No. 20-13462

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

USF FEDERAL CREDIT UNION,

Plaintiff-Appellant,

v.

GATEWAY RADIOLOGY CONSULTING, P.A.

Defendant-Appellee.

On Appeal from the United States Bankruptcy Court
for the Middle District of Florida

BRIEF FOR JOVITA CARRANZA, in her Capacity as Administrator for the U.S. Small Business Administration

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Jovita Carranza, in her Capacity as Administrator for the U.S. Small Business Administration, certify that the following have an interest in the outcome of this appeal:

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American Express National Bank

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Jovita Carranza, In Her Capacity as Administrator for The U.S. Small Business Administration

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/s/ *Joshua M. Salzman*

STATEMENT REGARDING ORAL ARGUMENT

The question presented here has divided courts within this circuit and across the country. We accordingly respectfully suggest that oral argument would be of assistance to the Court.

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INTRODUCTION

To address the economic consequences of the coronavirus (COVID-19) pandemic, *see* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (CARES Act), Congress made hundreds of billions of dollars' worth of government-guaranteed loans available to qualified small businesses. Congress implemented this program, called the Paycheck Protection Program (PPP), by adding a supplemental provision to Section 7(a) of the Small Business Act, which has long made loans available to small businesses. Congress tasked the Small Business Administration (SBA) with administering the PPP using its extensive pre-existing authority over the Section 7(a) loan program, as well as new emergency rulemaking authority granted by the CARES Act.

Section 7(a) imposes several restrictions on the issuance of loans, most of which remain applicable under the PPP. As relevant here, "[a]ll loans made" under Section 7(a), and therefore under the PPP, "shall be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6).

Exercising its authority to promulgate regulations implementing this critical and time-sensitive program, SBA determined that PPP loans should not be made to applicants in bankruptcy. SBA made this choice because more complex, multi-factor assessments of creditworthiness were not practicable given that SBA had to immediately implement a system capable of disbursing hundreds of billions of dollars to millions of distinct borrowers within a matter of months. Against that backdrop,

SBA determined that, as a general matter, "providing PPP loans to debtors in bankruptcy would present an unacceptably high risk" of both "unauthorized use of funds" and "non-repayment of unforgiven loans." *Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility*, 85 Fed. Reg. 23,450, 23,451 (Apr. 28, 2020).

The plaintiff here, Gateway Radiology Consulting, P.A., is a for-profit corporation that filed for Chapter 11 relief in May of 2019, and those proceedings remain pending. In May 2020, Gateway applied for a PPP loan from appellant USF Federal Credit Union (the Credit Union). Gateway's application was initially approved by the Credit Union, but the Credit Union has sought to deny Gateway access to the PPP funds since Gateway's bankruptcy status came to light.

Gateway filed an adversary proceeding against SBA and the Credit Union in bankruptcy court arguing, as relevant here, that SBA violated the Administrative Procedure Act (APA) in establishing a rule that precludes entities in bankruptcy from receiving PPP loans. The bankruptcy court accepted Gateway's APA argument and entered an injunction requiring SBA and the Credit Union to treat Gateway as if it were not in bankruptcy. Relying on that decision, the court also entered an order in the underlying bankruptcy case authorizing Gateway to borrow under the PPP. This Court granted direct review of those decisions.

The bankruptcy court erred on several levels. Congress required SBA to ensure that loans meet the statute's sound-value requirement and empowered SBA with the

rulemaking authority necessary to fulfill that requirement. Nothing in the CARES Act suggests that a company's bankruptcy status cannot be a basis for determining that a loan is not of "sound value." It was particularly reasonable for SBA to exclude bankrupt applicants in crafting a program that required lenders to review millions of applications in a matter of months, and that sought to ensure that loans were used to sustain companies' ability to pay American workers' paychecks and not for unauthorized purposes. Indeed, while there is a division of authority on this point, most courts to have considered the question, including at least one court in this circuit, have concluded that SBA's policy comports with APA standards. *See, e.g.*, *Henry Anesthesia Assocs. v. Carranza (In re Henry Anesthesia Assoc.)*, Adv. No. 20-6084, 2020 WL 3002124, at *9-*10 (Bankr. N.D. Ga. June 4, 2020).

The bankruptcy court's errors on the merits of the APA claim were compounded by the court's failure to recognize limits on its own authority. The court failed to show the requisite regard for Congress's determination that SBA should be protected from injunctive relief. *See* 15 U.S.C. § 634(b)(1); *see also In re Hidalgo Cty. Emergency Serv. Found.*, 962 F.3d 838, 840 (5th Cir. 2020) (rejecting an indistinguishable challenge to the same SBA policy at issue here based on Section 634(b)(1)). Moreover, the bankruptcy court lacked authority to issue an injunction on the basis of an APA claim, because doing so exceeded its authority in proceedings involving "non-core" issues. The judgment below should be reversed.

STATEMENT OF JURISDICTION

Gateway, a debtor in a then-already-pending Chapter 11 bankruptcy proceeding, initiated an adversary proceeding against SBA and the Credit Union, invoking the bankruptcy court's jurisdiction under 28 U.S.C. §157 and 28 U.S.C. § 1334(b). Adv.R.1@2.[1] On June 8, 2020, the bankruptcy court issued a memorandum decision concluding that Gateway was entitled to injunctive relief (Adv.R.14), and on June 22, 2020, the court issued an order granting a preliminary injunction that prohibited SBA from denying Gateway participation in the PPP based on Gateway's bankruptcy status (Adv.R.29). On June 24, 2020, the bankruptcy court entered an order on the underlying bankruptcy docket pursuant to 11 U.S.C. § 364(b), authorizing Gateway to borrow under the PPP. Bank.R.266.

On July 1, 2020, the bankruptcy court *sua sponte* certified the injunction order and the 364(b) order for direct review in this Court pursuant to 28 U.S.C. § 158(d)(2)(A). Adv.R.42; Bank.R.291. On July 17, 2020, Gateway filed a timely petition in this Court for permission for direct appeal, and on July 24, 2020, the Credit Union filed a timely cross-petition. *See generally* No. 20-90014 (11th Cir.). On

[1] Citations of the form "Adv.R.x" refer to docket number "x" of the Adversary Docket below, No. 20-330 (Bankr. M.D. Fla.). Citations of the form "Bank.R.y" refer to docket number "y" of the underlying bankruptcy proceeding, No. 19-4971 (Bankr. M.D. Fla.).

September 16, 2020, this Court granted the Credit Union's cross-petition (while denying Gateway's petition).

STATEMENT OF THE ISSUES

1. Whether SBA reasonably exercised expressly granted rulemaking authority in providing that entities in active bankruptcy proceedings may not receive PPP loans.

