In the United States Court of Appeals for the Eleventh Circuit

Case No.: 20-13462

USF FEDERAL CREDIT UNION; Jovita Carranza, In her Capacity as administrator for the U.S. Small Business Administration, et.al.

Appellants,

vs.

GATEWAY RADIOLOGY CONSULTANTS, P.A.,

Appellee,

APPELLEE GATEWAY RADIOLOGY CONSULTANTS, P.A.'S RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee hereby certifies that the following, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3:

The name of the trial judge(s), all attorneys, persons, associations, or persons, associations of persons firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held entity that own 10% or more of the party's stock and other identifiable legal entities related to a party:

1. Achieva Credit Union
2. American Express
3. Aresty, Joel
4. Bankruptcy Estate of Gateway Radiology Consultants, P.A.
5. Barnett, Denise
6. Beighley, Myrick, Udell & Lynee, P.A. (Attorneys for Appellee)
7. Boston Scientific Corp.
8. Cherry Bekaert LLP
9. Chetan Raina
10. Choice Health

11. Emanuel & Zwiebel, PLLC
12. Emden, Christopher
13. Everbank TIAA Commercial Finance, Inc.
14. FL Legal Group
15. Gagandeep S. Mangat MD
16. Gateway Holding LLC
17. Gateway Radiology Consultants (Appellee)
18. Gilbert, Adam
19. Global Imaging Specialists
20. Gray Robinson, P.A.
21. Harish Patel
22. Henry Schein, Inc.
23. Hissing, Brad
24. Hunt, Joseph
25. Jensen, Paul
26. Jovita Carranza, In Her Capacity as Administrator for The U.S. Small Business Administration (Appellant)
27. KK Real Estate LLC
28. Murray, Megan (Attorney for Appellant)
29. Office of the United States Trustee

30. Philips Healthcare, a division of Philips North America, LLC
31. Radiographic Engineering
32. Ramsoft USA Inc. (CA)
33. Raymond James & Assoc
34. RH Fund XIV
35. S Jacob & Wolf LP
36. Saiber LLC
37. Sherman, Lynn
38. Small Business Administration
39. Socuis Marketing
40. Solomon, Steven
41. The Hon. Michael G. Williamson
42. The Hon. Thomas P. Barber
43. The United States of America on behalf of the Small Business Administration
44. Trenam Law
45. Trilogy Medwaste
46. Udell, Maury L. (Attorney for Appellee)
47. Underwood Murray, P.A.
48. United States Trustee – TPA

49. US Bank Equipment Finance

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STATEMENT REGARDING ORAL ARUGMENT

Appellee Gateway Radiology Consultants, P.A. ("Gateway") believes that oral argument would be of assistance to the Court.

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STATEMENT OF JURISDICTION

The Court has jurisdiction to review the order granting preliminary injunction (the "**Injunction Order")** appealed by the SBA, (Doc. No. 29 in Adversary Proceeding No. 20-ap-330-MGW and the order granting motion to borrow Paycheck Protection Program Loan (Doc. No. 266 in the Bankruptcy Case), ("**the Approval Order**"), appealed by USF. Likewise, this Court's review of the Memorandum Opinion and Injunction Order, (Doc. No. 14 in Adversary Case No. 20-ap-330-MGW) is permissible under the doctrine of pendant appellate jurisdiction, as the final **Approval Order** relies entirely on the decision reached by the Bankruptcy Court in the Memorandum Opinion and Injunction Order.

