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No. 2:20-cv-3098

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

IN RE: ASTRIA HEALTH, et al.

Debtors.[1]

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

Appellants/Cross-Appellees,

v.

ASTRIA HEALTH, et al.,

Appellees/Cross-Appellants.

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

APPELLANTS' RESPONSE AND REPLY BRIEF

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December 4, 2020

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

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SUMMARY OF ARGUMENT

In its opening brief, the United States, on behalf of appellants the U.S. Small Business Administration and Jovita Carranza as its Administrator (the "Appellants"), demonstrated that this Court should vacate the Bankruptcy Court's injunction. First, the Bankruptcy Court lacked subject matter jurisdiction, both because Congress had not waived sovereign immunity and because the Bankruptcy Court lacked authority to adjudicate "non-core" proceedings. In addition, the Bankruptcy Court erroneously concluded that the Small Business Administration (SBA) violated § 706(2)(A) of the Administrative Procedure Act (APA), and failed to apply appropriate deference to the SBA in reviewing that claim. The opening brief for Appellees and Cross-Appellants Astria Health, SHV Medical Center – Toppenish, and Yakima HMA Home Heath LLC (collectively "Astria" or "Appellees") does nothing to alter this analysis or the conclusion that the preliminary injunction must be vacated.

First, Astria does not contest that, in enacting the Paycheck Protection Program ("PPP"), Congress vested the Small Business Administration (the "SBA") with emergency rulemaking authority and directed the agency to use that authority to enable lenders to make hundreds of billions of dollars in loans to millions of distinct small businesses within the span of a few short months. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1114, 134 Stat. 281, 312 (2020) (the "CARES Act"). Astria does not dispute that the SBA adopted the policy of

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denying PPP loans to entities in bankruptcy as an exercise of that express rulemaking authority and that the policy is subject to deferential judicial review.

Second, Astria does not dispute that Congress created the PPP as a form of lending under § 7(a) of the Small Business Act (codified at 15 U.S.C. § 636(a)), and specified that, "[e]xcept as otherwise provided," "the [SBA] Administrator may guarantee" PPP loans "under the same terms, conditions, and processes" as other § 7(a) loans. *See* CARES Act § 1102, 134 Stat. at 287 (codified at 15 U.S.C. § 636(a)(36)(B)). The CARES Act waives some requirements applicable to other forms of § 7(a) lending, *see, e.g.*, 15 U.S.C. § 636(a)(36)(I), (R), but Congress did not displace the usual requirement that loans made under § 7(a) must be of "sound value." 15 U.S.C. § 636(a)(6).

Third, Astria does not dispute that the SBA has long treated a potential borrower's bankruptcy status as an appropriate consideration in determining whether a loan under § 7(a) would be of "sound value." *See* Appellants' Br. 5–6. In light of the exigent circumstances that led to the creation of the PPP, the SBA found it necessary to dispense with the more extensive and tailored underwriting practices typically used to determine "sound value" under § 7(a), and it reasonably looked to bankruptcy status as an administrable, bright-line criterion for determining whether that requirement is met. Appellants' Br. 8, 30.

Astria instead raises two issues on cross-appeal, both of which lack merit. Astria first argues that the appeal is equitably moot. It is not. This Court can award

effective relief on appeal without rendering the bankruptcy case "uncontrollable," which the equitable mootness doctrine is intended to prevent. The Bankruptcy Court has not confirmed any plan, and Astria has not identified any other complex transactions in the bankruptcy case that would be undone by the appeal. Rather, vacating the preliminary injunction would only mean that Astria must repay its PPP loan, which it is already legally obligated to do.

Astria also reasserts its claim under 11 U.S.C. § 525(a) which the Bankruptcy Court correctly denied. By its plain language, § 525(a) does not apply to government lending programs. To evade this fact, Astria attempts to re-characterize its PPP loan as a "grant" so that it might be considered "a license, permit, charter, franchise, or similar grant" under § 525(a). But PPP funds are plainly loans in every sense. Congress defined PPP proceeds as loans, placed the PPP within SBA's existing small business lending program, and gave PPP loans all the characteristics of loans. But even assuming PPP loans could be called "grants," the PPP *still* would not fall within § 525(a)'s purview because PPP loans are not "similar to" "a license, permit, charter, [or] franchise," which each address a debtor's legal right to pursue certain occupations or economic endeavors. Interpreting § 525(a) to cover the PPP would require a broad, new extension of law. No authority supports that extension; in fact, all available circuit court authority precludes it.

In its response to the United States appeal, Astria largely relies on the Bankruptcy Court's faulty reasoning, and otherwise raises arguments without merit that do nothing to support the Bankruptcy Court's preliminary injunction.

On sovereign immunity, Astria does not dispute that the plain language of 15 U.S.C. § 634(b) prohibits injunctions and that no controlling authority explicitly allowed the Bankruptcy Court to disregard that statutory prohibition. Astria also does not dispute that waivers of sovereign immunity must be interpreted strictly, in favor of the sovereign. Astria instead relies on the Bankruptcy Court's incorrect inference of a waiver allowing injunctive relief. But Supreme Court and Ninth Circuit precedent prohibits inferring waivers of sovereign immunity in that way. Any waiver must instead be found in the plain text of the statute. Here, the plain statutory text *forbids* injunctions.

On "core" jurisdiction, Astria does not dispute that the Bankruptcy Court lacks authority to issue a preliminary injunction for "non-core" proceedings. Astria instead repeats the Bankruptcy Court's faulty "but for" logic to argue that its APA claim is core. But the APA claim does not arise under title 11 and it could proceed in district court; it is thus "non-core."

Finally, Astria adds nothing of substance to the Bankruptcy Court's analysis of the merits of the APA claim. It instead repeats the Bankruptcy Court's erroneous description of the standard of review for arbitrary-or-capricious claims under 5 U.S.C.

706(2)(A). Astria otherwise asserts an array of speculative and false assertions that do not support the Bankruptcy Court's preliminary injunction.

COUNTERSTATEMENT OF THE CASE

The United States' opening brief describes the relevant statutory and procedural background for the appeal. Appellants' Br. 3–12. Astria concedes the United States' summary of the facts and procedural history, but appears to dispute its summary of the statutory and regulatory background. Appellees' Br. 7 (noting that the United States' characterizations are "at issue"). Astria does not state what specific contentions it disagrees with, however. And its own Statement of the Case and Background sections include contentions without cited authority, *see e.g., id.* 17–18., and, moreover, include several misstatements. For example:

First, and most important, Astria's opening brief falsely states that "the CARES Act specifically waives all underwriting considerations under § 7(a) of the Small Business Act . . . ." Appellees' Br. 11–12. But the CARES Act does not address what underwriting must be performed for PPP loans, much less do so "specifically." Instead, as explained in the United States' opening brief, Congress created the PPP by placing it within the SBA's existing § 7(a) lending program. Appellants' Br. 6. In doing so, Congress amended specific parts of the existing § 7(a) program. *Id.* at 7. But "otherwise" the "same terms, conditions, and processes" of § 7(a) continue to apply to the PPP. *Id.* 6–7. Nothing in the CARES Act altered the pre-existing statutory requirement in the Small Business Act that small business loans "*shall* be of such

sound value or so secured as reasonably to assure repayment." *Id.* at 7. To meet that "sound value" requirement, the SBA had long considered applicants' bankruptcy status as part of the case-by-case review SBA required for traditional small business loans. *Id.* 5–6 (citing A141 (SBA Form 1919)). The SBA determined that, in light of the exigent need for PPP loans, the traditional detailed underwriting must be "streamlin[ed]." *Id.* at 8. (citing First Interim Final Rule). Thus the bankruptcy question on the application form was converted to a bright-line rule that could be administered quickly while still attending to the statutory "sound value" requirement. *Id*. at 8.

