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The Fresh Start Paradox: Economic Disaster Relief Available to Title 11 Debtors

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THE FRESH START PARADOX: ECONOMIC DISASTER RELIEF AVAILABLE TO TITLE 11 DEBTORS

ABSTRACT

The Small Business Administration ("SBA") has been providing disaster relief in the form of Economic Injury Disaster Loans ("EIDLs") since its inception in 1953. In the context of the COVID-19 pandemic, the CARES Act charged the SBA with issuing forgivable loans through the Paycheck Protection Program ("PPP") to small businesses which would otherwise face permanent closure. Though the CARES Act did not specifically grant the SBA authority to do so, the SBA interpreted its powers to include the ability to set requirements for loan approval which were not laid out in the Act itself. Specifically, the SBA promulgated a rule indicating that loan applicants presently involved in a bankruptcy petition were ineligible for PPP loans. This rule has become the subject of extensive litigation and courts have been forced to answer the question of whether the SBA's conduct violates 11 U.S.C. § 525(a), which prohibits discrimination in the award of certain government programs by governmental entities. Some courts have found the SBA to have violated this provision, while others have declined to rule against the SBA. Among the reasons cited for finding for the SBA is the argument that the Chevron *Doctrine constrains the judiciary's ability to scrutinize the actions of the agency. The result of this judicial split is an uneven application of bankruptcy law and a violation of the Code's overall purpose.*

This Comment first discusses the history of PPP loans and Economic Injury Disaster Loans generally. Next, this Comment surveys the statutory landscape of section 525(a) and the existing case law arising from PPP loan litigation. The subsequent analysis considers the merits of various arguments presented both against and in favor of the SBA's position and explains why Economic Injury Disaster Loans, such as PPP loans, should be protected under section 525(a). Finally, this Comment concludes by looking at how resolution of the PPP loan dispute will impact small businesses in the future and by offering a legislative solution for closing the gaps in the Code's current provisions.

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INTRODUCTION

In the small city of Grapevine, Texas, a business named Classic Chevrolet serves the community's automobile sale needs.[1] Though considered large for a town with only 50,000 residents,[2] Classic Chevrolet is a relatively small company, employing under 400 workers.[3] Like so many other businesses of its size, Classic Chevrolet felt the impact of the COVID-19 pandemic soon after its appearance in the United States. Despite these financial pressures, the business owners upheld their commitment both to serving the Grapevine community and to providing employment to several hundred of its residents.[4] Unfortunately, Classic Chevrolet only had enough resources to maintain operations for two months;[5] without external assistance, the company might have been forced to lay off a substantial portion of its employees or to cease operations temporarily or permanently. Receipt of a Paycheck Protection Program ("PPP") loan made the difference for Classic Chevrolet, as it had for approximately 76% of small businesses in the United States.[6] Because of the disaster relief funds made available by the government, the employees of Classic Chevrolet were able to keep their jobs and continue providing for their families. While the PPP was life-changing for the Classic Chevrolet workforce, many small businesses were unable to reap the benefits of the program, not because of its terms, but because of the inappropriate rulemaking of the Small Business Administration ("SBA").

Since its inception in 1953, the SBA has provided assistance to individuals and businesses who are financially impacted by natural disasters.[7] For instance, following Hurricanes Katrina, Rita, Wilma, Gustav, and Ike, the SBA approved 176,134 Disaster Assistance Loans, including $2,855,811 in Business Loans and

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[1] *See PPP Case Studies: Grapevine Sees ROI for Kindness, Innovation and Hard Work*, DALL. BUS. J., https://partners.bizjournals.com/greater-dallas-fort-worth/grapevine/ppp-case-studies/ (last visited Nov. 12, 2022).

[2] *QuickFacts: Grapevine City, Tex.*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/grapevinecitytexas (last visited Nov. 12, 2022).

[3] *Tracking PPP: Search Every Company Approved for Federal Loans*, PROPUBLICA, https://projects.propublica.org/coronavirus/bailouts/loans/classic-chevrolet-inc-1956097107 (last visited Nov. 12, 2022).

[4] *See PPP Case Studies: Grapevine*, *supra* note 1 ("Our employees are the most important . . . . We knew we'd lose good employees if we did layoffs.").

[5] *Id.*

[6] Mark E. Schweitzer & Garrett Borawski, *Which Industries Received PPP Loans?*, FED. RSRV. BANK OF CLEVELAND (Apr. 1, 2021), https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2021-economic-commentaries/ec-202108-which-industries-received-ppp-loans.aspx.

[7] CONG. RSCH. SERV., R41309, THE SBA DISASTER LOAN PROGRAM: OVERVIEW AND POSSIBLE ISSUES FOR CONGRESS (2015).

$211,167 in Economic Injury Disaster Loans ("EIDLs").[8] In the wake of the California wildfires, the SBA made available to business owners both property loss loans, and loans to aid small businesses in recovering from the fires' economic impact.[9] EIDLs are available for businesses with fewer than 500 employees, including sole proprietorships, independent contractors, and individuals who are self-employed.[10] Applications are evaluated using the applicant's credit score, credit history, and number of employees.[11] As of June 2020, approximately 1.43 million EIDLs had been approved by the SBA, with a large number of applications pouring in since the start of the COVID-19 pandemic.[12]

In an effort to mitigate the financial hardship resulting from the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") on March 25, 2020.[13] Section 1102 of the CARES Act establishes the Paycheck Protection Program ("PPP"), which provides funding to small businesses for certain expenses related to the operation of the business. Funds received from a PPP loan can be used to cover payroll distributions, mortgage or lease payments, and utility charges.[14] To qualify for a PPP loan, section 1102(a)(2) of the Act provides that business owners must certify that: (1) the loan is required to maintain normal operation of business in the current economic climate; (2) funds will be used as outlined in section 1102; (3) they do not have an application pending for a duplicative PPP loan; and (4) they have not received a separate loan for the same purpose.[15] Under section 1102, the SBA is authorized to grant PPP loans to eligible borrowers under the terms provided in the CARES Act.[16] The SBA has used this decision-making authority

[8] CONG. RSCH. SERV., R43139, FEDERAL DISASTER ASSISTANCE AFTER HURRICANES KATRINA, RITA, WILMA, GUSTAV, AND IKE 67–68 (2019).