INTRODUCTION

With mounting evidence of rampant PPP fraud as a result of applications for PPP loans approved sight unseen by the SBA and lenders to non-Chapter 11 debtors, for instance, a "Florida Man"[1] using $4 Million of PPP funds to buy a ***Lamborghini Huracon Evo*** and consume hours on 'dating websites,' the application of an arbitrary exclusionary rule to businesses already under court supervision in bankruptcy makes even less sense when juxtaposed to the goal of the CARES Act and the PPP—***to keep Americans employed in the time of a pandemic***. Given the almost daily bulletins of PPP fraud[2] being uncovered it can be said the bankruptcy court's logic and ruling was beyond prophetic in light of the court monitoring of a Chapter 11 debtor's financial status versus a figurative "wild west"[3][4] of non-debtors

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[1] A Florida Man charged in PPP Fraud for using funds to purchase Lamborghini. https://www.tampabay.com/news/health/2020/07/28/he-bought-a-lamborghini-after-getting-a-4-million-ppp-loan-now-he-faces-a-fraud-charge/

[2] Texas man charged in $24 Million Paycheck Protection Program Fraud, https://www.kcbd.com/2020/10/09/texas-man-charged-million-paycheck-protection-program-fraud/ , October 9, 2020.

[3] North Carolina man accused of fraud in seeking $6 Million PPP funding based on "Game of Thrones" Characters. https://www.nbcnews.com/news/us-news/man-illegally-sought-coronavirus-loans-companies-named-after-game-thrones-n1241616

[4] Feds charge Pretty Ricky rapper with fraud for using COVID-19 loan to purchase Ferrari. https://www.wsbtv.com/news/feds-charge-pretty-ricky-rapper-with-fraud-using-covid-19-loan-purchase-ferrari/EP52SMNBE5BINONDHVCXX73UGM/#:~:text=Federal%20prosecutors%20said%20Smith%20fabricated,impact%20of%20the%20global%20pandemic.

who have no limitation or oversight on the use of PPP funds whatsoever. The bankruptcy court was authorized to enjoin the SBA from enforcing its arbitrary and capricious rule which discriminates against Chapter 11 debtors.

Gateway Radiology Consultants, P.A. is a debtor in chapter 11 bankruptcy currently operates an outpatient imaging, diagnostic, and interventional radiology centers in Pinellas County, Florida. Gateway was thrust into bankruptcy as a result of Phillips North America, LLC's fraudulent conduct and failure to deliver medical equipment to another imaging center in Polk County, Florida. Gateway has been reeling ever since, slowly attempting to reorganize under Chapter 11. Gateway had stabilized and was on its way emerging from bankruptcy when the COVID-19 pandemic infected the United States.

Despite the COVID-19 crisis, all fifty of Gateway's full-time employees continue to come to work each day to treat sick patients, however they are doing so at half pay. Gateway applied for a PPP loan to use for payroll, health insurance for employees, rent, and utilities in conformity with the PPP. Gateway sought and received permission from the Bankruptcy Court to obtain the PPP loan from USF Federal Credit Union ("USF"), yet the credit union refused to release the funds to Gateway to pay its employees pursuant to the PPP. The Bankruptcy Court entered an injunction which enjoined the SBA Administrator from disqualifying Gateway as eligible for a PPP loan. The Bankruptcy Court's Memorandum Opinion and

Injunction Order found, among other things, that the SBA's Rule[5] which disqualifies Gateway from receiving a PPP Loan is unenforceable and enjoined the SBA on the basis that it's administrator exceeded her authority. The bankruptcy court certified the question directly to this Court and Gateway filed a petition to appeal directly from the bankruptcy court. The SBA and USF both appealed to the district court. USF filed a cross-petition for permission to appeal directly from the bankruptcy court pursuant to 28 U.S. C.§ 158(d). On September 16, 2020, this Court granted USF's cross-petition. For the following reasons, the bankruptcy court should be affirmed.

[5] Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorization, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23,451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120 and 121).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Gateway as Appellee is responding to both Appellants' briefs in this Response Brief.