Second, in a similar vein, Astria incorrectly states that SBA, in its Third Interim Final Rule, "disavow[ed] . . . any concern for creditworthiness." Appellees' Br. 14. Not so. The SBA's First Interim Final Rule announced that it would "streamlin[e] the requirements of the regular § 7(a) loan program." Appellants' Br. 8. The SBA thus excused PPP lenders from having to perform the typical detailed creditworthiness review required for § 7(a) loans. Instead, under a section titled "What Do Lenders Have to Do in Terms of Loan Underwriting," the SBA limited a lender's underwriting obligation to confirming certain receipts and dollar amounts, following applicable Bank Secrecy Act rules, and "reviewing the [PPP] Application Form." 85 Fed. Reg. at 20,815. The Paycheck Protection Application Form (SBA Form 2483), in turn, expressly requires the borrower to certify, among other things, that the entity is not currently involved in a bankruptcy. Appellants' Br. 8. Thus the SBA streamlined

underwriting to consist of a series of bright-line questions, but never "disavow[ed]" any concern with creditworthiness as Astria falsely asserts. Appellees' Br. 14.

The Third Interim Final Rule also does not contradict the SBA's statutory "sound value" obligation, as Astria asserts. Astria refers to a frequently asked question in the Third Interim Final Rule addressing whether "businesses owned by directors and officers of a PPP lender" could apply for a PPP loan from the lender they work for. Appellees' Br. 14 (citing 85 Fed. Reg. 21,750). In stating that certain officers and directors could indeed apply for loans from the PPP lender they operate, the SBA acknowledged that "financing terms are uniform for all PPP 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." 85 Fed. Reg. 21,750. In other words, the question addresses what PPP *lenders* must consider in processing loans. Because the streamlined PPP underwriting requirements do not require PPP *lenders* to conduct independent inquiries and due diligence to "assess[]" "creditworthiness"—and need only confirm that the questions on the application form are answered—the SBA determined there was "no meaningful risk" in allowing certain officers and directors to apply for PPP loans from the institutions they work for. *Id.* This FAQ does not address—much less disavow—the *SBA's* statutory obligation to assure the "sound value" of PPP loans. That obligation was satisfied, in part, by the bright-line bankruptcy exclusion, as the SBA specifically affirmed in its Fourth Interim Final

1 Rule, which stated that lending to bankrupt entities would present "unacceptably high
2 risk." Appellees' Br. 8–9 (citing Fourth Interim Final Rule).
3
4 Third, Astria inaccurately describes the relevant forgiveness conditions.
5 Appellees' Br. 5, 11 (incorrectly stating loan would be forgiven if "75% of PPP funds
6 are used for mortgage, rent, or utilities."). The original SBA forgiveness rule required
7
8 75% be used on payroll. *See* First Interim Final Rule § 2(o), 85 Fed. Reg. at 20,813–
9 14. Congress has since modified forgiveness conditions, stating "to receive
10 forgiveness . . . an eligible recipient shall use at least "60 percent of the covered loan"
11
12 for "payroll costs," and "may use up to 40 percent" for payment of mortgage interest,
13 rent, or covered utility payments. Paycheck Protection Program Flexibility Act of
14 2020 (PPP Flexibility Act) § 3(b)(2)(B), P.L. No. 116-142, 134 Stat. 542.
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ARGUMENT

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I. THE COURT REVIEWS THE APPEAL WITHOUT DEFERENCE TO THE BANKRUPTCY COURT'S ERRONEOUS LEGAL CONCLUSIONS.

18
19 Astria mistakenly contends that this Court must defer to the Bankruptcy Court's
20 erroneous legal conclusions. Appellees' Br. 23. As explained in the United States'
21 opening brief, the traditional standard for review of an order granting a preliminary
22
23 injunction requires the Court to review "*de novo* the legal premises underlying a
24 preliminary injunction. Otherwise, we review for abuse of discretion the [court's]
25 grant of a preliminary injunction." Appellants' Br. 2–3 (quoting *FTC v. Enforma*
26
27 *Natural Prods.*, 362 F.3d 1204 (9th Cir. 2004)). In this case, the issues on appeal are
28 purely legal, as Astria acknowledges. Appellees' Br. 24 ("all that remains for this

Court is a discrete review of proper interpretation of the law"). Thus review of these legal issues is *de novo*, without deference to the Bankruptcy Court's conclusions. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012) (on review of preliminary injunction order, the lower court's "interpretation of underlying legal principles is subject to de novo review"); *Enforma*, 362 F.3d at 1212–13 ("We will reverse a preliminary injunction when a [court] based its decision on an erroneous legal standard."). Indeed, the case Astria cites to disprove *de novo* review plainly states that "the first step of our abuse of discretion test is to determine *de novo* whether the trial court identified the correct legal rule to apply." Appellees' Br. 25 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)). What Astria fails to understand is that this appeal *only* implicates the legal principals underlying the Bankruptcy Court's order and thus must be reviewed *de novo* under *Hinkson's* so-called first step.[2]

With regard to the merits of Astria's APA claim, Astria does not dispute that review must be based on the administrative record, without deference to the Bankruptcy Court's analysis. *See* Appellants' Br. 3 (citing *California v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (*en banc*)).

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[2] Astria elsewhere appears to acknowledge that review of the issues on appeal here is *de novo*. Appellees' Br. 18 ("[T]he Court's *de novo* review is of discrete legal issues, simply to determine whether the Bankruptcy Court used an erroneous legal standard.").

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ARGUMENT IN RESPONSE

I. THE APPEAL IS NOT EQUITABLY MOOT.

Equitable mootness is a judge-created, prudential doctrine by which a court elects not to reach the merits of a bankruptcy appeal. *Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 933 (9th Cir. 1999). The party asserting mootness, "bears the heavy burden of establishing that we cannot provide any effective relief." *Strata Title, L.L.C. v. Pure Country Tower, LLC (In re Strata Title, L.L.C.)*, BAP No. AZ-13-1291, 2014 WL 661174 (9th Cir. B.A.P. Feb. 21, 2014) (quoting *United States v. Gould (In re Gould)*, 401 B.R. 415, 421 (9th Cir. BAP 2009)); *accord Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012) ("The party moving for dismissal on mootness grounds bears a heavy burden.").

The Ninth Circuit has described a four-factor test for equitable mootness:

> We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.

In re Thorpe, 677 F.3d at 881. "The principal question for equitable mootness is whether the appeal 'present[s] transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply.'" *Irish Pub Arrowhead Land,*

LLC v. Gillespie (In re Irish Pub Arrowhead, LLC), No. 13-1024, 2014 Bankr. LEXIS 514, *14 (9th Cir. B.A.P. Feb. 6, 2014) (quoting *Lowenschuss*, 170 F.3d at 933). "If [appellants] have presented appellate claims that can be remedied by some reasonable means without totally dislodging the . . . plan, it would be inequitable to dismiss their appeal on equitable mootness grounds." *In re Thorpe*, 677 F.3d at 881.

None of the factors favor equitable mootness. First, the United States sought a stay. A274 (Hr'g Tr. 128:2–5); *see* Lowenschuss, 170 F.3d at 933 (not equitably moot where stay sought but bankruptcy court refused to grant it). Astria faults the United States for not following its oral request with a written motion for reconsideration. Appellees' Br. 21. But the Bankruptcy Court made clear that it would not grant a stay. A274 (Hr'g Tr. 128:6–15). The standard does not require futile motion practice. Indeed, where, as here, the Court can grant effective relief on appeal without dislodging any confirmed plan or complex transactions in the bankruptcy case, courts refuse to find equitable mootness, even when the appellant failed to seek a stay at all. *See e.g.*, *In re Irish Pub Arrowhead*, 2014 Bankr. LEXIS 514, at *15 (denying equitable mootness though appellants failed to seek a stay); *see also In re Thorpe*, 881–82 ("The failure to gain a stay is one factor to be considered in assessing equitable mootness, but is not necessarily controlling.").