[9] *Federal Aid Programs for the State of California*, CAL. GOVERNOR'S OFF. OF EMERGENCY SERVS., https://wildfirerecovery.caloes.ca.gov/past-fires/november-2018-fires/fema-aid/ (last visited Nov. 12, 2022).

[10] Ty Kiisel, *What Are the EIDL Loan Requirements?*, NAV (June 3, 2022), https://www.nav.com/blog/what-are-the-eidl-loan-requirements-600410/.

[11] *See About COVID-19 EIDL*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl/covid-19-eidl (last visited Nov. 12, 2022).

[12] Kate Rogers, *Federal Disaster Loan Program Applications No Longer Limited to Agricultural Businesses*, CNBC (June 15, 2020, 7:05 PM), https://www.cnbc.com/2020/06/15/coronavirus-update-eidl-loan-applications-no-longer-limited-to-agriculture.html.

[13] *About the CARES Act and the Consolidated Appropriations Act*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/coronavirus/about-the-cares-act (last visited Nov. 12, 2022).

[14] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 286–94 (codified as amended at 15 U.S.C. 636(a)(36)(F)(i)).

[15] *Id.*

[16] *See id.* (codified as amended at 15 U.S.C. 636(a)(36)(B)).

to deny PPP loans to applicants who have a history of bankruptcy under Title 11 of the United States Code.[17]

In the wave of litigation that has ensued, the circuit courts remain split over whether the SBA's denial of PPP loans on this basis constitutes a violation of 11 U.S.C. § 525(a),[18] which prohibits government agencies from making decisions regarding a "license, permit, charter, franchise, or other similar grant" solely based on an entity's status as a debtor under Title 11.[19] Courts condemning the SBA's conduct have found PPP loans to be protected under the language of section 525 and have concluded that a denial of PPP loans based on the applicant's bankruptcy status is a violation of those provisions.[20] Those courts which have upheld the SBA's conduct have done so both by finding that PPP loans do not qualify for protection under section 525(a) and by determining that judicial review of SBA action is limited by the *Chevron* Doctrine.[21] Because these courts contend their review of administrative actions is constrained by the *Chevron* Doctrine, legislative action is required to extend the protections of section 525(a) to government programs such as the PPP.

This Comment proceeds by analyzing in detail the legal framework of chapter 5's anti-discrimination provisions and the PPP, and the arguments that parties have presented in that context. After examining the arguments presented both by courts upholding the SBA's conduct and by courts holding the SBA's conduct to be unlawful, this Comment explains why legislative action on this matter is crucial to protecting the purpose of the Bankruptcy Code and offers a statutory solution to the issue.

I. BACKGROUND AND LEGAL DOCTRINES

To lay the foundation of the judicial split on the applicability of section 525(a) to the PPP, it is first necessary to understand the historical context of PPP

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17 *See, e.g.*, *In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021); Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), No. 19-20497, 2020 Bankr. LEXIS 1174 (Bankr. S.D. Tex. Apr. 25, 2020), *vacated*, 962 F.3d 838 (5th Cir. 2020).

18 *Compare Penobscot Valley*, 626 B.R. 350, *with Springfield Hosp.*, 618 B.R. 70.

19 11 U.S.C. § 525(a).

20 *See* Skefos v. Carranza, No. 19-29718, 2020 Bankr. LEXIS 1479, at *41 (Bankr. W.D. Tenn. June 2, 2020). *But see Hidalgo Cnty.*, 2020 Bankr. LEXIS 1174 (granting a temporary restraining order prohibiting the SBA from denying the plaintiff's PPP application based on its status in bankruptcy).

21 The *Chevron* Doctrine grants deference to the statutory interpretations of administrative agencies where the agency is reasonably interpreting ambiguous statutory language. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

loans and how courts have approached the matter up to this point. The following sections provide background on (A) previous forms of economic aid similar to the PPP; (B) the denial of PPP loans by the SBA; and (C) various arguments presented in court both favoring and condemning the SBA's conduct.

A. *The PPP as an Economic Injury Disaster Loan*

As discussed, the SBA has been providing disaster loans since 1953.[22] The SBA has identified three categories of disaster loans: home disaster loans, business physical disaster loans, and EIDLs. While businesses can qualify for up to $2 million in physical disaster loans and EIDLs combined, the SBA will only award EIDLs to small businesses which are unable to obtain credit elsewhere.[23]

In the face of the COVID-19 pandemic, the SBA has overseen several disaster relief programs designed to provide relief to small businesses whose operations were impacted by the pandemic. The COVID-19 EIDL is described as a "loan directly from the SBA that must be repaid."[24] Loans in this program are accompanied by fees, collateral requirements, and personal guaranty provisions—each of which varies based on the total amount of the loan.[25] Moreover, applicants to this program might qualify for an "advance" in the amount of $15,000 which does not have to be repaid.[26]

The PPP was designed specifically to assist small businesses with the costs of maintaining their pre-pandemic payroll.[27] The program provides fully forgivable funds to small businesses which certify that they will be unable to maintain normal operations without PPP assistance, and that the funds will only be used for the purposes approved in the loan terms.[28] PPP funds were intended to provide quick access to SBA funds for businesses struggling to make ends

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22 CONG. RSCH. SERV., R41309, THE SBA DISASTER LOAN PROGRAM: OVERVIEW AND POSSIBLE ISSUES FOR CONGRESS (2015).

23 *See Disaster Loan Assistance*, U.S. SMALL BUS. ADMIN., https://disasterloanassistance.sba.gov/ela/s/article/ Economic-Injury-Disaster-Loans (Feb. 11, 2022).

24 *See About COVID-19 EIDL*, *supra* note 11.

25 *See id.*

26 *See About Targeted EIDL Advance and Supplemental Targeted Advance*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl/targeted-eidl-advance-supplemental-targeted-advance (last visited Nov. 12, 2022).

27 *See Paycheck Protection Program*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program (last visited Nov. 12, 2022).

28 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 290–91 (codified as amended at 15 U.S.C. 636(a)(36)(F)(i)); *id.* § 1106, 134 Stat. at 297–301 (codified as amended at 15 U.S.C. § 636m).

meet throughout the COVID-19 pandemic.[29] The urgent nature of the PPP, coupled with the requirement that the business certify the necessity of the funds for its survival, indicates that recipients of the funds likely could not obtain similar assistance from other lenders.[30] Therefore, the PPP closely resembles general EIDLs in many regards.

