TO GIVE OR NOT TO GIVE? EXAMINING WHETHER THE SMALL BUSINESS ADMINISTRATION HAS THE AUTHORITY TO EXCLUDE BANKRUPTCY DEBTORS FROM THE PAYCHECK PROTECTION PROGRAM

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I. INTRODUCTION

According to a survey conducted by CBIZ, Inc., over 43% of small to mid-sized businesses "report[ed] a significant to severe impact" from the Coronavirus pandemic ("COVID-19"), while "84% . . . of businesses surveyed realized some impact from the pandemic."[1] To help businesses combat their economic hardships, Congress enacted the "Coronavirus Aid, Relief, and Economic Security Act," also known as the "CARES Act."[2] Within the CARES Act is the "Paycheck Protection Program" ("PPP").[3] The PPP provides small businesses[4] with funds to pay payroll costs and other allowable expenses.[5] PPP funds are eligible for loan forgiveness if the applicant meets specific requirements enumerated under the CARES Act.[6] As of this Article, the Small Business

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1. *Small Businesses Feel Biggest Impact of Coronavirus Pandemic*, BUSINESS WIRE (Oct. 8, 2020, 9:30 AM), https://www.businesswire.com/news/home/20201008005232/en/Small-Businesses-Feel-Biggest-Impact-of-Coronavirus-Pandemic.

2. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–36, § 1101, 134 Stat. 281, 281 (2020) [hereinafter CARES Act].

3. *Id.* § 1102, 134 Stat. at 286.

4. The PPP defines a small business as a business that does not employ more than 500 employees. *Id.* at 288.

5. *Small Business Paycheck Protection Program*, U.S. DEP'T. OF THE TREAS., https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses (last visited Mar. 7, 2022).

6. The SBA will forgive a PPP loan if: (1) the "[e]mployee and compensation levels are maintained" by the applicant; (2) "[t]he loan proceeds are spent on payroll costs and other eligible

Administration ("SBA") dispersed $522 billion in the PPP's first draw and $284.45 billion in the second draw.[7]

But what if an applicant files for bankruptcy before receiving its PPP funds? Is the SBA required to distribute PPP funds to the bankruptcy debtor? The SBA does not believe so. After consulting the Secretary of the Treasury, the SBA issued an interim final rule ("IFR") on the PPP.[8] The IFR provided that applicants are ineligible to receive PPP funding if they are bankruptcy debtors or file for bankruptcy before applying.[9] Further, the IFR states that "[i]f the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application," but before the SBA disburses the loan, the applicant must notify their respective lender and "request cancellation of the [PPP] application."[10] The SBA justified its decision by stating that "providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or nonrepayment of unforgiven loans."[11]

While the SBA took a firm position on whether entities filing for bankruptcy before the disbursement of PPP funds are eligible to receive the PPP funds, the courts have not. As it currently

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expenses"; and (3) "[a]t least 60 percent of the proceeds are spent on payroll costs." *PPP Loan Forgiveness*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-loan-forgiveness (last visited Mar. 7, 2022).

7. Emily Hamann, *A New Round of PPP is Coming. Here's What's Changed, and What's the Same in the Program*, SACRAMENTO BUSINESS JOURNAL (Dec. 22, 2020), https://www.bizjournals.com/sacramento/news/2020/12/22/whats-the-same-whats-changed-ppp.html.

8. 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) (to be codified at 13 C.F.R. pt. 120-21). The IFR in question is the fourth regulation the SBA issued on the PPP/CARES Act. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020) (first regulation); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817 (Apr. 15, 2020) (second regulation); Requirements for Certain Pledges of Loans, 85 Fed. Reg. 21,747 (Apr. 20, 2020) (third regulation). Yet only the fourth regulation—the IFR—is of relevance here. *Infra* note 12.

9. Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. at 23,451 ("If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.").

10. *Id.* The SBA notes that "[f]ailure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes." *Id.*

11. *Id.*

stands, there is a split between courts on whether the IFR violates the Administrative Procedure Act ("APA") and 11 U.S.C. § 525.[12]

Part II of this Article will explore the relevant sections of the APA and 11 U.S.C. § 525 to understand the issues at hand better. Part III of this Article will then highlight the legal arguments each side advanced on this issue. Finally, Part IV of this Article will suggest that while SBA had both the constitutional and statutory authority to exclude bankruptcy debtors from the PPP program, there is a potential solution to the debtors' problem.

II. A DISCUSSION OF THE APA AND 11 U.S.C. § 525

Most debtors challenging the SBA's IFR have argued the IFR violates the APA because (1) the IFR exceeds statutory authority under 5 U.S.C. § 706(2)(C), and (2) it was arbitrary and capricious—and 11 U.S.C. § 525's prohibition against discriminatory treatment of bankruptcy debtors.[13] To better understand the legal arguments advanced on each side,[14] a deeper dive into the APA and 11 U.S.C. § 525 is required.

A. The Administrative Procedure Act

The APA is found within Title 5 of the United States Code ("U.S.C.").[15] The APA "governs the process by which federal agencies develop and issue regulations."[16] While agencies can create rules, whether formal[17] or informal,[18] these rules face, when

12. *Compare*, *e.g.*, Alaska Urological Inst., P.C. v. U.S. Small Bus. Admin., 619 B.R. 689, 710 (D. Alaska 2020) (ruling for the debtor); In re Skefos, 2020 WL 2893413, at *15 (Bankr. W.D. Tenn. June 2, 2020) (same); In re Roman Catholic Church of Archdiocese of Santa Fe, 615 B.R. 644, 657 (Bankr. D.N.M. 2020) (same), *with*, *e.g.*, In re Gateway Radiology Consultants, P.A., 983 F.3d 1239, 1262 (11th Cir. 2020) (ruling for the SBA) [hereinafter *Gateway II*]; Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *7 (D. Md. June 24, 2020) (same); Diocese of Rochester v. U.S. Small Bus. Admin., 466 F. Supp. 3d 363, 378, 380 (W.D.N.Y. 2020) (same).

13. *See Gateway II*, 983 F.3d at 1246–47 (only discussing the violations under the APA); *Tradeways, Ltd.*, 2020 WL 3447767, at *1; *Diocese of Rochester*, 466 F. Supp. 3d at 369; *Alaska Urological Inst.*, 619 B.R. at 696; *In re Skefos*, 2020 WL 2893413, at *1; *Roman Catholic Church*, 615 B.R. at 652–56.

14. *Infra* Pt. II.

15. 5 U.S.C. § 551 et seq. (2018).

16. *Summary of the Administrative Procedure Act*, EPA, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act (last visited Mar. 7, 2022).

17. 5 U.S.C. §§ 556, 557.

18. *Id.* § 553(b)–(c).

challenged, what is known as "judicial review."[19] The APA is clear that any person adversely affected or aggrieved by an agency's action is entitled to judicial review.[20] As for the scope of a judicial review, a court can "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"[21] or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[22]

Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. best explains the arbitrary and capricious standard.[23] Generally, an agency rule is arbitrary and capricious under four circumstances: (1) if "the agency [relies] on factors" which Congress did not intend for the agency to consider; (2) if the agency "entirely failed to consider an important aspect of the problem"; (3) if the agency "offered an explanation for its decision that runs counter to the evidence before the agency"; or (4) if the rule "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[24]

The Supreme Court noted that the scope of review to determine if an administrative act is arbitrary and capricious is narrow and that a court cannot "substitute its judgment for that of the agency."[25] Instead, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[26] When reviewing the agency's explanation, the court must determine whether the agency based its decision on relevant factors and whether the agency committed "a clear error of judgment."[27] Yet a reviewing court cannot make up for an agency's shortcomings or deficiencies.[28] Rather, a reviewing court should

19. *Id.* § 701 et seq. (2018). Judicial review is the review of an agency's legislation by a reviewing court. *Id.*

20. *Id.* § 702.

21. *Id.* § 706(2)(A).

22. *Id.* § 706(2)(C).

23. 463 U.S. 29 (1983).

24. *Id.* at 43.

25. *Id.*

26. *Id.* (citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)).

27. *Id.* (quotations in original) (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

28. *Id.* (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

uphold the agency's decision, even if it is "of less than ideal clarity," if the court can reasonably discern the agency's reasoning.[29]

Concerning whether an agency exceeded its statutory jurisdiction, authority, or limitations,[30] the standard comes from *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*[31] In *Chevron*, the Supreme Court focused on whether the Environmental Protection Agency exceeded its statutory authority by creating a regulation allowing States to group all pollution-emitting devices "as though they were encased within a single bubble."[32] The Supreme Court applied a two-step framework for evaluating agency actions under § 706(2)(C).[33] The first step of the test looks at "whether Congress has directly spoken [on] the precise question at issue."[34] If Congress has indeed spoken on the issue, and it's intent is clear, then the reviewing court and agency must adhere to Congress' interpretation.[35]

If Congress has not addressed the precise issue, "[a reviewing] court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[36] Instead, the question becomes whether the agency based its answer "on a permissible construction of the statute."[37] This analysis hinges on whether Congress' decision to leave an ambiguity or failure to include express language was explicit or implicit.[38] If the decision was explicit, the agency's regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[39] On the other hand, if the decision is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable

29. *Id.* (citing Bowman Transp., 419 U.S. at 286; Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (per curiam)).

