failure to,



1 "show your work." There's basically nothing
2 explaining or developing how the SBA's conclusion
3 was reached, let alone anything supporting it is a
4 substantive policy matter. Second, there,
5 likewise, there's nothing indicating a, "reasoned
6 evaluation," of anything. There was no material
7 suggesting the SBA considered the relative pros
8 and cons of excluding bankrupt debtors or
9 evaluated whether anything less than a categorical
10 ban might accomplish whatever goals the SBA did
11 have in mind. It's the show your work-problem yet
12 again. The Court sees nothing indicating a
13 process of analysis, reasoning, deliberation,
14 debate, study, or consideration. There's just
15 nothing here other than an insignificant
16 conclusion. Third, the Court further believes the
17 SBA has entirely failed to consider important
18 aspects of this problem. The CARES Act was
19 intended to provide rapid funding to businesses in
20 difficulty. The PPP loans are forgivable if used
21 to pay employees or utilities. Some of the very
22 businesses that are most in need of such relief
23 are going to be operating Chapter 11 debtors.
24 Providing financial support for those debtors so
25 they can, in turn, pay innocent employees,



1 landlords and utilities, is completely consistent
2 with the legislative goal behind the CARES Act,
3 yet nothing indicates the SBA even considered this
4 important aspect of the legislation. Rather, the
5 SBA appears to have unilaterally imposed a
6 categorical ban in the clumsiest way possible.

7 Furthermore, the SBA appears to have
8 (inaudible) an important aspect of the problem in
9 so far as the CARES Act can make certification
10 that, "the uncertainty of economic conditions
11 makes necessary the loan request to support the
12 ongoing operations of the eligible recipient." No
13 healthy business is likely to certify under
14 penalties, penalties of perjury or corporate
15 criminal action, that the loan is, "necessary" if
16 it's otherwise able to operate without it. Thus,
17 it's the debtor's note Congress created a
18 framework under which every PPP applicant must
19 certify that it is concerned that it is going to
20 go out of business under the current economic
21 conditions. The SBA blunderbuss exclusion of some
22 of these troubled businesses simply disregards
23 that entire backdrop assumption, that there is a
24 business that's in trouble, which is the "problem"
25 that motivated enactment of the CARES Act. The



1 Court sees absolutely no consideration of this
2 important aspect of the -- of the problem
3 whatsoever.

4 As I noted earlier, under the APA is the
5 SBA's burden to articulate the basis for its
6 decision. Ninth Circuit case law makes clear,
7 here the articulation is flimsy at best. It is an
8 implausible and insufficient justification for the
9 conclusion. There was no explanation about why
10 the administrator determined debtors in bankruptcy
11 have an "unacceptably high risk of an unauthorized
12 use of funds," and this conclusion flies in the
13 face of the expansive and persistent supervision
14 of such debtors by the bankruptcy court, the
15 United States Trustee Program via the Department
16 of Justice, creditors. And in a case like the
17 Astria case, the entire public and (inaudible).
18 Chapter 11 debtors need to be more transparent
19 about what they're doing with cash than virtually
20 any other debtors. This perfunctory SBA
21 explanation is wholly conclusory and falls to
22 anyone with even a passing familiarity with the
23 bankruptcy process. It is simply impossible for
24 me to call this a reasoned premise. Likewise,
25 there is no explanation of why Chapter 11 debtors



1 pose a high risk of, "non repayment of unforgiven
2 loans." The bankruptcy code contains an array of
3 tools that can make repayment more likely,
4 including finding leans or lanes or administrative
5 priority claims. These tools are part of the law
6 that every person in the country, including the
7 SBA and everyone who works there, is presumed to
8 know, but there was nothing indicating any
9 consideration of these tools by the SBA. There,
10 similarly, is not discussion or even citation of
11 any academic SBA studies of empirical rates of non
12 repayment of DIP loans versus other kinds of
13 loans. Instead, there's just a blanket
14 unsupported and unsightly un-cited statement that
15 is dubious -- that is of dubious veracity, if not
16 wholly implausible. Nothing anywhere in the SBA's
17 published rule, or any other record before me,
18 which is scant at best, provides any reasoned
19 explanation for this conclusion.

20 I understand and appreciate there's a
21 massive burden that was placed on the SBA by
22 Congress. Congress, for whatever reason, chose to
23 use the SBA as the funnel to convey this
24 particular allocated money for the public and the
25 businesses that needed it. At the same time



1 however, the Court cannot act as a rubber stamp
2 for something as weak as the analysis and
3 justification offered by the SBA for this
4 categorical PPP bankruptcy exclusion. Members of
5 the public, including the Astria debtors, are
6 entitled to ensure that their government agencies
7 proceed in a careful, considered, and a reasoned
8 way. To use the same phrase yet again, the
9 agencies have to both do the work and show the
10 work to the public. Here, there is nothing
11 indicating the SBA actually did any work to show,
12 and they certainly don't show them their work. As
13 a result, the apparent knee-jerk conclusion that
14 was reached is not the product of any reasoned
15 agency decision-making, cannot sustain any
16 judicial inquiry whatsoever, and must be nullified
17 as arbitrary and capricious.

18 The Court notes that other judges have
19 reached the same conclusion. The Court now adopts
20 and incorporates by reference the further
21 discussion contained in the Roman Catholic Church
22 of the Archdiocese of Santa Fe versus United
23 States SBA in re Roman Catholic Church of the
24 Archdiocese of Santa Fe 2020 Bankruptcy Lexis 1211
25 and pages star 12 through 16 by the decision by



1 the Bankruptcy Court District of New Mexico, May
2 1st, 2020. In sum, I conclude that the debtors
3 are highly likely to succeed on their
4 administrative procedure act claim that the SBA's
5 bankruptcy exclusion from PPP loan eligibility is
6 subject to invalidation as arbitrary and
7 capricious. As such, this first factor weighed
8 strongly in the debtor.

