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## [Agaña v. The U.S. Small Bus. Admin. \(In re Archbishop of Agaña\)](#)

United States Bankruptcy Court for the District of Guam

February 23, 2021, Decided

Bankruptcy Case No. 19-00010, Chapter 11, Adversary Proceeding, Case No. 20-00002

### Reporter

2021 Bankr. LEXIS 460 \*

In re: ARCHBISHOP OF AGAÑA, a Corporation Sole, Debtor. ARCHBISHOP OF AGAÑA, a Corporation Sole, Plaintiff, vs. The U.S. Small Business Administration and Tami Perriello,<sup>1</sup> solely as the (Acting) Administrator of the U.S. Small Business Administration, Defendants.

## Case Summary

### Overview

**HOLDINGS:** [1]-Chapter 11 debtor failed to state a claim as a matter of law against the SBA for declaratory and injunctive relief because the SBA's interpretation that bankruptcy debtors were not eligible for loans under the Paycheck Protection Program (PPP) was reasonable, so it did not exceed its statutory authority when it excluded bankruptcy debtors from the PPP because Congress put the PPP in § 7(a) of the Small Business Act, which had a sound value requirement that applied to all its loans; [2]-The SBA's decision was not arbitrary or capricious because the creation of the PPP and its implementation were under extraordinary and unusual circumstances at a time of global pandemic; [3]-The SBA did not violate 11 U.S.C.S. § 525(d) as a matter of law as its anti-discrimination provisions did not apply to PPP loan guarantees.

### Outcome

Motion for summary judgment granted; cross motion for summary judgment denied.

## LexisNexis® Headnotes

Banking Law > ... > Banking & Finance > Federal Acts > Home Owners' Loan Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

### [HNI](#) **Federal Acts, Home Owners' Loan Act**

The Small Business Administration (SBA) is empowered to make loans to any qualified small business, either directly or through financial institutions on an immediate or deferred (guarantee) basis. 15 U.S.C.S. § 636(a). Among the statutory requirements of an SBA loan is that all loans shall be of such sound value or so secured as reasonably to assure repayment. 15 U.S.C.S. § 636(a)(6). In considering whether a loan applicant is creditworthy, SBA established a criteria that includes, among other things, the applicant's character, reputation, credit history, strength of the business, and ability to repay the loan with earnings from the business. [13 C.F.R. § 120.150\(a\)-\(i\)](#).

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits &

<sup>1</sup>Fed. R. Civ. P. 25(d) provides that a public officer's successor is automatically substituted as a party.

Duties > Small Business Debtors

### [HN2](#) **Federal Acts, Small Business Act**

The Small Business Administration (SBA) Administrator may guarantee Paycheck Protection Program (PPP) loans under the same terms, conditions, and processes as a loan made under Section 7(a) of the Small Business Act. 15 U.S.C.S. § 636(a)(36)(B).

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

### [HN3](#) **Federal Acts, Small Business Act**

A lender approved to make Small Business Act § 7(a) loans are delegated the authority by the Small Business Administration (SBA) to make and approve Paycheck Protection Program loans. 15 U.S.C.S. § 636(a)(36)(F)(ii)(I). In evaluating the eligibility of a borrower, a lender considers whether the borrower was in operation on February 15, 2020, and had employees for whom the borrower paid salaries and payroll taxes. 15 U.S.C.S. § 636(a)(36)(F)(ii)(II)(aa) and (bb)(AA). A borrower (eligible recipient) is required to certify, inter alia, that its business was affected by the current economic conditions and that such funds will be used for payroll and other certain expenses. 15 U.S.C.S. § 636(a)(36)(G)(i).

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

### [HN4](#) **Federal Acts, Small Business Act**

A Paycheck Protection Program (PPP) loan is forgiven if certain criteria are met. 15 U.S.C.S. §§ 9005(b)(1)-(4) and 9005(d). Any amounts that are forgiven under the PPP, plus any interest, are remitted by the SBA to the lender. 15 U.S.C.S. § 9005(c)(3). Amounts that are not forgiven will continue to be guaranteed by Small Business Administration. 15 U.S.C. § 636(a)(36)(K).

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

### [HN5](#) **Federal Acts, Small Business Act**

To implement the Paycheck Protection Program, Congress granted emergency rulemaking authority to the Administrator of the Small Business Administration (SBA), authorizing the Administrator to issue regulations to carry out the loan program without regard to the notice requirements under [5 U.S.C.S. § 553\(b\)](#). [15 U.S.C.S. § 9012](#). SBA had 15 days after March 27, 2020, to issue said regulations. [§ 9012](#). At the time the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), was passed in March 2020, a "covered loan" was a loan made under the PPP between February 15, 2020 and June 30, 2020. 15 U.S.C.S. § 636(a)(36)(A)(ii)-(iii).