30. 5 U.S.C. § 706(2)(C).

31. 467 U.S. 837, 844, 863 (1984).

32. *Id.* at 840 (internal quotations omitted).

33. *Id.* at 842–43.

34. *Id.* at 842.

35. *Id.* at 842–43 ("[a reviewing] court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

36. *Id.* at 843 (citing R. POUND, THE SPIRIT OF THE COMMON LAW 174–75 (1921)).

37. *Id.*

38. *Id.* at 843 (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

39. *Id.* at 843–44 (citing United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424–26 (1977); Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 235–37 (1936)).

interpretation made by the administrator of an agency."[40]

B. 11 U.S.C. § 525

11 U.S.C. § 525 protects bankruptcy debtors against discriminatory treatment based on whether the person is or has been a bankruptcy debtor.[41] While Congress enacted § 525 in 1978,[42] its protections precede its codification.[43]

In *Perez*, the Supreme Court faced whether Arizona Rev. Stat. § 28–1163(B) of the Arizona Motor Safety Responsibility Act ("Arizona Act") "was in direct conflict with the Bankruptcy Act" and in violation of the Supremacy Clause.[44] While the Supreme Court respected the Arizona Act's principal purpose,[45] it contrasted the purpose of the Arizona Act to the purpose of the Bankruptcy Act.[46] The Bankruptcy Act gave debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[47] The Supreme Court noted Congress intended for the Bankruptcy Act to provide a "'new opportunity' to include freedom from most kinds of preexisting tort judgments."[48] As a result, the Supreme Court reasoned that the state law, like the Arizona Act, could not "frustrate the operation of federal law," such as the Bankruptcy Act, "as long as the state legislature . . . had some purpose in mind other than one of

40. *Id.* at 844 (citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 87 (1975)).

41. 11 U.S.C. § 525 (2018).

42. S. REP. 95-989, 81 (1978).

43. Perez v. Campbell, 402 U.S. 637, 656 (1971).

44. *Id.* at 643 (citing U.S. Const. Art. VI, cl. 2). The Arizona Act was "designed to secure compensation for automobile accident victims a section providing that a discharge in bankruptcy of the automobile accident tort judgment shall have no effect on the judgment debtor's obligation to repay the judgment creditor." *Id.*

45. *Id.* at 644 (citing Schecter v. Killingsworth, 93 Ariz. 273, 280 (1963)). The Arizona Act's purpose was "the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons." *Id.*

46. *Id.* at 648.

47. *Id.* (internal quotations omitted) (citing Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)). *Accord, e.g.*, Harris v. Zion Sav. Bank & Tr. Co., 317 U.S. 447, 451 (1943); Stellwagen v. Clum, 245 U.S. 605, 617 (1918); Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915).

48. *Id.* (citing Lewis v. Roberts 267 U.S. 467, 470 (1925)).

frustration."[49] Thus, the Supreme Court held Section 28–1163(B) to be invalid under the Supremacy Clause.[50]

As a result, Congress codified the *Perez* decision into 11 U.S.C. § 525 in 1978.[51] The relevant analysis falls under § 525(a). Under § 525(a):

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.[52]

Thus, to prevail on a bankruptcy discrimination claim, a debtor must show: (1) the discriminator is a "governmental unit"[53]; (2) the denial refers to a "license, permit, charter, franchise, or other

49. *Id.* at 651–52.

50. *Id.* at 652.

51. S. REP. 95-989 (1978) ("This section is additional debtor protection. It codified the result of Perez v. Campbell, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers [sic] license because a tort judgment resulting from an automobile accident has been unpaid as a result of a discharge in bankruptcy.").

52. 11 U.S.C. § 525(a).

53. Of relevance, the Bankruptcy Code defines "governmental unit" as the "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States." *Id.* § 101(27).

similar grant"; and (3) the discriminator discriminated against the debtor only because they are a bankruptcy debtor.[54]

III. THE CURRENT SPLIT: FRAMING THE ARGUMENTS

As noted in Part I,[55] there is a current split between courts on whether the SBA's IFR is lawful under the APA and 11 U.S.C. § 525(a).[56] The fundamental issues are: (1) whether the IFR exceeds its statutory authority under 5 U.S.C. § 706(2)(C); (2) whether the IFR is arbitrary and capricious under 5 U.S.C. § 706(2)(A); and (3) whether the IFR violates 11 U.S.C. § 525(a)'s prohibition against discrimination of bankruptcy debtors. This Part will outline the arguments advanced by both sides of the split on each issue.

A. Whether the IFR Exceeds Statutory Authority

i. The Debtor's Argument

First, the pro-debtor courts acknowledge that Congress did not explicitly deal with whether bankruptcy debtors are eligible for PPP funds.[57] Even so, Congress' silence or ambiguity infers delegation to the agency to "fill in the statutory gaps,"[58] "[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[59]

These courts determined that the PPP is one of those extraordinary cases.[60] As the starting point of the analysis, courts

54. *Id.* § 525(a); Ayes v. U.S. Dep't. of Veterans Affairs, 473 F.3d 104, 107 (4th Cir. 2006).

55. *See supra* Part I.

56. *Supra* note 12.

57. In re Gateway Radiology Consultants, P.A., 616 B.R. 833, 847 (Bankr. M.D. Fla. 2020) [hereinafter *Gateway I*], *vacated in part, appeal dismissed in part* by *Gateway II,* 983 F.3d 1239 (11th Cir. 2020).

58. *Id.* at 846.

59. King v. Burwell, 576 U.S. 473, 485 (2015) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

60. *Gateway I*, 616 B.R. at 847; In re Roman Catholic Church of Archdiocese of Santa Fe, 615 B.R. 644, 655–56 (Bankr. D.N.M. 2020).

determine whether the "statutory language is plain."[61] Determining whether statutory language is plain and unambiguous requires "read[ing] the words 'in their context and with a view to their place in the overall statutory scheme.'"[62] Here, the *Gateway I* court looked at the PPP in the context of the CARES Act,[63] the PPP's place in the overall statutory scheme,[64] and the words found in the CARES Act.[65] When looking at the context of the CARES Act, the courts noted that the COVID-19 pandemic forced the United States into a state of emergency.[66] As for the PPP's place in the statutory scheme, the *Gateway I* court determined that Congress intended to help keep these distressed workers employed based on Title I of the CARES Act, titled "Keeping Workers Paid and Employed Act."[67] Last, the *Gateway I* court looked at the word "shall"[68] when the CARES Act provided that any small business "that has 500 employees or fewer 'shall be eligible' for a PPP loan."[69]

What's more, these courts noted that when "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 act[ed] intentionally and purposely in the disparate inclusion or exclusion."[70] The courts also noted that CARES Act § 4003(c)(3)(D), codified under Title 15 of the United States Code, specifies that qualifying businesses that are debtors in bankruptcy are not eligible for the mid-size loan under the CARES Act.[71] The courts reasoned that Congress chose not to disqualify bankruptcy debtors from the PPP by including language disqualifying debtors

61. *Gateway I*, 616 B.R. at 847 (citing *King*, 576 U.S. at 486).

62. *Id.* (citing *King*, 576 U.S. at 486 (quoting *Brown & Williamson*, 529 U.S. at 133)).

63. *Id.*

64. *Id.* at 847–48.

65. *Id.* at 848.

66. *Id.* at 847; *In re Skefos*, 2020 WL 2893413, at *10 (Bankr. W.D. Tenn. June 2, 2020). When Congress enacted the CARES Act, close to one million people had lost their jobs because of COVID-19. *Gateway I*, 616 B.R. at 847. As of the *Gateway I* opinion, over 20 million other Americans had lost their jobs. *Id.*

67. *Gateway I*, 616 B.R. at 847–48 (citing CARES Act, DIVISION A, 134 Stat. at 281).

68. "Shall" is defined as "used in laws, regulations, or directives to express what is mandatory." *Shall*, Merriam-Webster, https://www.merriam-webster.com/dictionary/shall.

69. *Gateway I*, 616 B.R. at 848.

70. *Id.* at 849.