9 The second factor that the Court
10 considered is whether the moving parties will
11 suffer immediate and irreparable injury if the
12 relief is denied. Here, the record has
13 established an irreparable harm sufficient to
14 support a preliminary injunction. As set forth in
15 Mr. Gallagher's declaration and discussed in the
16 briefing, the COVID-19 situation is having an
17 adverse impact on the debtors business and
18 financial affairs, which, as we all know, is not
19 in the greatest shape to begin with. I had to
20 close the hospital in January that I didn't want
21 to do because of the debtors financial affairs.
22 To continue to provide healthcare services and pay
23 frontline nurses for the benefit of community
24 access, money is essential. Without PPP funding
25 there's a threat to the viability of the debtors



1 trader business. Moreover, why this is -- this is
2 ultimately a dispute about money, there's a
3 significant risk that all PPP money will be gone
4 as a result of the pressing June 30th deadline and
5 the SBA will then assert that it cannot be liable
6 for damages, leaving the debtors with no remedy
7 whatsoever at the end of this litigation, even if
8 their rights have been violated. Several other
9 courts have noted that this prospect of no
10 adequate remedy against the Government constitutes
11 irreparable harm for purposes of an injunctive
12 relief analysis. See, for example, DB Diamond
13 Club of Flint, LLC versus United States SBA 2020
14 U.S. District Lexis 82213 pages star 43 to 45, May
15 11th, 2020, decision by the Eastern District of
16 Michigan. I note that a subsequent SBA request
17 for a state pending appeal was denied by the Sixth
18 Circuit Court of Appeals, including based on the
19 Sixth Circuit finding that, and agreeing with the
20 district court, that there was a prospect of a
21 reputable harm to the plaintiffs. I also cite
22 Camelot Banquet Rooms, Inc., versus United States
23 SBA 2020 U.S. District Lexis 76713 pages star 34
24 to 36. That's a decision from the Eastern
25 District of Washington. Again, a district judge



1 May 1st, 2020. See, also, General United States
2 versus Cal Allman, Inc. 102 F 3rd 999 at pages
3 1002 to 2003. It's a Ninth Circuit decision from
4 1996.

5 Finally, I turned to the remaining factors
6 that collapsed together into a balance and the
7 consideration of the public interest and whether
8 there was favor granting the relief requested. As
9 previewed at the prior hearing, the Court now
10 takes judicial notice of the following facts.
11 First, COVID-19 cases are increasing at an
12 inexplicably high rate in Yakima County. For
13 whatever reason we are doing worse than the rest
14 of Washington State at this point in the process.
15 This is a very troubling situation. In fact,
16 things today are even worse than they were at the
17 prior hearing in May. Governor Inslee just last
18 Friday called Yakima County, "the most dangerous
19 place in Washington State," from a COVID-19 virus
20 perspective. Again, I don't know why this is the
21 case, but the problem is not getting better here.
22 Second, the Court takes judicial notice that many
23 of the new cases are in the lower Valley,
24 including around Sunnyside and Toppenish. This
25 also continues to be true today as it was in May.



1 Third, the Court takes judicial notice of the fact
2 that there's limited access to healthcare other
3 than at the Astria hospitals. That was true in
4 May; it's true today. Fourth, the Court takes
5 judicial notice that these PPP funds will be used
6 to pay frontline medical staff, including nurses.
7 The Court further takes judicial notice that the
8 nurses are the people who are being correctly
9 recognized in the local and national press as the
10 heros dealing with this virus in the trenches.
11 That was true in May and it true today. It will
12 be true forever. Perhaps there could be a more
13 compelling public interest case, but, again, it's
14 hard to think of one. As I said at the prior
15 hearing, we're clearly in the 99th percentile of
16 public interest cases here. And this context is
17 -- it (inaudible) weight on the scales as it comes
18 to the third factor. I agree with the Government,
19 it doesn't affect the first and second factor, but
20 certainly the third factor is relevant. The
21 balancing here is overwhelming and lopsided and
22 favors the debtors. The government's claim,
23 public interest consideration, simply if we do not
24 have counterbalance. Yes, SBA funds are limited,
25 and this is something of a zero sum exercise where



1 PPP borrowers are competing with each other, but I
2 think we cannot imagine other borrowers, in
3 bankruptcy or out, that would be more deserving of
4 this money than these particular borrowers.
5 Certainly there are many borrowers less deserving.
6 I know there are law firms throughout the country
7 that have received PPP money. Money, as I said at
8 the last hearing, some of my best friends are
9 lawyers, but I don't think law firms need this
10 money while hospitals, particularly critical
11 hospitals in rural areas, are denied the money.
12 So the overwhelming public interest and community
13 interest and the debtors receiving this money is
14 manifest.

15 So to summarize, all of the factors
16 individually, weigh in favor of the debtors here.
17 And collectively, they weighed in favor with great
18 force. Therefore issuance of a preliminary
19 injunction is warranted.

20 The details in the process here should
21 resemble what Judge David Jones described in his
22 Hidalgo County Emergency Services Foundation oral
23 ruling with the exception that I do want the
24 debtors to provide and pin down the stipulations
25 they described with Lapis and other parties



1 regarding segregation of the money. As framed by
2 the debtors, the Court agrees that the debtors
3 have the right to have their PPP applications
4 submitted without being discriminated against on
5 the basis of their status as Chapter 11 debtors
6 should the debtors otherwise be eligible for PPP
7 loans.

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

22 Finally, to the extent this is an
23 appealable decision, the Court now on its own
24 motion invokes 28 USC section 158 (d) 2, to
25 certify this dispute for direct appeal to the



1 Ninth Circuit Court of Appeals.

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

15 Second, the order of judgment or decree
16 involves the question of law requiring resolution
17 of conflicting decisions. Bankruptcy judges are
18 all over the map here. There are decisions that
19 have held section 525 applies. There are courts
20 that have held that it doesn't. There are courts
21 that have held that the decision is arbitrary and
22 capricious, including this court today. There are
23 courts that are, apparently, although a few of
24 them expressly, rule the other way. So there's
25 certainly a patchwork and conflicting decisions



1 that weren't resolution at the circuit level.