B. PPP Denial Based on Bankruptcy Status

Since April 2020, the SBA has been denying PPP loans to otherwise eligible small businesses based on their bankruptcy status both at the time of application and before loan disbursement.[31] According to the SBA, providing a PPP loan to these businesses "would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans."[32] Moreover, the SBA argues it is under no obligation to provide financial assistance to debtors in bankruptcy.[33]

In December 2020, then-President Trump signed the Consolidated Appropriations Act of 2021 (the "CAA"), which attempted to make eligible for PPP loans businesses who were in bankruptcy.[34] However, the language of the CAA remained permissive, leaving the authority to permit such debtors to obtain PPP loans with the SBA.[35] On April 6, 2021, the SBA provided further insight into its position on this matter in a document entitled *Paycheck Protection Program Loans: Frequently Asked Questions* (the "FAQs").[36] The answers to

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29 SBA rules indicate that approved funds must be issued within ten days of approval. *Paycheck Protection Program Loans Frequently Asked Questions*, U.S. SMALL BUS. ADMIN. 1, 20 (2021), https://www.sba.gov/sites/default/files/2021-01/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf.

30 *See id.*; Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1102(a)(2), 134 Stat. at 291 (codified as amended at 15 U.S.C. 636(a)(36)(G)(i)).

31 Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21); *see also, e.g.*, *In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021); Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020).

32 Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. at 23451.

33 *Id.*

34 *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 320, 134 Stat. 1182, 2015–17 (2021) (amending 11 U.S.C. § 364).

35 *See id.*

36 *Frequently Asked Questions*, *supra* note 29. The FAQs are the SBA's attempt, in consultation with other implicated government agencies, to provide "timely additional guidance to address borrower and lender questions concerning the implementation of the Paycheck Protection Program." *Id.* at 1. The FAQs take the form of a series of numbered questions, updated periodically as the need arises.

the FAQs provide clarification on what constitutes a business "presently involved in any bankruptcy," indicating a business would not be deemed involved in bankruptcy if: (1) it had received a discharge following a chapter 7 bankruptcy; (2) an order dismissing the case had been entered; or (3) an order confirming a plan of reorganization had been entered in a chapter 11, 12, or 13 bankruptcy.[37] Though this modification decreased the number of businesses whose chances at obtaining a PPP loan would be adversely impacted by their bankruptcy status, there were many businesses whose circumstances fell outside the scope of these three exceptions. Those entities which fall outside of the three circumstances identified in FAQ 67 must rely on section 525(a) to provide an exception under which they could qualify for a PPP loan.

C. Competing Interpretations of 11 U.S.C. § 525(a)

Chapter 5 of the U.S. Bankruptcy Code lays out procedural guidelines for both debtors and creditors; within this chapter, subchapter II identifies a debtor's duties and benefits established by the Code.[38] Among other things, this subchapter identifies protections to which debtors are entitled, including protection against discriminatory treatment.[39] Section 525(a) states, in pertinent part, "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant" based on whether the business "is or has been a debtor under this title."[40] Perhaps the most contentious segment of this section is the inclusion of "other similar grant[s]" in the entitlements protected by section 525(a).

In the wake of the COVID-19 pandemic, courts have been inundated with litigation surrounding the meaning of "other similar grant" within section 525(a).[41] Specifically, the circuits are split on whether a PPP loan qualifies as an "other similar grant" within the meaning of the Code.[42] Courts within the First, Second, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have upheld the SBA's conduct,[43] while courts within the Fifth and Sixth Circuits

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37 *Id.* at 30.

38 *See* 11 U.S.C. §§ 521–528 ("Subchapter II: Debtor's Duties and Benefits").

39 *See id.*

40 11 U.S.C. § 525(a).

41 *See, e.g.*, *In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021); Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020).

42 *Compare Penobscot Valley*, 626 B.R. 350, *with Springfield Hosp.*, 618 B.R. 70.

43 *See Penobscot Valley*, 626 B.R. 350; Tradeways, Ltd. v. U.S. Dep't of the Treasury, No. 20-1324, 2020 U.S. Dist. LEXIS 110737, at *42–44 (D. Md. June 24, 2020); Schuessler v. U.S. Small. Bus. Admin., No. 20-

have come to the conclusion that PPP loans are protected under 11 U.S.C. § 525(a).[44]

The most recent of these decisions was issued by the U.S. Court of Appeals for the Second Circuit in *Springfield Hospital, Inc. v. Guzman*. In *Guzman*, the Second Circuit joined the majority of courts by upholding the SBA's conduct as permissible;[45] however, prior to the *Guzman* decision, lower courts within the Second Circuit had condemned the SBA's conduct as a violation of section 525(a).[46] Despite this overruling, the lower court's reasoning remains illustrative of the key arguments presented against the SBA and should nonetheless be considered.

1. *Using the* Chevron *Doctrine in Support of the SBA*

Courts within the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have upheld the SBA's conduct based on their findings that the SBA's construction of the CARES Act is permissible under the *Chevron* Doctrine and PPP loans do not fall within the meaning of "other similar grants" in section 525(a).[47]

If Congress has given an agency authority to fill in the gaps of its legislation with rulemaking, the agency's actions are presumed to be controlling unless deemed an unreasonable construction of the relevant statute.[48] For example, in *In re Penobscot Valley Hospital*, the U.S. Bankruptcy Court for the District of Maine—a court within the First Circuit—upheld the SBA's denial of PPP loans due to the powers granted to it by Congress in the Small Business Act.[49] Section 7(a) of that legislation grants to the SBA the power to provide small businesses with loans they would be unable to obtain from private lenders.[50] Moreover, the Administrator, who manages the SBA, is vested with the authority to promulgate

02065, 2020 Bankr. LEXIS 1347 (Bankr. E.D. Wis. May 22, 2020); *In re* Dancor Transit, No. 2:20-bk-70536, 2020 Bankr. LEXIS 2219 (Bankr. W.D. Ark. June 22, 2020); Vestavia Hills, Ltd. v. U.S. Small Bus. Admin. (*In re* Vestavia Hills, Ltd.), 630 B.R. 816 (Bankr. S.D. Cal. 2021); U.S. Small Bus. Admin. v. Roman Cath. Church of the Archdiocese of Santa Fe, 632 B.R. 816 (Bankr. D.N.M. 2021); Henry Anesthesia Assocs. LLC v. Carranza (*In re* Henry Anesthesia Assocs. LLC), No. 20-06084, 2020 Bankr. LEXIS 1471 (Bankr. N.D. Ga. June 4, 2020).