2. Whether the bankruptcy court exceeded its authority in enjoining SBA from enforcing its rule, both because the court showed insufficient regard for statutory protections that shield SBA from injunctive relief, *see* 15 U.S.C. § 634(b)(1), and because the court lacked authority to enter an injunction based on a claim under the Administrative Procedure Act, which is not a "core" bankruptcy proceeding.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Small Business Administration

Congress created the Small Business Administration in 1953 to "aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns." *SBA v. McClellan*, 364 U.S. 446, 447 (1960) (quoting Small Business Act of 1953, Pub. L. No. 83-163, § 202, 67 Stat. 232, 232). Congress gave SBA "extraordinarily broad powers to accomplish" this objective. *Id.* Those powers include "that of lending money to small businesses whenever they could not get necessary loans on reasonable terms from private lenders." *Id.*

SBA's primary means for providing loan assistance to small businesses is through what are commonly known as "Section 7(a) loans," which refers to the section of the Small Business Act authorizing their issuance. *See* Small Business Act § 207, 67 Stat. at 235-36; 13 C.F.R. § 120.2(a). SBA is authorized to provide Section 7(a) loans through a variety of financing arrangements. In practice, however, SBA typically guarantees loans made by private lenders rather than disburse funds directly to borrowers. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 n.3 (1979).

Ordinarily, to qualify for an SBA general business loan, an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c); meet the size standards for a "small business concern" set forth under the statute and SBA rules, *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. pt. 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101. As particularly relevant here, Section 7(a) of the Small Business Act requires that "[a]ll loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6).

Congress has given SBA broad powers to make rules and regulations, to take actions that "are necessary or desirable in making . . . loans," 15 U.S.C. § 634(b)(6)-(7), and to establish general policies to "govern the granting and denial of applications for financial assistance by the Administration," *id.* § 633(d); *see also* 30 Fed. Reg. 9353, 9353 (July 28, 1965). In exercise of that authority, SBA has long provided that

Section 7(a) loan applicants "must be creditworthy," and that an inquiry into creditworthiness requires considering the "credit history of the applicant," the "[s]trength of the business," the "[a]bility to repay the loan with earnings from the business," and the "[p]otential for long-term success." 13 C.F.R. § 120.150. Accordingly, SBA asks Section 7(a) loan applicants whether they have ever filed for bankruptcy protection. SBA Form 1919, *SBA 7(a) Borrower Information Form* 2 (Jan. 2018), https://go.usa.gov/xwkjd; *see* 13 C.F.R. § 120.10 ("official SBA notices and forms" are part of SBA's "[l]oan [p]rogram [r]equirements"). And agency guidance to lenders specifies that when a lender recommends in favor of approving a loan, the lender's credit analysis memorandum must include a discussion and analysis of any "bankruptcy filings" by the loan applicant. SBA, Standard Operating Procedure § 50 10 5(K), *Lender and Development Company Loan Programs* 180 (Apr. 1, 2019), https://go.usa.gov/xwN2J.

2. The CARES Act

The CARES Act was signed into law on March 27, 2020, in order to provide emergency economic assistance to ameliorate the effects of the COVID-19 pandemic. As relevant here, Section 1102 of the CARES Act "temporarily adds a new product, titled the 'Paycheck Protection Program,' to [SBA's] 7(a) Loan Program." *Business Loan Program Temporary Changes; Paycheck Protection Program,* 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020); *see* CARES Act § 1102, 134 Stat. at 286 (amending "Section 7(a) of the Small Business Act"). Congress stated that, "[e]xcept as otherwise provided," "the

[SBA] Administrator may guarantee" PPP loans "under the same terms, conditions, and processes" as other Section 7(a) loans. *See* CARES Act § 1102, 134 Stat. at 287 (codified at 15 U.S.C. § 636(a)(36)(B)). The CARES Act additionally provides that PPP loans may be forgiven if they are used to cover employees' payroll costs or a business's mortgage, rent, or utility payments. CARES Act § 1106, 134 Stat. at 297 (codified at 15 U.S.C. § 9005(b)). In establishing the PPP as a form of Section 7(a) lending, Congress left in place the statutory requirement that all loans must be of "sound value." 15 U.S.C. § 636(a)(6).

Congress initially authorized SBA to guarantee up to $349 billion worth of PPP loans, *see* CARES Act § 1102(b)(1), 134 Stat. at 293, and subsequently increased that amount to $659 billion. *See* Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020). As initially enacted, the CARES Act required PPP funds to be disbursed within a matter of just three months (by June 30, 2020), *see* CARES Act § 1102(a)(2), 134 Stat. at 286 (defining "covered period" and "covered loan"), though the application deadline was eventually extended until August 8, 2020.

In light of the exigencies created by the pandemic, Congress charged SBA with issuing emergency regulations within just 15 days in order to implement the PPP. CARES Act § 1114, 134 Stat. at 312. Pursuant to that authority, SBA promulgated several regulations concerning PPP eligibility. Immediately after Congress created the program, SBA determined that the need to "provide relief to America's small

businesses expeditiously" required "streamlining the requirements of the regular 7(a) loan program." 85 Fed. Reg. at 20,812. Accordingly, SBA determined that PPP lenders should not be required to implement the multi-factor test of creditworthiness set forth at 13 C.F.R. § 120.150. 85 Fed. Reg. at 20,812. Rather, SBA would "allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower." *Id.*

One such "certification," appearing on SBA's Paycheck Protection Application Form, *see* 85 Fed. Reg. at 20,814, required applicants to indicate whether they are "presently involved in any bankruptcy." *See* SBA Form 2483, *Paycheck Protection Program Borrower Application Form* 1 (Apr. 2020), https://go.usa.gov/xwXfs. In a rule providing additional explanation and guidance to borrowers, SBA explained that, "[i]f the applicant . . . is the debtor in a bankruptcy proceeding . . . , the applicant is ineligible to receive a PPP loan." 85 Fed. Reg. at 23,451. SBA explained that "[t]he Administrator, in consultation with the Secretary [of Treasury], determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans." *Id.* And, consistent with SBA's goal of streamlining the PPP application process, SBA indicated that "[l]enders may rely on an applicant's representation concerning the applicant's . . . involvement in a bankruptcy proceeding," and need not perform an independent inquiry into the applicant's creditworthiness and bankruptcy status. *Id.*

B. Facts and Procedural History

Gateway is the debtor in an ongoing Chapter 11 bankruptcy proceeding that has been pending since May 2019. Adv.R.14@12. It applied for a PPP loan through USF Federal Credit Union (the Credit Union), a private lender. *See* Adv.R.14@12-13. The Credit Union initially approved the loan in the amount of $527,710, believing that Gateway was not in bankruptcy, but subsequently sought to avoid having to release the funds after becoming aware of Gateway's bankruptcy. Adv.R.14@12-13. There is an unresolved factual question as to whether the confusion regarding Gateway's bankruptcy status was the result of a misrepresentation by Gateway or an error by the Credit Union. Adv.R.14@13.

Gateway commenced an adversary proceeding against SBA and the Credit Union in the bankruptcy court, seeking declaratory and injunctive relief. Adv.R.1@12-13, Adv.R.14@12. As relevant here, Gateway asserted that SBA's bankruptcy regulation was arbitrary and capricious and in excess of statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. § 702(2)(A), (C). Adv.R.14@14.[2] In response, SBA argued (among other things) that its rule comports with the APA and that no injunction should issue in light of a statutory provision establishing that "no attachment, injunction, garnishment, or other similar process . . .