Second, the appeal will not disturb any confirmed plan because the Bankruptcy Court has not yet confirmed any plan. Astria otherwise identifies no "complex transactions" that would be undone if this Court vacates the preliminary injunction. To

1 the contrary, if the United States succeeds on appeal, then Astria would have to repay
2 its PPP loans that it is *already* obligated to repay. And rather than "creat[ing] an
3 unmanageable situation for the bankruptcy court," the Bankruptcy Code specifically
4 addresses post-petition loans, like Astria's PPP loans, and describes how they must be
5 treated in the bankruptcy. *See* 11 U.S.C. § 364(b) (allowing post-petition lenders to
6 receive administrative expense claims).
7
8 Third, the appeal does not affect any third parties. While Astria threatens that it
9 would have to "clawback[]" funds from third parties, it offers no explanation
10 supporting why that must be so. Again, Astria currently owes a debt for the PPP funds
11 and granting the appeal would only maintain that status. The bankruptcy code then
12 governs how such a post-petition debt must be paid. *See* 11 U.S.C. § 364(b).
13
14 Finally, and most importantly, the Court can grant relief without "creating an
15 uncontrollable situation for the bankruptcy court." The Bankruptcy Court's order
16 continues to constrain the SBA, so vacating the order will provide the SBA with
17 effective relief. The preliminary injunction requires the SBA to ignore Astria's
18 bankruptcy status in any "forms, applications, or other documents" relating to Astria's
19 PPP loans. A308 (Order ¶ 3(e)). That order thus appears to restrain the SBA from
20 considering Astria's bankruptcy status in any loan forgiveness application. Astria has
21 made clear that it intends to seek forgiveness. Appellees' Br. 15–16. When this
22 happens, the SBA would seemingly be prohibited b the injunction from considering
23 Astria's ineligibility as a bankrupt debtor in deciding whether to grant forgiveness.
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For this reason, the Court may grant meaningful relief by vacating the bankruptcy court's injunction, which would allow the SBA to deny forgiveness based on Astria's bankruptcy status.

If Astria truly wishes to moot this appeal, then it should agree to dissolve the preliminary injunction entirely. As Astria concedes, it has already obtained a PPP loan. Appellees' Br. 21. Should this Court then grant the United States' pending motion to withdraw the reference, Appellants' Br. 12 (citing *Astria Health v. SBA*, Civ. No. 20-03109-RMP (Dkt. 1)), the United States will file a motion to dismiss or, in the alternative, for summary judgment, and Astria may file a cross-motion for summary judgment. The issues before this Court are purely legal, and the Court may resolve the cross motions and enter final judgment.

II. THE BANKRUPTCY COURT CORRECTLY REJECTED ASTRIA'S CLAIM UNDER 11 U.S.C. § 525 BECAUSE THAT SECTION DOES NOT APPLY TO PPP LOANS.

A. Section 525(a) 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 . . ." on the basis of being or having been a debtor in bankruptcy. By its plain language, the prohibition in § 525(a) does not apply to lending or loan guarantees. Thus the exclusion of loans from the enumerated list precludes Appellees' claim. *See Barnhard v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[W]hen the items expressed are members of an associated group or series,

[it] justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”).

Indeed, the only mention of lending in § 525 is found in subsection (c), added in 1994 to address government student loan programs. Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, § 313, 108 Stat. 4106 (1994). Subsection (c) provides: “[a] governmental unit that operates a student grant or loan program … may not deny a student grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or … under the Bankruptcy Act.” 11 U.S.C. § 525(c). If § 525 applied to government guaranteed loans more broadly, Congress would 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. *See Ayes v. U.S. Dep’t of Veterans Affairs*, 473 F.3d 104, 110 (4th Cir. 2006).

Each Circuit that has addressed this issue has determined that a government entity conditioning a loan on whether the party receiving the loan is in bankruptcy *does not* violate § 525 because a loan is not “grant” that is similar to a “license, permit, charter, [or] franchise.” *Ayes*, 473 F.3d at 110 (holding that veteran loan guarantee was not within the scope of § 525); *Toth v. Michigan State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir. 1998) (holding that § 525 does not apply to state issued home improvement loans); *Watts v. Pennsylvania Hous. Fin. Co.*, 876 F.2d 1090, 1094 (3d Cir. 1989) (holding that an emergency home loan assistance program

1 in which payments were suspended if an entity filed for bankruptcy and the automatic
2 stay was not lifted did not violate § 525). The Second Circuit reached the same
3 conclusion in a case concerning student loans prior to the amendment of § 525 in 1994
4 to include subsection (c). *In re Goldrich*, 771 F.2d 28, 30 (2d Cir.1985) (interpreting
5 omission of post-discharge credit arrangements from language of § 525 as intentional
6 and declining to extend § 525 to student loan guarantees).
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8 Astria misplaces its reliance on *In re Rees*, 61 B.R. 114, 124 (Bankr. D. Utah
9 1986) (holding that employment security taxes "do not fall within the scope of Section
10 525(a)" because such taxes are not "any licenses, permits, charters, franchises, or any
11 similar grant"). In *Rees*, the bankruptcy court extensively explained that 11 U.S.C. §
12 525 was not intended to cover lending programs. 61 B.R. at 116–24. The bankruptcy
13 court stated that § 525 "intended to codify the rule of *Perez v. Campbell*, 402 U.S. 637
14 (1971), which held that a state could not frustrate the Congressional policy of a fresh
15 start for a bankrupt by refusing to renew a driver's license based on a discharged
16 judgment resulting from an automobile accident." *Id.* at 116-17. An early proposal for
17 § 525 contained broad language prohibiting "discriminatory treatment because he, or
18 any person with whom he is or has been associated, is or has been a debtor or has
19 failed to pay a debt discharged in a case under the Act." *Id*. at 117. "The credit
20 industry was extremely concerned about the wording …, and urged that it be redrafted
21 to limit its application to *Perez*-type situations and prevent its application in the field
22 of credit granting." *Id.* The provision was subsequently redrafted to hue more closely
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to the *Perez* decision, prohibiting discrimination in the issuance of "a license, permit, charter, franchise, or other similar grant." *Id.* at 118.

B. PPP Proceeds Are Loans.

Recognizing that § 525(a) does not apply to government loan programs, Astria argues that PPP loans should be considered "grants" because they have forgiveness terms. First, PPP proceeds are—by statute, form and function—loans. Or, to use Astria's analogy, PPP proceeds "look," "walk," and "quack" like loans. Appellees' Br. 46.

Congress folded the PPP into the SBA's primary *lending program* under § 7(a) and directed the SBA to guarantee PPP *loans* under the same terms and conditions as § 7(a) loans unless otherwise provided. 15 U.S.C. § 636(a)(36)(B). Additionally, Congress refers to PPP proceeds as "Paycheck protection *loans*," *id.*, and defines "covered *loan*" to mean "a *loan* made under this paragraph during the covered period." § 636(a)(36)(A)(ii) (emphasis added). *See* generally *Tradeways, Ltd. v. U.S. Dep't of the Treasury*, Civ. No. 20-1324, 2020 WL 3447767, *17 (D. Md. June 24, 2020) ("In total, the word 'loan' appears some 75 times in the CARES Act provisions establishing the PPP. The takeaway is clear . . . .") (holding that "[t]he conclusion that the PPP is a loan program is fatal to [plaintiff's] claim arising under 11 U.S.C. § 525(a)."). Further, Congress gave PPP proceeds typical loan characteristics. *See, e.g.*, § 636(a)(36)(E)–(M) (specifying, *inter alia*, maximum loan amounts and refinancing, maturity, and deferment conditions). PPP loans carry an interest rate, are secured with

a promissory note, and may include amortization terms and conditions. Fourth Interim Final Rule, 85 Fed. Reg. at 23,450; First Interim Final Rule, 85 Fed. Reg. at 20,811. Congress also knows the distinction between loans and grants. *Compare* 11 U.S.C. § 525(c) (prohibiting certain discrimination in the denial of a "grant," "loan," or loan guarantee"), with 11 U.S.C. § 525(a) (limiting discrimination to the denial of a certain "grant"); *see also Penobscot Valley Hosp.* v. *Carranza*, No. 19-10034, 2020 WL 3032939, *9 (Bankr. D. Me. June 3, 2020) (noting that "Congress knows how to distribute aid without strings attached and, in fact, did so recently" by providing up to $1,200 to eligible individuals as economic stimulus in the wake of COVID-19), *adopted in part,* 620 B.R. 1, 6 (D. Me. 2020) (adopting bankruptcy court's "highly persuasive" ruling that § 525(a) does not apply to PPP loans). Indeed, Congress gave Astria grants through the CARES Act as part of the HHS Provider Relief Fund. *See* Appellants' Br. 10 (citing publically available data listing HHS grant recipients);[3] *see also* CARES Act § 3211, 134 Stat. 281 (authorizing $1.32 billion for "awards" to providers).