1. Whether the SBA Administrator can be enjoined where the agency has exceeded its statutory authority and where an injunction would not interfere with the agency's internal operations;

2. Whether the Bankruptcy Court erred in holding that the SBA Administrator exceeded her authority when she promulgated a rule disqualifying Chapter 11 Debtors from participating in the Paycheck Protection Program ("PPP");

3. Assuming the SBA Administrator did not exceed her authority, whether the Bankruptcy Court erred in holding that the SBA Administrator acted arbitrarily and capriciously in disqualifying Gateway from participating in the PPP because:

   a. she considered factors Congress did not intend her to consider (i.e., collectability);
   b. she failed to consider an important aspect of the problem (i.e., how the bankruptcy process promotes the same public policy as the CARES Act and how it makes it unlikely a Chapter 11 debtor will use a PPP "loan" for noncovered expenses);
   c. the SBA Administrator's explanation for her rule is contrary to the evidence before her (i.e., chapter 11 debtors are more likely to use PPP "loans" for noncovered expenses and less likely to repay PPP "loans" when the facts support the opposite).

STATEMENT OF THE CASE

Pursuant to Fed. R. App. P. 28(b), Gateway does not quarrel with the SBA's statement of the case in its initial brief. With respect to USF's statement of the case in its initial brief, Gateway only disputes its statement on page 6 that "the risk of non-repayment would be financial disastrous for USF." Pursuant to the SBA's Interim Final Rule which provides that a lender such as USF is able to rely upon borrower certifications to qualify for the SBA's guaranty of the loan without risk to the lender:

> "**SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria**; remedies for borrower violations or fraud are separately addressed in this interim final rule."
>
> Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811-01 (the "Interim Final Rule)(emphasis added).

STANDARD OF REVIEW

Although "the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Janvey v. Alguire*, 647 F.3d 585, 591-92 (5th Cir. 2011), *quoting Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). Preliminary injunctions are reviewed for an abuse of discretion, and the legal conclusions on which they are based are reviewed *de novo*. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F. 3d 1177, 1198 (11th Cir. 2009).

SUMMARY OF ARGUMENT

The bankruptcy court was authorized to enjoin the SBA Administrator. The SBA's categorical exclusion of bankruptcy debtors from the PPP exceeded its authority because the CARES Act contains no such exclusion for the PPP, while another section of the same Act, involving a different loan program for mid-sized businesses, specifically excludes bankruptcy debtors. Therefore, the omission proves express Congressional intent that PPP support loans are available to Chapter 11 debtors and the bankruptcy court was correct in enjoining the SBA Administrator.

The SBA's categorical exclusion of bankruptcy debtors from the PPP was arbitrary, capricious, an abuse of discretion, and not in accordance with law. Lastly, USF's loan is fully guaranteed despite any alleged "false certifications" by Gateway under the plain and unambiguous language of SBA's own rules which holds USF harmless from any certifications made by Gateway.

ARGUMENT

I. The SBA's determination that Chapter 11 debtors are not eligible for PPP loans is not consistent with the plain language of the CARES Act.

To provide emergency relief to American workers and small businesses, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Although the CARES Act was intended, in part, to help American workers who had already lost their job, much of the $2 trillion in relief provided for under

the CARES Act was intended to preserve American jobs. Congress passed the CARES Act in order to "provide an economic stimulus for our nation's businesses and citizens" affected by the COVID 19 pandemic. *Am. Ass'n of Political Consultants v. U.S. Small Bus. Admin.*, 2020 WL 1935525, at *1 (D.D.C. Apr. 21, 2020). Title I of the CARES Act focuses on supporting displaced American employees. It is titled the "Keeping American Workers Paid and Employed Act." *See* Pub. L. No. 116-136, 134 Stat. 281 (2020) at Title I.

For small businesses (those with 500 employees or fewer), Congress initially provided $349 billion in funding for the Paycheck Protection Program ("PPP"). Under the PPP, eligible small businesses can borrow up to two and a half times their average monthly payroll. The PPP is no ordinary loan program. Rather, as found by the Bankruptcy Court, the PPP operates in all respects as a grant.