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

12 So all three of these -- moreover the
13 policy considerations when Congress added this
14 provision to the judicial code are satisfied here.
15 This is important. It's conflicting. It's time
16 to get a final word. It's time this should go up
17 to the Court of Appeals as I think one of these
18 questions already has to the Fifth Circuit.
19 Counsel for the debtor should include their
20 certification in their proposed form of order and
21 getting clear. And to be clear, I certified the
22 entirety of the issues. So if the debtors intend
23 to cross -- cross appeal me regarding the section
24 525 issue, which you're certainly free to do, I
25 think -- I think that appeal would satisfy the



1 conditions for certification of a direct appeal as
2 much as the Administrative Procedures Act.

3 I ask that the debtors prepare the form of
4 judgment that they wish me to enter consistent
5 with -- with the hearing today. And I then leave
6 it for the parties where -- where things go from
7 there.

8 MR. MAIZEL: Your Honor, we'll run the
9 proposed form of order by Mr. Sacks and by
10 Mr. Donovan before we send it too.

11 THE COURT: Thank you, Mr. Maizel.
12 Mr. Sacks, anything further today?

13 MR. SACKS: I have two points, Your Honor,
14 if you would allow me for a second. Certainly not
15 challenging the legal basis for the injunction,
16 but actually the relief that you're granting.

17 I think what Mr. Maizel said before,
18 talking about what they're asking for, is he said
19 that he wanted the application to be held in
20 abeyance and the funds escrowed. And so I'd like
21 to propose something for the Court, if the Court
22 would be willing to consider this. I think the
23 relief you just granted essentially allows them to
24 go out this afternoon and get a loan. And if a
25 bank will process it, then the SBA has no



1 authority to -- the guarantee. I understand
2 that's the Court's ruling. And it would be very
3 difficult to unscramble that egg if indeed -- I
4 certainly have no idea what might happen if this
5 case will be appealed or if there is an appeal,
6 but an alternative may be this. If I understand
7 the Court's ruling, the Court found for the
8 plaintiffs on the APA issue in part because the
9 Agency could not do its work, show its work, and
10 (inaudible) work. So one alternative may be is if
11 the Court were willing to make the relief that the
12 Agency continues to set the money aside and that
13 the application is still held in abeyance -- it's
14 not processed -- and the Court says there's short
15 deadline for the Government to produce
16 administrative records. And then if the
17 Government doesn't, then the Court can rule on
18 that. And if the Government does, then the Court
19 could hold a trial on the merits with that record,
20 and then enter relief based on that. Obviously
21 the Court has suggested it has the ability under
22 the APA claims to enter upon a relief from there.
23 So it will not take the fee (inaudible) at this
24 point, but I understand the Court's ruling. That
25 would really keep the status (inaudible). And we



1 understand there's a short deadline. June 30th is
2 the statutory cutoff and so we understand there'll
3 be short deadlines from the Court on that, but it
4 might allow us to get a ruling on the APA with a
5 record. And the Court may find the record doesn't
6 show the work or do the work or doesn't address
7 the concerns the Court made, or the Court may feel
8 differently once it's seen the record.

9 The alternative is they go out and get the
10 money today and we have appeal rights, but that
11 money is now within the bankruptcy and what can be
12 done with that question I'm not sure of the answer
13 to. So I'd like to first propose that and see if
14 the Court is willing to entertain that.

15 THE COURT: Mr. Sacks, I appreciate the
16 proposal. I'm going to deny that, I think for two
17 reasons. First, I think the record supports that
18 the debtors that have (inaudible) business needs
19 to access the money. You know, you made the point
20 and I don't think Mr. Maizel contested it, that,
21 you know, the record doesn't indicate that the
22 business dies and the hospitals close tomorrow, so
23 they don't get the money. But I think the record
24 does substantiate a logical continuing harm as a
25 result of the orders that Governor Inslee has



1 entered relating to elective surgeries. I think
2 the debtors have -- have a need for the money.
3 And I think that that's established and supported
4 by the record. And that's the request they
5 entered.

6 Second, I hear you on your point about the
7 administrative record, but, just in all candor and
8 fairness, I -- when we were here in May, I think
9 15 days ago, I did my best to -- you know, I
10 wasn't deciding anything then. I spent a lot of
11 time thinking about this since then, but I think I
12 fairly, even strongly, outlined my concerns about
13 the administrative record. I think I used the
14 phrase, show your work. I don't know, I haven't
15 really read the transcripts that the debtors filed
16 yesterday, but I think I used it three or four
17 times. I think I outlined -- you know,
18 (inaudible), I'm not going to tell the Government
19 how to litigate his case, but I don't think there
20 can be any claim of sandbagging since -- you've
21 have 15 days to put that together and it's not
22 there. I mean, I gave you that opportunity
23 already.

24 MR. SACKS: I understand, Your Honor.
25 We're not at all disputing that, and I understand



1 the Court's ruling on that request.

2 If I could make a second request under
3 rule 8007, if the Court would be willing to
4 entertain an oral motion for a state pending
5 appeal?

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

16 MR. SACKS: Thanks, Your Honor. That's
17 all I have.

18 THE COURT: Okay. All right. Anything
19 further, Mr. Maizel?

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

21 THE COURT: Okay. Thank you, both. I,
22 again, appreciate the time and argument today.
23 We'll look for the judgment and, you know, this
24 will go wherever it goes.

25 (Whereupon, hearing concluded)



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CERTIFICATION

I, Andie Evered, do here by declare
under penalty of perjury under the laws of the
State of Washington that the following is true and
correct:

1. That I am an authorized
transcriptionist;
2. This transcript is a true and
correct record of the proceedings to the best of
my ability.
3. I am in no way related to or
employed by any party in this matter; and
4. I have no financial interest in the
litigation.

Dated in Bend, Oregon, this 7th
day June 2020.