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

### [HN6](#) **Federal Acts, Small Business Act**

The First Interim Final Rule issued implementing the Paycheck Protection Program (PPP) did not address the eligibility of bankruptcy debtors but required applicants to submit Small Business Administration Form 2483 ([Paycheck Protection Program Application Form](#)). [85 Fed. Reg. 20811 \(April 15, 2020\)](#). Therein, if the applicant answers "Yes" to the question of being involved in any active bankruptcy, then the PPP loan will not be approved.

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

### [HN7](#) **Debtor Benefits & Duties, Small Business**

**Debtors**

The Fourth Interim Final Rule issued implementing the Paycheck Protection Program (PPP) specifically provides that bankruptcy debtors are not eligible for PPP loans.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

**[HN8](#) [↓] Entitlement as Matter of Law, Appropriateness**

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(a\)](#).

Administrative Law > Judicial Review > Administrative Record

**[HN9](#) [↓] Judicial Review, Administrative Record**

For APA claims, judicial review is limited to the administrative record, [5 U.S.C.S. § 706](#), and the scope of review is typically focused on the administrative record in existence at the time of the agency decision and does not encompass any part of the record that is made initially in the reviewing court. Thus, the usual standard set forth in [Fed. R. Civ. P. 56\(c\)](#) does not apply.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Exceeding Statutory Authority

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

**[HN10](#) [↓] Standards of Review, Arbitrary & Capricious Standard of Review**

The APA requires that the court hold unlawful and set aside agency action, findings, and conclusions found to be— in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. [5 U.S.C.S. § 706\(2\)\(C\)](#). The U.S. Supreme Court sets forth a two-step test for judicial review of administrative agency interpretations of federal law. The court must first determine whether Congress has directly spoken to the question at issue. If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. An agency's interpretation is permissible, unless it is arbitrary, capricious, or manifestly contrary to the statute.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

**[HN11](#) [↓] Federal Acts, Small Business Act**

Under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress granted emergency rulemaking authority to the Small Business Administration without the notice requirements. [15 U.S.C.S. § 9012](#).

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

**[HN12](#) [↓] Federal Acts, Small Business Act**

Paycheck Protection Program (PPP) loans are administered by the Small Business Administration (SBA). The statutory provisions governing the PPP are incorporated into Section 7(a) of the Small Business Act, which concerns SBA's lending authority. Within Section 7(a), there are mechanisms

already in place governing lending practices by SBA. This includes the requirement that the loan must be of sound value. 15 U.S.C.S. § 636(a)(6).

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

### [HN13](#) **Debtor Benefits & Duties, Small Business Debtors**

15 U.S.C.S. § 636(a)(36)(D)(i) is properly understood not as setting forth the exclusive criteria for participation in the Paycheck Protection Program, but merely as expanding the size limitations that would otherwise have been in place.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

### [HN14](#) **Standards of Review, Arbitrary & Capricious Standard of Review**

A court must determine whether an agency's interpretation is based on a permissible construction of the statute. An agency's interpretation is permissible, unless it is arbitrary, capricious, or manifestly contrary to the statute. A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Small Business Debtors

### [HN15](#) **Federal Acts, Small Business Act**

Congress put the Paycheck Protection Program (PPP) § 7(a) of the Small Business Act, which has a sound value requirement that applies to all § 7(a) loans. 15 U.S.C.S. § 636(a)(6). In that way, it identified manifestly competing interests that it intended to accommodate. But it did not accommodate them with specificity when it came to whether

bankruptcy debtors are eligible for PPP loans. It left that to the Small Business Administration (SBA). The SBA's interpretation of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), and § 7(a) was a reasonable accommodation of those interests. One way it reconciled the competing interests was by replacing its usual lending criteria with a simple bright-line proxy based on bankruptcy status. Unlike courts, agencies possess invaluable technical expertise and, by virtue of their accountability to the President, are a proper forum to make policy choices based on unresolved competing interests. Given all of the circumstances and the urgency with which it was forced to act, the SBA's interpretation was reasonable. The U.S. Supreme Court did not say this is an inevitable interpretation of the statute; but it is assuredly a permissible one.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

### [HN16](#) **Standards of Review, Arbitrary & Capricious Standard of Review**

The APA requires that the court hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary capricious, an abuse of discretion, or otherwise not in accordance with the law. [5 U.S.C.S. § 706\(2\)\(A\)](#). This is a highly deferential standard under which there is a presumption that the agency's action is valid if a reasonable basis exists for its decision. Under such deferential review, the scope is narrow, and a court may not substitute its judgment for that of the agency.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

### [HN17](#) **Standards of Review, Arbitrary & Capricious Standard of Review**

An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. A rule is arbitrary or capricious if the agency has (1) relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) 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.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

### [HN18](#) [↓] **Federal Acts, Small Business Act**

The First Interim Final Rule for the Paycheck Protection Program waives the requirement of [13 C.F.R. § 120.150](#) (the Small Business Administration's lending criteria).