That PPP Loans may be forgiven does not render them "grants." Indeed, potential forgiveness is common to many federally-subsidized loan programs. *See Tradeways*, 2020 WL 3447767, at *17 ("[T]he possibility of forgiveness is unremarkable. Many federal loan programs allow some or all of the amount borrowed

[3] Astria incorrectly states that the United States' reference to Astria's grants was "without citation." Appellees' Br. 11 n.14.

to be forgiven . . . . [T]he mere existence of favorable forgiveness terms in the CARES Act does not transform a PPP loan into a grant.") (collecting examples of forgivable federal loans); *see also Diocese of Rochester v. SBA*, 466 F. Supp. 3d 363, 379 (W.D.N.Y. 2020) ("[T]he existence of favorable terms and a unique feature (namely, forgiveness under specified circumstances) does not change the character of what [Plaintiffs want] to obtain: a loan that might be forgiven by the lender.") (quoting *Penobscot*, 2020 WL 3032939 at *11); *Henry Anesthesia Assoc. v. Carranza*, Adv. No. 20-6084, 2020 WL 3002124, *6 (Bankr. N.D. Ga. June 4, 2020) (holding that "the PPP is a loan guarantee program" not subject to § 525(a)); *Schuessler v. SBA*, Adv. No. 20-02065, 2020 WL 2621186, *11 (Bankr. E.D. Wis. May 22, 2020) ("The record is clear that Congress created the PPP as an amendment to the SBA's pre-existing *loan* program and both the statute and agency regulations refer to the funds distributed as 'loans.'") (emphasis in original).

Further, even some authorized uses of PPP loans will not result in forgiveness. For example, PPP borrowers may use loans to pay for employees' healthcare and to pay interest on certain debt, 15 U.S.C. § 636(a)(36)(F), but funds used for these purposes are not forgiven and must be repaid. 15 U.S.C. § 9005(b). Given the CARES Act's plain terms, the placement of the PPP within the § 7(a) lending program, the substance of the PPP funds, and Congress's clear intention that some PPP loans *will* be subject to a repayment obligation, the PPP is a loan program.

C. PPP Loans Are Not "Similar Grants" Under § 525(a).

Even if PPP proceeds could be called "grants" and not loans, PPP loans still would not fall within the scope of § 525(a). The proper question under §525(a) is not whether a PPP loan is a grant, but whether it is a grant "*similar to* a license, permit, charter, [or] franchise." 11 U.S.C. § 525(a) (emphasis added). Notably, the plaintiffs in *Toth*, *Goldrich*, *Watts*, and *Ayes* (discussed above) all argued that the loan program at issue in their cases constituted a "grant." But the circuit courts rejected that framing, explaining that even if the loan program was considered a "grant," it was not a grant similar to "a license, permit, charter, [or] franchise." *See*, *e.g.*, *Goldrich*, 771 F.2d at 30 ("A credit guarantee is not a license, permit, charter or franchise; nor is it in any way similar to those grants."); *Watts*, 876 F.2d at 1093 ("[A] HEMAP loan simply is not a 'license, permit, charter, franchise or other similar grant.' Indeed, it seems perfectly clear that the items enumerated are in the nature of indicia of authority from a governmental unit to the authorized person to pursue some endeavor."). The Fourth Circuit in *Ayes* explained:

> Unfortunately for Appellants, the veteran guaranty entitlement bears no such resemblance to the items listed in § 525(a). Licenses, permits, charters, and franchises are all governmental authorization that typically permit an individual to pursue some occupation or endeavor aimed at economic betterment. For example, governmental entities issue real-estate, driver's, and medical licenses; building and business permits; corporate charters; and utility franchises. *All of these implicate "government's role as a gatekeeper in determining who may pursue certain livelihoods,"* and show that Congress intended § 525(a)'s protections to be "limited to situations sufficiently

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> similar to *Perez*." This interpretation of "other similar grant" is supported by the remainder of § 525(a), which forbids governmental discrimination in employment decisions based on an individual's discharge in bankruptcy.

473 F.3d at 108-09 (emphasis added) (quoting *Toth*, 136 F.3d at 480 and *Goldrich*, 771 F.2d at 30).

Addressing the same PPP claim at issue here, the *Tradeways* court explained:

> Unlike the denial of a medical license or a building permit, the rejection of a borrower's PPP application does not "completely foreclose[ ]" the borrower "from legally pursuing a career." To the contrary, the borrower remains uninhibited to conduct business. And, like the VA home-loan guaranty, the PPP is not the only source of capital; [Plaintiff] could, for example, seek a traditional loan from a bank. Indeed, defendants hardly "exercise exclusive or even pervasive control over the 'world'" of small business loans.

Tradeways, 2020 WL 3447767 at *18 (quoting *Ayes*, 473 F.3d at 109); *see Rochester*, 466 F. Supp. 3d at 379 (bankruptcy exclusion is "not similar to denying a debtor a license to operate in his chosen field and thereby denying the debtor the opportunity to pursue economic betterment."). Being ineligible for PPP loans does not legally preclude bankrupt debtors from operating; thus, § 525(a) does not apply. *Ayes*, 473 F.3d at 108–09 (collecting cases).

Rather than following the consistent approach for government loan programs adopted by the circuit courts addressing § 525(a) claims—along with nearly every lower court that has addressed the PPP claim at issue, *see infra* 23—Astria instead urges the Court to extend the holding of *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), to the PPP. In *Stoltz*, the Second Circuit addressed whether a public housing lease was a

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"similar grant" under § 525(a). 315 F.3d at 89–90. At the outset, whether § 525(a) covers subsidized government loans has already been directly answered by the Second Circuit. *See Rochester*, 466 F. Supp. 3d at 379–80 (holding § 525(a) "does not promise protection against consideration of the prior bankruptcy in post-discharge credit arrangements and that Congress did not intend to extend its protections to cover loans or other forms of credit") (quoting *Goldrich*, 771 F.2d at 30).

Stoltz is otherwise inapposite to this case. In *Stoltz*, the Second Circuit did not have to look beyond *Black's Law Dictionary* in reaching its holding that § 525(a) protected public housing leases because the definition of "grants" explicitly includes "leases." *Id.* at 89–90. But unlike "leases," "loans" are not included in any definition of "grants" *Stoltz* then determined that "the common qualities" of "license[s], permit[s], charter[s], franchise[s], and other similar grants" were that they "are unobtainable from the private sector and essential to a debtor's fresh start." *Id.* at 90. But even under that standard, which ignores the plain language of the statute and legislative history, the PPP would not fall within § 525(a)'s purview. The SBA "hardly exercise[s] exclusive or even pervasive control over the world of small business loans." *Tradeways*, 2020 WL 3447767, at *18 (quoting Ayes, 473 F.3d at 109). And nothing in § 525(a) (or elsewhere in the Bankruptcy Code) entitles debtors to force lenders to extend financing on favorable terms in order to achieve a "fresh start" in bankruptcy. As the Sixth Circuit remarked, "the intent of Congress incorporated into the plain language of § 525(a) should not be transformed by

employing an expansive understanding of the 'fresh start' policy to insulate a debtor from all adverse consequences of a bankruptcy filing or discharge." *Toth*, 136 F.3d at 480 (concluding § 525(a) applies to debtors denied "permission to pursue certain occupations or endeavors" rather than financing). Some "reckoning of an applicant's financial responsibility is an essential part of any lender's evaluation of a post-discharge application for a loan or extension of credit." *Id.*; *see Rochester*, 466 F. Supp. 3d at 379 (distinguishing *Stoltz* and concluding that "[t]he exclusion of persons involved in bankruptcy from the PPP does not conflict with the fresh start or otherwise frustrate the operation of the Bankruptcy Code and is not similar to denying a debtor a license to operate in his chosen field and thereby denying the debtor the opportunity to pursue economic betterment").

Yet Astria is seemingly unsatisfied with even *Stoltz's* expansive reading of § 525(a) and instead asks this Court to go further to fashion a new standard from whole cloth. Appellees' Br. 41 (arguing that § 525(a) should be extended whenever "the particular benefit is something the *government* is providing") (emphasis in original). No authority supports that extension. Moreover, Astria's proposed standard is incompatible with the language of § 525(a). *See supra* 13–14. Indeed, Congress considered, and rejected, a broad anti-discrimination provision like Astria suggests. *Rees*, 61 B.R. at 117 (describing history of § 525(a)).