Andie Evered, CCR
State of Washington CCR
#2393



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Whitman L. Holt
Bankruptcy Judge

Dated: June 10th, 2020

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

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
Possession.¹

Astria Health, *et al.*,

Plaintiffs,

v.

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

Defendants.

Chapter 11

Lead Case No. 19-01189-11

Jointly Administered

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

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

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

**ORDER GRANTING
PRELIMINARY INJUNCTION**



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

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

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

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

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

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preliminary injunction is in the public interest.

THEREFORE, IT IS HEREBY **ORDERED**:

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

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

3. The preliminary injunction order is as follows:

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

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

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1 “no.”

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

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

4 4. No bond is required.

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

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

12 ///End of Order///

13 PRESENTED BY:

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

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

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

21 **ORDER GRANTING
PRELIMINARY INJUNCTION**

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Exhibit A

[Oral Ruling]

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**ORDER GRANTING
PRELIMINARY INJUNCTION**

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U.S. Active\114911885\V-8

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

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

25 (Whereupon a recess was taken)

Astria Health vs SBA, et al.

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

3 MR. MAIZEL: Yes, Your Honor.

4 THE COURT: Mr. Sachs?

5 MR. SACHS: Yes, Your Honor.

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

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

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

25 The Court's now prepared to rule on the



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

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



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



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

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

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



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

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

25 I ultimately agree with the various other



Astria Health vs SBA, et al.

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



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

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

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



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

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

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



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

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



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

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

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



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

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



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

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



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

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



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

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



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



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

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

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



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



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

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



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

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



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



1 explanation for this conclusion.

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

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



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

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



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



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

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



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



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

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



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

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



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

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

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

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



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

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

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



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

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

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

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

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

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



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



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

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

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



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

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



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

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

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

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

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

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



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

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

6 (Whereupon, hearing concluded)
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*Attorneys for the Chapter 11 Debtors and Debtors
In Possession*

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

In re:
ASTRIA HEALTH, *et al.*,
Debtors and Debtors in
Possession.¹

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

ASTRIA HEALTH, *et al.*,
Plaintiffs,

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

V.

NOTICE OF CROSS-APPEAL AND STATEMENT OF ELECTION

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). DENTONS US LLP BUSH KORNFIELD

NOTICE OF CROSS-APPEAL

1



Fax: (215) 625-7724 Facsimile (206) 292-2104

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

Defendants.

5 **Part 1: Identify the cross-appellants**

6 1. Names of cross-appellants:

- 7 • Astria Health;
8 • SHC Medical Center - Toppenish; and
9 • Yakima HMA Home Health, LLC.

10 2. Position of cross-appellants in the adversary proceeding or bankruptcy case that
is the subject of this appeal:

11 For appeals in an adversary proceeding.

12 ☒ Plaintiff

13 ☐ Defendant

14 ☐ Other (describe) _____

15 **Part 2: Identify the subject of this cross-appeal**

16 1. Describe the judgment, order, or decree appealed from:

17 *Order Granting Preliminary Injunction, Denying Stay Pending Appeal, and*
18 *Certifying Issues to the Ninth Circuit* [Docket No. 22]; Transcript of Hearing Held
19 06/03/2020 [Docket No. 22 at Exhibit A]; Minute Entry Re; Motion for Temporary
20 Restraining Order and Use of PPP Funds. HELD [Docket No. 19].

21 2. State the date on which the judgment, order, or decree was entered:

Docket No. 22 was entered June 10, 2020, with oral ruling on June 3, 2020.

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

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NOTICE OF CROSS-APPEAL

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11 2. Party:

12 Jovita Carranza, in her capacity as Administrator for the United States Small
13 Business Administration

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18 **Part 4: Optional election to have cross-appeal heard by District Court**
 19 **(applicable only in certain districts)**

20 If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy
 21 Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a
 party elects to have the appeal heard by the United States District Court. If an
 appellant filing this notice wishes to have the appeal heard by the United States
 District Court, check below. Do not check the box if the appellant wishes the
 Bankruptcy Appellate Panel to hear the appeal.

Although Astria Health, SHC Medical Center - Toppenish, and Yakima HMA
 Home Health, LLC would prefer to proceed before the Bankruptcy Appellate
 Panel, because the United States Small Business Administration and Jovita
 Carranza, in her capacity as Administrator for the United States Small
 Business Administration (as appellants in the first instance) have already
 elected to have their appeal heard by the United States District Court rather
 than by the Bankruptcy Appellate Panel, this cross-appeal will proceed before
 the District Court as well.

Part 5: Sign below

NOTICE OF CROSS-APPEAL

5

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1 Dated: July 7, 2020

DENTONS US LLP

2 By /s/ Sam J. Alberts
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5 GEOFFREY M. MILLER (Admitted *Pro Hac Vice*)
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9 *Attorneys for the Chapter 11 Debtors and*
10 *Debtors In Possession*

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19 UNITED STATES BANKRUPTCY COURT
 20 EASTERN DISTRICT OF WASHINGTON

21 In Re:

22 ASTRIA HEALTH, et al.¹

23 Debtors and Debtors in Possession,

24

ASTRIA HEALTH, et al.,

25 Plaintiffs,

26 v.

27 Lead Case No. 19-01189-11

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

APPELLANT'S DESIGNATION OF
 RECORD ON APPEAL AND
 STATEMENT OF THE ISSUES TO
 BE PRESENTED

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).