Administrative Law > Judicial Review > Standards of Review

### [HN19](#) [↓] **Judicial Review, Standards of Review**

A court must uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Administrative Law > Agency Adjudication > Review of Initial Decisions

### [HN20](#) [↓] **Agency Adjudication, Review of Initial Decisions**

An agency is also not generally required to consider all policy alternatives in reaching a decision.

Banking Law > ... > Banking & Finance > Federal Acts > Small Business Act

Public Contracts Law > Business Aids & Assistance > Small Businesses

### [HN21](#) [↓] **Federal Acts, Small Business Act**

Congress created the Paycheck Protection Program (PPP) as an amendment to the Small Business Administration's pre-existing loan program and both the statute and agency regulations refer to the funds distributed as "loans." The PPP loans are made through private lenders and participants sign promissory notes, subject to SBA guarantees. While the loan may be forgiven, it is not an automatic forgiveness. The borrower would have to apply for forgiveness, and the loan is only forgiven if certain criteria are met. 15 U.S.C.S. § 9005(b)(1)-(4) and 9005(d). Had Congress intended for 11

U.S.C.S. § 525 to apply to PPP loan guarantees, it would have stated so expressly in the Consolidated Appropriations Act, 2021.

Business & Corporate  
Compliance > ... > Consideration > Enforcement of Promises > Forbearance

### [HN22](#) [↓] **Enforcement of Promises, Forbearance**

11 U.S.C.S. § 525(d) provides anti-discrimination on the foreclosure moratorium and right to request forbearance ([15 U.S.C.S. § 9056](#)); the forbearance of mortgage payments for multifamily properties ([15 U.S.C.S. § 9057](#)); and the temporary moratorium on eviction filings ([15 U.S.C.S. § 9058](#)). Had Congress intended for § 525 to apply to Paycheck Protection Program loan guarantees, it would have stated so expressly in the Consolidated Appropriations Act, 2021.

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For Sisters of Mercy Entities, Interested Party [\*4] (1:19bk00010): Duncan G. McCully, The Law Offices of Duncan G. McCully, Hagatna, GU.

For Victim M.T.D., Creditor (1:19bk00010): Charles H. McDonald, II, McDonald Law Office, Hagatna, GU.

For The Continental Insurance Company, as successor by merger to Commercial Insurance Company of Newark, New Jersey,, Interested Party (1:19bk00010): David Christian, II, David Christian Attorneys LLC, Mission, KS; William Michael Fitzgerald, Law Office of William H. Fitzgerald, Saipan, MP.

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For Archbishop of Agana, a Corporation Sole, Most Rev. Michael Jude Byrnes, Coadjutor Archbishop of Agana, Plaintiff (1:20ap2): Bruce A. Anderson, Elsaesser Anderson, Chtd., Coeur d'Alene, ID; John C. Terlaje, LEAD ATTORNEY, Attorney at Law, Hagatna, GU.

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For Jovita Corranza, U.S. Small Business Administration, Defendants (1:20ap2): Daniel Jeffrey Martin, Washington, DC; Jessica F. Wessling, U.S. Attorney's Office, Hagatna, GU.

For Boy Scouts of America, Boy Scouts of America Aloha Council Chamorro District, Interested Party (1:19bk00010): Jessica C.K. Boelter, Sidley Austin LLP, New York, NY; G.

**Judges:** Frances M. Tydingco-Gatewood, Chief United States Bankruptcy Judge.

**Opinion by:** Frances M. Tydingco-Gatewood

## Opinion

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### DECISION AND ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Before the court is Defendants' Motion for Summary Judgment, ECF No. 34, and [\*5] Plaintiff's Cross Motion for Summary Judgment, ECF No. 35. On December 4, 2020, the parties appeared before the court for a hearing on said motions. Thereafter, further briefing was ordered. For the reasons stated herein, the court hereby **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Cross Motion for Summary Judgment.

#### I. PROCEDURAL BACKGROUND

On June 2, 2020, Plaintiff Archbishop of Agaña, a chapter 11 debtor, filed a Complaint against the U.S. Small Business Administration and the Administrator of the U.S. Small Business Administration in her official capacity (collectively, the "SBA" or "Defendants"). Plaintiff seeks declaratory and injunctive relief against Defendants based on the [Administrative Procedures Act \("APA"\)](#) (Counts 1 and 2), and Section 525 of the Bankruptcy Code (Count 3). Plaintiff also seeks a writ of mandamus under [28 U.S.C. § 1361](#) (Count 4).<sup>2</sup>

The factual basis of the Complaint is that SBA has set a criteria that excludes those in bankruptcy from qualifying for the Paycheck Protection Program ("PPP"). Accordingly, when Plaintiff attempted to obtain PPP loans in May 2020, the loan application was denied by a bank.

On June 16, 2020, Plaintiff filed a motion for preliminary injunction. The court granted [\*6] said motion. Defendants have now filed their motion for summary judgment,<sup>3</sup> and Plaintiff subsequently filed its cross motion for summary judgment. The court heard the motions on December 4, 2020. Thereafter, a case this court heavily relied on when it made its

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<sup>2</sup> At the December 4, 2020 hearing, Plaintiff orally withdrew the request for a writ of mandamus.