71. 15 U.S.C. § 9042(c)(3)(D)(i)(V) (2020) ("the recipient is not a debtor in a bankruptcy proceeding"); *Gateway I*, 616 B.R. at 848; In re Roman Catholic Church of Archdiocese of Santa Fe, 615 B.R. 644, 656 (Bankr. D.N.M. 2020).

in the mid-size business section of the CARES Act, but not from the PPP.[72] As a result, the pro-debtor courts held the SBA exceeded its statutory authority under 5 U.S.C. § 706(2)(C).[73]

ii. The SBA's Argument

The pro-SBA courts found that Congress has not directly spoken to whether bankruptcy debtors are eligible for PPP loans for three reasons.[74] First, the *Gateway II* court noted that "the PPP was not created as a standalone program but was added into the existing § 7(a) program,[75] which subjects it to existing conditions and regulations, as well as existing SBA authority."[76] Because § 7(a) subjects every loan made under that section to the sound value requirement,[77] the courts reasoned that Congress was aware of the sound value requirement when it passed the CARES Act legislation.[78] Second, the *Gateway II* court considered the CARES Act in context.[79] The *Gateway II* court noted that while Congress relaxed some existing section 7(a) requirements,[80] it did not relax the sound value requirement.[81] Third, the *Gateway II* court also reasoned that, under the CARES Act, the use of the word "may,"[82]

72. *Gateway I*, 616 B.R. at 849; *Roman Catholic Church*, 615 B.R. at 656.

73. *Gateway I*, 616 B.R. at 849; *In re Skefos*, 2020 WL 2893413, at *10; *Roman Catholic Church*, 615 B.R. at 657.

74. *Gateway II*, 983 F.3d 1239, 1256 (11th Cir. 2020); Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *14 (D. Md. June 24, 2020).

75. For the purpose of this Article, § 7(a) refers to 15 U.S.C. 636(a) (2018).

76. *Gateway II*, 983 F.3d at 1256 (citing CARES Act, § 1102, 134 Stat. at 286).

77. *Id.* (citing 15 U.S.C. § 636(a)(6) ("[a]ll loans made under [§ 7(a)] shall be of such sound value or so secured as to reasonably assure repayment)); *Tradeways, Ltd.*, 2020 WL 3447767, at *13 (same). The SBA codified the sound value requirement under the Code of Federal Regulations. 13 C.F.R. § 120.150 ("[t]he applicant . . . must be creditworthy" and "[l]oans must be so sound as to reasonably assure repayment."). The SBA considers nine factors in determining the soundness of its repayment criteria, such as "[c]haracter, reputation, and credit history" of the business, "[s]trength of the business," "future prospects" of the business, the business' "[a]bility to repay the loan," and the business' "[p]otential for long-term success." *Id.*

78. *Gateway II*, 983 F.3d at 1256–57; *Tradeways Ltd.*, 2020 WL 3447767, at *13.

79. *Gateway II*, 983 F.3d at 1256 (citing Wachovia Bank, N.A. v. United States, 455 F.3d 1261, 1267 (11th Cir. 2006)).

80. The relaxed requirements include allowing applicants to use PPP loans for "interest on any other debt obligations that were incurred before the covered period," 15 U.S.C. § 636(a)(36)(F)(i)(VII) and giving the SVA "no recourse" against the applicant unless the proceeds are used for an unauthorized purpose. *Id.* § 636(a)(36)(F)(v).

81. *Gateway II*, 983 F.3d at 1257.

82. Under the CARES Act, the SBA "may guarantee covered [PPP] loans under the same terms, conditions, and processes" as loans made under § 7(a). 15 U.S.C. § 636(a)(36)(B).

combined with the fact that the CARES Act provided the SBA with "[e]mergency rulemaking authority" to issue regulations on the PPP,[83] vests the SBA with discretionary authority to handle PPP loans under the sound value requirement.[84]

Next, these courts found the SBA's IFR rested on a reasonable construction of the CARES Act and section 7(a) for two reasons.[85] First, the *Tradeways, Ltd.* court looked at the SBA's justification for excluding bankruptcy debtors from the PPP.[86] It noted that the bankruptcy eligibility criteria to exclude bankruptcy debtors "did not arise out of thin air" but has instead been a part of the SBA's preexisting loan process under section 7(a).[87] Second, the courts noted that Congress gave the SBA fifteen days after enacting the CARES Act to issue regulations on the PPP.[88] Provided that fifteen days is "practically warp speed for regulatory action,"[89] these courts reasoned the SBA prioritized efficiency over accessibility.[90] As a result, the pro-SBA courts held that the PPP does not exceed statutory authority under section 706(2)(C).[91]

B. Arbitrary and Capricious

i. The Debtor's Argument

The pro-debtor courts argued that the IFR is arbitrary and capricious for three reasons. The courts' first reason was that the SBA's justification[92] is arbitrary and capricious because Congress

83. *Id.* § 9012.

84. *Gateway II*, 983 F.3d at 1257 (citing Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016)).

85. *Id.* at 1262; Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *14 (D. Md. June 24, 2020).

86. *Tradeways, Ltd.*, 2020 WL 3447767, at *14 (citing 85 Fed. Reg. at 2,3451).

87. *Id.* (citing 13 C.F.R. § 120.10).

88. CARES Act, § 1114, 134 Stat. at 312; *Gateway II*, 983 F.3d at 1262; *Tradeways, Ltd.*, 2020 WL 3447767, at *14.

89. *Gateway II*, 983 F.3d at 1262.

90. *Id.*

91. *Id.*; *Tradeways, Ltd.*, 2020 WL 3447767, at *15 (citing Diocese of Rochester v. U.S. Small Bus. Admin., 466 F. Supp. 3d 363, 378 (W.D.N.Y. 2020); *In re Penobscot Valley Hosp.*, 19-10034, 2020 WL 3032939, at *9 (Bankr. D. Me. June 3, 2020) [hereinafter *Penobscot II*]).

92. As noted above, the SBA justified its decision to exclude bankruptcy debtors due to an "unacceptably high risk of an unauthorized use of funds or nonrepayment of unforgiven loans." Business Loan Program Temporary Changes, 85 Fed. Reg. at 23,451.

was not concerned with collectability.[93] The courts evidenced such a lack of concern in two ways.[94] The first way focused on the fact that "Congress requires no collateral or personal guarantee to obtain a PPP loan."[95] The second way relied on the fact that the SBA forgives PPP loans in full, so long as the applicant uses the proceeds for the PPP's specified purposes.[96] As a result, these courts determined that because "PPP loans are designed to be forgiven," the IFR ignored that Congress did not want the SBA to "focus on collectability."[97]

Second, these courts reasoned the IFR is arbitrary and capricious because it ignores protections afforded to debtors under Chapter 11.[98] The *Alaska Urological Inst.* court first looked at the policy behind Chapter 11[99] and the restrictions on what a debtor can and cannot do in a Chapter 11 bankruptcy.[100] As a result, the courts figured that the SBA ignored the purpose of Chapter 11 and the bankruptcy because there was no indication the SBA considered either in coming to its decision to exclude bankruptcy debtors from the PPP.[101]

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93. Alaska Urological Inst., P.C. v. U.S. Small Bus. Admin., 619 B.R. 689, 709 (D. Alaska 2020); 616 B.R. 833, 850 (Bankr. M.D. Fla. 2020).

94. *Alaska Urological Inst.*, 619 B.R. at 709 (citing *In re Vestavia Hills, Ltd.*, 618 B.R. 294, 304–05 (Bankr. S.D. Cal. 2020)).

95. *Id.*

96. *Id.* ("Congress structured the PPP loans to be completely forgivable so long as the borrower uses the loan proceeds for covered expenses and provides documentation of such to its lender.").

97. *Id.*; *Gateway I*, 616 B.R. at 850.

98. *Alaska Urological Inst.*, 619 B.R. at 708; *Gateway I*, 616 B.R. at 851.

99. *Gateway I*, 616 B.R. at 851. As the court noted,

> The policy of chapter 11 is to provide a forum where troubled businesses can rehabilitate. . . . Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize or sell its business as a going concern rather than simply to liquidate a troubled business." Continued operation of a business is preferable to liquidation not only because it preserves going-concern value, but because it can save the jobs of employees and the tax base of communities, and generally reduce the upheaval that can result from termination of a business.

Id. (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *In re Paris Indus. Corp.*, 106 B.R. 339, 341 (Bankr. D. Me. 1989); 7 Collier on Bankruptcy ¶ 1100.01 (Matthew Bender & Co. 16th ed.)).

100. *Alaska Urological Inst.*, 619 B.R. at 708. As the court noted,

> A debtor in chapter 11 bankruptcy must give notice to interested parties where it intends to borrow money outside the ordinary course of business. If the bankruptcy court permits the debtor to borrow money, the court can impose conditions on the debtor's doing so such as restricting [the] use of the loan proceeds. Moreover, debtors are required to file monthly operating reports detailing the debtor's receipts and disbursements.

Id. (citing *In re Vestavia Hills*, 618 B.R. at 305–06).

101. *Alaska Urological Inst.*, 619 B.R. at 709; *Gateway I*, 616 B.R. at 852.