Finally, Astria argues that "a growing number of bankruptcy courts across the nation" concur that PPP Loans are grants within the meaning of § 525(a). Appellees'

Br. 41–42 (citing bankruptcy court orders).[4] That is misleading. Of the more than *fifty* cases filed raising the same claims here, only a few bankruptcy courts have concluded that PPP loans fall within § 525(a). Those courts are true outliers. The vast majority of district courts and bankruptcy courts that have addressed the claim have *refused* to extend § 525(a) to the PPP. *See* Appellants' Br. 14–15 (collecting cases denying relief on any claim, including claims under § 525(a)).

ARGUMENT IN REPLY

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

In its opening brief, the United States demonstrated that the Bankruptcy Court erred in awarding injunctive relief against the SBA because 1) the plain language of the Small Business Act, 15 U.S.C. § 634(b)(1) prohibits injunctive relief; 2) controlling law in the Ninth Circuit precludes finding implicit waivers of sovereign immunity; waivers must instead be unequivocally expressed in the statute; 3) most circuit courts that have addressed the Small Business Act's waiver of immunity have applied its plain language to bar injunctive relief against the SBA; and 4) even under the incorrect approach adopted in *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052 (1st Cir. 1987)—which the Bankruptcy Court purported to follow—the

[4] Astria erroneously includes *Weather King Heating & Air, Inc. v. Carranza*, Adv. No. 20-5023 (Bankr. N.D. Ohio May 21, 2020), appeal docketed, Civ. No. 20-1241 (N.D. Ohio) in its list. But in *Weather King*, the bankruptcy court concluded that the plaintiff was *not likely* to succeed on the merits of its § 525(a) claim. Hr'g Tr. 17:25–18:3 (excerpt attached hereto as Exhibit A).

injunction here is forbidden because it interferes with a central SBA function, assisting small businesses to obtain credit through a loan guarantee program, and effectively attaches appropriated funds. Appellants' Br. 21. Nothing in Astria's brief alters this analysis.

Astria's brief attempts to bolster the Bankruptcy Court's sovereign immunity analysis with additional authorities, *see* Appellees' Br. 26–30, but each of the referenced cases incorporates the same analysis as in *Ulstein*, and thus fails for the same reason. Appellants' Br. 18–21. Astria relies principally on the Federal Circuit's analysis in *Cavalier Clothes, Inc. v. United States*, 810 F.2d 1108 (Fed. Cir. 1987). Appellees' Br. 26–28. *Ulstein* incorporated and followed *Cavalier Clothes*' analysis, which was issued shortly before *Ulstein*. *Ulstein*, 833 F.2d at 1056–57. In *Cavalier Clothes*, the Federal Circuit used legislative history of other, similar waivers of sovereign immunity to infer a waiver, despite the Small Business Act's clear textual prohibition against injunctions. But the Supreme Court has since rejected using legislative history in that way. *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[L]egislative history cannot supply a waiver that does not appear clearly in any statutory text; the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text.").[5] And the Ninth Circuit has followed that Supreme

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[5] Astria has no compelling answer to the Supreme Court's unequivocal expression rule and instead misstates the United States argument. Contrary to Astria's assertion, the United States never argued that *Lane* specifically addressed *Ulstein*. Appellees' Br. 28. But *Lane*'s holding clearly rejects the "approach" adopted by *Ulstein* of relying on

Court's insistence on an "unequivocal expression" of waiver, as it must. Appellants' Br. 19 (collecting cases).[6] Here, the Small Business Act does not contain any "unequivocal expression" of waiver for injunctive relief. To the contrary, the text of the statute, in no uncertain terms, *forbids* injunctive relief. *See* Appellants' Br. 15 U.S.C. 634(b)(1). Legislative history cannot be used to avoid that clear prohibition.

Astria also relies on a collection of lower court cases that are similarly unpersuasive. Astria cites *Dubrow v. Small Bus. Admin.*, 345 F. Supp. 4, 7 (C.D. Cal. 1972). There, the district court surmised that the SBA may be enjoined in appropriate circumstances, but, importantly, the *Dubrow* court did not ultimately enjoin the SBA. 345 F. Supp. at 7–8. Thus, the district court's supposition regarding injunctive relief is *dicta*. And that *dicta* has not since been followed by other courts. Moreover, the actual holding of *Dubrow* weighs against the Bankruptcy Court's injunction. The *Dubrow* court declined to review the SBA's refusal to extend a loan, explaining that "[s]ince the determination of whether to grant a loan is action committed by law to agency discretion, this Court is barred by the A.P.A. from reviewing loan determinations

legislative history to imply a waiver not explicitly provided in statutory text. Appellants' Br. 25.

[6] Astria incorrectly cites *DV Diamond Club of Flint, LLC v. SBA*, 960 F.3d 743 (6th Cir. 2020) as a circuit decision purportedly supporting the Bankruptcy Courts' sovereign immunity analysis. Appellees' Br. 30. But the Sixth Circuit's opinion in *DV Diamond Club*—a non-final, split decision denying SBA's request for a stay pending appeal—did not address sovereign immunity at all.

except to the extent that those determinations involve the failure to perform a ministerial duty." Here, SBA bankruptcy exclusion rule was not merely ministerial.

Astria also relies on *Related Indus. Inc. v. United States*, 2 Cl. Ct. 517 (1983). But, the Court of Claims in *Related Indus*. relied on the same legislative history argument as in *Ulstein* and *Cavalier Clothes*, and thus fails for the same reason. *Id.* at 522. Second, the direct holding of *Related Indus.* relied on the Tucker Act, which does not apply here. *Id*. at 521.

Astria next appears to argue that the Bankruptcy Code implicitly overrules the Small Business Act's bar on injunctive relief. *See* Appellees' Br. 29 (citing 11 U.S.C. §§ 105(a), 106(a) & 525(a)). It does not. First, while 11 U.S.C. § 106 waives immunity to certain enumerated claims under the Bankruptcy Code, including claims under § 525, it does not purport to waive immunity for APA claims. Thus, § 106 provides no waiver for Astria's arbitrary-or-capricious claim under the APA, and is instead only implicated at all if this Court reverses the Bankruptcy Court's denial of Astria's § 525(a) claim. Second, even as to Astria's § 525(a) claim, the waiver in § 106 does not alter the Small Business Act's prohibition against injunctions because §106(a)(4) explicitly limits its sovereign immunity waiver to exclude relief not otherwise available against an agency outside of bankruptcy. *See* 11 U.S.C. § 106(a)(4) ("The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit."); *Kuhl v. U.S.*, 467 F.3d 145 (2006) (where plaintiff failed

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to satisfy IRS's statutory sovereign immunity waiver in 26 U.S.C. § 7433(e), neither district court nor bankruptcy court had jurisdiction to entertain plaintiff's claim under 11 U.S.C. § 524 for willful violation of the bankruptcy discharge). Here, Astria cannot obtain injunctive relief against the SBA under the waiver in § 106(a), because that relief is inconsistent with "the nonbankruptcy law applicable to the [SBA]", namely the Small Business Act, 15 U.S.C. § 634(b). Further, interpreting 11 U.S.C. § 106 to implicitly overrule the Small Business Act's prohibition against injunction would contradict binding Supreme Court and Ninth Circuit precedent requiring an unequivocal expression of waiver in the statutory text and barring waivers by implication. *See* Appellants' Br. 18–19.

II. THE BANKRUPTCY COURT LACKED AUTHORITY TO AWARD INJUNCTIVE RELIEF BECAUSE ASTRIA'S APA CLAIM IS NON-CORE.

The United States' opening brief demonstrated that Astria's APA claim is non-core because it does not depend on the Bankruptcy Code for its existence and could have proceeded in district court. Appellants' Br. 23. Because the APA claim is non-core, the Bankruptcy Court lacked authority to adjudicate it. *Id.*

Since filing the United States' opening brief, the District Court for the Western District of Washington in *Fishing Vessels Owners Marine Ways, Inc. v. SBA*, Civ. No. 20-1016-RAJ (W.D. Wash. Nov. 4, 2020) confirmed that the same APA claim raised here is non-core. *Fishing Vessel*s, Order (Dkt. 5) (attached hereto as Exhibit B). The district court, in granting withdrawal of the reference, explained:

> The primary issue here is whether the SBA overstepped its authority in excluding bankrupt entities from the PPP. This is a non-core matter that requires interpretation of non-bankruptcy law, and as such, should be adjudicated in the district court.