<sup>3</sup> One of Defendants' arguments is that injunctive relief is not available pursuant to [15 U.S.C. § 634\(b\)](#). The court need not address this issue, because the court finds for Defendants.

preliminary injunction decision was overturned by the United States Court of Appeals for the Eleventh Circuit on December 22, 2020. See [In re Gateway Consultants, P.A., 983 F.3d 1239 \(11th Cir. 2020\)](#). This court asked for further briefing from the parties no later than January 8, 2021. A Notice of Supplemental Authority was filed by Defendants on January 28, 2021.

As the court had recognized in its decision granting the preliminary injunction, ECF No. 26, bankruptcy and district courts across the nation are dealing with the same legal issues that are currently before this court. Decisions are split among the courts. Prior to the Eleventh Circuit's decision, no other appellate courts have decided on these issues. The Eleventh Circuit's decision is the first, most recent, and highest authority available to date.

#### II. FACTUAL BACKGROUND

##### A. SBA, PPP and the CARES Act

[HNI](#)[↑] SBA is "empowered" to make loans to any qualified small business, either directly or through financial institutions on an immediate [\*7] or deferred (guarantee) basis. 15 U.S.C. § 636(a). Among the statutory requirements of an SBA loan is that all loans "shall be of such sound value or so secured as reasonably to assure repayment[.]" 15 U.S.C. § 636(a)(6). In considering whether a loan applicant is "creditworthy," SBA established a criteria that includes, among other things, the applicant's character, reputation, credit history, strength of the business, and ability to repay the loan with earnings from the business. [13 C.F.R. § 120.150\(a\)-\(i\)](#). SBA's Section 7(a) loan application form, Form 1919, asks the applicant if it has ever filed for bankruptcy.

When the PPP was created, Congress added the loan program under 15 U.S.C. § 636(a), commonly known as the Section 7(a) of the Small Business Act. CARES Act<sup>4</sup> § 1102(a). [HNI](#)[↑] The SBA "Administrator may guarantee [PPP loans] under the same terms, conditions, and processes as a loan made under [Section 7(a)]." 15 U.S.C. § 636(a)(36)(B). An eligible recipient of the PPP may use the loan to cover payroll and other expenses, in addition to the existing allowable uses of the loan under Section 7(a). 15 U.S.C. § 636(a)(36)(F)(i). Under the PPP, Congress also increased the eligibility for certain small businesses and organizations, e.g., extending the PPP loans to nonprofit organizations, veterans

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<sup>4</sup> The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (the "CARES Act").

organizations, and Tribal businesses; and relaxing the size limitation. 15 U.S.C. § 636(a)(36)(D).

[HN3](#)<sup>[↑]</sup> A lender [\*8] approved to make Section 7(a) loans are delegated the authority by SBA to make and approve PPP loans. 15 U.S.C. § 636(a)(36)(F)(ii)(I). In evaluating the eligibility of a borrower, a lender considers whether the borrower was in operation on February 15, 2020, and had employees for whom the borrower paid salaries and payroll taxes. 15 U.S.C. § 636(a)(36)(F)(ii)(II)(aa) and (bb)(AA). A borrower ("eligible recipient") is required to certify, *inter alia*, that its business was affected by the current economic conditions and that such funds will be used for payroll and other certain expenses. 15 U.S.C. § 636(a)(36)(G)(i).

The PPP loan is 100 percent guaranteed by SBA. 15 U.S.C. § 636(a)(2)(F). [HN4](#)<sup>[↑]</sup> The loan is forgiven if certain criteria are met. 15 U.S.C. §§ 9005(b)(1)-(4) and 9005(d). Any amounts that are forgiven under the PPP, plus any interest, are remitted by the SBA to the lender. 15 U.S.C. § 9005(c)(3). Amounts that are not forgiven will continue to be guaranteed by SBA. 15 U.S.C. § 636(a)(36)(K).

[HN5](#)<sup>[↑]</sup> To implement the PPP, Congress granted "emergency rulemaking authority" to the Administrator of the SBA, authorizing the Administrator to "issue regulations to carry out" the loan program "without regard to the notice requirements under [section 553\(b\)](#) of Title 5." [15 U.S.C. § 9012](#). SBA had 15 days after March 27, 2020, to issue said regulations. *Id.* At the time the CARES Act was passed in March 2020, the "covered loan" was a loan made under [\*9] the PPP between February 15, 2020 and June 30, 2020. 15 U.S.C. § 636(a)(36)(A)(ii)-(iii).