Although denominated a "loan", the PPP requires no demonstration of creditworthiness, no personal guarantee, no collateral, no requirement to show that credit is unobtainable elsewhere, and in fact no requirement for repayment if the funds are used for the approved purposes. So long as a PPP borrower uses the "loan" for covered expenses (payroll, mortgage interest, rent, and utilities) the entire "loan" is forgiven. Because the loans are designed to be forgiven, both Congress and the SBA Administrator have dispensed with the underwriting typically required for SBA loans. This fact alone statutorily sets the PPP apart from any other loan program

ever authorized by the United States Congress. Normally borrowers are subject to strict underwriting guidelines. In the pandemic world, no such guidelines exist. Pursuant to the CARES Act, to be eligible for a PPP Loan, a borrower need only be a small business concern or a nonprofit organization, veterans organization, or Tribal business concern with fewer than 500 employees. The statute contains a list of the only requirements to participate in the PPP. Under SBA's rules the applicants' creditworthiness is not even considered. Therefore, it is presumed that applicants are in financial distress.

When applying for a PPP Loan, a borrower must also certify that:

- because of the economic uncertainty caused by COVID-19, the business needs the PPP Loan for its ongoing operations;
- the business will use the PPP Loan proceeds to retain workers and maintain payroll or make mortgage interest, lease, and utility payments; and
- between February 15, 2020 and December 31, 2020, the business has not and will not receive another PPP Loan.[11]

Congress intended that the SBA would make the PPP loan guarantees widely available to small businesses across the commercial spectrum. Indeed, Congress was aware that the SBA had historically declared certain classes of businesses ineligible

[11] 15 U.S.C. § 636(G)(i)(I) – (IV).

for SBA lending, and Congress set about to "[i]ncrease[] [e]ligibility" for PPP loan guarantees. 15 U.S.C. § 636(a)(36)(D). Congress did that by establishing only two criteria for PPP loan guarantee eligibility and providing that "*any* business concern … *shall* be eligible" for a PPP loan guarantee if it met those criteria. 15 U.S.C. § 636(a)(36)(D)(i) (emphasis added).

Unlike it does for the mid-size loan program, the CARES Act does not require a small business applying for a PPP Loan to certify that it is not a debtor in bankruptcy. Contrary to the SBA's contention, the SBA's policy of declining to extend PPP loans is inconsistent with the CARES Act. There is no statutory provision in the CARES Act, or the Small Business Act that prohibits extending PPP funding to debtors in bankruptcy. The CARES Act directly, explicitly, and unequivocally addresses the eligibility requirements for a PPP loan in Section 1102 and those requirements do not include or even contemplate a bankruptcy exclusion. The statutory silence on this issue stands in stark contrast with other parts of the CARES Act—parts that are inapplicable to the PPP—in which Congress explicitly prohibited lending to bankrupt entities. See CARES Act at § 4003(c)(3)(D)(i)(V) (requiring that any recipient of loan under Title IV not be "a debtor in a bankruptcy proceeding"). It is clear that Congress knew how to exclude debtors from loan programs in the CARES Act as they did in Section 4003, but they chose not to for the PPP.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States,* 522 U.S. 23, 29-30 (1997), *citing Russello v. United States,* 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo,* 472 F. 2d 720, 722 (5th Cir.1972); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012); *Lamie v. U.S. Trustee,* 540 U.S. 526, 538 (2004); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 374 (5th Cir. 2009); *State v. United States*, 336 F. Supp. 3d 664, 671 (N.D. Tex. 2018).

The Court must presume that Congress meant what it said and will not infer that which clearly does not exist. *See Conn. Nat'l Bank v. Germain* 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says"); *see also Bostock v. Clayton County*, 590 U.S __, No. 17–1618, June 15, 2020, slip op. at p. 24("[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written . . . unexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage— not to leave room for courts to recognize ad hoc exceptions.).

The SBA arbitrarily promulgated an application form for the PPP that categorically denies PPP relief to anyone in bankruptcy in the context of the CARES

Act passed to remedy the effect of the COVID-19 pandemic on the economy. Regular SBA 7(a) loan programs do not have such a categorical exclusion, although the existence of a bankruptcy is a factor to be considered in the determination of creditworthiness. In this categorical exclusion of bankrupts the SBA exceeded its authority under the CARES Act, mandating that the Bankruptcy Court hold unlawful and set aside the exclusion pursuant to the Administrative Procedures Act. 5 U.S.C. §706(2)(C). "[T]he [SBA] was not authorized to exclude American workers [from having their jobs saved with PPP funding] on the basis that they happened to be employed by a debtor in bankruptcy." *Alpha Visions Learning Academy, Inc. v. Carranza* (*In re Skefos) 2020 WL 2893413*10* (W.D.Tenn. June 2, 2020).