44 *See Hidalgo Cnty.*, 962 F.3d 838; Skefos v. Carranza, No. 19-29718, 2020 Bankr. LEXIS 1479 (Bankr. W.D. Tenn. June 2, 2020). As this article goes to press, the issue has not been adjudicated by any courts within the Third Circuit.

45 *See* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022).

46 *See Springfield Hosp.*, 618 B.R. 70.

47 *See, e.g.*, *Penobscot Valley*, 626 B.R. 350; *Tradeways*, 2020 U.S. Dist. LEXIS 110737.

48 *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

49 *See Penobscot Valley*, 626 B.R. at 372.

50 *See* 15 U.S.C. § 636(a)(1)(A); *see also Penobscot Valley*, 626 B.R. at 356–57.

rules necessary to carry out the powers of the SBA.[51] This broad authority is constrained in the context of loan awards only by the requirements of section 7(a), which includes in part that an award amount "shall be of such sound value or so secured as reasonably to assure repayment."[52]

The court in *In re Penobscot Valley Hospital* determined an inquiry into a loan applicant's bankruptcy history falls within the SBA's power under section 7(a).[53] It was therefore unable to grant relief to the Hospitals, given that Congress expressly granted rulemaking authority to the SBA, and its promulgations were reasonable under section 7(a).[54] Moreover, the court found the SBA's conduct to be reasonable under the guidelines of the CARES Act, which requires loans granted thereunder to be used to alleviate the financial pressures of COVID-19 specifically.[55] In the court's view, a business's bankruptcy status is relevant in determining the probability that loan funds would be used for purposes other than that required by the CARES Act.[56] On these bases, the court concluded the SBA was not carrying out its powers in an unreasonable manner, and it therefore could not grant the relief sought.[57]

2. *Constructions of "Other Similar Grant" Favoring the SBA*

Another argument adopted by courts that have found in favor of the SBA is that section 525(a) does not apply to loans funded through government agencies.[58] The view of many courts, including the U.S. District Court for the District of New Mexico—a court within the Tenth Circuit—is that an "other similar grant" is an item which "'implicate[s] the government's gate-keeping role in determining who may pursue certain livelihoods' or activities."[59] The courts which adopt this definition tend to conclude that PPP loans do not fall

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[51] *See Penobscot Valley*, 626 B.R. at 356–57.

[52] *See id.* (quoting 15 U.S.C. § 636(a)(6)).

[53] *Id.* at 357 ("To ensure that a loan will be 'so sound as to reasonably assure repayment[,]' the SBA's lending criteria involve consideration of nine factors, including the applicant's credit history. For Section 7(a) loans, the SBA also considers an applicant's bankruptcy history . . . .") (citation omitted).

[54] *See id.* at 356–57.

[55] *Id.* at 368.

[56] *Id.*

[57] *See id.* at 356–57, 368.

[58] *See, e.g.*, Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022) (holding that section 525(a) does not apply to PPP loans because "the substance of the PPP conclusively demonstrates that it is, as described, a loan guaranty program, not a grant program").

[59] U.S. Small Bus. Admin. v. Roman Cath. Church of the Archdiocese of Santa Fe, 632 B.R. 816, 833–34 (Bankr. D.N.M. 2021) (quoting Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006)).

within the interests protected by section 525(a) because they do not provide authorization to take an action which could not be taken otherwise.[60]

In *Tradeways, Ltd. v. U.S. Department of the Treasury*, the U.S. District Court for the District of Maryland described the language of section 525(a) as "plain" and "clearly specif[ying] that its protections extend to licenses, permits, charters, and franchises, and to grants similar to those items."[61] In *Tradeways*, the plaintiff argued that PPP loans should be classified as grants, rather than true loans, largely due to the provisions for loan forgiveness included in the CARES Act.[62] The court rejected this argument, reasoning that because the loan forgiveness provisions are contingent on the borrower satisfying specific requirements, a PPP loan is not an "outright gift."[63] Therefore, according to this court, the "mere existence of favorable forgiveness terms in the CARES Act does not transform a PPP loan into a grant."[64] Additionally, the court used the canon of *expressio unius est exclusio alterius*[65] to determine that the inclusion of licenses, permits, charters, and franchises indicates Congress' intention to exclude loans as interests protected under section 525(a).[66] The court proceeded to explain that even if the PPP is characterized as a grant, it is not a grant similar to the other property interests listed, and is therefore not a protected interest within chapter 5.[67]

3. *Arguments Opposing the SBA's Actions*

In stark contrast with the aforementioned arguments, courts within the Second, Fifth, and Sixth Circuits have expressed opposition to the conduct of the SBA, finding that PPP loans are protected interests under section 525(a).[68] As discussed previously, an examination of this issue should include analysis of

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60 *See id.*

61 Tradeways, Ltd. v. U.S. Dep't of the Treasury, No. 20-1324, 2020 U.S. Dist. LEXIS 110737, at *43–44 (D. Md. June 24, 2020).

62 *Id.* at *46.

63 *Id.*

64 *Id.* at *46–47.

65 *Expressio unius est exclusio alterius* conveys the idea that the inclusion of one or more things implies the intentional exclusion of another thing. *E.g.*, Chevron U.S.A. v. Echazabal, 536 U.S. 73, 73 (2002).

66 *Tradeways*, 2020 U.S. Dist. LEXIS 110737, at *47.

67 *Id.* at *47–48.