### B. SBA's Interim Rules

Pursuant to the authority granted to it by Congress, SBA issued four interim final rules on the PPP program. Of relevance in this case are the first and fourth interim final rules. [HN6](#)<sup>[↑]</sup> The First Interim Final Rule did not address the eligibility of bankruptcy debtors but required applicants to submit an "SBA Form 2483 (Paycheck Protection Program Application Form)." [85 FR 20811 \(April 15, 2020\)](#). Therein, if the applicant answers "Yes" to the question of being involved in any active bankruptcy, then the PPP loan will not be approved.

[HN7](#)<sup>[↑]</sup> The Fourth Interim Final Rule specifically provides that bankruptcy debtors are not eligible for PPP loans. [85 FR 23450 \(April 28, 2020\)](#).

### III. SUMMARY JUDGMENT STANDARD

[HN8](#)<sup>[↑]</sup> "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(a\)](#).

[HN9](#)<sup>[↑]</sup> For APA claims, judicial review is limited to the administrative record, [5 U.S.C. § 706](#), and the scope of review is typically focused on "the administrative record in existence at the time of the [agency] decision and does not encompass any part of the record that is made initially in the reviewing court."<sup>5</sup> *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) (citation [\*10] omitted). Thus, the usual standard set forth in [Rule 56\(c\)](#) does not apply.

For the discriminatory claim under 11 U.S.C. § 525(a), that count may also be determined as a matter of law. When asked at the hearing, neither party argued that there are genuine disputes as to any material fact on Defendants' motion for summary judgment and Plaintiff's cross motion for summary judgment.<sup>6</sup> As such, the court finds that summary judgment is appropriate in this case.

### IV. DISCUSSION

#### A. Count 1: Administrative Procedure Act — Exceeds Statutory Authority

Count 1 of the Complaint asserts that Defendants' implementation of the PPP which excludes debtors in bankruptcy is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and in violation of [Section 706\(2\)\(C\)](#). Compl. at 8-10, ECF No. 1.

In the preliminary injunction decision, this court mainly relied on the analysis in [In re Gateway Radiology Consultants, P.A.](#), [616 B.R. 833, 2020 WL 3048197 \(Bankr. M.D. Fla. 2020\)](#). Prelim. Inj. Order at 8-10, ECF No. 26. This court skipped the two-step *Chevron* analysis, in favor of the standard used in *King v. Burnell* and as relied upon by the *Gateway* bankruptcy court. [Gateway](#) has since been overturned by the Eleventh Circuit in [In re Gateway Consultants, P.A.](#), [983 F.3d 1239](#)

<sup>5</sup> In Defendants' motion for summary judgment, they included a Miller declaration. The court need not consider this, because the existing administrative records before it is sufficient.

<sup>6</sup> There are issues of material fact as to the permanent injunctive relief requested by Plaintiff. However, because Plaintiff's cross motion for summary judgment is denied, this issue is moot.



(*11th Cir. 2020*). Although persuasive in authority, it is the only appellate decision available to this court [\*11] on the same legal issues surrounding the PPP loan and SBA's exclusion of bankruptcy debtors. The Ninth Circuit has yet to decide on these issues.

[HN10](#) [↑] The APA requires that the court "hold unlawful and set aside agency action, findings, and conclusions found to be—. . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" [5 U.S.C. § 706\(2\)\(C\)](#). The Supreme Court sets forth a two-step test for judicial review of administrative agency interpretations of federal law. The court must first determine "whether Congress has directly spoken to the question at issue." [Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 \(1984\)](#). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* An agency's interpretation is permissible, unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Here, Plaintiff sets forth several arguments. Plaintiff argues that the interim final rules were made without any notice or comment period. Pl.'s Mot. at 9, ECF No. 35. This argument has no merit. [HN11](#) [↑] Under the CARES Act, Congress granted emergency rulemaking authority to SBA and without the notice requirements. [\*12] [15 U.S.C. § 9012](#).

Plaintiff urges the court to apply *King v. Burwell*,<sup>7</sup> which was relied upon by the bankruptcy court in *Gateway*. Pl.'s Mot. at 9-12, ECF No. 35; Pl.'s Reply at 17-18, ECF No. 40. Plaintiff supports its position by citing to two cases within the Ninth Circuit. Pl.'s Mot. at 11-12, ECF No. 35. Both cases,<sup>8</sup> just like this court in its preliminary injunction decision, relied on the bankruptcy court's decision in *Gateway*. As noted above, [Gateway](#) is no longer good law.

Moreover, Plaintiff argues that the statute was not ambiguous and sets forth several reasons for this argument. Pl.'s Reply at 6-9, 16, ECF No. 40. For example, Plaintiff asserts that "[t]he fact that bankruptcy debtors were left out of the statute does not create an ambiguity. It can be equally argued that the reason that the bankruptcy debtors were left out of the statute

<sup>7</sup>*King v. Burwell* held that in extraordinary cases, the court should examine whether the issue is one of "deep economic and political significance." [576 U.S. 473, 135 S.Ct. 2480, 2489, 192 L. Ed. 2d 483 \(2015\)](#).