[2] Gateway also alleged SBA's policy contravenes a provision of the Bankruptcy Code, 11 U.S.C. § 525(a), but the bankruptcy court did not reach the issue. Adv.R.14@14, 21 n.65.

shall be issued against the [SBA] Administrator or his property." 15 U.S.C. § 634(b)(1).

The bankruptcy court ultimately issued a memorandum opinion concluding that Gateway was likely to succeed on the merits of its APA claims and that the policy should be enjoined. *See generally* Adv.R.14. The court first addressed the Section 634(b) issue and held that the statute does not bar a court from enjoining SBA from exceeding its statutory authority, as the court believed was the case here. Adv.R.14@15-20. Turning to the merits, the court found SBA's policy inconsistent with the CARES Act. It concluded that because Congress did not itself disqualify Chapter 11 debtors from being eligible for PPP Loans, it implicitly precluded SBA from doing so in the exercise of its rulemaking authority. The bankruptcy court also concluded that the bankruptcy exclusion is arbitrary and capricious because PPP Loans are designed to be forgiven, and that any consideration of the soundness of the borrower was thus unreasonable. Adv.R.14@31-32. The Court additionally determined SBA failed to consider the protections afforded by the Chapter 11 process which, the court believed, would prevent misuse of PPP funds. Adv.R.14@32-40. Based on these conclusions, the court entered a preliminary injunction in the adversary proceeding forbidding SBA from enforcing its bankruptcy rule against Gateway. Adv.R.29.

In parallel with its challenge to the SBA policy in the adversary proceeding, Gateway filed a motion in the underlying bankruptcy proceeding, seeking permission

from the bankruptcy court to take out a PPP loan. *See* 11 U.S.C. § 364(b) (empowering the bankruptcy court to authorize a debtor to incur unsecured debt outside the ordinary course of business). Shortly after entering the preliminary injunction, the bankruptcy court granted Gateway's motion under Section 364(b). Bank.R.266@1-2. The court's Section 364(b) order stated: "Because the Court has determined th[at] [SBA's bankruptcy rule] is unenforceable . . . the Court concludes it is appropriate to . . . grant [Gateway's] motion." Bank.R.266@2 (footnote omitted). In the Section 364(b) order, the court further ordered SBA to guarantee Gateway's loan without regard to Gateway's bankruptcy. Bank.R.266@2. On the Credit Union's motion, the bankruptcy court subsequently stayed the Section 364(b) order pending appeal (thereby allowing the Credit Union to continue to freeze the disputed funds). Bank.R.311.

SBA filed prompt appeals from both the preliminary injunction order and the Section 364(b) order, seeking review in district court. Adv.R.17, 35; Bank.R.279. After those appeals were filed, the bankruptcy court, "on its own initiative," certified its preliminary injunction and Section 364(b) orders for direct appeal to this Court. Bank.R.291@2. Gateway subsequently petitioned this Court for review of the preliminary injunction order, and the Credit Union filed a cross-petition. This Court denied Gateway's petition, but granted the Credit Union's petition.

C. Standard of Review

This Court reviews decisions granting a preliminary injunction for an abuse of discretion, but "the legal conclusions on which they are based are reviewed de novo." *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1297 (11th Cir. 2017).

SUMMARY OF ARGUMENT

Congress has vested SBA with express rulemaking authority to implement the statutory requirement that SBA loans be of "sound value." That requirement applies to loans under the Paycheck Protection Program as it applies to all other SBA loans under Section 7(a). In exercising its rulemaking responsibilities in effectuating the PPP, the agency recognized that the usual case-by-case consideration of a borrower's creditworthiness would be incompatible with the PPP's goal of distributing hundreds of billions of dollars to millions of borrowers within a matter of months. SBA accordingly chose to use bankruptcy status as an administrable proxy for assessing "sound value." Nothing in the CARES Act or any other provision of law precluded adoption of this reasonable measure, and the bankruptcy court erred in enjoining its enforcement.

The errors in the bankruptcy court's APA analysis are underscored by the court's failure to abide by the limits on its own authority. Congress has limited the availability of injunctive relief against SBA. *See* 15 U.S.C. § 634(b)(1). The Fifth Circuit recently held that provision squarely precluded an injunction in a challenge identical to that presented here. *See In re Hidalgo Cty. Emergency Serv. Found.*, 962 F.3d

838, 840 (5th Cir. 2020). The bankruptcy court's willingness to enjoin the agency's action is particularly anomalous here because the resolution of an APA claim does not constitute a "core" proceeding within the bankruptcy court's authority.

ARGUMENT

I. SBA Reasonably Determined That Entities In Bankruptcy Should Not Be Eligible For PPP Loans, Consistent With The Terms And Purpose Of The CARES Act

In the CARES Act, Congress directed SBA to adopt regulations implementing the Paycheck Protection Program. *See* CARES Act § 1114, 134 Stat. at 312. Acting pursuant to that grant of authority, SBA determined that entities in bankruptcy should not be extended PPP loans because of the "unacceptably high risk" of both "unauthorized use of funds" and "non-repayment of unforgiven loans." 85 Fed. Reg. at 23,451.

Nothing in the CARES Act expressly addresses the precise question of whether entities in bankruptcy are entitled to participate in the PPP. And it is a hornbook principle of administrative law that when Congress has "failed to address a precise question" and has "given an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the agency's regulations are entitled to "controlling weight" unless they are "arbitrary [or] capricious," or "manifestly contrary to the statute." *Scheerer v. U.S. Attorney Gen.*, 513 F.3d 1244, 1250 (11th Cir. 2008) (quotation marks omitted); *see also id.* (discussing the framework from *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) for reviewing challenges to

administrative action); *see also, e.g.*, *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1220 (11th Cir. 2015). The bankruptcy court concluded that SBA's policy is both contrary to statute and arbitrary and capricious. This ruling, which misconstrues the statutory scheme and fails to afford the requisite deference owed to the agency charged with administering the PPP, should be reversed.

A. SBA's Policy Is Not Contrary To The CARES Act

1. The Challenged Policy Constitutes A Permissible Exercise Of The Rulemaking Authority Expressly Granted To SBA In The CARES Act

SBA acted well within the bounds of its statutory authority in excluding applicants in bankruptcy from PPP eligibility. Congress made the considered decision not to enact the PPP as a freestanding program, but rather to utilize the pre-existing infrastructure of SBA's Section 7(a) lending program. *See* 85 Fed. Reg. at 20,811 (recognizing the CARES Act "temporarily adds a new product, titled the 'Paycheck Protection Program,' to [SBA's] 7(a) Loan Program"). Congress confirmed that its placement of the PPP within the Section 7(a) lending program was deliberate, specifying that "[e]xcept as otherwise provided" in the Act, the Administrator "may" guarantee PPP loans "under the same terms, conditions, and processes" as a loan made under Section 7(a). CARES Act § 1102, 134 Stat. at 287 (codified 15 U.S.C. § 636(a)(36)(B)).