68 Skefos v. Carranza, No. 19-29718, 2020 Bankr. LEXIS 1479, at *41 (Bankr. W.D. Tenn. June 2, 2020); *see* Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp., Inc.), 618 B.R. 70, 91–93 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), No. 19-20497, 2020 Bankr. LEXIS 1174 (Bankr. S.D. Tex. Apr. 25, 2020) (granting a temporary restraining order prohibiting the SBA from denying the plaintiff's PPP application based on its status in bankruptcy), *vacated*, 962 F.3d 838 (5th Cir. 2020).

the reasoning of lower courts within the Second Circuit, despite that those courts were overruled in the Second Circuit's recent *Guzman* decision.[69]

For example, in *Springfield Hospital, Inc. v. Carranza*, the U.S. Bankruptcy Court for the District of Vermont—a court within the Second Circui —reached the conclusion that, in denying PPP loans based on bankruptcy status, the SBA directly violated chapter 5 of the Bankruptcy Code.[70] In that case, the court defined a grant as "an agreement that creates a right of any description other than the one held by the grantor."[71] The court identified a two-prong test for determining whether a program qualifies as a grant under section 525(a) (the "*Stoltz* test").[72] Initially, the court explained the first prong requires a determination of whether the relevant interest can be obtained from the private sector, and the second prong involves an analysis of whether the interest is essential to providing the debtor with a fresh start.[73]

Because a requirement of eligibility for SBA loans under section 7(a) is that the borrower could not obtain the funds from private lenders, the court found that the first prong of the *Stoltz* test was satisfied.[74] Similarly, because a requirement for PPP eligibility is that the loan is necessary to the borrower's continued normal operation of business in the financial wake of COVID-19, the second prong was deemed satisfied as well.[75] Accordingly, the court concluded that PPP loans qualify as other similar grants within the meaning of section 525(a).[76]

Additionally, the court opined that in listing a number of forms of discrimination, the legislature's intent was not to thereby permit discrimination on other bases.[77] Rather, according to the court, Congress intentionally left room for the judiciary "to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy."[78]

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69 *Springfield Hosp.*, 618 B.R. at 93. Though this case was subsequently overruled by the U.S. Court of Appeals for the Second Circuit, many arguments presented remain illustrative of those utilized by the minority of courts on this issue. Analysis of those arguments therefore remains pertinent to a discussion of competing views on the issue at hand. *See supra* text accompanying notes 45–46.

70 *Id.*

71 *Id.* at 86 (quoting Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 89 (2d Cir. 2002)).

72 *Id.* at 87. In *Guzman*, the Second Circuit upheld the validity of the *Stoltz* test, though disagreeing with its application to PPP loans. *See also Guzman*, 28 F.4th at 419.

73 *Springfield Hosp.*, 618 B.R. at 87.

74 *Id.* at 90–91.

75 *Id.* at 91.

76 *Id.*

77 *Id.* at 88 (quoting Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 89 (2d Cir. 2002) (quoting H.R. REP. NO. 95-595, at 366–67 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 6323)).

78 *Id.*

To that end, in *Skefos v. Carranza*, the U.S. Bankruptcy Court for the Western District of Tennessee emphasized the unique nature of the PPP to "meet an unprecedented crisis using whatever tools were ready to hand."[79] The court further pointed out that the novelty of the program can be seen in the fact that borrowers were not required to undergo an underwriting process, given the loan will be forgiven provided that the funds be used as designated.[80] The court emphasized the loan's forgiveness as indication that the program was intended to serve as a grant to provide a fresh start, rather than a traditional loan.[81]

In regard to the *Chevron* argument presented by the SBA, the court in *Skefo*s found the SBA to have "acted arbitrarily and capriciously in excluding entities owned by debtors in bankruptcy from the PPP."[82] Specifically, the court pointed to Supreme Court precedent which described actions which are taken in reliance on factors which Congress has not intended the agency to consider as "arbitrary and capricious."[83] Because the CARES Act does not include creditworthiness as a requirement for eligibility for PPP, and actually provides a means of relief from financial distress itself, the court in *Skefos* found it was arbitrary and capricious for the SBA to base PPP award decisions on bankruptcy status, and granted the debtor's preliminary injunction against the SBA.[84]

II. ANALYSIS

Numerous judicial decisions have declined to examine the SBA's conduct on the grounds of the *Chevron* Doctrine.[85] In response to these decisions, this Comment proposes legislative action to clarify relevant provisions of the Bankruptcy Code. Recognizing that litigation concerning the SBA's denial of PPP loans based on bankruptcy status will continue to take place until new legislation is adopted,[86] this Comment advances several arguments which can

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79 Skefos v. Carranza, No. 19-29718, 2020 Bankr. LEXIS 1479, at *39 (Bankr. W.D. Tenn. June 2, 2020).

80 *Id.* at *39–40.

81 *Id.* at *41.

82 *Id.* at *30.

83 *Id.* at *30–31.

84 *Id.* at *32–36, *44.

85 *See supra* notes 47–57 and accompanying text.

86 At this time, the only relevant legislative action which has been taken is the introduction of the Continuing Small Business Recovery and Paycheck Protection Program Act by Senators Rubio and Collins. That legislation was introduced in the Senate in July 2020 and no further action has taken place since. *See* Continuing Small Business Recovery and Paycheck Protection Program Act, S. 4321, 116th Cong. (2020); *see also* Helen Park, Article, *III. Expanding the Paycheck Protection Program to Bankrupt Small Businesses*, 40 REV. BANKING & FIN. L. 30, 33 (2020) ("Although the bill implies that Congress intended the PPP loans to be available to bankrupt businesses, it remains unclear whether the SBA has the authority to override such an intent . . . . Therefore, the new bill does very little to address the issues present in the current PPP loan administration.").

be raised to counter the SBA-adhering courts' continued reliance on the *Chevron* Doctrine. In order for the SBA to be held judicially accountable for its actions regarding the administration of PPP loans, it must be the case that (1) the SBA's conduct is the result of an impermissible construction of the CARES Act, and (2) the denial of PPP loans based on an applicant's bankruptcy status is a violation of 11 U.S.C. § 525(a).

A. Impermissible Construction of the CARES Act

Under the *Chevron* Doctrine, if an administrative agency is authorized to take action under a statute which contains an ambiguity, that agency is permitted to adopt its own interpretation of the ambiguity, so long as that interpretation is reasonable.[87] The reasonableness of an interpretation can be ascertained by examining the legislative intent shown by prior, concurrent, and subsequent legislative history.[88] In the case of the CARES Act and the PPP, there are competing showings of legislative intent which must be weighed to determine the true scope of the ambiguity exploited by the SBA.

Regarding PPP loans, the CARES Act served to amend 15 U.S.C. § 636(a), which codified section 7(a) of the Small Business Act.[89] New provisions pertaining to the PPP were included in paragraph 36 of that subsection, but the amendment provided that, except as otherwise set out in paragraph 36, the Administrator can award PPP loans under the same terms as typical SBA loans under that subsection.[90] Those terms include the requirement that loans be awarded in such a way to ensure timely repayment.[91] Presumably, this is the provision from which the SBA draws the power to create additional requirements for PPP loan eligibility. However, this perception of authority is not in line with the legislative intent demonstrated by the amendment of the Code to include subchapter V.