<sup>8</sup>[Alaska Urological Inst., P.C. v. United States Small Bus. Admin., 619 B.R. 689 \(D. Alaska 2020\)](#); and [In re Vestavia Hills, Ltd., 618 B.R. 294, 299 \(Bankr. S.D. Cal. 2020\)](#).

for PPP loans was by design, so that debtors in bankruptcy could qualify." Pl.'s Mot. at 9, ECF No. 35.

Plaintiff uses [Section 4003](#) of the CARES Act to illustrate its point. Pl.'s Mot. at 9-10, ECF No. 35. In that section, Congress expressly prohibited bankruptcy debtors' participation in a mid-sized loan program, whereas in the PPP loans, Congress did not. [\*13] [Section 4003](#) is different in many respects. First, the mid-sized loan program is administered by the Treasury Department. 15 U.S.C. § 9042. The [HN12](#) [↑] PPP loans, on the other hand, are administered by SBA. The statutory provisions governing the PPP are incorporated into Section 7(a), which concerns SBA's lending authority. Within Section 7(a), there are mechanisms already in place governing lending practices by SBA. This includes the requirement that the loan must be of "sound value." 15 U.S.C. § 636(a)(6). [Section 4003](#) is a stand-alone program within the United States Code. [Tradeways, Ltd. v. United States Dep't of the Treasury, 2020 U.S. Dist. LEXIS 110737, 2020 WL 3447767, at \\*3 \(D. Md. June 24, 2020\)](#). Second, unlike the PPP loans, there is no loan forgiveness available to the mid-sized loan program. 15 U.S.C. § 9042(d)(3); [In re Gateway Radiology Consultants, P.A., 983 F.3d at 1259](#).

Next, Plaintiff argues that the only eligibility requirements for PPP under the CARES Act are as follows: the loan is for the "covered period"; the applicant meets the definition of an eligible entity, e.g., nonprofit; and the applicant employs no more than 500 employees. Pl.'s Reply at 7, ECF No. 40. Plaintiff's reading of that section is erroneous. [HN13](#) [↑] That section simply relaxes Section 7(a)'s general eligibility requirements to include certain small businesses and organizations, such as non-profit organizations employing less than 500 people. See [Diocese of Rochester v. U.S. Small Bus. Admin., 466 F. Supp. 3d 363, 375 \(W.D.N.Y. 2020\)](#) ("15 U.S.C. § 636(a)(36)(D)(i) is properly understood not as setting forth the exclusive criteria [\*14] for participation in the PPP, but merely as expanding the size limitations that would otherwise have been in place."); [Tradeways, 2020 U.S. Dist. LEXIS 110737, 2020 WL 3447767, at \\*13](#) (the same).

Plaintiff also argues that SBA was not given authority to alter the PPP eligibility requirements, citing 15 U.S.C. § 636(a)(36)(B). Pl.'s Reply at 7, ECF No. 40. That section states the following, "Except as otherwise provided in this paragraph, the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection." 15 U.S.C. § 636(a)(36)(B). It appears that Plaintiff attempts to argue that this should be read in conjunction with its argument above on § 636(a)(36)(D). As the appellate court stated in *Gateway*, "it would be illogical to conclude that this subsection of the CARES Act sets size as the one and only requirement for PPP eligibility. It

would be illogical because other sections of the CARES Act waive or relax for PPP loans other § 7(a) requirements." *In re Gateway Radiology Consultants, P.A.*, 983 F.3d at 1258.

Because Congress has not directly spoken to the question at issue, i.e., the CARES Act is silent on the issue of whether a bankruptcy debtor is excluded or eligible for the PPP loans, the court will proceed with Step 2 of the *Chevron* analysis.

[HN14](#) [↑] As mentioned above, the court must determine whether the agency's [\*15] interpretation is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. An agency's interpretation is permissible, unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

A review of the CARES Act and the existing provisions of Section 7(a) show Defendants' action to be reasonable. This court adopts the reasoning stated by the Eleventh Circuit in *Gateway*.

Congress gave the SBA only 15 days to issue rules, which is practically warp speed for regulatory action, a command that undoubtedly sprang from the felt need for quick action in light of the burgeoning economic crisis stemming from the pandemic. Even though the purpose of the PPP was to quickly help small businesses in distress or before they became distressed, as we have stressed and stressed again, [HN15](#) [↑] Congress did put the program in § 7(a), which has a sound value requirement that applies to "all" § 7(a) loans. See 15 U.S.C. § 636(a)(6). In that way, it identified "manifestly competing interests" that it "intended to accommodate." *Chevron*, 467 U.S. at 865, 104 S.Ct. 2778. But it did not accommodate them with specificity when it came to whether bankruptcy [\*16] debtors are eligible for PPP loans. It left that to the SBA.