Congress granted SBA "extraordinarily broad powers" in the administration of loans to small businesses under the Section 7(a) program, *SBA v. McClellan*, 364 U.S.

446, 447 (1960), and it gave the SBA Administrator broad rulemaking powers to carry out that authority, 15 U.S.C. § 634(b)(6), (7). That background authority naturally extends to the PPP lending program, and the CARES Act expressly empowers SBA to issue regulations implementing the PPP. *See* CARES Act § 1114, 134 Stat. at 312. Indeed, understanding that the CARES Act left gaps that would need to be filled by SBA, Congress did not merely authorize SBA to adopt implementing regulations for the PPP, it required SBA to adopt implementing regulations, and to do so in just fifteen days. *Id.*; *see also Schuessler v. U.S. SBA*, Adv. No. 20-02065, 2020 WL 2621186, at *11 (Bankr. E.D. Wis. May 22, 2020) (recognizing that in light of the speed with which Congress wanted PPP funds deployed, Congress "did not spell out in the statute all requirements for PPP participation," and instead "entrusted the details to the SBA, engrafting the PPP on to the SBA's existing section 7(a) lending program, and giving the SBA emergency rulemaking authority").

SBA's policy of declining to extend PPP loans to entities in bankruptcy is wholly consistent with the CARES Act and its aims. The CARES Act expressly modified some of Section 7(a)'s requirements for purposes of PPP loans. *See, e.g.*, 15 U.S.C. § 636(a)(36)(I), (R) (exempting PPP from Section 7(a) requirements regarding an applicant's ability to obtain credit elsewhere and prepayment penalties). But Congress made clear that, "[e]xcept as otherwise provided," "the [SBA] Administrator may guarantee" PPP loans "under the same terms, conditions, and processes" as other

Section 7(a) loans. *Id.* § 636(a)(36)(B). And the CARES Act did not alter the "sound value" requirement, *id.* § 636(a)(6), and it thus applies with full force here.

As explained further below, *see infra* Part I.B.1, SBA's policy of excluding debtors in bankruptcy from PPP loan eligibility reflects a reasonable effort to implement the statutory "sound value" requirement. SBA recognized that the exigent circumstances that gave rise to the PPP made it impossible for lenders to undertake the customary case-by-case evaluation of a borrower's creditworthiness. SBA accordingly adopted the challenged policy after concluding that, particularly absent the safeguards provided by the usual, more extensive and tailored underwriting practices for SBA loans, allowing businesses currently in bankruptcy proceedings to participate in the PPP would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. Notably, SBA's determination that bankruptcy status should be considered "did not arise out of thin air," because "SBA's preexisting § 7(a) loan application asks a prospective borrower to disclose whether it or an affiliate has filed for bankruptcy." *Tradeways, Ltd. v. U.S. Dep't of the Treasury*, No. 20-1324, 2020 WL 3447767, at *14 (D. Md. June 24, 2020); *see also supra* p. 7.

2. The Bankruptcy Court Failed To Identify Any Statutory Provision That Forecloses SBA's Policy

In concluding that SBA's policy is nonetheless contrary to statute, the bankruptcy court pointed to several features of the CARES Act that the court mistakenly believed indicated that Congress foreclosed SBA from adopting a rule

limiting the ability of entities in bankruptcy to access PPP funds. These statutory features show, at most, that SBA was not required to adopt the challenged policy. They fall well short of demonstrating the SBA's policy is "manifestly contrary" to statute. *Scheerer*, 513 F.3d at 1250 (quotation marks omitted).

As an initial matter, the court began from the flawed premise that the question of whether entities in bankruptcy can participate in the PPP is a question of such significance that Congress was unlikely to have delegated it to SBA and that, accordingly, SBA's implementation of the statute is not entitled to any deference. Adv.R.14@24 (discussing *King v. Burwell*, 576 U.S. 473, 486 (2015)). *King* is distinguishable because this case involves a specific and express delegation of rulemaking authority, CARES Act § 1114, 134 Stat. at 312, rather than a possible "implicit delegation," *King*, 576 U.S. at 485. Likewise, here there is no reason to doubt that Congress would have delegated to SBA responsibility for determining how best to administer a type of Section 7(a) lending—a task the agency has performed for more than five decades, *cf. id* at 486 (expressing doubt that Congress would delegate an important question to an agency that had "no expertise" regarding the relevant issue). And though the PPP, taken as a whole, involves many hundreds of billions of dollars and affects many millions of Americans, the universe of businesses affected by SBA's bankruptcy rule is substantially smaller, making it unlikely that the treatment of such businesses would have seemed to Congress so integral to the program that only Congress could speak to that issue.

The bankruptcy court further erred in concluding that the statutory context establishes that SBA's policy is incompatible with the CARES Act. The relevant context here is that Congress adopted the PPP as a form of Section 7(a) lending and left intact the requirement that loans must be of "sound value." 15 U.S.C. § 636(a)(6). Rather than respect this deliberate framework, the bankruptcy court focused on the fact that the CARES Act was adopted as a response to the pandemic and was designed to keep American workers paid and employed. Adv.R.14@25. But nothing about that fact makes SBA's policy incompatible with the statute. While there is no question that Congress wanted to protect American workers from unemployment, it does not follow that Congress expected that objective to be pursued to the exclusion of all other considerations and lending criteria, let alone that Congress foreclosed SBA from adopting limited safeguards to protect against misuse of PPP funds. While the bankruptcy court may have believed that laxer eligibility requirements would make for better policy, or would better achieve Congress's objectives, absent an unambiguous statutory provision directly on point, that judgment is reserved for the agency, not the courts.

The bankruptcy court was equally mistaken in inferring a congressional restriction from a handful of other statutory provisions. Adv.R.14@25-28. The court first pointed to a provision specifying that "in addition" to the "small business concerns" already eligible for regular Section 7(a) loans, eligibility for PPP loans is extended to "any business concern, nonprofit organization, veterans organization, or

Tribal business concern" with 500 employees or fewer. 15 U.S.C. § 636(a)(36)(D)(i). This provision simply relaxes the size limitations applicable to other types of Section 7(a) loans, and "merely serves to identify the types and size of organizations that are eligible to receive PPP funds." *Tradeways*, 2020 WL 3447767, at *13 (adopting this interpretation and collecting cases holding the same); *see also* 13 C.F.R. pt. 121 (size restrictions generally governing eligibility for Section 7(a) loans).