APPELLANT'S DESIGNATION OF RECORD ON APPEAL
 ISSUES TO BE PRESENTED - 1



1901189200713000000000001

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

7 Defendants.

8 **APPELLANTS' DESIGNATION OF RECORD ON APPEAL AND**
9 **STATEMENT OF THE ISSUES TO BE PRESENTED**

10 The United States of America (the "United States"), on behalf of the U.S. Small
11 Business Administration ("SBA"), and Jovita Carranza, in her capacity as
12 Administrator for the SBA, pursuant to Rule 8009(a) of the Federal Rules of
13 Bankruptcy Procedure, hereby designates the following items to be included in the
14 record on appeal and states the issues to be presented on appeal from the *Order*
15 *Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues*
16 *to the Ninth Circuit Court of Appeals* [Docket No. 22]:

17 **Statement of Issues Presented on Appeal**

- 18
- 19 1. Whether the bankruptcy court erred in enjoining the SBA and Jovita Carranza,
20 in her capacity as Administrator for the SBA.
21
 - 22 2. Whether the bankruptcy court erred in awarding injunctive relief in the absence
23 of a waiver of sovereign immunity by the United States.
24
- 25
26
27

28 APPELLANT'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF THE
ISSUES TO BE PRESENTED - 2

3. Whether the bankruptcy court erred in holding that it has authority to issue a preliminary injunction with respect to Plaintiffs' Administrative Procedure Act ("APA") claims.
4. Whether the bankruptcy court erred in concluding that the Plaintiffs proved that they were likely to succeed on the merits of their claim that SBA and Ms. Carranza violated the APA.
5. Whether the bankruptcy court erred in concluding that SBA and Ms. Carranza exceeded their statutory authority and acted arbitrarily and capriciously by excluding debtors in bankruptcy from the PPP.
6. Whether the bankruptcy court erred in concluding that the Plaintiffs demonstrated irreparable harm.
7. Whether the bankruptcy court erred in finding the Plaintiffs had met their burden of proof with respect to their motion for preliminary injunction.

Designation of Items for Record on Appeal²

1	05/15/2020	Adversary case 20-80016. COMPLAINT. Fee Amount \$350. Nature of Suit: (91 (Declaratory judgment)) (72 (Injunctive relief - other)) (21 (Validity, priority or extent of lien or other interest in property)) (02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Alberts, Sam) (Entered: 05/15/2020)
2	05/15/2020	MOTION for Temporary Restraining Order and Request for Hearing and Briefing Schedule With Respect for a Preliminary Injunction. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC,

² Each item designated in this Record on Appeal includes any exhibits that are attached thereto.

		Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Attachments: # 1 Exhibits A through F) (Alberts, Sam) Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. DEPUTY Clerk Note: Hearing information added and entry clarified. Modified on 5/18/2020 (CMR). (Entered: 05/15/2020)
3	05/15/2020	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 05/15/2020)
8	05/19/2020	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 05/19/2020)
9	05/19/2020	PDF with attached Audio File. Court Date & Time [5/19/2020 11:15:17 AM]. File Size [3756 KB]. Run Time [00:15:39]. (NydiaUrlacher). (Entered: 05/19/2020)
12	05/19/2020	MINUTE Entry Re: Motion for Temporary Restraining Order. HELD. The parties reached an agreement and submitted a proposed agreed order. Court finds the schedule outlined is appropriate and will sign/enter order (RE: 2 Motion for Temporary Restraining Order) Appearances: Samuel Maizel, Thomas Buford, Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant United States Small Business Administration. Other parties: John Gallagher with Astria Health; Michael Lane with Astria Health; Gary Dyer, Attorney for US Trustee; Ryan Jareck, Attorney for Lapis Advisers; William Kannel, Attorney for UMB Bank, Lapis Advisers; David Leigh, Attorney for Med One Capital Funding LLC; Richard Hyatt, Attorney for TIAA Commercial Finance Inc; Boris Mankovetskiy, Jane Pearson and Andrew Sherman, Attorneys for the Unsecured Creditors Committee; Darin Dalmat, Attorney for Washington State Nurses Assc; Michael Siderius, Attorney for GE Precision Healthcare LLC (NNU) (Entered: 05/19/2020)
13	05/20/2020	AGREED ORDER Regarding Scheduling and Reservation of PPP Funds (RE: Motion for Temporary Restraining Order 2). Hearing scheduled 6/3/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/20/2020)
14	05/26/2020	BRIEF signed by Brian M. Donovan. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion for Temporary Restraining Order 2). (Attachments: # 1 Exhibit A # 2 Exhibit 1 # 3 Exhibit 2 # 4 Exhibit 3 # 5 Exhibit 4 # 6 Exhibit 5 # 7 Exhibit 6 # 8 Exhibit 7 # 9 Exhibit 8 # 10 Exhibit 9 # 11 Exhibit 10 # 12 Exhibit 11 # 13 Exhibit 12 # 14 Exhibit 13) (Donovan, Brian) (Entered: 05/26/2020)
16	06/01/2020	REPLY signed by Samuel R. Maizel (RE: Brief 14). Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home

APPELLANT'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF THE ISSUES TO BE PRESENTED - 4

1		Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/01/2020)
2	17 06/03/2020	PDF with attached Audio File. Court Date & Time [6/3/2020 11:24:37 AM]. File Size [36135 KB]. Run Time [02:30:34]. (NydiaUrlacher). (Entered: 06/03/2020)
3		
4	19 06/03/2020	MINUTE Entry Re: Motion for Temporary Restraining Order and Use of PPP Funds. HELD. The court heard argument of counsel and for the reasons stated on the record, the court grants motion and delivers oral ruling. Proposed form of order to be circulated and submitted to the court for signature. (related document(s): 2 Motion for Temporary Restraining Order filed by Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC) Appearances: Sam Alberts, James Day, Samuel Maizel, Geoffrey Miller, Sarah Schrag, Attorneys for Astria/Plaintiff; Mark Sacks and Brian Donovan, Attorneys for US Small Business Administration/Defendant. Other Attendees: William Kannel, Attorney for UMB Bank, N.A., Lapis Advisers; Jane Pearson, Boris Mankovetskiy and Andrew Sherman, Attorneys for Unsecured Creditors Committee; Gary Dyer, Attorney for US Trustee; John Gallagher, CEO of Astria Health; Michael Lane, CRO of Astria Health.(NNU) (Entered: 06/08/2020)
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15	18 06/08/2020	STIPULATION. Signed by Samuel R. Maizel for the Debtors, William W. Kannel, Attorneys for UMB Bank, N.A., as Trustee and Lapis Advisers, L.P. and Ryan T. Jareck Attorneys for Lapis Advisers, L.P. and the filer.. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/08/2020)
16		
17		
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20	20 06/09/2020	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 06/09/2020)
21		
22	22 06/10/2020	ORDER Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals (Related Doc # 2). (CMR) (Entered: 06/10/2020)
23		
24	23 06/23/2020	ORDER Uploaded. Filed by Alberts, Sam. (RE: 4) (Entered: 06/23/2020)
25		
26	24 06/23/2020	MOTION to Withdraw Reference . Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
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28 APPELLANT'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF THE ISSUES TO BE PRESENTED - 5