1. Prior Legislative History

Initially, it is worth examining related legislation passed within the same timeframe to identify any recurring policy themes in Congressional actions from that period. In 2019, Congress elected to modify the Bankruptcy Code to include

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87 *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984).

88 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1776 (2020).

89 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 286–94 (amending 15 U.S.C. 636(a)).

90 *See* 15 U.S.C. § 636(a)(36)(B).

91 *See* 15 U.S.C. § 636(a)(6).

subchapter V of chapter 11.[92] Effective as of February 19, 2020, subchapter V was drafted to make reorganization a viable option for small businesses.[93] Though this legislation was introduced and passed prior to the onset of the COVID-19 pandemic, its enactment indicates a legislative goal of providing more effective assistance to small businesses in financial distress.

2. *Concurrent Legislative History*

Additional important demonstrations of legislative intent may be found in the text and provisions of the statute itself. Section 1106 of the CARES Act provides that PPP loans may be forgiven if the funds are used to cover permitted costs under section 1102(a)(2): payroll, costs related to continuation of group healthcare benefits, employee compensation, mortgage interest payments, utilities, and interest on other debts incurred prior to the statute's covered period.[94] The inclusion of a loan forgiveness provision, which by its terms is in effect unless the borrower violates the utilization provisions of the statute, is evidence the statute was drafted to provide borrowers with the means to financially recover from the pandemic at no cost to themselves. Moreover, one of the permissible uses of PPP funds is to pay interest on previously acquired debt obligations.[95] In light of this permitted use, it would be counterintuitive to suggest PPP loans could not be awarded to businesses that have previously endured financial distress. As the court in *Skefos* indicated, financial distress of the business is assumed by the very need for the CARES Act.[96] If businesses were not in financial distress as a result of the ensuing pandemic, there would have been no need for the legislation to begin with. It would be contrary to the purpose of the CARES Act's inception to discriminate in PPP loan approval based on an applicant's previous status of financial distress.

Additionally, presuming the SBA is attempting to exploit the ambiguity of 15 U.S.C. § 636(a) regarding an assurance of timely repayment, the loan forgiveness provisions of the CARES Act could potentially render that ambiguity moot. Given that all a borrower must do to qualify for loan forgiveness is to abide by the terms of the loan itself, forgiveness seems to be

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92 *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 2(a), 133 Stat. 1079, 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")).

93 *See* 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization").

94 Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1102(a)(2), 134 Stat. at 290–91 (codified as amended at 15 U.S.C. 636(a)(36)(F)(i)).

95 *Id.* § 1102(a)(2), 134 Stat. at 290 (codified as amended at 15 U.S.C. 636(a)(36)(F)(i)(VII)).

96 *See* Skefos v. Carranza, No. 19-29718, 2020 Bankr. LEXIS 1479, at *32 (Bankr. W.D. Tenn. June 2, 2020) (quoting Roman Cath. Church of the Archdiocese of Santa Fe v. U.S. Small Bus. Admin. (*In re* Roman Cath. Church of Archdiocese of Santa Fe), 615 B.R. 644, 650 (Bankr. D.N.M. 2020)).

built into the statute.[97] This raises the question of whether timely repayment was an actual concern of the legislature at the time of enacting the CARES Act. The financial conditions arising from the unprecedented pandemic and the sweeping relief measures provided by the government indicate that the legislature's goal was to keep individuals and businesses afloat in the wake of the COVID-19 crisis.[98] Therefore, it seems unlikely Congress would include provisions for loan forgiveness specific to the PPP, which are repayment provisions in their own right, in addition to granting the SBA authority to tack on supplemental requirements for eligibility.

3. *Subsequent Legislative History*

Though the prior and concurrent legislative history favors a reading contrary to the SBA's interpretation, the SBA's conduct is consistent with the legislative intent demonstrated by the language used in the Coronavirus Response and Relief Supplemental Appropriations Act ("CRRSAA"). After the CRRSAA took effect, the SBA continued inquiring into potential borrowers' bankruptcy status in the PPP application and made clear that applications would be denied if the business or its owners were presently in bankruptcy or had previously defaulted on a federal loan.[99] The CRRSAA opened the door of PPP eligibility for bankrupt potential borrowers, but ultimately left the discretion with the SBA. Section 320 establishes a special, expedited bankruptcy procedure for debtors who want to apply for the PPP, but the procedure only takes effect if the SBA provides a written determination that those small business debtors are eligible for PPP loans.[100] This grant of discretion provides some evidence that the SBA's resolution of the ambiguity was permissible under the *Chevron* Doctrine.

However, even though the use of the expedited procedure is left to the SBA's discretion, it does not necessarily follow that the SBA then has permission to construct PPP eligibility requirements beyond those laid out in the CARES Act. Indeed, the recent trend of making fresh start policies more readily available to small businesses, seen in actions taken by both Congress and the Executive

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[97] *See id.* ("Given the effect of the lockdown, many, perhaps most, applicants would not be able to repay their PPP loans. They don't have to, because the 'loans' are really grants. Repayment is not a significant part of the program. That is why Congress did not include creditworthiness as a requirement.").

[98] *See id.* (Considering the extenuating circumstances of the pandemic, "the CARES Act makes PPP money available regardless of financial distress.").

[99] *See* U.S. SMALL BUS. ADMIN., SBA FORM NO. 2483, PAYCHECK PROTECTION PROGRAM BORROWER APPLICATION FORM (Mar. 2021), https://www.sba.gov/sites/default/files/2021-03/BorrowerApplication2483ARPrevisions%20%28final%203-18-21%29-508.pdf ("If questions (1) [or] (2) . . . are answered 'Yes,' the loan will not be approved.").

[100] *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 320, 134 Stat. 1182, 2016.

Branch, indicates the contrary, as does the inclusion of strong loan forgiveness provisions in these initiatives.[101] To the extent the SBA was construing the ambiguity found in the provision regarding assurance of timely repayment, the prior and concurrent legislative history demonstrates discrimination against businesses who are involved in bankruptcy is inconsistent with the legislative intent.[102] Therefore, the SBA's conduct in this regard is not a reasonable construction of the CARES Act under the *Chevron* Doctrine.