The bankruptcy court, however, construed this provision as mandating that all business with fewer than 500 employees are per se eligible to receive PPP loans, thereby precluding SBA from adopting any other eligibility criteria. This interpretation reads explicit requirements out of the statute, and, as other courts have noted, renders other provisions of the CARES Act superfluous. *See, e.g.*, *Diocese of Rochester v. U.S. SBA*, No. 6:20-06243, 2020 WL 3071603, at *7 (W.D.N.Y. June 10, 2020) (recognizing that "[o]ther provisions of the CARES Act clearly anticipate the existence of additional eligibility criteria" and "waivers of otherwise applicable eligibility requirements would be superfluous if, in fact, § 1102(a)(36)(D)(i) unambiguously eliminated any requirement beyond size"). If Congress had meant to displace "all eligibility criteria governing SBA loans administered under § 7(a) of the Small Business Act, one would expect Congress to have spoken clearly." *Defy Ventures, Inc. v. U.S. SBA*, No. 20-1736, 2020 WL 3546873, at *8 (D. Md. June 29, 2020) (quoting *Tradeways*, 2020 WL 3447767, at *13). But Congress said the opposite, specifying that, except as otherwise provided for in the CARES Act, PPP loans may

be made only "under the same terms, conditions, and processes as a loan made under" Section 7(a). 15 U.S.C. § 636(a)(36)(B).

The bankruptcy court likewise mistakenly invoked 15 U.S.C. § 636(a)(36)(G)(i)—which specifies certain certifications that an "eligible recipient" must make to receive a PPP loan—for the proposition that "Congress chose not to require borrowers to certify that they were not involved in a bankruptcy case when applying for a PPP Loan." Adv.R.14@26. But this list of certifications does not purport to be a list of eligibility criteria—let alone an exclusive list—making the bankruptcy court's reliance on that provision misplaced. Indeed, the statute specifies that the certifications are to be made by an "eligible recipient," 15 U.S.C. § 636(a)(36)(G)(i), indicating that the question of whether a borrower is eligible is antecedent to the certification process. *See Dioceses of Rochester*, 2020 WL 3071603, at *7 (making this point).

The bankruptcy court similarly erred in pointing to a provision of the CARES Act that delegates the authority to make PPP loans to private lenders and directs lenders to consider whether the business was operating on February 15, 2020, and whether the borrower has employees for whom it was paying salaries and payroll taxes. Adv.R.14@26 (discussing 15 U.S.C. § 636(a)(36)(F)(ii)(II)). As with other provisions discussed by the bankruptcy court, these two criteria do not purport to be exclusive (and, indeed, cannot be). And to the extent that the bankruptcy court thought it probative that this provision vests the lender with delegated authority to

make PPP loans, nothing in this provision displaces SBA's express authority to establish implementing regulations for the PPP, or to impose standards governing the circumstances under which SBA "may" choose to guarantee a covered loan, 15 U.S.C. § 636(a)(36)(B).

Finally, the bankruptcy court also attributed unwarranted significance to the fact that a different title of the CARES Act, which established a new program administered by the Secretary of the Treasury to provide loan assistance to mid-sized businesses, excludes recipients who are "debtor[s] in a bankruptcy proceeding." CARES Act § 4003, 134 Stat. at 473; *see* Adv.R.14@27-28. Congress had no need to include such an express requirement in the PPP because it instead elected to fold the PPP into a preexisting loan program with a longstanding statutory requirement that loans be of "sound value." 15 U.S.C. § 636(a)(6). Particularly in light of this important difference in statutory context, the bankruptcy court was wrong to infer that congressional silence regarding the eligibility of entities in bankruptcy to receive PPP loans was tantamount to a requirement that such entities be treated as eligible. *See Tradeways*, 2020 WL 3447767, at *14; *see also Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1192 (11th Cir. 2013) (recognizing that the presumption that significance should be attributed to the omission of language from one statutory provision that is included elsewhere in the same Act should yield to other contextual factors).

In sum, nothing in the CARES Act speaks directly to the question of whether entities in bankruptcy are entitled to PPP loans, and Congress vested SBA with the

authority necessary to adopt such a policy. The statute does not narrow SBA's authority to determine the criteria to be used in evaluating "sound value." Instead, Congress provided that SBA "may" (rather than "shall") guarantee PPP loans, 15 U.S.C. § 636(a)(36)(B), and preserved and expanded SBA's rulemaking authority, *see* CARES Act § 1114, 134 Stat. at 312, to ensure that the agency would be able to formulate standards that would allow lenders to effectively evaluate an unprecedented volume of loan applications in a period of months. Accordingly, the bankruptcy court erred in concluding that SBA's policy conflicts with the statute.

B. SBA's Policy Is Not Arbitrary And Capricious

1. SBA Adopted A Reasonable Policy To Satisfy The "Sound Value" Requirement In An Administrable Manner

The bankruptcy court similarly erred in concluding that SBA's policy is arbitrary and capricious. As this Court has recognized, the arbitrary and capricious standard is "exceedingly deferential." *Georgia Dep't of Educ. v. U.S. Dep't of Educ.*, 883 F.3d 1311, 1314 (11th Cir. 2018) (quoting *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008)). The challenged action will not be overturned so long as the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). A court may not, as the bankruptcy court did here, "substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43.

SBA's policy readily satisfies this standard. SBA adopted its policy towards entities in bankruptcy in furtherance of the "sound value" requirement that is generally applicable to Section 7(a) loans, and which also extends to the PPP. *See* 15 U.S.C. § 636(a)(6). In the typical Section 7(a) context, SBA implements the sound-value provision by requiring that applicants "must be creditworthy," and by conducting a multi-factor inquiry into, *inter alia*, the "credit history of the applicant," "[s]trength of the business," "[a]bility to repay the loan with earnings from the business," and "[p]otential for long-term success." 13 C.F.R. § 120.150. To that end, the application form for regular Section 7(a) loans requires applicants to disclose if they or their affiliates have ever filed for bankruptcy protection. *See supra* p. 7.

In implementing the PPP, SBA recognized that its usual approach to determining "sound value" would not permit it to "provide relief to America's small businesses expeditiously." 85 Fed. Reg. at 20,812. SBA therefore determined to "streamlin[e] the requirements of the regular 7(a) loan program," *id.*, by providing that PPP lenders need not assess the various indicia of creditworthiness set forth in 13 C.F.R. § 120.150. Instead, SBA would "allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower." 85 Fed. Reg. at 20,812. One such certification, at issue in this case, requires applicants to vouch that they are not in bankruptcy. *See supra* p. 9 (describing SBA's application form). SBA explained that this certification would avoid "an unacceptably high risk of . . . non-repayment of unforgiven loans." 85 Fed. Reg. at 23,451. Thus, as one bankruptcy court put it, the

bankruptcy exclusion question on the PPP application provides "a much simpler 'bright-line' rule" that reconciles the sound-value requirement with Congress's directive to proceed expeditiously with the PPP. *Schuessler*, 2020 WL 2621186, at *12.