II. The bankruptcy court was correct in holding that the SBA Administrator exceeded her authority in promulgating the rule

Assuming arguendo that the CARES Act is ambiguous, the Bankruptcy Court correctly applied the *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) framework. Congress must have implicitly delegated to the agency the authority to fill in the statutory gaps. A court's application of APA §706(2)(C) is governed by the two-part test from *Chevron.* "At step one, the court considers 'whether Congress has directly spoken to the precise question at issue.' If Congress has directly spoken on an issue, that settles the matter: '[T]he Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' *Sw. Elec. Power Co. v.*

U.S. Envtl. Prot. Agency, 920 F.3d 999, 1014 (5th Cir. 2019)(*quoting Chevron*)(internal citations omitted).

Here the SBA's exclusion of debtors fails the *Chevron* test at step one. Neither the PPP nor section 7(a) of the Small Business Act categorically prohibits lending money to a debtor that is currently operating under Chapter 11 of the Bankruptcy Code as the SBA has done. Congress directly referenced bankruptcy eligibility in the CARES Act as well as other bankruptcy related provisions. In section 1113, Congress made amendments specifically relevant to the Bankruptcy Code. Congress temporarily increased the debt limit for a Subchapter V bankruptcy to $7,500,000.00 (up from $2.7 million). *See* CARES Act § 1113(1). Next, Congress chose when to make the CARES Act applicable to pending bankruptcy petitions. In section 1103(3) Congress specifically provided that the increased debt limit for Subchapter V bankruptcies only applied "to cases commenced . . . on or after the date of enactment of this Act." Third, Congress rewrote the definition of "Current Monthly Income" in 11 U.S.C. §101(10A)(B)(ii) to specifically provide that benefits under the CARES Act would not be counted as "current monthly income."

If the express Congressional intent is that CARES Act benefits can be used by a debtor as part of the debtor's plan, then how could Congress's intent suggest that debtors are not eligible for the PPP? Given that Congress specifically intended to give increased access to small businesses to reorganize under subchapter V, it

works directly against Congress' unambiguous intent when the SBA to preemptively disqualify businesses who are seeking to reorganize in bankruptcy from participation in the PPP. Congress amended Subchapter V to provide that new subchapter V debtors would benefit from the increased debt limit of $7.5 million but that existing subchapter V debtors would not benefit from the increased debt limit. See CARES Act § 1113(1) and (3). Congress also specifically allowed chapter 13 debtors to calculate "disposable income" without including CARES Act benefits but did not provide the same relief to subchapter V debtors or chapter 11 debtors generally.

Congress specifically addressed existing bankruptcies in the legislation and omitted any creditworthiness considerations (like being in bankruptcy) for PPP eligibility. Nevertheless, the SBA promulgated a form for PPP applications which states that "the loan will not be approved" if the applicant is "presently involved in any bankruptcy." In doing so the SBA clearly exceeded its authority and the bankruptcy court should be affirmed.

III. Injunctive relief was authorized and entirely proper

There is a split in the Federal Circuits on the issue of a court's ability to enjoin the SBA. The SBA relies on the Fifth Circuit's case of *In re Hidalgo County Emergency Service Foundation,* 962 F. 3d 838 (5th Cir. 2020), where the Court held that the bankruptcy court exceeded its authority in enjoining the SBA

based on binding precedent and refused to entertain any argument related to 11 U.S.C. § 525(a)'s prohibition of discrimination based on bankruptcy status.