Third, these courts reasoned the IFR is arbitrary and capricious because it fails to counter the evidence.[102] The *Alaska Urological Inst.* court noted that the record is "devoid of evidence that debtors are likely to misuse funds or that they pose a heightened risk of non-repayment of those misused funds."[103] Instead, the court determined it is even less likely that a debtor would misuse those funds based on the bankruptcy process.[104] As a result, the courts reasoned the SBA made no effort to support the IFR with any facts, citations, or evidence, as presented in the administrative record.[105]

ii. The SBA's Argument

These pro-SBA courts originally noted that an agency's explanation is usually "connected to the 'relevant matter presented' during the notice and comment period."[106] Yet these courts determined that this case is rather unusual because Congress ordered the SBA to issue its regulations on the PPP "without regard to the notice requirements [of] 5 U.S.C. § 553(b)."[107] As a result, the administrative record before the PPP's enactment is somewhat limited.[108]

To begin, these courts looked to the SBA's justification in the IFR.[109] The *Gateway II* court noted that none of the four situations in which courts have found an agency's decision to be arbitrary and

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102. *Alaska Urological Inst.*, 619 B.R. at 709; *Gateway I*, 616 B.R. at 852.

103. *Alaska Urological Inst.*, 619 B.R. at 709.

104. *Id.* As the court in *Gateway I* noted, the bankruptcy court can order the debtor to only use the proceeds for the specified purposes of a PPP loan and even subject the debtor to file reports with supporting documentation so any interested party can confirm the debtor is using the funds for an authorized purpose. *Gateway I*, 616 B.R. at 854.

105. *Alaska Urological Inst.*, 619 B.R. at 709; *Gateway I*, 616 B.R. at 854.

106. 983 F.3d 1239, 1263 (11th Cir. 2020) (citing 5 U.S.C. § 553(c)).

107. *Id.* (internal quotations omitted) (citing 15 U.S.C. § 9012). This is because, as noted above, Congress required that the SBA issue regulations on the PPP within fifteen days of the "enactment of the [CARES Act]." *Supra* n. 88.

108. *Gateway II*, 983 F.3d 1239, 1263 (11th Cir. 2020).

109. Matter of Henry Anesthesia Assoc. LLC, AP 20-06084-LRC, 2020 WL 3002124, at *9 (Bankr. N.D. Ga. June 4, 2020). The SBA, after consulting the Secretary of the Treasury, justified its decision in the IFR by stating 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." Business Loan Program Temporary Changes, 85 Fed. Reg. 23,451 (Apr. 28, 2020). The SBA reached this conclusion with the expertise of not one, but two agencies: The SBA and the Secretary of the Treasury. *Gateway II*, 983 F.3d at 1263.

capricious are present in this case.[110] As for whether the SBA relied "on factors which Congress has not intended it to consider,"[111] the *Gateway II* court found that the SBA relied on two factors: the unauthorized use of funds and the risk of non-repayment,[112] finding both factors to be relevant.[113] Additionally, the *Gateway II* court noted that no court can say the SBA "failed to consider any important aspect of the problem, or offered an explanation contradicted by evidence that was put before it" because "there was no evidence put before it" to show otherwise.[114] Finally, the *Gateway II* court reasoned that no court can say that the SBA's explanation was implausible, considering the status of bankruptcy debtors[115] and the SBA's decision to consider the bankruptcy status of an applicant "did not arise out of thin [air]."[116]

While several courts disagreed with the SBA's decision to exclude bankruptcy debtors from the PPP,[117] the pro-SBA courts recognized that courts cannot "substitute . . . judgment for that of the [SBA]."[118] As a result, because the SBA's justification aligned with the CARES Act and § 7(a),[119]a bright-line rule to simply speed up decisions on an applicant's PPP-loan eligibility does not make such a rule arbitrary and capricious.[120]

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110. *Gateway II*, 983 F.3d at 1263–64.

111. Motor Vehicle. Mfrs. Ass'n of U.S., Inc., 463 U.S. 29, 43 (1983).

112. *Gateway II*, 983 F.3d at 1264.

113. *Id.* As for the unauthorized use of funds, Congress created a list of "[a]llowable uses" for PPP loans. *Id.* (citing 15 U.S.C. § 636(a)(36)(F)). As for the risk of non-repayment, Congress additionally created "a specific list of costs for which loan forgiveness would be available." *Id.* (citing 15 U.S.C. § 9005(b)). As a result, it cannot be said that the SBA relied on factors that Congress did not intend for it to rely on. Schuessler v. U.S. Small Bus. Admin., AP 20-02065-BHL, 2020 WL 2621186, at *12 (Bankr. E.D. Wis. May 22, 2020) ("The record shows that the SBA has considered the relevant factors, including the goals of the CARES Act and those statutory provisions that the CARES Act left intact.").

114. *Gateway II*, 983 F.3d at 1263.

115. *Id.* This side noted that because bankruptcy debtors are normally financially distressed and have several competing creditors, "it is not implausible to believe" that giving PPP funds to a bankruptcy debtor "will increase the risk of unauthorized use of funds and non-repayment." *Id.*

116. *Tradeways, Ltd.*, 2020 WL 3447767, at *14 ("Rather, the SBA's preexisting § 7(a) loan application asks a prospective borrower to disclose whether it or an affiliate has filed for bankruptcy." (citing SBA Form 1919: SBA 7(a) Borrower Information Form at 2, *Tradeways, Ltd.*, 2020 WL 3447767, ECF No. 12-1.)).

117. *Id.* at *15; Matter of Henry Anesthesia Assoc. LLC, AP 20-06084-LRC, 2020 WL 3002124, at *10 (Bankr. N.D. Ga. June 4, 2020); *Schuessler*, 2020 WL 2621186, at *12.

118. *E.g.*, Motor Vehicle. Mfrs. Ass'n of U.S., Inc., 463 U.S. 29, 43 (1983); *Schuessler*, 2020 WL 2621186, at *12.

119. *Schuessler*, 2020 WL 2621186, at *12.

120. *Gateway II*, 983 F.3d at 1263.

C. 11 U.S.C. § 525

The SBA conceded that it falls within the definition of "governmental unit" in the Bankruptcy Code and that it denies debtors the opportunity to take part in the PPP because they filed for bankruptcy.[121] Thus, the only element at issue is whether the PPP is a "license, permit, charter, franchise, or other similar grant," as defined in § 525(a).

IV. THE DEBTOR'S ARGUMENT

The pro-debtor courts held that the PPP is not a loan but "a grant or support program."[122] The courts reasoned that the PPP program falls under § 525(a)'s requirements under the "other similar grant" category.[123] While the Bankruptcy Code does not define "other similar grant," these courts rely on the Second Circuit's interpretation of "other similar grant."[124] The Second Circuit characterizes the property interests protected under § 525(a) as having two essential qualities: (1) being "unobtainable from the private sector" and (2) "essential to a debtor's fresh

121. In re Calais Regl. Hosp., 615 B.R. 354, 358 (Bankr. D. Me. 2020); In re Penobscot Valley Hosp., 19-10034, 2020 WL 2201943, at *3 (Bankr. D. Me. May 1, 2020) [hereinafter Penobscot I].

122. In re Roman Catholic Church of Archdiocese of Santa Fe, 615 B.R. 644, 654 (Bankr. D.N.M. 2020); *Calais Regl. Hosp.*, 615 B.R. at 359; *Penobscot I*, 19-10034, 2020 WL 2201943, at *3 (Bankr. D. Me. May 1, 2020).

123. *Roman Catholic Church*, 615 B.R. at 656; *Calais Regl. Hosp.*, 615 B.R. at 358; *Penobscot I*, 2020 WL 2201943, at *4. Of note here, the *Calais Regl. Hosp.* and *Penobscot I* case involved the granting of a temporary restraining order (collectively, "TRO Opinions"). *Calais Regl. Hosp.*, 615 B.R. at 355; *Penobscot I*, 2020 WL 2201943, at *1. The presiding judge in both cases, Judge Michael A. Fagone, is also the author of *Penobscot II*, in which Judge Fagone finds the PPP does not fall under the "other similar grant" language and ruled for the SBA on the § 525(a) issue. *Penobscot II*, No. 19-10034, 2020 WL 3032939, at *14–16 (Bankr. D. Me. Jan. 12, 2021).

124. *Roman Catholic Church*, 615 B.R. at 656 (citing Stoltz v. Brattleboro Hous. Auth. (In re Stoltz), 315 F.3d 80, 88–90 (2d Cir. 2002) (holding that eviction of a debtor from a public unit house solely based on failure to pay a discharged, pre-petition rent violated § 525(a)); *Calais Regl. Hosp.*, 615 B.R. at 358 (citing *Stoltz*, 315 F.3d at 88–90. *See also* In re The Bible Speaks, 69 B.R. 368, 374 (Bankr. D. Mass. 1987) ("Congress intended § 525(a) . . . to expand on and develop *Perez* so that the doctrine would extend to many forms of discrimination."); Rose v. Conn. Hous. Fin. Auth. (In re Rose), 23 B.R. 662, 666–67 (Bankr. D. Conn 1982) (construing § 525(a) given the fresh start policy and concluding that a state may not exempt debtors from a state-sponsored home financing program just because of bankruptcy); 4 Collier on Bankruptcy ¶ 525.02 (16th ed.)); *Penobscot I*, 2020 WL 2201943, at *3 (citing same).

start."[125] According to the pro-debtor courts, the PPP satisfies both conditions.[126] As for the first prong, they reasoned the PPP can "only be offered by the government" because "private lenders do not give away money."[127] As for the second prong, they reasoned the PPP loans are essential to a debtor's fresh start because the PPP is "free money."[128]

What's more, while these courts acknowledge that the PPP characterizes the program as "covered loans" and specifies features specific only to loans,[129] they reasoned that fixating on details takes away from the purpose of the PPP.[130] Lastly, the courts find the argument that § 525(c)[131] proves Congress did not intend for § 525(a) to extend to loans[132] rather unpersuasive.[133]As a result, the pro-debtor courts held that the PPP violates 11 U.S.C. § 525(a).[134]

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125. *Stoltz*, 315 F.3d at 88–90.