SBA's policy here is plainly reasonable. An administrable rule was essential in a context where SBA was tasked with developing a program capable of rapidly distributing hundreds of billions of dollars to millions of distinct borrowers. *See* SBA, *Paycheck Protection Program (PPP) Report* 2 (May 30, 2020), https://go.usa.gov/xw5cn (showing that nearly 4.5 million loans were processed in just the first two months of the program). This endeavor would have been impossible without a modification to SBA's normal underwriting process. SBA's policy regarding bankruptcy status reflects a sound accommodation of the exigencies that necessitated streamlining through the use of plainly rational criteria. That is more than adequate to withstand review under the deferential arbitrary and capricious standard, as many courts have held. *See, e.g.*, *Schuessler*, 2020 WL 2621186, at *12; *accord Diocese of Rochester*, 2020 WL 3071603, at *8; *Henry Anesthesia Assocs. v. Carranza*, Adv. No. 20-6084, 2020 WL 3002124, at *10 (Bankr. N.D. Ga. June 4, 2020); *but see, e.g.*, *In re USA Gymnastics*, No. 120-1631, 2020 WL 4932233, at *2 (S.D. Ind. June 22, 2020).

2. The Bankruptcy Court's Contrary Conclusions Disregard Statutory Text And Fail To Afford SBA Appropriate Deference

In reaching the opposite conclusion, the bankruptcy court found that SBA's policy was infirm in two respects. First, the bankruptcy court faulted SBA for

believing that the sound value of a loan can be a legitimate consideration in the PPP context. Second, the court declared that SBA failed to consider the protections afforded by the Chapter 11 process that, in the court's view, should have mitigated the agency's concerns. Adv.R.14@31-40.

1. The bankruptcy court began from the premise that it was irrational for SBA to consider the collectability of unforgiven PPP loans because "PPP loans are designed to be forgiven." Adv.R.14@31; *see also* Adv.R.14@2 ("Although referred to as PPP 'loans,' the Paycheck Protection Program functions like a grant."). Congress has specified, however, that PPP loans are a form of Section 7(a) lending, and that these loans should (absent an express exception) be made "under the same terms, conditions, and processes as a loan made under" Section 7(a), including the sound value requirement. 15 U.S.C. § 636(a)(6), (a)(36)(B). SBA cannot have acted arbitrarily and capriciously in following a statutory directive.

The bankruptcy court was not at liberty to effectively reclassify PPP loans as grants. As one court explained, "the word 'loan' appears some 75 times in the CARES Act provisions establishing the PPP. The takeaway is clear: the $659 billion disbursed to borrowers through the PPP are loans, not grants." *See Tradeways*, 2020 WL 3447767, at *17. Although PPP loans may be forgiven when used for certain purposes, they will not be forgiven if used for unauthorized, or even some authorized, purposes. Congress contemplated that some businesses would use loans for purposes that are allowable under the PPP but are not forgivable. For example, PPP borrowers

are allowed to 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 those purposes will not be forgiven and must be repaid. *Id.* § 9005(b). Given Congress's clear intention that some PPP loans *will* be subject to a repayment obligation, there is no basis to conclude that SBA need not assure itself that loans awarded must be of "sound value," consistent with the requirements of the Section 7(a) program. When Congress meant to supersede specific requirements of the Section 7(a) lending program in establishing the PPP, it did so expressly. *See, e.g.*, *id.* § 636(a)(36)(I), (R).

There is likewise no inconsistency between SBA's decision to waive the more time-consuming underwriting requirements applicable to typical Section 7(a) loans, while adopting the challenged policy towards entities in bankruptcy. Contrary to the bankruptcy court's suggestion, SBA was not "talking out of both sides of its mouth," Adv.R.14@32; rather, SBA reasonably substituted one set of procedures for another in light of the urgent circumstances the PPP was adopted to address.

2. The bankruptcy court separately determined that SBA's policy failed to consider the protections afforded by the Chapter 11 process and was contrary to the evidence before the agency. Adv.R.14@32-40. The court noted that a bankruptcy court may impose conditions when allowing a debtor to borrow money; that debtors are subject to reporting requirements and oversight from the court, the U.S. Trustee, and from creditors; and that post-petition debt receives administrative priority. Adv.R.14@35. According to the bankruptcy court, these safeguards sufficiently

ameliorate the risk that debtors will misuse PPP funds or be unable to repay unforgiven loans and undermine the reasonableness of the agency's rule.

The bankruptcy court improperly substituted its judgment for that of the agency. As a commonsense matter, entities in bankruptcy, as a group, pose a greater credit risk than entities not in bankruptcy. For this reason, SBA has long considered bankruptcy status in the context of the Section 7(a) lending program. *See Tradeways*, 2020 WL 3447767, at *14 ("SBA's preexisting § 7(a) loan application asks a prospective borrower to disclose whether it or an affiliate has filed for bankruptcy.").

The safeguards noted by the bankruptcy court do not render it arbitrary and capricious for SBA to have determined that entities in bankruptcy should be treated differently. For one thing, many of the safeguards identified by the bankruptcy court require discretionary acts of vigilance by actors outside of SBA's control. While a bankruptcy court "can" impose conditions that limit how a debtor will use borrowed funds, the court is not required to obligate the debtor to use PPP funds only for forgivable purposes. Adv.R.14@34. Likewise, while creditors may assert an objection if PPP funds are used for unauthorized purposes that will not result in forgiveness (Adv.R.14@38), there is no guarantee that they will do so. SBA is not required to cede to others its responsibility to protect the federal fisc.

The bankruptcy court also overstated the repayment protections that the Bankruptcy Code would provide a lender that made a PPP loan to an applicant in bankruptcy. A debtor in bankruptcy may receive the court's permission "to obtain

unsecured credit," such as a PPP loan, which may be treated "as an administrative expense" in the hierarchy of priority. 11 U.S.C. § 364(b); *see also id.* § 507(a)(2). But any reassurance that might be thought to provide is undermined by the fact that (1) the PPP lender (and, by extension, the SBA as guarantor), would share administrative-expense priority with a potentially long list of other post-petition creditors, *see* 11 U.S.C. § 503; (2) the bankruptcy court may authorize the debtor to obtain additional credit "with priority over *any or all administrative expenses*," 11 U.S.C. § 364(c)(1) (emphasis added); *see also id.* § 364(d); and, (3) if the Chapter 11 bankruptcy fails and converts into liquidation, *all* pre-conversion administrative-expense claims would be subordinated to post-conversion claims, *see* 11 U.S.C. § 726(b). As one bankruptcy court has noted, given these "layers of claim payment priorities," Tr. at 46, *Trudy's Texas Star, Inc. v. Carranza*, Adv. No. 20-01026 (Bankr. W.D. Tex. May 7, 2020) (Mott, J.), it was entirely reasonable for SBA to conclude that "providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of . . . non-repayment of unforgiven loans." 85 Fed. Reg. at 23,451.

At bottom, even if a debtor such as Gateway had every intention of complying with its financial obligation, there is a very real risk that PPP loans to bankrupt applicants would provide funds to creditors rather than employees. If a debtor's Chapter 11 reorganization were to fail—and many do—any unspent PPP funds would be property of the debtor's estate and subject to distribution according to creditors' priority. *See* 11 U.S.C. §§ 541(a), 726. At that point, no amount of oversight would

supersede the Bankruptcy Code's priority list. It was not arbitrary and capricious for SBA to take that risk into account.