The SBA's interpretation of the CARES Act and § 7(a) was a reasonable accommodation of those interests. One way it reconciled the competing interests was by replacing its usual lending criteria with a simple bright-line proxy based on bankruptcy status. See *Chevron*, 467 U.S. at 865, 104 S.Ct. 2778; see also *Animal Legal*, 789 F.3d at 1215 ("Unlike courts ... agencies possess invaluable technical expertise and, by virtue of their accountability to the President, are a proper forum to make policy choices based on unresolved competing interests.") (quotation marks omitted). Given all of the circumstances and the urgency with which it was forced to act, the SBA's interpretation was reasonable. "We do

not say this is an inevitable interpretation of the statute; but it is assuredly a permissible one." *Sullivan v. Everhart*, 494 U.S. 83, 93, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990).

*In re Gateway Radiology Consultants, P.A.*, 983 F.3d at 1262.

Based on the foregoing, the court finds as a matter of law that SBA did not exceed its statutory authority when it excluded bankruptcy debtors in the PPP.

## **B. Count 2: Administrative Procedure Act — Arbitrary and Capricious**

Count 2 of the Complaint asserts that Defendants' implementation of the PPP which excludes debtors in bankruptcy is "arbitrary, capricious, [or] an abuse of discretion" and in violation of [\*17] [Section 706\(2\)\(A\)](#). Compl. at 11-13, ECF No. 1.

[HN16](#) [↑] The APA requires that the court "hold unlawful and set aside agency action, findings, and conclusions found to be— . . . arbitrary capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This is a "highly deferential" standard under which there is a presumption that the agency's action is valid "if a reasonable basis exists for its decision." *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Under such deferential review, the scope is narrow, and a court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[HN17](#) [↑] Nonetheless, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal brackets omitted). A rule is arbitrary or capricious if the agency has (1) relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) 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. *Id.*

Here, Plaintiff raises the following arguments. First, [\*18] the PPP loan is different from the Section 7(a) loan. Pl.'s Mot. at 12-13. It does not require underwriting or credit worthiness requirements. *Id.* As such, Section 7(a) is inconsistent with the PPP program. *Id.*

Second, there was no explanation as to the bankruptcy exclusion decision in the First Interim Final Rule, or even in

the Second and Third Interim Final Rules. Pl.'s Reply at 9-10, ECF No. 40. Third, the rationale contained in the Fourth Interim Final Rule was "well after the fact." *Id.* at 10. Plaintiff cites to [Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1959, 1981, 207 L. Ed. 2d 427 \(2020\)](#), for support. *Id.* at 12.

Fourth, Plaintiff argues that courts have noted inconsistencies between the First and Fourth Interim Final Rules, citing [Alaska Urological Inst., P.C. v. United States Small Bus. Admin., 619 B.R. 689, 692 \(D. Alaska 2020\)](#). *Id.* at 11. Specifically, "the First Interim Final Rule mentions streamlining, but no connection to the Bankruptcy Exclusion. The Fourth Interim Final Rule mentions the Bankruptcy Exclusion but does not connect it to the streamlining." *Id.*

Fifth, Plaintiff argues that SBA failed to consider the fact that bankruptcy debtors are subject to the court's supervision and therefore would likely be a better candidate for the PPP. *Id.* at 14-15. In fact, to ensure that the loans are forgiven, Plaintiff states that it will ensure the funds will be used accordingly. Pl.'s Mot. at 13, ECF No. 35. Further, [\*19] funds that are not forgiven will be classified as unsecured credit with administrative expense status, as Plaintiff had requested from the court. *Id.*

Sixth, Plaintiff argues that the primary reason for the CARES Act is to assist businesses in trouble. *Id.* at 13-14. Seventh, neither the First nor Fourth Interim Final Rule mentioned the "sound value requirement." *Id.* at 18. [HN18](#)<sup>↑</sup> The First Interim Final Rule, however, waives the requirement of [13 C.F.R. § 120.150](#) (SBA's lending criteria). *Id.* at 19.

The court will address these altogether, rather than individually. The PPP loan is different from Section 7(a) while it is still set up within the Section 7(a) structure. Thus, the provision that states, "Except as otherwise provided in this paragraph, the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under [Section 7(a)]", 15 U.S.C. § 636(a)(36)(B), provides exactly that.

As the courts have held, the creation of the PPP under the CARES Act and its implementation were under extraordinary and unusual circumstances. It was created at a time of global pandemic, with the goal of alleviating the economic devastation caused by COVID-19. See [Tradeways, 2020 U.S. Dist. LEXIS 110737, 2020 WL 3447767, at \\*3](#). Congress expected speedy action, mandating SBA to promulgate rules and regulations for the implementation of the [\*20] PPP, in a very short amount of time of 15 days. [15 U.S.C. § 9012](#). Time is of the essence, because at the time the CARES Act was enacted, the "covered loan" was to end June 30, 2020 (cutoff date for PPP applications). 15 U.S.C. § 636(a)(36)(A)(ii)-(iii).