1	26	06/23/2020	NOTICE of Appeal and Statement of Election to District Court. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: 22 Temporary Restraining Order). (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
5	28	06/24/2020	PDF with attached Audio File. Court Date & Time [6/24/2020 1:36:08 AM]. File Size [2320 KB]. Run Time [00:09:40]. (NydiaUrlacher). (Entered: 06/24/2020)
7	29	06/24/2020	MINUTE Entry Re: Scheduling Conference. HELD. Court will sign the proposed joint stipulated order submitted by counsel staying the adversary proceeding pending appeal in District Court. (RE: 4 Notice of Scheduling Conference) Appearances: Samuel Maizel, and Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant (NNU) (Entered: 06/24/2020)
10	30	06/24/2020	APPEAL Transmittal to District Court. Appellant(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Appellee(s): Astria Health, et al (See Exhibit A of ECF 28). Case County: YAKIMA. Date Notice of Appeal Filed: 06/23/2020. Date of Entry of Order on Appeal: 06/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: N/A. Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order 22 , Notice of Appeal and Statement of Election 28). Certificate of Record due by 8/13/2020. (CMR) (Entered: 06/24/2020)
16	31	06/25/2020	CASE Number from Appellate Court, District Court, Case Number: 20-cv-03089-RMP (RE: Notice of Appeal and Statement of Election 28). (CMR) (Entered: 06/25/2020)
18	32	06/26/2020	STIPULATED Order (RE: Notice of Scheduling Conference 4). Status Hearing scheduled 8/25/2020 at 01:30 PM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 06/26/2020)
20		07/07/2020	NOTICE of Cross Appeal and Statement of Election. Fee Amount \$298. Filed by Sam Alberts on behalf of Astria Health, SHC Medical Center - Toppenish, Yakima HMA Home Health, LLC (RE: 19 Minutes of Proceedings, 22 Temporary Restraining Order). Appellant Designation due by 07/21/2020. (Alberts, Sam) (Entered: 07/07/2020)
23	33	07/07/2020	OBJECTION (RE: Motion to Withdraw Reference 26). Filed by Sam Alberts on behalf of Astria Health (Alberts, Sam) (Entered: 07/07/2020)
24	34	07/08/2020	APPEAL Transmittal to District Court. Appellant(s): Astria Health, SHC Medical Center - Toppenish, and Yakima HMA Home Health Care, LLC. Appellee(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Case County: YAKIMA. Date Notice of Appeal Filed: 7/7/2020. Date of Entry of Order on Appeal: 6/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: No.

APPELLANT'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF THE ISSUES TO BE PRESENTED - 6

1		Transmittal of Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order ²² , Notice of Cross Appeal ³⁴). Certificate of Record due by 8/27/2020. (CMR) (Entered: 07/08/2020)
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4	35 07/09/2020	CASE Number from Appellate Court, District Court, Case Number: 20-cv-03098-RMP (RE: Notice of Cross Appeal ³⁴). (CMR) (Entered: 07/09/2020)
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6	36 07/09/2020	RECEIPT of Notice of Cross Appeal(20-80016-WLH) [appeal,crssapl] (298.00) Filing Fee. Receipt number A7648026. Fee amount 298.00 (RE: Notice of Cross Appeal ³⁴). (U.S. Treasury) (Entered: 07/09/2020)
7		

8
9 RESPECTFULLY SUBMITTED: July 10, 2020.

10 ETHAN P. DAVIS
11 Acting Assistant Attorney General

12 WILLIAM D. HYSLOP
13 United States Attorney

14 /s/ Brian M. Donovan
15 BRIAN M. DONOVAN
16 Assistant United States Attorney

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27 *Attorneys for the United States*

28 APPELLANT'S DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF THE
ISSUES TO BE PRESENTED - 7

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

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

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
Possession.¹

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

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).

**CROSS-APPELLANTS'
DESIGNATION OF RECORD AND
STATEMENT OF ISSUES**

1

DENTONS US LLP

BUSH KORNFELD LLP



ASTRIA HEALTH, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

**CROSS-APPELLANTS'
DESIGNATION OF RECORD
ON APPEAL AND STATEMENT
OF ISSUES PRESENTED**

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" or "Cross-Appellants"), the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Chapter 11 Cases"), pursuant to Rule 8009(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), hereby designate the following items to be included in the record on appeal and states the issues to be presented on appeal from the *Order Granting Preliminary Injunction*,

**CROSS-APPELLANTS'
DESIGNATION OF RECORD AND
STATEMENT OF ISSUES**

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1 *Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of*
 2 *Appeals* [Docket No. 22]:²

3 **A. Statement of Issues Presented.**

4 1. Whether the bankruptcy court erred in holding funds received under the
 5 Paycheck Protection Program (“PPP”) as part of the Coronavirus Aid, Relief, and
 6 Economic Security Act (the “CARES Act”), Public Law 116-136 (signed into law
 7 March 27, 2020), as augmented by the Payment Protection Program and Health Care
 8 Enhancement Act, Pub. L. 116-139 (signed into law April 24, 2020) and by Public
 9 Law No: 116-147 (signed into law July 4, 2020), are not an “other similar grant”
 10 within the meaning of § 525(a) of title 11 of the United States Code, §§ 101 *et seq.*
 11 (the “Bankruptcy Code”).