However, the 1st, 2nd, 4th, 6th, 7th, and Federal Circuits allow injunctive relief against the SBA in certain circumstances. *Ulstein Maritime, Ltd. v. United States,* 833 F.2d 1052, 1056 (1st Cir.1987); *Springfield Hosp. v. Carranza (In re Springfield Hosp.)*, Case # 19-10283, at *24 (Bankr. D. Vt. June 22, 2020); *Defy Ventures v. U.S. Small Bus. Admin.*, Civil Action No. CCB-20-1838, 12 (D. Md. Jun. 29, 2020) (". . . injunctive relief in this case is available against the SBA."); *Cavalier Clothes, Inc. v. United States,* 810 F.2d 1108 (Fed. Cir. 1987); *Camelot Banquet Rooms, Inc. v. U.S. Small Business Administration*, 2020 WL 2088637 (E. D. Wisc. 2020) (section 634(b)(1) does not preclude an injunction against the SBA in its regulation of the PPP program.); *Camelot Banquet Rooms, Inc. v. U.S. Small Business Administration,* Order dated May 20, 2020, Case: 20-1729 (*7th Cir.)* (SBA's request for stay of injunction regarding PPP is denied); *DV Diamond Club of Flint, LLC, et al v. SBA, et al* , Order dated May 15, 2020, Case No. 20-1437 (6th Cir.) (SBA's request for stay of injunction regarding PPP is denied). S*ee also Canterbury Career School, Inc. v. Riley*, 833 F. Supp. 1097, 1103 (D.N.J. 1993) (injunctive relief would be permissible if the agency actions exceed its statutory authority); *CBM Education Center of San Antonio, Inc. v. Alexander*, 1992 WL 551256 (Bankr.S.D.Tex. February 14, 1992) (same).

The First Circuit held that the "no-injunction" language protects the agency from interference with its internal workings, such as by judicial orders attaching agency funds, but that it does not provide blanket immunity from every type of injunction. In particular, it should not be interpreted as a bar to judicial review of agency actions that exceed agency authority where the remedies would not interfere with internal agency operations. *Ulstein, supra* at 1057 (citing other courts holding 634(b)(1) not a bar to injunctions in all circumstances). *See also Cavalier Clothes, supra at* 1112; *Oklahoma Aerotronics v. U.S.,* 661 F.2d 976, 977(D.C.Cir.1981); *Related Indus. v. United States,* 2 Cl.Ct. 517, 522 (1983); *Dubrow v. Small Business Admin.,* 345 F.Supp. 4, 7 (D.Cal.1972); *Simpkins v. Davidson,* 302 F.Supp. 456, 458 (S.D.N.Y.1969).

More recently, the District Court for the Eastern District of Wisconsin held that section 634(b)(1) does not preclude an injunction against the SBA in its regulation of PPP funds. *Camelot Banquet Rooms, supra,* 2020 WL 2088637. The Court pointed out the reasoning with a hypothetical:

> Indeed, if provisions such as §634(b)(1) meant that the agency could never be enjoined, then an agency could adopt unconstitutional policies and continue to follow them even after a court declared them unconstitutional. For example, the SBA could adopt a policy stating that it will extend small business loans only to companies owned by white men. If §634(b)(1) means that the SBA may never be enjoined, then a court could not enjoin this policy, even though it would be blatantly unconstitutional.

The Federal Circuit analyzed the meaning of the limitation on the waiver of

immunity in 15 U.S.C. § 634(b)(1) in *Cavalier Clothes, supra*, 810 F.2d at 1108. The origin and purpose of the language in 15 U.S.C. § 634(b)(1) goes back to *FHA v. Burr*, 309 U.S. 242 (1940), which held that when Congress established an agency that was authorized to engage in business transactions and permitted it to "sue and be sued" (as is true of the SBA), this waiver extended to all civil processes incident to suit such as garnishment and attachment of the agency's assets. Therefore, language such as that in § 634(b)(1) was added to enabling statutes to bar the attachment of agency funds and other interference with agency functioning. The same boilerplate language is found repeatedly in statutes establishing agencies that provide loans or funds to the public, *e.g.,* 7 U.S.C. § 1506(d) (Federal Crop Insurance Corporation); 15 U.S.C. § 714b(c) (Commodity Credit Corporation); 42 U.S.C. § 3211(11) (Secretary of Commerce).