126. *Roman Catholic Church*, 615 B.R. at 656; *Calais Regl. Hosp.*, 615 B.R. at 358; *Penobscot I*, 2020 WL 2201943, at *3.

127. *Roman Catholic Church*, 615 B.R. at 657. As a result, this side reasoned that PPP funds are unobtainable from the private sector. *Id.* (quotations omitted) (citing *Stoltz*, 315 F.3d at 90).

128. *Id.* ("[o]f all the benefits a government can grant, free money might be the best of all").

129. *See, e.g.*, 15 U.S.C. § 636(a)(36)(A)(ii).

130. *Calais Regl. Hosp.*, 615 B.R. at 359 ("fixation on the details loses the forest in the trees during a conflagration."); *Penobscot I*, 2020 WL 2201943, at *4. As noted in TRO Opinions, the CARES Act "is a grant of aid necessitated by a public health crisis." *Calais Regl. Hosp.*, 615 B.R. at 359; *Penobscot I*, 2020 WL 2201943, at *4. To liken the PPP to a normal loan "may miss the point" of establishing the PPP in the first place. *Calais Regl. Hosp.*, 615 B.R. at 359; *Penobscot I*, 2020 WL 2201943, at *4.

131. Section 525(c) states that "[a] governmental unit . . . may not deny a student grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor."

132. *See Infra* note 139.

133. *Calais Reg'l. Hosp.*, 615 B.R. at 359. This side finds this argument unpersuasive for two reasons. First, it states that the Supreme Court has "been skeptical of this type of inferential reasoning." *Id.* (citing Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1664–65 (2019)). Second, it finds that the canon of *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of another) is not an inflexible rule. *Id.* (citing Hewlett-Packard Co., Inc. v. Berg, 61 F.3d 101, 106 (1st Cir. 1995)).

134. In re Roman Catholic Church of the Archdiocese of Santa Fe, 615 B.R.644, 657 (Bankr. D.N.M. 2020); *Calais Reg'l. Hosp.*, 615 B.R. at 359; *Penobscot I*, 2020 WL 2201943, at *4.

V. THE SBA'S ARGUMENT

The pro-SBA courts held that the PPP is a loan, not a grant, for four reasons.[135] The first reason focuses on the text of the CARES Act itself, which categorizes the PPP as a loan.[136] The second reason relies on the statutory context and placement of the PPP.[137] The third reason hinges on the possibility of PPP forgiveness, but still does not make the PPP a grant.[138] The fourth reason focuses on the argument that the inclusion of the word "loan" under § 525(c), but not § 525(a), proves that Congress did not intend for § 525(a) to apply to PPP loans.[139]

What's more, these courts reasoned that even if the PPP is a grant, it does not fall within the scope of § 525(a) because it is not similar to a "license, permit, charter, [or] franchise" to fall under the "other similar grant" requirement of § 525(a).[140] These courts rely heavily on the *Ayes* case, in which the Fourth Circuit reasoned the word "similar" limits the universe of the word "grant" to "license[s], permit[s], charter[s], [and] franchise[s]."[141] The courts

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135. *Tradeways, Ltd.*, 2020 WL 3447767, at *17 (D. Md. June 24, 2020); *Penobscot II*, No. 19-10034, 2020 WL 3032939, at *11 (Bankr. D. Me. Jan. 12, 2021).

136. *Tradeways, Ltd., 2020 WL 3447767, at *17* (citing 15 U.S.C. § 636(a)(36)(A)–(F)). The word "loan" appears 75 times in the CARES Act provisions for the PPP. *Id.* As a result, this side reasoned the PPP is a loan, not a grant. *Id.*

137. *Tradeways, Ltd.*, 2020 WL 3447767, at *17 (citing Gundy v. United States, 139 S. Ct. 2116, 2126 (2019)). As is relevant here, Congress did not create a new subchapter under Title 15 for the PPP, as it did for mid-size businesses. *Id.* (citing 15 U.S.C. § 9042). Rather, the CARES Act added the PPP to § 636(a) and subjected it to the requirements of § 7(a). *Id.* As a result, this side reasoned the PPP is a loan, not a grant. *Id.*

138. *Tradeways, Ltd.*, 2020 WL 3447767, at *17. Most notably, the SBA requires PPP borrowers to sign a promissory note when they receive PPP funds. *Id.* (citing 85 Fed. Reg. at 23,450–51 (Apr. 28, 2020); SBA Form 147). What's more, this side reasoned that many federal programs forgive "some or all of the amount borrowed . . . depending on the circumstances." *Id.* (citing 20 U.S.C. § 1087e(m)(1) (Public Service Loan Forgiveness Program); 20 U.S.C. § 1087j(b) (Teacher Loan Forgiveness Program)). As a result, "[t]he existence of favorable terms and a unique feature (namely, forgiveness under specified circumstances) does not change the character of what the [d]ebtor wants to obtain: a loan that might be forgiven by the lender." *Penobscot II*, 2020 WL 3032939, at *11.

139. *Tradeways, Ltd.*, 2020 WL 3447767, at *18 (citing Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020); Loughrin v. United States, 573 U.S. 351, 358 (2014)).

140. *Tradeways, Ltd.*, 2020 WL 3447767, at *19; *Penobscot II*, 2020 WL 3032939, at *14.

141. *Tradeways, Ltd.*, 2020 WL 3447767, at *16 (citing Ayes v. U.S. Dep't. of Veterans Affairs, 473 F.3d 104, 108 (4th Cir. 2006)); *Penobscot II*, 2020 WL 3032939, at *14 (citing *Ayes*, 473 F.3d at 108). Like the Second Circuit, the Fourth Circuit reasoned that "[l]icenses, permits, charters, and franchises" under § 525(a) are all meant (1) to "permit an individual to pursue some occupation or endeavor aimed at economic betterment" and, (2) implicate the "government's role as a gatekeeper in determining who may pursue certain livelihoods."

reasoned the PPP fits neither characteristic required of a "license, permit, charter, [or] franchise" under § 525(a).[142] Thus, the pro-SBA courts held the PPP is not a grant similar to a "license, permit, charter, [or] franchise" under § 525(a).[143]

VI. ANALYSIS

While both sides made compelling arguments,[144] only one view can be correct. This Part will first address why the IFR does not exceed statutory authority under 5 U.S.C. § 706(c). Second, it will address why the IFR is not arbitrary and capricious under 5 U.S.C. § 706(a). Third, it will explain why the IFR does not violate 11 U.S.C. § 525(a).

A. THE IFR DOES NOT EXCEED STATUTORY AUTHORITY

i. Congress Has Not Directly Spoken On The Issue

As noted above, the *Chevron* two-step test requires a reviewing court first to determine whether Congress has directly spoken on the issue at hand: Whether bankruptcy debtors are eligible for the PPP.[145] While Congress has not directly spoken on the issue, this is not one of the extreme situations in which Congress's silence provides finality on the matter.[146] Instead, the PPP's placement under § 7(a), a reading of the CARES Act in context, and the SBA's longstanding discretionary authority to implement §7(a) and the sound value requirement make it clear that Congress intended to delegate who is eligible for the PPP to the SBA.

First, while the CARES Act did provide that a small business "that has 500 employees or fewer 'shall be eligible' for a PPP

Tradeways, Ltd., 2020 WL 3447767, at *16 (citing *Ayes*, 473 F.3d at 108–09); *Penobscot II*, 2020 WL 3032939, at *14 (citing *Ayes*, 473 F.3d at 108–09).

142. *Tradeways, Ltd.*, 2020 WL 3447767, at *16; *See Infra* note 226–31.

143. *Tradeways, Ltd.*, 2020 WL 3447767, at *16 (citing *Ayes*, 473 F.3d at 108–09); *Penobscot II*, 2020 WL 3032939, at *15 (citing *Ayes*, 473 F.3d at 108–09).

144. *See supra* Part III.

145. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

146. King v. Burwell, 576 U.S. 473, 485 (2015) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

loan,"[147] the PPP's placement under § 7(a) makes it clear that Congress intended to delegate regulations on PPP eligibility to the SBA.[148] Any loan made under § 7(a) subjects the SBA to the sound value requirement to "assure repayment" of such loan.[149] The SBA, facing the sound value requirement, generally considers nine factors in determining the soundness of its repayment.[150] These factors include "[c]haracter, reputation, and credit history" of the business, "[s]trength of the business," "future prospects" of the business, the business' "[a]bility to repay the loan," and the business' "[p]otential for long-term success."[151] While it is true that the CARES Act did render mid-size businesses ineligible for loans under the Act,[152] it needed to do so because Congress created a new subchapter under Title 15 for mid-size businesses.[153] The same is not true for the PPP. The PPP "was not created as a standalone program[,] but was added into the existing § 7(a) program," subjecting the PPP to the existing § 7(a)'s conditions, rules, and regulations.[154] As a result, because courts presume that "Congress is aware of existing law when it passes legislation,"[155] one can assume Congress knew that placing the PPP under § 7(a) subjected it to the sound value requirement and the SBA's discretion.

Second, another indicator that Congress intended to delegate the authority to the SBA derives from reading the text of the CARES Act. In the context of the PPP, the CARES act relaxed specific requirements under § 7(a).[156] Yet Congress did not render

147. *Gateway I*, 616 B.R. 833, 848 (Bankr. M.D. Fla. 2020), *vacated in part*, *appeal dismissed in part*, *Gateway II*, 983 F.3d 1239 (11th Cir. 2020).

148. Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 169 (2014) (citing Hall v. United States, 566 U.S. 506, 516 (2012)).

149. 15 U.S.C. § 636(a)(6).

150. 13 C.F.R. 120.150.

151. *Id.*

152. 15 U.S.C. § 9042(c)(3)(D)(i)(V) ("the recipient is not a debtor in a bankruptcy proceeding"); *Gateway I*, 616 B.R. at 848; In re Roman Catholic Church of the Archdiocese of Santa Fe, 615 B.R. 644, 655–56 (Bankr. D.N.M. 2020).

153. 15 U.S.C. § 9042.

154. *Gateway II*, 983 F.3d 1239, 1256 (11th Cir. 2020) (citing CARES Act, § 1102, 134 Stat. at 286 (noting that Congress "amended" § 7(a) of the Small Business Act to include the PPP)). As a result, Congress subjected the PPP to "existing conditions and regulations, as well as existing SBA authority." *Id.*

155. Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 169 (2014).

156. *See, e.g.*, 15 U.S.C. § 636(a)(36)(D) (increasing "eligibility for certain small businesses and organizations" under the PPP); 15 U.S.C. § 636(a)(36)(I) ("[d]uring the

PPP loans inapplicable to the sound value requirement. Because Congress "does not alter . . . fundamental details of a regulatory scheme in vague terms or ancillary provisions,"[157] one cannot infer that Congress intended to render PPP loans inapplicable to § 7(a) based on its silence.[158] As a result, "[a]ny tension between the more lenient aspects of the CARES Act and the existing § 7(a) sound value requirement" is more evidence that Congress identified several interests it wanted accommodated but delegated the task to the SBA.[159]

Last, the final indicator that Congress intended to delegate the matter to the SBA stems from the SBA's longstanding discretionary authority to implement the sound value requirement.[160] As usual, Congress gave the SBA its ordinary discretionary authority to enforce the PPP under the normal § 7(a) provisions.[161] Yet the CARES Act also gave the SBA "[e]mergency rulemaking authority" to "issue regulations to carry out" the PPP without regard to the general notice requirements of 5 U.S.C. § 553(b).[162] That the SBA can bypass standard rulemaking requirements for the PPP makes it clear Congress intended for the SBA to have discretion on who can be a debtor under the CARES Act.

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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.").

157. Whitman v. Am. Trucking Ass'ns , 531 U.S. 457, 468 (2001) (congress does not "hide elephants in mouseholes.").

158. *Id.*

159. *Gateway II*, 983 F.3d at 1257 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).

160. When Congress created the Small Business Act of 1953, it declared "the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise . . . and to maintain and strengthen the overall economy of the Nation." 15 U.S.C. § 631(a). The SBA, created to carry out these policies, "was given extraordinarily broad powers to accomplish [its] important objectives, including that of lending money to small businesses whenever they could not get necessary loans on reasonable terms from private lenders." Small Bus. Administration v. McLellan, 364 U.S. 446, 447 (1960).

161. Under the CARES Act, Congress noted that the SBA "may guarantee covered [PPP] loans under the same terms, conditions, and processes" as loans made under § 7(a). 15 U.S.C. 636(a)(36)(B). The use of the word "may" vests the SBA with discretionary authority to manage the PPP loan process under the sound value requirement. Kingdomware Techs., Inc. v. U.S., 136 S. Ct. 1969, 1977 (2016) (citing United States v. Rodgers, 461 U.S. 677, 706 (1983)).

162. 5 U.S.C. § 9012.

B. THE SBA BASED THE IFR ON A PERMISSIBLE CONSTRUCTION OF THE STATUTE

Because Congress has not spoken on the issue at hand, this Article must turn to the second step in *Chevron*: whether the SBA based the IFR on a "permissible construction of the statute."[163] Because Congress's delegation was implicit rather than explicit, the IFR's validity hinges on whether it was reasonable.[164] As explained below, the IFR is reasonable based on the circumstances leading up to the IFR's enactment.

To begin, the IFR is reasonable based on the SBA's justification. The SBA justified the IFR by stating that "providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or nonrepayment of unforgiven loans."[165] What's more, Congress only gave the SBA fifteen days to issue regulations on the PPP.[166] Fifteen days "is practically warp speed for regulatory action, a command that undoubtedly sprang from the felt need for quick action in light of the burgeoning economic crisis stemming from the pandemic."[167]

While it is true that financial distress is a baseline for PPP funding approval, "the SBA perceived an additional risk that PPP loan funds might not be used for their intended purposes" by bankruptcy debtors, such as paying administrative creditors.[168] Furthermore, while it is true that many Chapter 11 debtors are trying to reorganize, "the SBA simply did not have the luxury of considering" each individualized bankruptcy case given the ongoing pandemic.[169] As the *Penobscot III* court reasoned, "many reorganizations do fail despite" the best efforts of the debtors.[170] When reorganization fails, one of the options is that the Chapter 11 reorganization converts to a Chapter 7 liquidation.[171]

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163. *Chevron*, 467 U.S. at 843.

164. *Gateway II*, 983 F.3d at 1261.

165. Business Loan Program Temporary Changes, 85 Fed. Reg. 23,450, 23,451 (Apr. 28, 2020).

166. *Gateway II*, 983 F.3d at 1262.

167. *Id.*; CARES Act, § 1114, 134 Stat. at 312.

168. In re Penobscot Valley Hosp., No. 19-10034, 2021 WL 150412, at *13 (Bankr. D. Me. Jan. 12, 2021) [hereinafter *Penobscot III*].

169. *Id.*

170. *Id.*

171. *Id.* (citing 11 U.S.C. 1112) (under chapter 7, any unencumbered assets "would be distributed in accordance with the waterfall contained in 11 U.S.C. § 726.").

The possibility of a PPP borrower converting their Chapter 11 bankruptcy to a Chapter 7 bankruptcy is problematic. Liquidation does not further the purpose of the PPP because of the possibility of using funds for unauthorized purposes.[172] What's more, liquidation also accentuates the risk of non-repayment.[173] As explained below, these are two factors Congress intended for the SBA to rely on in regulating the PPP.[174] To bypass such concerns and implement Congress's wishes, "[t]he SBA . . . simplified the process by adopting a bright-line rule rendering debtors in bankruptcy ineligible."[175] The SBA's decision "obviat[ed] the need for a lender or the SBA to review the circumstances of individual debtors and to monitor ongoing bankruptcy cases."[176]

While the SBA's interpretation is likely not "the reading [one] would . . . reach[] if the question initially had arisen in a judicial proceeding," a reviewing court cannot substitute their judgment for that of the SBA.[177] Still, given the SBA's reasoning and the circumstances surrounding the enactment of the IFR, the SBA based the IFR on a permissible construction of the CARES Act and § 7(a).[178] As a result, the SBA did not exceed its statutory authority under 5 U.S.C. § 706(2)(C).

172. *Id.* at 368–69.

173. *Id.*

174. *See infra* notes 181–85.

175. *Penobscot III*, 2021 WL 150412, at *12. As noted above, the decision to consider the bankruptcy status of an applicant "did not arise out of thin [air]." Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *14 (D. Md. June 24, 2020). As explained above, "the SBA is constrained and guided by the terms" of § 7(a) and the sound value requirement. *Penobscot III*, 2021 WL 150412, at *3. Given the constraints of the sound value requirement, the SBA considers an applicant's bankruptcy history, as "applicants are asked to disclose prior bankruptcy filings." *Id.*

176. *Id.*

177. *Gateway II*, 983 F.3d 1239, 1261–62 (11th Cir. 2020).