Ex. B (Order at 3).

Astria argues that because the challenged regulation is a bankruptcy exclusion rule, its APA claim must be core. Appellees' Br. 31. But this is the same faulty "but for" logic employed by the Bankruptcy Court, and thus fails for the same reasons. Appellants' Br. 24–25.

Astria also attempts to distinguish the cases rejecting the Bankruptcy Court's "but for" logic, emphasizing that "it cannot be underscored enough: the Appellants' violations of the APA here attack substantive rights provided under title 11." Appellees' Br. 32. First, Astria cites no support or explanation for that argument. *Id.* Astria instead simply goes on to assert the same "but for" reasoning adopted by the Bankruptcy Court. *Id.* at 33 (arguing that the APA claim must be core because "only debtors in bankruptcy could be subject to" the rule). Second, title 11 creates no substantive right to a PPP loan; Astria's claims to a PPP loan instead depend entirely on the CARES Act and its implementing rules, and the procedural cause of action provided under the APA.

Finally, Astria argues that its APA claim is core under 28 U.S.C. § 157(b)(2)(C), authorizing bankruptcy courts to consider "counterclaims by the estate against persons filing claims against the estate." First, and conclusively, this

arguments fails for the simple reason that Astria's APA claim is not a "counterclaim" in any sense of the word. Astria's suit was not filed in response to any suit or claim from the SBA. Indeed, the SBA has filed no claim against the estate and thus is not a "person filing claims against the estate." 28 U.S.C. § 157(b)(2)(C). The cases Astria cites all invoke the United States' right to offset debts owed to agencies. *See* Appellees' Br. 33. None of those cases suggests that a bankruptcy court can exercise authority to resolve any type of lawsuit against an agency as soon as any other federal agency files a proof of claim. And third, if § 157(b)(2)(C) applied to Astria's APA claim—it does not—allowing the Bankruptcy Court to adjudicate the APA claim would raise the same constitutional problem confronted in *Stern v. Marshall*, 564 U.S. 462, 499 (2011) (holding bankruptcy court lacked constitutional authority to adjudicate tort counterclaim that "was in no way derived from or dependent upon bankruptcy law," even though the counterclaim met the standard of § 157(b)(2)(C)).

III. THE BANKRUPTCY COURT ERRED IN HOLDING THAT THE SBA RULEMAKING WAS ARBITRARY OR CAPRICIOUS UNDER THE APA.

The United States' opening brief describes the deferential standard applicable to arbitrary-or-capricious challenges under 5 U.S.C. § 706(2)(A). Appellants' Br. 25–26. It also explains how the SBA's rationale for its bankruptcy exclusion "may reasonably be discerned" from its published interim final rules. Appellants' Br. 29–35. Those rules demonstrate that the SBA "streamlin[ed]" its traditional case-by-case underwriting under the § 7(a) lending program—with its long-standing consideration

of bankruptcy status—into a bright-line question on the application form that could be administered quickly, allowing the SBA to process millions of loan applications in a matter of weeks. *Id.* at 29–30. The bankruptcy exclusion thus satisfied the purpose of the CARES Act to distribute loans expeditiously to meet an exigent need, while still attending, to the extent practicable, to the "sound value" of those loans, as required by the Small Business Act. Appellants' Br. 31. The United States further articulated how the SBA's bankruptcy exclusion does not fail the factors described in *State Farm*. Appellants' Br. 31–33.

Rather than confront these central arguments, Astria's brief adopts the same legal errors made by the Bankruptcy Court, betraying a fundamental misunderstanding of administrative law. Astria otherwise advances a smattering of speculative and false assertions that do not support the Bankruptcy Court's preliminary injunction.

First, just as the Bankruptcy Court did, Astria's brief conflates the relevant standards for adjudicating different APA claims. As explained in the United States' opening brief, Astria's complaint asserted two APA claims. Appellants' Br. 28. The first alleged under 5 U.S.C. § 706(2)(C) that the SBA's bankruptcy exclusion exceeded its statutory authority. Appellants' Br. 28 (citing A031 (Compl.)). A claim under § 706(2)(C) is analyzed under the steps described in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to determine whether the SBA's interpretation of the applicable statutes was permissible. *See* Appellants' Br. 26–27. The Bankruptcy Court, however, did not address that claim. *See* A249 (Hr'g Tr.

103:2–10). And Astria did not assert the claim in its brief as an alternative ground to affirm the Bankruptcy Court's injunction. *See, generally,* Appellees' Br.[7]

The Bankruptcy Court based its order entirely on Astria's second APA claim, under 5 U.S.C. § 706(2)(A), which addresses whether SBA's rulemaking process was arbitrary or capricious. Appellants' Br. 27. Arbitrary-or-capricious claims under § 706(2)(A) are governed by the standard described in *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Appellants' Br. 27. While Astria argues that it is sufficient that the Bankruptcy Court described the *State Farm* standard, Appellees' Br. 34, the Bankruptcy Court plainly conflated that standard with the *Chevron* standard, and then went even further astray by wrongly determining that an even lesser form of deference (*Skidmore*) should apply. Appellants' Br. 26–29. The deferential *State Farm* standard applies, and the Bankruptcy Court failed to correctly follow it. Appellants' Br. 25–26.

Second, Astria's brief otherwise advances a grab-bag of baseless contentions that do not aid its claim.

1. Astria exaggerates the certifications required to obtain a loan, falsely asserting that "literally every applicant must certify that they are concerned they are

[7] Astria contends that the United States agrees that "*Chevron* deference is inapplicable." Appellees' Br. 36 n.23. As described above, while *Chevron* deference *would* apply to Astria's "exceeds authority" claim under § 706(2)(C), that claim is not at issue in this appeal because neither the Bankruptcy Court in its ruling below, nor Astria on appeal, raised the claim to support the preliminary injunction.

going out of business." The CARES Act requires applicants to certify "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." 15 U.S.C. § 636(a)(36)(G)(i)(I). This certification in no way implies that every applicant presents an equal risk of non-payment or misuse of PPP funds.

2. Astria argues that the SBA claims "every debtor in Chapter 11 is more risky than [entities] not in bankruptcy before the Covid-19 crisis." Appellees' Br. 25. But the SBA made no such assertion. Moreover, the SBA does not need to demonstrate that *every* bankrupt debtor is riskier than *every* non-bankrupt entity. The SBA's rule need not perfectly capture all entities' risk with such precision. *Schuessler*, 2020 WL 2621186, at *12 ("That the SBA chose to use a broad and blunt instrument—flatly excluding bankrupt debtors from PPP participation—does not make the SBA's rule arbitrary and capricious. The law does not require precision or perfection, particularly at the expense of other valid and competing Congressional goals."). The law only requires an agency to reasonably consider the factors Congress intended. Here, the published interim final rules make clear that SBA's considered risk of repayment, risk of misuse, and the need to process loans expeditiously. Appellants' Br. 29–31. Those are exactly the factors Congress intended. Appellants' Br. 31. The law does not require more.

3. Astria incorrectly states that the Third Interim Final Rule contradicts any concern that PPP loans "must be creditworthy" and of "sound value." Appellees' Br.

35. But Astria cites a portion of the Third Interim Final Rule addressing PPP *lenders'* obligations. *See supra* 6. It does not purport to disavow the SBA's statutory "sound value" obligation. *See supra* 6–7. Rather than disavowing that statutory requirement, the interim final rules confirm that the SBA was following it. The First Interim Final Rule clearly states that underwriting will be assessed through the bright-line questions on the application form. Appellants' Br. 8. And the Fourth Interim Final Rule makes clear that the SBA was concerned with risk of nonpayment or misuse of funds. *Id.* at 8–9.