While the specific legislative history of 15 U.S.C. § 634(b)(1) is silent on the purpose of this language, the legislative history of earlier statutes containing the identical wording indicates that it was intended to keep creditors or others suing the government from hindering and obstructing agency operations through mechanisms such as attachment of funds. Nothing in the language or the legislative history of § 634 suggests that Congress intended to grant the SBA any greater immunity from injunctive relief than that possessed by other governmental agencies. Rather, it merely intended to ensure that the SBA be treated the same as

any other government agency in this respect." *Ulstein,* 833 F.2d at 1056-57 (internal citations omitted) (emphasis added).

IV. The SBA's rule excluding Chapter 11 debtors from receiving PPP loans is arbitrary and capricious

"When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). "[C]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision-making." *Id.* at 53. SBA's exclusionary rule does not meet this standard.

It was not until the fourth interim rule published on April 28, 2020 that the SBA explained 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." The SBA's bankruptcy exclusionary rule has the effect of disqualifying an entire class of troubled small businesses with employees—perhaps those who need it the most. At the same time, SBA's rules permit loans to convicted felons and waived normal conflicts of interest vetting.

It is beyond dispute that court-authorized post-petition indebtedness obtained pursuant to 11 U.S.C. §364(b) has at least administrative expense priority, which would be significantly more favorable for the SBA than the general unsecured status that would apply to PPP funding obtained by a distressed borrower prior to commencing a bankruptcy case. *See* 11 U.S.C. §507(a)(2). Moreover, the notion

that a borrower in bankruptcy presents a higher risk of nonrepayment than a borrower outside of bankruptcy is empirically false. *See, e.g.,* Espen Eckbo, B., Li, K. and Wang, W., Rent Extraction by Super-Priority Lenders (Mar. 13, 2020), Tuck School of Business Working Paper No. 3384389 (2019)(reviewing data on DIP loans over the period 1988-2014 and finding "a near-zero likelihood of less than full repayment."). The SBA's exclusionary rule simply ignores the many protections available for post-petition lenders that are not available to lenders for borrowers outside of bankruptcy.

As for the supposed "unacceptably high risk of an unauthorized use of funds," debtors in bankruptcy are required to file monthly reports of all their financial activity, which reports are subject to scrutiny by other creditors and the bankruptcy court itself. Debtors must obtain court approval to borrow money outside the ordinary course of business pursuant 11 U.S.C. §364, which is subject to objection by creditors and the imposition of conditions for use of funds by the court. Debtors also have express fiduciary obligations to their entire creditor constituency, who are often vociferous and demanding about a debtor's conduct, in particular how the debtor uses its cash while "in the fishbowl". *See e.g., In re Alterra Healthcare Corp.*, 353 B.R. 66, 73 (Bankr. D. Del. 2006)("During a chapter 11 reorganization, a debtor's affairs are an open book and the debtor operates in a fish bowl"). Another bankruptcy court reasoned that a debtor with a PPP loan would be watched by a

"hundred-eyed Argus" to assure the PPP money is used only for the covered expenses so that the proceeds are forgiven. *Roman Catholic Church of the Archdiocese of Santa Fe v. United States of America Small Business Administration (In re Roman Catholic Church of Archdiocese of Santa Fe)*, 2020 WL 2096113 at *6 (Bankr D.N.M. May 1, 2020). ("In short, the chapter 11 bankruptcy system is a hundred eyed Argus.").