II. THE BANKRUPTCY COURT SHOULD NOT HAVE ENTERED AN INJUNCTION AGAINST SBA

The bankruptcy court's errors in resolving the merits of Gateway's APA claim are underscored by the fact that the court overstepped its authority in two separate respects in using its APA determination as a predicate for entering orders that preclude SBA from enforcing its policy against Gateway and require SBA to guarantee and potentially forgive a loan to Gateway.

A. Congress Has Protected SBA Against Intrusive Injunctions

The Small Business Act provides that "no . . . injunction . . . shall be issued against the Administrator or [her] property." 15 U.S.C. § 634(b)(1).[3] On the basis of that provision, the Fifth Circuit recently held in a closely related case that a bankruptcy court lacked the authority to enjoin the same SBA policy at issue here because "all injunctive relief directed at the SBA is absolutely prohibited." *In re Hidalgo Cty. Emergency Serv. Found.*, 962 F.3d 838, 840 (5th Cir. 2020) (emphasis omitted). In reaching that conclusion, the Fifth Circuit cited a string of circuit precedent, including one case, *Expedient Services, Inc v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980), that also constitutes circuit precedent in this Court. *See Hidalgo*, 962 F.3d at 840

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[3] The provision reads in full that: "[N]o attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property." 15 U.S.C. § 634(b)(1).

n.2; *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (establishing that Fifth Circuit cases from before 1981 constitute circuit precedent in the Eleventh Circuit).

The bankruptcy court's decision in this case, which predated *Hidalgo*, concluded that *Expedient Services* was inapplicable here because (the bankruptcy court believed) the Administrator exceeded her statutory authority, and the court declined to follow subsequent Fifth Circuit cases that read Section 634(b) as unequivocally precluding injunctive relief against the Administrator. Adv.R.14@17-20. Citing a division in the circuits as to the scope of Section 634(b), the court concluded that, based on "legislative purpose," it was appropriate to follow those courts that have taken the most limited view of Section 634(b). Adv.R.14@20; *see also Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057 (1st Cir. 1987).

This Court has not yet addressed the scope of Section 634(b). There can be no dispute that if the Court were to adopt the Fifth Circuit's interpretation, the judgment below must be reversed. *See Hidalgo*, 962 F.3d at 840. But even if the bar on injunctions were not categorical, it would, at a minimum, demonstrate that Congress has determined that public policy disfavors injunctions against SBA—a determination that should be a significant factor guiding courts in their exercise of equitable discretion. Had the bankruptcy court paid proper heed to Congress's determination that public policy disfavors issuance of a mandatory injunction that effectively compels SBA to expend federal funds, it would not have entered an injunction here.

The concerns animating Section 634(b) are particularly salient in these circumstances, in which SBA was charged by Congress with protecting the American economy by distributing hundreds of billions of dollars in loans to millions of borrowers over a period of just a few months.

B. The Bankruptcy Court Lacked Authority To Adjudicate A Claim Under The Administrative Procedure Act

1. The bankruptcy court's issuance of an injunction is further anomalous because the resolution of an APA claim is not within its core jurisdiction and thus can ultimately be resolved only by a district court.[4] Bankruptcy courts are courts of limited jurisdiction that "may hear two types of proceedings": core proceedings and non-core proceedings. *Wortley v. Bakst*, 844 F.3d 1313, 1317-18 (11th Cir. 2017). "Core proceedings" must either "exist exclusively in the bankruptcy context" or "invoke substantive rights created by federal bankruptcy law." *Id.* at 1318. Non-core proceedings, by contrast, include all matters "that 'could conceivably have an effect on the [bankruptcy] estate." *Id.* (quoting *Miller v. Kemira, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990)). Bankruptcy courts can issue final decisions with respect to core proceedings, but may only issue reports containing recommended decisions—akin to

[4] SBA did not raise this issue before the bankruptcy court. But because it is a jurisdictional defect in the judgment below, the issue is not subject to forfeiture. *See, e.g.*, *United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc.*, 841 F.3d 927, 932 n.1 (11th Cir. 2016) (recognizing that "subject matter jurisdiction cannot be created by waiver or forfeiture").

those of federal magistrate judges—in non-core proceedings. *See id.* at 1322. Ordinarily, district courts review a bankruptcy court's determinations in non-core matters *de novo*. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1940 (2015); 28 U.S.C. § 157(c)(1).

An APA claim is not a core proceeding—it neither arises in a bankruptcy-specific proceeding nor invokes substantive rights created by the Bankruptcy Code. Proceedings are bankruptcy-specific when they involve "the sort of case" that "would arise only in bankruptcy." *Wortley*, 844 F.3d at 1319; *see In re Toledo*, 170 F.3d 1340, 1348 (11th Cir. 1999) (quoting *Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). This is not such a case because Gateway could have filed its APA claim against SBA directly in district court. *See, e.g.*, *Diocese of Rochester*, 2020 WL 3071603, at *3-*4 (one such suit).[5] Accordingly, the bankruptcy court should not have finally adjudicated the APA claim in its injunction opinion, because it is a type of claim that falls outside the core domain of bankruptcy courts.

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[5] Gateway did assert one claim that arises under bankruptcy law, asserting that SBA's policy contravenes 11 U.S.C. § 525(a). *See supra* n. 2. But the bankruptcy court declined to decide that issue, and Gateway's mere assertion of that separate, unadjudicated claim does not transform the injunction that the bankruptcy court *did* issue into the product of a core proceeding. *See, e.g.*, *In re Exide Tech.*, 544 F.3d 196, 206 (3d Cir. 2008) ("The mere fact that a non-core claim is filed with a core claim will not mean that the second claim becomes 'core.'"); *Waldman v. Stone*, 698 F.3d 910, 921 (6th Cir. 2012) (same, citing *Exide*). Otherwise, litigants could convert non-core proceedings into core proceedings by pleading one core claim alongside many non-core counterparts.

2. Ordinarily, this Court would lack jurisdiction to review directly a bankruptcy court order resolving a non-core claim, *see Wortley*, 844 F.3d at 1322, and thus, the Court would be unable even to reach the merits of the APA arguments briefed in Part I, *supra*. The jurisdictional analysis here is complicated, however, by the fact that the bankruptcy court's order authorizing Gateway to take out a PPP loan pursuant to 11 U.S.C. § 364(b) is premised on, and effectively incorporates by reference, the court's resolution of the APA claim. Bank.R.266@2 ("*Because* the Court has determined the Rule is unenforceable to the extent it disqualifies the Debtor from participating in the Paycheck Protection Program, [footnote citing to the court's preliminary injunction opinion,] the Court concludes it is appropriate to overrule the objections and grant the Debtor's motion.") (emphasis added). In addition, the Section 364(b) order not only authorizes Gateway to incur the loan, but also specifies: "So long as the Debtor meets all the requirement of the Paycheck Protection Program (other than the Debtor not being in bankruptcy), the PPP Loan shall be eligible for loan forgiveness and the SBA guarantee." Bank.R.266@2. The Section 364(b) order thus purports to impose the same obligations on SBA as the injunction entered in connection with the APA claim.