4. In a footnote, Astria falsely and baselessly claims that SBA's concern with the risk of lending to bankrupt entities is "simply made up." Appellees' Br. 35 n.22. To support this dramatic allegation of bad faith, Astria merely cites the fact that a handful of debtors appear to have dismissed their bankruptcy cases to obtain a PPP loan. Astria then concludes—without any factual basis—that the SBA does not "actually care" that such debtors could obtain PPP loans in this fashion. First, Astria's allegation of bad faith cannot be sustained on mere conjecture. Second, the fact that, after the SBA had established the bankruptcy exclusion rule, a handful of debtors may have exited bankruptcy to obtain a loan does not render SBA's decision-making arbitrary or capricious. The bankruptcy exclusion reflects a valid accommodation of the exigencies that necessitated streamlining the underwriting process through the use of plainly rational criteria. That is more than adequate to withstand review under the deferential arbitrary or capricious standard. *See* Appellants' Br. 29–33.

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5. Astria incorrectly states that "the repayment liability is $0.00" and thus there is no risk of nonpayment. In doing so, Astria mistakenly assumes all PPP loans will be forgiven in their entirety. But that is plainly untrue. *See supra* 18.[8] Given Congress's clear intention that some PPP loans *will* be subject to a repayment obligation, it was reasonable for SBA to be address repayment risk. Further, that some PPP loans may eventually be forgiven does not mean that the SBA could disregard any concern with the "sound value" of those loans. Unless and until forgiveness is provided, borrowers have a repayment obligation, not of $0.00, but of 100 percent.

6. Astria demonstrates a misunderstanding of administrative review, faulting the SBA for not complying with the Bankruptcy Court's admonition that SBA produce a witness to testify about the bankruptcy exclusion. Appellees' Br. 39. But such discovery is not permitted under the APA; review must instead be based on the administrative record. *See Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (holding review must be limited to administrative record and prohibiting discovery where allegations of agency's bad faith were "speculative"). Astria further argues that the SBA's reference to assembling the administrative record demonstrates an impermissible post-hac rationalization. Appellees' Br. 39. But the fact that the SBA assembled its administrative record after the bankruptcy rule was implemented is neither surprising nor improper. An agency "can offer a fuller explanation of [its]

[8] Forgiveness conditions are also less generous than Astria contends—forgiveness is not a forgone conclusion for borrowers. *See supra* 8.

reasoning" after taking an action so long as the explanation reflects the agency's reasoning "*at the time of the agency action*." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (emphasis added). And even an "amplified articulation of a prior conclusory observation "is permissible." *Id.* What the APA prohibits is a decision *made* for one reason that the agency attempts to *justify* with another later. *Id.* at 1909–10. The administrative record before the Bankruptcy Court consisted of the SBA's published interim final rules. Those rules provide a sufficient basis to determine that the SBA's bankruptcy exclusion was not arbitrary-or-capricious. *See* Appellants' Br. 29–33.

CONCLUSION

For the foregoing reasons, along with those stated in the United States' opening brief, this Court should vacate the Bankruptcy Court's preliminary injunction.

December 4, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. Bankr. R. 8016(d)(2)(A)(i) because, excluding the parts of the document exempted by the Rule 8015(g), this document contains 9,185 words.

December 4, 2020

/s/ Kevin P. VanLandingham
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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2020, I electronically filed the United States' APPELLANTS RESPONSE AND REPLY BRIEF with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Kevin P. VanLandingham
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Commercial Litigation Branch
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United States Department of Justice

EXHIBIT A

In The Matter Of:

WEATHER KING HEATING & AIR, INC. v.
U.S. SMALL BUSINESS ADMINISTRATION

May 21, 2020

LEGAL ELECTRONIC RECORDING, INC.
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Min-U-Script® with Word Index

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION (AKRON)

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                                *
IN RE:                          *
                                *
WEATHER KING HEATING & AIR,     *    Case No. 19-52957
INC.                            *
    Debtor.                     *
* * * * * * * * * * * * * * * * *
WEATHER KING HEATING & AIR,     *
INC.                            *
    Plaintiff,                  *    Adv. No. 20-5023
        v.                      *
U.S. SMALL BUSINESS             *
ADMINISTRATION, et al.          *
    Defendants.                 *
* * * * * * * * * * * * * * * * *
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TRANSCRIPT OF HEARING HELD MAY 21, 2020
BEFORE THE HONORABLE ALAN M. KOSCHIK
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

STEVEN HEIMBERGER, ESQ.
TODD MAZZOLA, ESQ.
For the Debtor/Plaintiff

MARC SACKS, ESQ.
SUZANA KOCH, ESQ.
For the Defendants

KATE BRADLEY, ESQ.
For the U.S. Trustee

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1 with the agency's internal operation."
2 DV Diamond Club and Camelot Banquet Rooms
3 thereby held that an action under the APA seeking to
4 declare the SBA's PPP regulations inconsistent with the
5 CARES Act provisions creating the PPP and further
6 enjoining the SBA from enforcing those regulations are
7 not prohibited by the anti-injunction exception found
8 in the SBA's own sovereign immunity waiver statute.
9 For these reasons the Court finds that the
10 SBA has waived its sovereign immunity as to the claims
11 raised by the Plaintiff/Debtor in this case and that
12 the Court has jurisdiction to consider the claims
13 seeking injunctive relief within its related-to
14 bankruptcy jurisdiction.
15 The parties -- turning to the legal standard
16 for injunctive relief, the parties agree that the four
17 factors determine whether the Court may grant a
18 preliminary injunction. They are whether the party
19 moving for the injunction faces immediate irreparable
20 harm, the likelihood that the movant will succeed on
21 the merits of its claim, the balance of the equities
22 between the parties and the public interest.
23 Let's start with the likelihood of success on
24 the merits.
25 The Court concludes that the Plaintiff/Debtor

1 is not likely to succeed on the merits with respect to
2 Count 1, which alleges a violation of Section 525(a)
3 and discriminatory treatment by the SBA. However, the
4 Court does conclude that the Plaintiff/Debtor is likely
5 to succeed on the merits of its claim in Count 2 of the
6 complaint, which asserts that the SBA exceeded its
7 statutory authority and promulgated regulations in
8 excess of its statutory authority under the CARES Act,
9 in violation of the APA, when it imposed the bankruptcy
10 debtor exclusion in its administration of the PPP.
11 The Plaintiff/Debtor also contends in Count 2
12 that the SBA relied inappropriately on retroactive rule
13 making in order to invalidate the PPP award advanced to
14 the Debtor in this case.
15 Finally, the Court concludes that in
16 consideration of the motion for a preliminary
17 injunction, it need not consider the likelihood of the
18 Plaintiff/Debtor's success under Count 3 of its
19 complaint, asserting under the APA that the SBA's
20 regulations were arbitrary, capricious and an abuse of
21 discretion.
22 All right. Now I'd like to discuss why the
23 Debtor is unlikely to succeed on the merits of its
24 Section 525 claim.
25 The Court concludes for purposes of

1 considering the motion for preliminary injunction that
2 the Plaintiff/Debtor is unlikely to succeed on the 525
3 claim against the SBA. The Court is persuaded that
4 Section 525 prevents discrimination against bankruptcy
5 debtors by governmental units with respect to a narrow
6 set of governmental actions.
7 The statute demands that "a governmental unit
8 may not deny, revoke, suspend or refuse to renew a
9 license, permit, charter, franchise or other similar
10 grant to, condition such a grant to, discriminate with
11 respect to such a grant against, deny employment to,
12 terminate the employment of, or discriminate with
13 respect to the employment against a person that is or
14 has been a bankruptcy debtor."
15 The Debtor seizes upon the reference to the
16 word "grant" and argues that the PPP is not so much a
17 loan as it is a grant program, wherein an applicant can
18 with ease obtain loan forgiveness, assuming its own
19 good faith. The applicant need only clear a very low
20 bar to achieve this result by assuring that the funds
21 are used primarily for payroll expenses, along with
22 other urgent expenses designed to allow a business to
23 survive a brief period of time during the pending
24 COVID-19 pandemic, such as rent, mortgage, interest and
25 utility expenses.