178. *Id.*

C. THE IFR IS NOT ARBITRARY AND CAPRICIOUS

While multiple courts agree that the arbitrary and capricious test overlaps with the second step of *Chevron*,[179] this Article will address each test separately. When applying the four elements mentioned in *Motor Vehicle. Mfrs. Ass'n of U.S., Inc.*, the only conclusion a reviewing court can reach is that none of them apply here.[180]

First, the SBA focused on factors Congress intended for it to rely on. In the IFR, the SBA focused on the "unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans" when justifying its decision to exclude bankruptcy debtors from the PPP.[181] While the court's ruling for the debtor has held the IFR to be arbitrary and capricious because Congress was not concerned with collectability,[182] such reasoning disregards provisions in the CARES Act that say otherwise. Regarding the unauthorized use of funds, Congress defined a specific list of "[a]llowable uses" for PPP loans.[183] On the non-repayment of unforgiven loans, this argument fails because Congress enacted a list of specific costs for which loan forgiveness would be available for the PPP.[184] What's more, Congress also factored the risk of non-repayment into the PPP "by adding [the] PPP into § 7(a) and maintaining the sound value requirement, which is implemented by creditworthiness regulations."[185]

Additionally, no court can say the SBA "failed to consider any important aspect of the problem, or offered an explanation contradicted by evidence that was put before it" because "there was no evidence put before it" to show otherwise.[186] Typically, an

179. *See, e.g.*, River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 117 (1st Cir. 2009).

180. 463 U.S. 29, 43 (1983).

181. Business Loan Program Temporary Changes, 85 Fed. Reg. 23,451 (Apr. 28, 2020).

182. Alaska Urological Inst., P.C. v. U.S. Small Bus. Admin., 619 B.R. 689, 710 (D. Alaska 2020); *Gateway I*, 616 B.R. 833, 850 (Bankr. M.D. Fla. 2020).

183. 15 U.S.C. § 636(a)(36)(F)(i).

184. 15 U.S.C. § 9005(b) (current version at 15 U.S.C. § 636(m)).

185. *Gateway II*, 983 F.3d 1239,1264 (11th Cir. 2020); Matter of Henry Anesthesia Associates LLC, AP 20-06084-LRC, 2020 WL 3002124, at *9 (Bankr. N.D. Ga. June 4, 2020). What's more, if the SBA does not forgive the PPP amount, the PPP turns into a full-fledged loan, with a ten-year maturation period and an interest rate of up to four percent. CARES Act § 1102, 134 Stat. at 291. Thus, while Congress was not concerned with the collectability of forgiven loans, the same is not true for unforgiven PPP loans.

186. *Gateway II*, 983 F.3d at 1263.

agency's explanation "is connected to the 'relevant matter presented' during the notice and comment period."[187] A formal notice and comment period was impossible because Congress gave the SBA such short notice to create these regulations.[188] Provided that fifteen days is "practically warp speed for regulatory action,"[189] to hold the SBA liable for a devoid record would be to punish the SBA for doing what Congress intended for it to do.

Finally, while it is true that Chapter 11 affords debtors more protections than it would under Chapter 7, "the SBA simply did not have the luxury of considering" each individualized bankruptcy case given the ongoing pandemic.[190] Instead, the SBA looked at bankruptcy debtors generally[191] and "decided to streamline processing by imposing a bright line exclusion of debtors in bankruptcy,"[192] a consideration that "did not arise out of thin [air]."[193] As a result, the SBA's decision to create a bright-line exclusion for bankruptcy to speed up PPP eligibility is not implausible, irrational, nor is it the product of arbitrary and capricious decision making.[194]

None of the four situations from *Motor Vehicle Mfrs. Ass'n*, in which courts have found an agency's decision to be arbitrary and capricious, are present here.[195] As a result, a reviewing court must defer to the SBA's reasoning[196] and cannot "substitute its judgment

187. *Id.* (citing 5 U.S.C. § 553(c)).

188. *Id.* at 1262; CARES Act § 1114, 134 Stat. at 312; Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *14 (D. Md. June 24, 2020).

189. *Gateway II*, 983 F.3d at 1262.

190. *Penobscot III*, 626 B.R. at 368.

191. Bankruptcy debtors are normally financially distressed and have several competing creditors. *Gateway II*, 983 F.3d at 1263.

192. Diocese of Rochester v. U.S. Small Bus. Admin., 466 F. Supp. 3d 363, 378 (W.D.N.Y. 2020).

193. *Tradeways, Ltd.*, 2020 WL 3447767, at *14. "Rather, the SBA's preexisting § 7(a) loan application asks a prospective borrower to disclose whether it or an affiliate has filed for bankruptcy." *Id.* (citing ECF 12-1).

194. *Id.*; Schuessler v. U.S. Small Bus. Admin., AP 20-02065-BHL, 2020 WL 2621186, at *12 (Bankr. E.D. Wis. May 22, 2020) ("[t]he SBA's explanation is consistent with the record and the court cannot conclude that it is 'implausible.'").

195. 463 U.S. at 43–44.

196. *Penobscot II*, No. 19-10034, 2020 WL 3032939, at *9 (Bankr. D. Me. Jan. 12, 2021) ("[t]he SBA's bankruptcy exclusion was a reasonable effort to accommodate the conflicting policies committed to the SBA's care, and one that Congress might reasonably have sanctioned."); *Schuessler*, 2020 WL 2621186, at *12 ("[t]he record shows that the SBA has considered the relevant factors, including the goals of the CARES Act and those statutory provisions that the CARES Act left intact. The denial of PPP participation to entities that have already resorted to bankruptcy, while reserving PPP loans to those whose financial

for that of the [SBA]."[197] Thus, the IFR is not arbitrary and capricious under 5 U.S.C. § 706(2)(A).

D. THE IFR DOES NOT VIOLATE 11 U.S.C. § 525(a)

The SBA concedes that it falls within the definition of "governmental unit" in the Bankruptcy Code and that it denies debtors the opportunity to take part in the PPP because they filed for bankruptcy.[198] Thus, the only remaining element at issue is whether the PPP is a "license, permit, charter, franchise, or other similar grant," as defined in § 525(a). As explained below, the PPP does not fall into such a categorization. Even if the PPP were a grant, though, it still does not violate § 525(a) because it is not similar to a "license, permit, charter, franchise, or other similar grant."

i. The PPP is a loan, not a grant

While some courts, when ruling in favor of debtors, characterize the PPP as a grant,[199] this goes against the plain meaning of the words in the CARES Act.[200] First, the CARES Act characterizes the PPP as a "covered loan" and defines an eligible recipient as "an individual or entity that is eligible to receive a covered loan."[201] Further, Congress authorized the SBA to guarantee these "covered loan[s]" issued under the PPP and directed the SBA to "register the [PPP] loan]" within fifteen days of disbursement of the PPP proceeds.[202] Congress also titled the section that determines how much PPP funds a recipient receives the "[m]aximum loan amount."[203] Finally, the CARES Act specifies

troubles have not yet gotten to the point (and perhaps never will) is a rational policy choice. The agency's policy choice is consistent with the CARES Act and the SBA's preexisting statutory mandate.").

197. *E.g.*, Motor Vehicle. Mfrs. Ass'n of U.S., Inc., 463 U.S. 29, 43 (1983); *Schuessler*, 2020 WL 2621186, at *12.

198. *E.g.*, In re Calais Regl. Hosp., 615 B.R. 354, 358 (Bankr. D. Me. 2020); *Penobscot I*, 19-10034, 2020 WL 2201943, at *3 (Bankr. D. Me. May 1, 2020).

199. *E.g.*, *Calais Reg'l Hosp.*, 615 B.R. at 359; *Roman Cath. Church*, 615 B.R. at 656; *Penobscot I*, 2020 WL 2201943, at *3.

200. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

201. 15 U.S.C. §§ 636(a)(36)(A)(ii), (iv).

202. *Id.* §§ 636(a)(36)(B), (C).

203. *Id.* § 636(a)(36)(E).

that financial lenders exercise the SBA's authority to make and approve these "covered loans."[204] Overall, the word "loan" appears seventy five times within the CARES Act when describing the PPP.[205] Because the words "loan" and "grant" have different meanings[206] and are unambiguous in the context of the CARES Act,[207] that Congress categorized the PPP as a loan rather than a grant makes it not subject to § 525(a).

Additionally, the statutory context of the CARES Act reinforces the idea that the PPP is a loan, not a grant. As mentioned above, Congress decided to add the PPP as a subsection to § 7(a). Congress did not do the same thing for loans for mid-size businesses.[208] Instead, Congress enacted a new subchapter under Title 15 for mid-size business loans.[209] Because "Congress is aware of existing law when it passes legislation,"[210] Congress knew that, by adding the PPP as a subsection to § 636(a) rather than creating a new subchapter for it under Title 15, it characterized the PPP as a loan and subjected the PPP to the "sound value" requirement. Thus, the location of the PPP's placement under section 636(a) makes it clear that the PPP is a loan program, not a grant program.