B. Impermissible Violation of Section 525(a)

At the root of the debate as to whether the SBA should be allowed to discriminate in PPP loan awards based on status in bankruptcy is the question of whether PPP loans are a protected interest within chapter 5 of the Bankruptcy Code. Regardless of whether the SBA's construction and implementation of the CARES Act is permissible under the *Chevron* Doctrine, if the discriminatory practices used are found to violate chapter 5, the SBA ought to be prohibited from utilizing those same practices moving forward. To determine whether a PPP loan qualifies as an "other similar grant" within the meaning of 11 U.S.C. § 525(a), the meaning of "other similar grant" must be ascertained using the purpose of the statute and the textual context of the provision itself.

1. Purpose of the Bankruptcy Code

The Supreme Court has held that a main purpose of the Bankruptcy Code is to provide debtors with a fresh start and new opportunities in life.[103] More specifically, the Bankruptcy Code exists to alleviate debtors of the stifling impact of "oppressive indebtedness" resulting from unfortunate business circumstances.[104] Construing "other similar grant" to exclude a federal program which endeavors to relieve small business owners from financial distress resulting from circumstances beyond their control would violate the very purpose of the Bankruptcy Code.

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101 *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54 § 2(a), 133 Stat. 1079, 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")); Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1106, 134 Stat. 281, 297–301 (codified as amended at 15 U.S.C. § 636m).

102 *See* Small Business Reorganization Act of 2019 § 2(a), 133 Stat. at 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")); Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1106, 134 Stat. at 297–301 (codified as amended at 15 U.S.C. § 636m).

103 *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) (quoting Stellwagen v. Clum, 245 U.S. 605, 617 (1918)).

104 *See* Cont'l Ill. Nat'l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 670–71 (1935) (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

In particular, the Bankruptcy Code attempts to lend a helping hand to the "honest but unfortunate debtor."[105] Requirements of good faith are integral to the Code's purpose and are evaluated at every stage of a bankruptcy proceeding. In determining whether a debtor has filed for bankruptcy in good faith, courts look at all surrounding circumstances to examine whether the debtor is attempting to abuse the fresh start system in any way.[106] The emphasis placed on this requirement ensures debtors are not using the bankruptcy system as a means to escape an obligation they are fully capable of fulfilling. Instead, bankruptcy is reserved for individuals and entities which come into extenuating circumstances which render them unable to repay prior obligations.[107] In arguing that an award of government aid to people who have filed bankruptcy presents an increased risk of nonpayment, the SBA is insinuating that the Code is ineffective in providing relief solely to the "honest but unfortunate debtor." That argument is premised on an assumption that because these entities previously found themselves unable to satisfy their debts, they must be *habitual* defaulters. This is proven incorrect by the substantial good-faith requirements which gatekeep each stage of the bankruptcy petition.[108]

The good faith requirements for relief in bankruptcy ensure that debtors who make it to the final stages of a bankruptcy petition have not filed with the intention to dishonestly escape liability for an assumed debt.[109] Additionally, statistics show that being in the middle of a bankruptcy petition does not indicate that a debtor is more likely to default on future debts; indeed, only 8% of those who file for bankruptcy are repeat filers.[110] This fact diminishes the credibility of the SBA's argument that awarding PPP funds to business involved in bankruptcy increases the risk of non-payment. Moreover, the low threshold of qualification for PPP loan forgiveness, coupled with the rate at which businesses have achieved loan forgiveness thus far, is evidence that the repayment of PPP funds is not a prevailing issue among recipients.[111] That approximately 95% of PPP loans awarded in 2020 were forgiven indicates the other requirements of

[105] Cohen v. De La Cruz, 523 U.S. 213, 217 (1998).

[106] Meredith v. Roberts (*In re* Roberts), No. 11-60690, 2013 Bankr. LEXIS 631, at *4 (Bankr. S.D. Ga. Jan. 24, 2013).

[107] *See* Penobscot Valley Hosp. v. Carranza (*In re* Penobscot Valley Hosp.), No. 19-10034, 2020 Bankr. LEXIS 1464, at *40 (Bankr. D. Me. June 3, 2020) (quoting H.R. REP. NO. 95-595, at 165 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 6126).

[108] *See Roberts*, 2013 Bankr. LEXIS 631, at *4.

[109] *Id.*

[110] Bill Fay, *Bankruptcy Statistics*, DEBT.ORG (Dec. 14, 2021) (citing John Golmant & Tom Ulrich, *Bankruptcy Repeat Filings*, 14 AM. BANKR. INST. L. REV. 169, 169 (2006)), https://www.debt.org/bankruptcy/statistics/#:~:text=Repeat%20Filers,to%20repeat%20filings%20as%20proof.

[111] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136 § 1106, 134 Stat. 281, 297–301 (codified as amended at 15 U.S.C. § 636m).

loan eligibility sufficiently filter applicants, given that there is not a higher threshold for forgiveness qualification than for complying with the terms of the loan itself.[112] Therefore, it would appear that additional barriers to the receipt of PPP funds are unnecessary in light of the requirements imposed by the CARES Act and the availability of loan forgiveness.

2. *Purpose of Chapter 5*

Chapter 5 of the Bankruptcy Code was drafted to ensure individuals and entities who seek financial relief under the Code would not face discrimination based on that choice moving forward.[113] As the U.S. Bankruptcy Court for the District of Maine articulated in *In re Penobscot Valley Hospital*, the majority of bankruptcies result from circumstances outside the control of the unfortunate debtor, and to penalize such a debtor for permissibly availing itself of the assistance of the government would "undo[] the beneficial effects of the bankruptcy laws."[114] That court correctly observed that when the causes of a debtor's bankruptcies are related to the grant in question, section 525(a) does not prohibit a governmental entity from taking into account the circumstances surrounding the bankruptcy petition.[115] However, that section does prohibit a government agency from denying such grant solely based on the debtor's present involvement in a bankruptcy proceeding. In the context of the PPP, the SBA has routinely denied loan applications based on the mere fact that the applicant is presently involved in bankruptcy, regardless of the facts giving rise to the applicant's bankruptcy filing.[116] This conduct is outside the scope of conduct permitted by the purpose of chapter 5.