12 **B. Designation of Record on Appeal.**³

Filing Date	#	Docket Text
05/15/2020	<u>1</u> (136 pgs)	Adversary case 20-80016. COMPLAINT. Fee Amount \$350. Nature of Suit: (91 (Declaratory

17 ² Although the Debtors intended their appeal of Docket No. 22 to be designated as a “cross-appeal”
 18 from the appeal commenced by the United States Small Business Administration (the “SBA”) and
 19 Jovita Carranza, in her capacity as Administrator for the SBA (Appellate Case No. 20-cv-03089),
 the Court Clerk’s office for the District Court for the Eastern District of Washington has created a
 second appeal (Appellate Case No. 20-cv-03098). The Debtors will be filing a motion to
 consolidate the two appeals shortly. This Designation of Record on Appeal and Statement of Issues
 Presented applies to both appellate cases.

20 ³ Cross-Appellants’ designation of record on appeal includes all exhibits and attachments to any
 filings referenced herein.

21 **CROSS-APPELLANTS’
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1			judgment)) (72 (Injunctive relief - other)) (21 (Validity, priority or extent of lien or other interest in property)) (02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Alberts, Sam) (Entered: 05/15/2020)
2			
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4		2	MOTION for Temporary Restraining Order and Request for Hearing and Briefing Schedule With Respect for a Preliminary Injunction. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Attachments: # 1 Exhibits A through F) (Alberts, Sam) Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. DEPUTY Clerk Note: Hearing information added and entry clarified. Modified on 5/18/2020 (CMR). (Entered: 05/15/2020)
5	05/15/2020	(111 pgs; 2 docs)	
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13		6	ORDER Setting Emergency Hearing Regarding Debtors' Motion for Temporary Restraining Order (RE: Motion for Temporary Restraining Order 2). Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/18/2020)
14	05/18/2020	(4 pgs)	
15			
16		9	PDF with attached Audio File. Court Date & Time [5/19/2020 11:15:17 AM]. File Size [3756 KB]. Run Time [00:15:39]. (NydiaUrlacher). (Entered: 05/19/2020)
17	05/19/2020	(1 pg)	
18			
19		12	MINUTE Entry Re: Motion for Temporary Restraining Order. HELD. The parties reached an agreement and submitted a proposed agreed order. Court finds the schedule outlined is
20	05/19/2020		

**CROSS-APPELLANTS'
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1		appropriate and will sign/enter order (RE: 2 Motion for Temporary Restraining Order)
2		Appearances: Samuel Maizel, Thomas Buford, Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant United States Small Business Administration. Other parties: John Gallagher with Astria Health; Michael Lane with Astria Health; Gary Dyer, Attorney for US Trustee; Ryan Jareck, Attorney for Lapis Advisers; William Kannel, Attorney for UMB Bank, Lapis Advisers; David Leigh, Attorney for Med One Capital Funding LLC; Richard Hyatt, Attorney for TIAA Commercial Finance Inc; Boris Mankovetskiy, Jane Pearson and Andrew Sherman, Attorneys for the Unsecured Creditors Committee; Darin Dalmat, Attorney for Washington State Nurses Assc; Michael Siderius, Attorney for GE Precision Healthcare LLC (NNU) (Entered: 05/19/2020)
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12	05/20/2020	13 (4 pgs) AGREED ORDER Regarding Scheduling and Reservation of PPP Funds (RE: Motion for Temporary Restraining Order 2). Hearing scheduled 6/3/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/20/2020)
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18	05/26/2020	14 (514 pgs; 15 docs) BRIEF signed by Brian M. Donovan. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion for Temporary Restraining Order 2). (Attachments: # 1 Exhibit A # 2 Exhibit 1 # 3 Exhibit 2 # 4 Exhibit 3 # 5 Exhibit 4 # 6 Exhibit 5 # 7 Exhibit 6 # 8 Exhibit 7 # 9 Exhibit 8 # 10 Exhibit 9 # 11 Exhibit 10 # 12 Exhibit 11 # 13 Exhibit 12 # 14 Exhibit 13)(Donovan, Brian) (Entered: 05/26/2020)
19		
20	06/01/2020	16 (94 pgs) REPLY signed by Samuel R. Maizel (RE: Brief 14). Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC,