If a non-debtor recipient of PPP funds uses the money for noncovered expenses, there is nothing anyone can do about it, and the company would simply be obligated to repay the money if it could. Fraudsters and scammers across the country have taken advantage of the PPP, to the detriment of other workers who had the unfortunate luck of being employed at an entity trying to reorganize under Chapter 11 ***in the middle of a pandemic.***

Moreover, debtors often operate under the close supervision of official committees and the constant threat of the appointment of trustees and/or examiners. *See* 11 U.S.C. §1102, 11 U.S.C. §1104. PPP recipients outside of bankruptcy have no such reporting obligations, ongoing scrutiny, supervision, overhanging risk of losing control of the company, or express fiduciary duties to creditors. Thus, as an undisputable factual matter, debtors in bankruptcy have *less* risk of an unauthorized use of funds than non-debtors. The purpose of a business reorganization case is to restructure a business's finances so that it may continue to operate and provide its

employees with jobs. See H.Rep. No.95-595, 95th Cong., 1st Sess. 220 (1977), U.S. Code Cong. Admin. News 1978, p.5787, 6179. ***That is exactly the same Congressional policy goal as the PPP.*** The SBA's misguided exclusionary rule actually defeats express Congressional policy goals for both statutes, instead of harmonizing them as Congress clearly intended for the PPP, and is therefore arbitrary and capricious.

V. There is no risk of irreparable injury to USF

USF's claim that its PPP loan to Gateway will lose guaranteed status has no basis in law or fact. If this Court affirms the Bankruptcy Court's approval order and injunction of the SBA, then there is no harm since the loan is to an eligible entity and those protected by the SBA's guarantee through its eventual capitulation and deference to this Court's judgment. The SBA's Interim Final Rule states that a lender will be held harmless for a borrowers' failure to comply with the PPP criteria:

> "**SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria**; remedies for borrower violations or fraud are separately addressed in this interim final rule."

> Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811-01 (the "Interim Final Rule)(emphasis added).

USF's exaggerated statements on the possibility of jeopardizing USF's operations if the loan was not guaranteed is not well founded, The SBA's own Rules and Regulations specifically address an instance involving a lender's reliance on possibly inaccurate statements of a borrower.

Specifically, the Rules pose the following question and answer:

> "Can lenders rely on borrower documentation for loan forgiveness?
>
> Yes. The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. The Administrator will hold harmless any lender that relies on such borrower documents and attestation from a borrower. The Administrator, in consultation with the Secretary, has determined that lender reliance on a borrower's required documents and attestation is necessary and appropriate in light of section 1106(h) of the Act, which prohibits the Administrator from taking an enforcement action or imposing penalties if the lender has received a borrower attestation."
>
> Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811-01 at 20815-20816.
>
> "What are the loan terms and conditions?
>
> **Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans,** with certain changes including but not limited to: i. The guarantee percentage is 100 percent. ii. No collateral

> will be required. iii. No personal guarantees will be required. iv. The interest rate will be 100 basis points or one percent. **v. All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds."**
>
> Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811-01 at 20815-20816.(emphasis added).

USF concedes that Gateway qualifies for PPP based on the certifications, albeit according to USF, "false or misleading." A lender, such as USF, was permitted to rely on Gateway's certifications and the loan must be guaranteed by the SBA. Nevertheless, USF would still be held harmless by the SBA so long *as the* ***certifications reflect that*** Gateway qualifies for the PPP loan. There was no dispute that Gateway's certifications reflected that it was eligible for PPP, the SBA's position notwithstanding. Therefore, USF's PPP loan to Gateway is guaranteed by the SBA and no harm exists for USF.

CONCLUSION

Based on the reasons set forth above, this Court should affirm the bankruptcy court's Approval Order and Injunction Order and allow Gateway to participate in the PPP like every other eligible entity during the worst pandemic in the history of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 16, 2020, a copy of the foregoing Response Brief was served this day on all counsel of record via Notices of Electronic Filing generated by CM/ECF: Megan Wilson Murray, Esq., mmurray@underwoodmurray.com, Lindsey Powell, Lindsey.E.Powell@usdoj.gov, Joshua Mark Salzman, Joshua.M.Salzman@usdoj.gov

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CERTIFICATE OF COMPLIANCE

I certify that the forgoing Response Brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and Fed. R. App. P. 27(a) (2) (B) because it contains 5309 words, as created by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

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