Further, the statutory canon that "the expression of one thing is the exclusion of another" counsels a reviewing court from reading § 525(a) to encompass loans.[211] While it is true that § 525(a) does mention a "similar grant" applying under § 525(a), 11 U.S.C. § 525(c) states that "[a] governmental unit . . . may not deny a student grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title. . . ." That

204. *Id.* § 636(a)(36)(F)(ii)(I).

205. Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *17 (D. Md. June 24, 2020).

206. A loan is "money lent at interest." *Loan*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loan (last visited Mar. 21, 2022). On the other hand, a grant is "a gift (as of land or money) for a particular purpose." *Grant*, Merriam-Webster, https://www.merriam-webster.com/dictionary/grant (last visited Mar. 21, 2022).

207. *Tradeways, Ltd.*, 2020 WL 3447767, at *17.

208. 15 U.S.C. § 9042.

209. *Id.* § 9042.

210. Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 169 (2014) (citing Hall v. United States, 566 U.S. 506, 516 (2012)).

211. *Tradeways, Ltd.*, 2020 WL 3447767, at *18 (citing Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020); Loughrin v. United States, 573 U.S. 351, 358 (2014)).

Congress included loans under § 525(c), but not § 525(a), makes it clear that Congress did not intend for § 525(a) to cover loans.[212]

Lastly, any argument that the PPP is a grant rather than a loan because of its "generous forgiveness terms" is troublesome.[213] First, in some cases, the SBA does not forgive a PPP loan.[214] When the SBA does not forgive a PPP loan, the PPP turns into a full-fledged loan, with a ten-year maturation period and an interest rate of up to four percent.[215] What's more, many federal programs forgive "some or all of the amount borrowed . . . depending on the circumstances."[216] That the SBA forgives some or even all of the PPP funds does not change that the PPP is, in essence, a loan. As a result, "the mere existence of favorable forgiveness terms in the CARES Act does not transform a PPP loan into a grant."[217] Thus, because the PPP is by nature a loan, although a forgivable one,[218] it cannot be subject to § 525(a).[219]

E. THE PPP IS NOT SIMILAR TO A "[L]ICENSE, [P]ERMIT, [C]HARTER, [OR] [F]RANCHISE" UNDER § 525(a)

Even if a reviewing court did characterize the PPP as a grant, it still would not fall within the scope of § 525(a). In *Ayes*, the Fourth Circuit focused on whether a guaranty entitlement, "undoubtedly a 'grant' as that term is used in the statute," falls under § 525(a)'s "other similar grant" requirement.[220] The court reasoned that the word "similar," based on its plain meaning,[221]

212. *Id.* at *16.
213. *Id.* at *17.
214. 15 U.S.C. § 636m.
215. CARES Act, § 1102, 134 Stat. at 291.
216. *Tradeways, Ltd.*, 2020 WL 3447767, at *17 (citing 20 U.S.C. § 1087e(m)(1) (Public Service Loan Forgiveness Program); 20 U.S.C. § 2087j(b) (Teacher Loan Forgiveness Program)).
217. *Id.* (citing Diocese of Rochester v. U.S. Small Bus. Admin., 466 F. Supp. 3d 363, 379 (W.D.N.Y. 2020); No. 19-10034, 2020 WL 3032939, at *15 (Bankr. D. Me. Jan. 12, 2021); Schuessler v. U.S. Small Bus. Admin., AP 20-02065-BHL, 2020 WL 2621186, at *2 (Bankr. E.D. Wis. May 22, 2020)).
218. *See supra* notes 213–17.
219. *Tradeways, Ltd.*, 2020 WL 3447767, at *18 (citing Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020); Loughrin v. United States, 573 U.S. 351, 358 (2014)).
220. Ayes v. U.S. Dep't. of Veterans Affairs, 473 F.3d 104, 108 (4th Cir. 2006).
221. Merriam-Webster defines the word "similar" as "having characteristics in common" and "alike in substance or essentials." *Similar*, Merriam-Webster, https://www.merriam-webster.com/dictionary/similar (last visited Mar. 21, 2022).

limits any grants to those resembling "license[s], permit[s], charter[s], [and] franchise[s]."[222] This is because, as noted above, "[l]icenses, permits, charters, and franchises are all governmental authorizations that typically permit an individual to pursue some occupation or endeavor aimed at economic betterment,"[223] and that those interests "implicate 'government's role as a gatekeeper in determining who may pursue certain livelihoods.'"[224] Thus, the court held § 525(a) did not cover the economic guaranty entitlement.[225]

The same reasoning applies here. While the PPP helps businesses struggling from the Coronavirus pandemic by providing emergency funding, it is not a government authorization to help individuals pursue an occupation or economic betterment.[226] For example, unlike those who do not receive a "license, permit, charter, [or] franchise" from the government, who cannot operate otherwise, businesses excluded from the PPP are not prohibited from operating.[227] Rather, to be eligible for a PPP loan, the business must have been operating before February 15, 2020.[228] What's more, should the entity not receive a PPP loan, it may still be eligible for other relief under the CARES Act, such as the Emergency Economic Injury Disaster Loan or even a loan from a private lender.[229] In administering PPP loans, the SBA cannot be a "gatekeeper in determining who may pursue certain livelihoods," as one providing "[l]icense[s], permit[s], charter[s], [and] franchise[s]" would be under § 525(a).[230] As a result, one cannot conclude the PPP is like the "license[s], permit[s], charter[s], [and] franchise[s]" described in § 525(a).[231] Thus, the SBA's IFR cannot violate 11 U.S.C. § 525(a).

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222. *Ayes*, 473 F.3d at 108.

223. *Id.* (citing Watts v. Pennsylvania Hous. Fin. Co., 876 F.2d 1090, 1093 (3d Cir. 1989)); *Supra* n. 141.

224. *Id.* at 109 (citing Toth v. Michigan State Hous. Dev. Auth., 136 F.3d 477, 480 (6th Cir. 1998)).

225. *Id.* at 111. Several courts have reached the same ruling as *Ayes*. *E.g.*, *Watts*, 876 F.2d at 1093–94; *Toth*, 136 F.3d at 479–80; In re Goldrich, 771 F.2d 28, 30 (2d Cir. 1985).

226. *Ayes*, 473 F.3d at 108.

227. Tradeways, Ltd. v. U.S. Dep't. of the Treas., CV ELH-20-1324, 2020 WL 3447767, at *19 (D. Md. June 24, 2020).

228. CARES Act, § 1102, 134 Stat. at 290; *Tradeways, Ltd.*, 2020 WL 3447767, at *4.

229. CARES Act, § 1110, 134 Stat. at 306; *Tradeways, Ltd.*, 2020 WL 3447767, at *19.

230. *Tradeways, Ltd.*, 2020 WL 3447767, at *19.

231. *Id.* (citing Diocese of Rochester v. U.S. Small Bus. Admin., 466 F. Supp. 3d 363, 379–80 (W.D.N.Y. 2020); *Schuessler*, 2020 WL 2621186, at *9).

VI. CONCLUSION

As explained above, the SBA did not violate 5 U.S.C. § 706(2)(A), 5 U.S.C. § 706(2)(A), or 11 U.S.C. § 525(a) when it rendered bankruptcy debtors ineligible for the PPP. One potential option to bypass this issue would be for a debtor to dismiss their bankruptcy case, obtain the CARES Act funding, and reinstate the bankruptcy.[232] Yet, should the debtor not dismiss their bankruptcy case to get the funds, unless Congress clarifies the situation, the chances of obtaining PPP funds are limited.

232. This precise outcome happened in Ryan Turner Investments, LLC v. Jackson Durham Floral-Event Design, LLC. 3:20-CV-00400, 2021 WL 602908 (M.D. Tenn. Feb. 16, 2021). In *Ryan Turner Investments, LLC*, the bankruptcy court reasoned that dismissing the bankruptcy case "is the most viable option and it keeps all the parties in an equal setting in which they could avail themselves of the CARES Act (indiscernible) and the debtor has a shot, at least, of obtaining funds to continue operations." *Id.* at *3. The bankruptcy court thereby granted the debtor's motion to dismiss, and the debtor managed to receive PPP funding. *Id.* The district court, in reviewing the motion to dismiss, reasoned the bankruptcy judge "considered the interest of both the debtor and the creditors" in reaching its conclusion. *Id.* at *9. As a result, the district court held the bankruptcy court did not abuse its discretion by dismissing the case. *Id.* Two other courts have followed the same reasoning by granting the debtor's motion to dismiss, allowing the debtor to receive PPP funding, granting the debtor's motion to reconsider dismissal, and reinstating the bankruptcy case. Advanced Power Technologies LLC, Case No. 20-13304 (Bankr. S.D. Fla. Apr. 24, 2020); In re Blue Ice Inv., LLC v. U.S. Small Bus. Admin., Adv. No. 2:20-AP-00095 (Bankr. Ariz. 2020).