**CROSS-APPELLANTS'
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1		SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/01/2020)
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5	06/03/2020	17 (1 pg) PDF with attached Audio File. Court Date & Time [6/3/2020 11:24:37 AM]. File Size [36135 KB]. Run Time [02:30:34]. (NydiaUrlacher). (Entered: 06/03/2020)
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8	06/03/2020	19 MINUTE Entry Re: Motion for Temporary Restraining Order and Use of PPP Funds. HELD. The court heard argument of counsel and for the reasons stated on the record, the court grants motion and delivers oral ruling. Proposed form of order to be circulated and submitted to the court for signature. (related document(s): 2 Motion for Temporary Restraining Order filed by Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC) Appearances: Sam Alberts, James Day, Samuel Maizel, Geoffrey Miller, Sarah Schrag, Attorneys for Astria/Plaintiff; Mark Sacks and Brian Donovan, Attorneys for US Small Business Administration/Defendant. Other Attendees: William Kannel, Attorney for UMB Bank, N.A., Lapis Advisers; Jane Pearson, Boris Mankovetskiy and Andrew Sherman, Attorneys for Unsecured Creditors Committee; Gary Dyer, Attorney for US Trustee; John Gallagher, CEO of Astria Health; Michael Lane, CRO of Astria Health.(NNU) (Entered: 06/08/2020)
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1		18 (5 pgs)	STIPULATION. Signed by Samuel R. Maizel for the Debtors, William W. Kannel, Attorneys for UMB Bank, N.A., as Trustee and Lapis Advisers, L.P. and Ryan T. Jareck Attorneys for Lapis Advisers, L.P. and the filer.. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/08/2020)
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5	06/08/2020		
6		22 (56 pgs)	ORDER Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals (Related Doc # 2). (CMR) (Entered: 06/10/2020)
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9	06/10/2020		
10		28 (6 pgs)	NOTICE of Appeal and Statement of Election to District Court. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: 22 Temporary Restraining Order). (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
11			
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14	06/23/2020		
15		30 (1 pg)	 PDF with attached Audio File. Court Date & Time [6/24/2020 1:36:08 AM]. File Size [2320 KB]. Run Time [00:09:40]. (NydiaUrlacher). (Entered: 06/24/2020)
16	06/24/2020		
17		31	MINUTE Entry Re: Scheduling Conference. HELD. Court will sign the proposed joint stipulated order submitted by counsel staying the adversary proceeding pending appeal in District Court. (RE: 4 Notice of Scheduling Conference)
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**CROSS-APPELLANTS'
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1		Appearances: Samuel Maizel, and Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant (NNU) (Entered: 06/24/2020)
2		
3	32	APPEAL Transmittal to District Court. Appellant(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Appellee(s): Astria Health, et al (See Exhibit A of ECF 28). Case County: YAKIMA. Date Notice of Appeal Filed: 06/23/2020. Date of Entry of Order on Appeal: 06/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: N/A. Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order 22 , Notice of Appeal and Statement of Election 28). Certificate of Record due by 8/13/2020. (CMR) (Entered: 06/24/2020)
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5	06/24/2020	
6		CASE Number from Appellate Court, District Court, Case Number: 20-cv-03089-RMP (RE: Notice of Appeal and Statement of Election 28). (CMR) (Entered: 06/25/2020)
7	06/25/2020	
8		
9	33 (5 pgs)	STIPULATED Order (RE: Notice of Scheduling Conference 4). Status Hearing scheduled 8/25/2020 at 01:30 PM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 06/26/2020)
10	06/26/2020	
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12	34 (64 pgs)	NOTICE of Cross Appeal and Statement of Election. Fee Amount \$298. Filed by Sam Alberts on behalf of Astria Health, SHC Medical Center - Toppenish, Yakima HMA Home Health, LLC (RE: 19 Minutes of Proceedings, 22 Temporary Restraining Order). Appellant Designation due by 07/21/2020. (Alberts, Sam) (Entered: 07/07/2020)
13	07/07/2020	
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15	36	APPEAL Transmittal to District Court. Appellant(s): Astria Health, SHC Medical Center - Toppenish, and Yakima HMA Home Health Care, LLC. Appellee(s): United States Small
16	07/08/2020	
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1		Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Case County: YAKIMA. Date Notice of Appeal Filed: 7/7/2020. Date of Entry of Order on Appeal: 6/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: No. Transmittal of Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order ²² , Notice of Cross Appeal ³⁴). Certificate of Record due by 8/27/2020. (CMR) (Entered: 07/08/2020)
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9	07/09/2020	RECEIPT of Notice of Cross Appeal(^{20-80016-WLH}) [appeal,crssapl] (298.00) Filing Fee. Receipt number A7648026. Fee amount 298.00 (RE: Notice of Cross Appeal ³⁴). (U.S. Treasury) (Entered: 07/09/2020)
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12	07/10/2020	37 STATUS Report to Appellate Court Regarding Payment of Appeal Filing Fee. Please be advised the filing fee in District Court Case Number 20-cv-03098-RMP was paid on 7/9/2020 (RE: Notice of Cross Appeal ³⁴). (CMR) (Entered: 07/10/2020)
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15	07/10/2020	³⁸ (7 pgs) APPELLANT Designation of Contents For Inclusion in Record On Appeal, STATEMENT of Issues. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: ²⁸ Notice of Appeal and Statement of Election, 32 Appeal Transmittal). (Donovan, Brian) DEPUTY Clerk Note: APPELLANT Designation of Contents For Inclusion in Record On Appeal added to docket text. Modified on 7/13/2020 (CMR). (Entered: 07/10/2020)
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**CROSS-APPELLANTS'
DESIGNATION OF RECORD AND
STATEMENT OF ISSUES**

U.S. Active 115130174V-2

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Dated: July 21, 2020

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By /s/ Sam J. Alberts
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*Attorneys for the Chapter 11 Debtors and Debtors
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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
Possession.¹

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

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).

**CROSS-APPELLANTS'
DESIGNATION OF RECORD AND
STATEMENT OF ISSUES**

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DENTONS US LLP

BUSH KORNFELD LLP



ASTRIA HEALTH, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

**CROSS-APPELLANTS'
SUPPLEMENT TO THEIR
DESIGNATION OF RECORD
ON APPEAL AND STATEMENT
OF ISSUES PRESENTED**

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" or "Cross-Appellants"), the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Chapter 11 Cases"), pursuant to Rule 8009(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), hereby file this supplement to the *Cross-Appellants' Designation Of Record On Appeal And Statement Of Issues Presented* [Docket No. 44], requesting that the following additional items also be included in the record on appeal from the *Order Granting*

**CROSS-APPELLANTS'
DESIGNATION OF RECORD AND
STATEMENT OF ISSUES**

U.S. Active 115130174/V-3

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Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals [Docket No. 22]:²

Additional Items for the Designation of Record on Appeal.³

Filing Date	Docket No.	Document Title
07/07/2020	35 (17 pgs)	OBJECTION (RE: Motion to Withdraw Reference). Filed by Sam Alberts on behalf of Astria Health (Alberts, Sam) (Entered: 07/07/2020)
07/17/2020	41 (5 pgs)	JUDGE Comments (RE: Motion to Withdraw Reference). (KAC) (Entered: 07/17/2020)

² The District Court for the Eastern District of Washington has consolidated the appeals into Appellate Case No. 20-cv-03098 and has closed Appellate Case No. 20-cv-03089.

³ Cross-Appellants' designation of record on appeal includes all exhibits and attachments to any filings referenced herein.

**CROSS-APPELLANTS'
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1 Dated: August 17, 2020

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21 **CROSS-APPELLANTS'
DESIGNATION OF RECORD AND
STATEMENT OF ISSUES**

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