Because an order under Section 364(b)—unlike an order resolving an APA claim—resolves a claim that exists only in bankruptcy and is premised on rights created by bankruptcy law, this Court may review it directly. And because the Section 364(b) order at issue here is predicated on the bankruptcy court's APA analysis from

its injunction opinion, this Court can consider the merits of that APA analysis (and the arguments addressed in Part I, *supra*) in the course of reviewing the Section 364(b) order.

The conclusion that this Court has appellate jurisdiction does not, however, mean that the bankruptcy court acted within the proper scope of its authority. On the contrary, the bankruptcy court exceeded its Section 364(b) powers to the extent it used them to enjoin SBA's policy and to require that Gateway's PPP loan be eligible for loan forgiveness and the SBA guarantee. Bank.R.266@2. Nothing in Section 364(b) vested the bankruptcy court with authority to impose conditions on *SBA*. Section 364(b) merely allows a bankruptcy court to authorize a debtor to incur unsecured debt. It does not empower the court to require any party to lend to the debtor or guarantee such a loan. That the bankruptcy court included such conditions in a Section 364(b) order only underscores that in resolving the APA challenge to SBA's policy, and in enjoining SBA, the court overstepped its authority.

CONCLUSION

For the foregoing reasons, the judgment of the bankruptcy court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,773 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua M. Salzman
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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Joshua M. Salzman
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15 U.S.C. § 634

§ 634. General powers

* * *

(b) Powers of Administrator. In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—

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

* * *

* * *

15 U.S.C. § 636

§ 636. Additional powers

(a) Loans to small business concerns; allowable purposes; qualified business; restrictions and limitations—The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes, for purposes of this chapter. Such financings may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis. These powers shall be subject, however, to the following restrictions, limitations, and provisions:

(1) In general.—

(A) Credit elsewhere.—

(i)In general.—The Administrator has the authority to direct, and conduct oversight for, the methods by which lenders determine whether a borrower is able to obtain credit elsewhere. No financial assistance shall be extended pursuant to this subsection if the applicant can obtain credit elsewhere. No immediate participation may be purchased unless it is shown that a deferred participation is not available; and no direct financing may be made unless it is shown that a participation is not available.

* * *

* * *

* * *

(4) Interest rates and prepayment charges.—

* * *

(C) Prepayment charges

(i) In general.—A borrower who prepays any loan guaranteed under this subsection shall remit to the Administration a subsidy recoupment fee calculated in accordance with clause (ii) if—

(I) the loan is for a term of not less than 15 years;

(II) the prepayment is voluntary;

(III) the amount of prepayment in any calendar year is more than 25 percent of the outstanding balance of the loan; and

(IV) the prepayment is made within the first 3 years after disbursement of the loan proceeds.

* * *

* * *

(6) All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment: Provided, however, That—

(A) for loans to assist any public or private organization or to assist any handicapped individual as provided in paragraph (10) of this subsection any reasonable doubt shall be resolved in favor of the applicant;

(B) recognizing that greater risk may be associated with loans for energy measures as provided in paragraph (12) of this subsection, factors in determining "sound value" shall include, but not be limited to, quality of the product or service; technical qualifications of the applicant or his employees; sales projections; and the financial status of the business concern: Provided further, That such status need not be as sound as that required for general loans under this subsection; and

(C) Repealed. Pub. L. 97–35, title XIX, § 1910, Aug. 13, 1981, 95 Stat. 778.

On that portion of the loan used to refinance existing indebtedness held by a bank or other lending institution, the Administration shall limit the amount of deferred participation to 80 per centum of the amount of the loan at the time of disbursement: Provided further, That any authority conferred by this subparagraph on the Administration shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel.

* * *

(36) Paycheck protection program.—

* * *

(B) Paycheck protection loans.—

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.

(C) Registration of loans.—

Not later than 15 days after the date on which a loan is made under this paragraph, the Administration shall register the loan using the TIN (as defined in section 7701 of title 26) assigned to the borrower.

(D) Increased eligibility for certain small businesses and organizations.—

(i) In general.—During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 657a(b)(2)(C) of this title shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—

(I) 500 employees; or

(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.

(ii) Inclusion of sole proprietors, independent contractors, and eligible self-employed individuals.—

(I) In general.—

During the covered period, individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals shall be eligible to receive a covered loan.

(II) Documentation.—

An eligible self-employed individual, independent contractor, or sole proprietorship seeking a covered loan shall submit such documentation as is necessary to establish such individual as eligible, including payroll tax filings reported to the Internal Revenue Service, Forms 1099–MISC, and income and expenses from the sole proprietorship, as determined by the Administrator and the Secretary.

(iii) Business concerns with more than 1 physical location.—

During the covered period, any business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursal shall be eligible to receive a covered loan.

(iv) Waiver of affiliation rules.—During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for—

(I) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72;

(II) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and

(III) any business concern that receives financial assistance from a company licensed under section 681 of this title.

* * *

(F) Allowable uses of covered loans.—

(i)In general.—During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for—

(I) payroll costs;

(II) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

(III) employee salaries, commissions, or similar compensations;

(IV) payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);

(V) rent (including rent under a lease agreement);

(VI) utilities; and

(VII) interest on any other debt obligations that were incurred before the covered period.

(ii) Delegated authority.—

(I) In general.—

For purposes of making covered loans for the purposes described in clause (i), a lender approved to make loans under this subsection shall be deemed to have been delegated authority by the Administrator to make and approve covered loans, subject to the provisions of this paragraph.

(II) Considerations.—In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, a lender shall consider whether the borrower—

(aa) was in operation on February 15, 2020; and

(bb)

(AA) had employees for whom the borrower paid salaries and payroll taxes; or

(BB) paid independent contractors, as reported on a Form 1099–MISC.

* * *

(G) Borrower requirements.—

(i) Certification.—An eligible recipient applying for a covered loan shall make a good faith certification—

(I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;

(II) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;

(III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and

(IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

* * *

(I) Credit elsewhere.—During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere, as defined in section 632(h) of this title, shall not apply to a covered loan.

* * *

(K) Maturity for loans with remaining balance after application of forgiveness.—With respect to a covered loan that has a remaining balance after reduction based on the loan forgiveness amount under section 9005 of this title—

(i)the remaining balance shall continue to be guaranteed by the Administration under this subsection; and

(ii)the covered loan shall have a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness under that section.

* * *

(R) Waiver of prepayment penalty.—

Notwithstanding any other provision of law, there shall be no prepayment penalty for any payment made on a covered loan.

* * *

* * *

13 C.F.R. § 120.150

§ 120.150. What are SBA's lending criteria?

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

(a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors;

(b) Experience and depth of management;

(c) Strength of the business;

(d) Past earnings, projected cash flow, and future prospects;

(e) Ability to repay the loan with earnings from the business;

(f) Sufficient invested equity to operate on a sound financial basis;

(g) Potential for long-term success;

(h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and

(i) The effect any affiliates (as defined in part 121 of this chapter) may have on the ultimate repayment ability of the applicant.