Ideally, the notice requirements under 5 U.C.C. [§ 553\(b\)](#) provides that time period for the agency to incorporate in the rules "a concise general statement of their basis and purpose." [5 U.S.C. § 553\(c\)](#). However, SBA did not have this opportunity, because Congress waived this notice requirement. [15 U.S.C. § 9012](#). See also [In re Gateway Consultants, P.A., 983 F.3d at 1263](#) ("Normally, an agency's explanation for a rule is connected to the 'relevant matter presented' during the notice and comment period."). The inevitable result of a waiver of notice requirement, plus a quick turnaround to promulgate rules, is "a far more limited administrative record than we might otherwise have had." *Id.*

The First Interim Final Rule was issued to allow for immediate implementation of the [PPP. 85 FR 20811 \(April 15, 2020\)](#). The court finds no inconsistency between the First and Fourth Interim Final Rules. One incorporates an application form that indicates the bankruptcy exclusion; the other was issued less than two weeks after, supplements the existing one, and explicitly indicates the bankruptcy exclusion which was already [\*21] contained in the First Interim Final Rule through the PPP Application Form. The Fourth Interim Final Rule is not a "post hoc rationalization" as Plaintiff characterizes it to be. [HN19](#)<sup>↑</sup> A court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." [State Farm, 463 U.S. at 43](#).

Finally, on the issue of whether bankruptcy debtors are safer debtors because they are under the supervision of the court, "[b]ankruptcy debtors are financially distressed and have competing creditors, which it is not implausible to believe will increase the risk of unauthorized use of funds and non-repayment. . . That [SBA] fashioned its consideration of bankruptcy status into a streamlined and bright-line rule that would speed up decisions about whether PPP loans should be made is not implausible, irrational, or the product of arbitrary and capricious decision making." [In re Gateway Consultants, P.A., 983 F.3d at 1263](#). [HN20](#)<sup>↑</sup> An agency is also not generally required to "consider all policy alternatives in reaching a decision." [State Farm, 463 U.S. at 51](#).

Based on the foregoing, the court finds as a matter of law that SBA did not act arbitrarily or capriciously when it excluded bankruptcy debtors in the PPP.

### **C. Count 3: Violation of 11 U.S.C. § 525 - Discriminatory Treatment of Chapter 11 Debtor [\*22]**

Count 3 of the Complaint asserts that Defendants violated 11 U.S.C. § 525. Compl. at 13-15, ECF No. 1. In its preliminary injunction decision, this court found that Defendants would likely be in violation of said section. Order at 5-7, ECF No.

26. After further consideration, the court finds that Defendants did not violate Section 525(a).

Section 525(a) provides in relevant part that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, . . ." a debtor. 11 U.S.C. § 525(a).

Plaintiff argues that the PPP loans could be forgiven and are therefore "grants" and not "loans." Mot. at 20, ECF No. 35. As summarized in this order, the PPP loans are under Section 7(a), which governs the lending practices of SBA. *See Schuessler v. United States Small Bus. Admin.*, 2020 Bankr. LEXIS 1347, 2020 WL 2621186, at \*11 (Bankr. E.D. Wis. May 22, 2020) ("The record is clear that [HN21](#)<sup>[↑]</sup> 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.' The PPP loans are made through private lenders and participants sign promissory notes, subject to SBA guarantees."). While the loan may be forgiven, it is not an automatic forgiveness. The borrower would have [\*23] to apply for forgiveness, and the loan is only forgiven if certain criteria are met. 15 U.S.C. §§ 9005(b)(1)-(4) and 9005(d).

Recently, after the court's issuance of its preliminary injunction order, the Consolidated Appropriations Act, 2021 ("CARES Act II") was signed into law. CARES Act II amended Section 525. Among its amendments, Congress added subsection (c), which relates to anti-discrimination on student loans or grants only. [HN22](#)<sup>[↑]</sup> Congress also added subsection (d), which provides anti-discrimination on the following: the foreclosure moratorium and right to request forbearance ([15 U.S.C. § 9056](#)); the forbearance of mortgage payments for multifamily properties ([15 U.S.C. § 9057](#)); and the temporary moratorium on eviction filings ([15 U.S.C. § 9058](#)).

This court agrees with Defendants that "[h]ad Congress intended for section 525 to apply to PPP loan guarantees, it would have stated so expressly in the Consolidated Appropriations Act, 2021, as it did with the amendment addressing federally-backed multifamily mortgage loans and in the immediately preceding subsection for student loans through prior amendment." Defs.' Supplemental Brief at 8, ECF No. 47.

Based on the foregoing, the court finds as a matter of law that SBA did not violate Section 525 of the Bankruptcy Code.

For the reasons stated herein, Defendants' Motion for Summary Judgment, [\*24] ECF No. 34, is **GRANTED**; and Plaintiff's Cross Motion for Summary Judgment, ECF No. 35, is **DENIED**. The Clerk of Court is ordered to enter judgment in favor of Defendants and against Plaintiff.

**SO ORDERED.**

/s/ **Frances M. Tydingco-Gatewood**

**Chief Judge**

**Dated: February 23, 2021**

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## V. CONCLUSION