1 The Court tends to agree with the
2 Plaintiff/Debtor's characterization of the PPP and
3 disagrees with the SBA that it is simply a loan, with a
4 possible forgiveness contingency. However, the Section
5 525 claim depends on not merely a broad reading of the
6 PPP, but also a broad interpretation of Section 525(a).
7 The SBA noted in its brief that a variety of courts
8 rely on the interpretative principle of, and I will now
9 mangle Latin, ejusdem generis, which holds that a
10 general term following a specific list can apply only
11 to things similar to the list.
12 This Court recently had the opportunity to
13 apply a similar canon of construction known as noscitur
14 a sociis, which may be translated into English as "a
15 word is known by the company it keeps," and which
16 demands that terms contained in a list be given related
17 meaning.
18 It has been observed that the specific list
19 in Section 525(a) refers to privileges of citizens to
20 exercise their livelihood, such as obtaining building
21 permits, state contracts or liquor licenses, or
22 exercise a personal freedom, such as driving a car. In
23 re Elter, 95 B.R. 618 at 622, Bankruptcy, Eastern
24 District of Wisconsin, 1989.
25 Indeed, the Sixth Circuit has addressed this

1 issue directly. In Toth versus Michigan State Housing
2 Development Authority, 136 F.3d 477, Sixth Circuit,
3 1998, the Court rejected a former debtor's claim that
4 the denial of an application for a low-income home
5 improvement loan, based upon a recent bankruptcy
6 discharge, was discriminatory under Section 525(a).
7 Toth held that "the court of appeals that have
8 approached the question have read the statute's reach
9 narrowly, focused on the specific language of the
10 statute." That's at Pages 479 and 80. Toth concluded
11 that the target of Section 525(a) is the government's
12 role as a gatekeeper in determining who may pursue
13 certain livelihoods. It is directed at governmental
14 entities that might be inclined to discriminate against
15 former bankruptcy debtors in a manner that frustrates
16 the fresh start policy of the Bankruptcy Code by
17 denying them permission to pursue certain occupations
18 or endeavors. The intent of Congress incorporated into
19 the plain language of Section 525(a) should not be
20 transformed by employing an expansive understanding of
21 the fresh start policy to insulate a debtor from all
22 adverse consequences of a bankruptcy filing or
23 discharge.
24 Based on these authorities, the Court
25 concludes that the Plaintiff/Debtor is unlikely to

1 succeed on the merits of a Section 525(a) claim, so as
2 to invalidate the SBA regulations concerning the
3 bankruptcy exclusion to the PPP on grounds of
4 bankruptcy discrimination.
5 Turning to the APA claims, the Debtor is
6 likely to succeed on the merits of those claims. The
7 Debtor's claims under the APA are based on Counts 2 and
8 3 of the Plaintiff/Debtor's complaint in this adversary
9 proceeding. In Count 2 the Plaintiff contends that the
10 SBA bankruptcy exclusion regulation exceeds the SBA's
11 statutory authority under the CARES Act, and
12 furthermore, that even the SBA's own regulation as of
13 the time its APA application was filed, approved and
14 funded, did not contain such an exclusion.
15 Rather, the bankruptcy exclusion was
16 formalized by a regulation first published several days
17 after the funding of the Debtor's PPP loan or grant.
18 The Plaintiff/Debtor contends that the SBA is not
19 entitled, by the terms of its own regulations, to apply
20 new regulations retroactively. The Court finds that
21 the Debtor is likely to succeed on the merits of these
22 claims under Count 2.
23 The Plaintiff/Debtors argue that the SBA's
24 regulation in place as of the sudden commencement of
25 the PPP under the CARES Act did not include a strict

EXHIBIT B

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FISHING VESSEL OWNERS MARINE WAYS, INC., and SEATTLE MACHINE WORKS,

Plaintiffs,

v.

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

Defendants.

No. 2:20-cv-01016-RAJ

ORDER GRANTING MOTION FOR WITHDRAWAL OF REFERENCE

I. INTRODUCTION

This matter comes before the Court on Defendants' Motion to Withdraw the Reference. Dkt. # 1-1 at 6-15. Plaintiffs filed a response disagreeing with Defendants arguments but do not oppose the motion. Dkt. # 1-1 at 18-19. For the reasons stated below, the Court **GRANTS** the motion.

II. LEGAL STANDARD

"All cases under Title 11, and all proceedings arising under Title 11 or arising in

1 or related to a case under Title 11" are automatically referred to the bankruptcy court.
2 W.D. Wash. Local Civ. R. 87(a). An adversarial proceeding in bankruptcy court may be
3 withdrawn for reference pursuant to 28 U.S.C. § 157(d):

4 > The district court may withdraw, in whole or in part, any case or proceeding
5 > referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a
6 > proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating
7 > organizations or activities affecting interstate commerce.

8 28 U.S.C. § 157(d).

9 A bankruptcy court's statutory authority to enter judgment in a particular
10 proceeding depends on whether that proceeding is a "core proceeding" under Section
11 157(b)(1). Thus, in assessing whether cause is shown, a district court "should first
12 evaluate whether the claim is core or non-core, since it is upon this issue that questions of
13 efficiency and uniformity will turn." *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d
14 Cir. 1993). Non-core matters are "[a]ctions that do not depend on bankruptcy laws for
15 their existence and that could proceed in another court." *Sec. Farms v. Int'l Bhd. of*
16 *Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997).

17 Once a district court determines whether the claims are core or non-core, the Ninth
18 Circuit instructs district courts to consider "the efficient use of judicial resources, delay
19 and costs to the parties, uniformity of bankruptcy administration, the prevention of forum
20 shopping, and other related factors." *Sec. Farms*, 124 F.3d at 1008 (citing *In re Orion*
21 *Pictures Corp.*, 4 F.3d at 1101). Where non-core issues predominate, withdrawal may
22 promote efficiency because a single proceeding in the district court could avoid
23 unnecessary costs implicated by the district court's de novo review of non-core
24 bankruptcy determinations. *Sec. Farms*, 124 F.3d at 1008–09. District courts have
25 discretion to determine whether the moving party has shown sufficient cause to justify
26 granting a motion to withdraw the reference. *In re Cinematronics, Inc.*, 916 F.2d at 1451;
27 *In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 215 (C.D. Cal. 2014).

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III. DISCUSSION

Plaintiffs Fishing Vessel Owners Marine Ways, Inc. and Seattle Machine Works (collectively "Plaintiffs") brought an adversary proceeding against Defendants United States Small Business Administration ("SBA") and Jovita Carranza, in her capacity as Administrator for the SBA, (collectively "Defendants") in the United States Bankruptcy Court of the Western District of Washington ("Bankruptcy Court"). Dkt. # 1-1 at 18. Plaintiffs claim, among other things, that the SBA exceeded its statutory authority or acted arbitrarily or capriciously in violation of the Administrative Procedures Act ("APA") when it issued an emergency rule excluding bankrupt entities from the Paycheck Protection Program ("PPP"). *Id.* at 7. Plaintiffs assert that the Bankruptcy Court has statutory and constitutional jurisdiction to determine these claims. *Id.* at 18. Plaintiffs claim that the APA claims are "statutorily 'core' pursuant to 28 U.S.C. § 157(b)(2)(A) because they arise in [a] matter concerning the administration of this bankruptcy, and therefore, the Bankruptcy Court has subject matter jurisdiction." *Id.* at 18.

Defendants claim that Congress had explicitly delegated authority to the SBA Administrator to issue rules excluding bankrupt entities through the Coronavirus Aid, Relief, and Economic Stimulus ("CARES") Act and Small Business Act. *Id.* at 7. They argue that resolving the dispute requires the interpretation of new non-bankruptcy law, specifically, the CARES Act, and the emergency rules issued by the SBA as authorized by the CARES Act. *Id.* Such a question involving interpretation of non-bankruptcy law, they assert, "should be heard and resolved in the district court." *Id.* at 14.

The Court finds agrees and finds that withdrawal is warranted in this case. The primary issue here is whether the SBA overstepped its authority in excluding bankrupt entities from the PPP. This is a non-core matter that requires interpretation of non-bankruptcy law, and as such, should be adjudicated in the district court. The Court therefore grants the motion.

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IV. CONCLUSION

Based on the foregoing reasons, the Court **GRANTS** Defendants' Motion for Withdrawal of Reference. Dkt. # 1-1 at 6-15.

DATED this 4th day of November, 2020.

The Honorable Richard A. Jones
United States District Judge