3. *Purpose of Section 525(a)*

Many of the circuit courts have expressed the view that 11 U.S.C. § 525(a) was passed to codify the Supreme Court's decision in *Perez v. Campbell*, which

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112 *See Forgiveness Platform Lender Submission Metrics*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/sites/default/files/2022-08/2022.08.21_Weekly%20Forgiveness%20Report_Public-508.pdf (last visited Nov. 12, 2022).

113 Penobscot Valley Hosp. v. Carranza (*In re* Penobscot Valley Hosp.), No. 19-10034, 2020 Bankr. LEXIS 1464, at *40 (Bankr. D. Me. June 3, 2020) (quoting H.R. REP. NO. 95-595, at 165 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 6126).

114 *Id.*

115 *Id.*

116 The Interim Final Rule published by the SBA on April 28, 2020 clearly states that "[i]f 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." Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21).

held "a state law requiring the suspension of a driver's license until payment of an accident-related judgment, even though the judgment was discharged in bankruptcy, violated the 'fresh start' policy of the Bankruptcy Code."[117] In discussing the breadth of section 525(a), the Senate Report indicates it was not the intention of Congress, in enumerating specific forms of discrimination prohibited by the section, to indirectly permit any forms of discrimination not expressly included in the statute.[118] The Senate Report specifically "permits further development to prohibit actions" by entities which "can seriously affect the debtors' livelihood" or ability to obtain a fresh start.[119]

Courts have often focused on the text of section 525(a), and the argument that Congress could have included loan programs in the language of the statute, to support a more narrow reading of section 525(a).[120] Even though Congress's intention in leaving room for judicial development of the anti-discrimination provisions seems clear, courts have often declined to exercise this authority and maintained that those forms of discrimination enumerated in the statute are the extent of protections awarded by section 525(a).[121] This is contrary to the intent demonstrated by the Senate Report, which makes clear that section 525(a) was drafted to preserve the Bankruptcy Code's purpose of providing a fresh start to unfortunate debtors.[122]

Section 525(a) was created to protect debtors from governmental actions which seriously threaten their livelihoods by impairing their ability to take full advantage of the clean slate offered by filing for bankruptcy.[123] The SBA's conduct violates this statutory purpose; a core requirement of qualification for a PPP loan is that the funds are necessary to maintaining normal business operations.[124] By its own construction, the PPP is vital to applicants' survival.[125]

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[117] Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1093 (3d Cir. 1989) (citing Perez v. Campbell, 402 U.S. 637 (1971)); *see* Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 87 (2d Cir. 2002); Majewski v. St. Rose Dominican Hosp. (*In re* Majewski), 310 F.3d 653, 658–59 (9th Cir. 2002); *see also* Perez v. Campbell, 402 U.S. 637 (1971).

[118] *See* S. REP. NO. 95-989, at 81 (1978), *as reprinted in* 1978 U.S. U.S.C.C.A.N. 5787, 5867; H.R. REP. NO. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6322.

[119] *See* S. REP. NO. 95-989, at 81; H.R. REP. NO. 95-595, at 367.

[120] *See* Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006); *Watts*, 876 F.2d at 1094; Elter v. Great Lakes Higher Educ. Corp. (*In re* Elter), 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989).

[121] *See Ayes*, 473 F.3d at 109; *Watts*, 876 F.2d at 1094; *Elter*, 95 B.R. at 622.

[122] *See* S. REP. NO. 95-989, at 81; H.R. REP. NO. 95-595, at 367.

[123] *See* S. REP. NO. 95-989, at 81; H.R. REP. NO. 95-595, at 367.

[124] Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 291 (codified as amended at 15 U.S.C. 636(a)(36)(G)(i)).

[125] *See id*.

This is compounded by the fact that PPP loans are limited to small businesses.[126] The nature of the businesses which qualify for the PPP by its terms ensures loan receipt, or the lack thereof, would largely impact the livelihood of the business and its owners. Therefore, interpreting section 525(a) to exclude debtors from emergency loan programs such as the PPP would violate the very purpose which the section was drafted to accomplish.

In discerning the meaning of ambiguous statutory provisions, interpreters often look to the purpose of the statute as a whole to reveal an interpretation consistent with the statutory scheme.[127] However, it is also necessary to analyze competing definitions of ambiguous language in the context of the provisions in which that language appears.

4. Textual Context

The ordinary meaning of "grant" is "a transfer of property by deed or writing."[128] In the legal context, "grant" refers to "an agreement that creates a right of any description other than the one held by the grantor."[129] In the instance of a PPP loan, the government serves as grantor and the conveyance is the transfer of the right to use funds offered through the loan in exchange for the 1% interest rate.[130] Thus, the PPP creates the right of borrowers to use federal funds, which is different than the government's right to receive interest on the loan amount. Therefore, under the legal definition, PPP loans fall within the meaning of "grant."

In the business context, the primary distinction between grants and loans is that loans are understood to be accompanied by the obligation of repayment, whereas a grant is awarded for a specific business purpose, but has no obligation of repayment.[131] As discussed, the loan forgiveness provisions of the CARES

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[126] A business must have 500 or fewer employees to qualify for a PPP loan, or 300 or fewer to qualify for a second draw. *See Frequently Asked Questions*, *supra* note 29, at 22; *Paycheck Protection Program (PPP) Report*, U.S. SMALL BUS. ADMIN., 1, 4, https://www.sba.gov/sites/default/files/2020-07/PPP%20Results%20-%20Sunday%20FINAL.pdf.

[127] Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1057 (2019) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989)) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

[128] *Grant*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/grant (last visited Nov. 12, 2022).

[129] Napoleon v. Shows, Cali & Walsh, LLP, No. 20-1775, 2021 WL 5630895, at *7 (E.D. La. Dec. 1, 2021) (citing *Grant*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

[130] *See First Draw PPP Loan,* U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/first-draw-ppp-loan (last visited Nov. 12, 2022).

[131] Skye Schooley, *What's the Difference Between a Grant and Business Loan?*, BUSINESS.COM (Aug. 18, 2020), https://www.business.com/articles/difference-between-grants-and-loans/.

Act indicate that so long as the borrower abides by the terms of the loan itself, the borrower will be eligible for loan forgiveness.[132] Given that the requirements for forgiveness eligibility are baked into loan eligibility, there is not a higher threshold for release from repayment obligations.[133] This alone is evidence the PPP was crafted to more closely resemble a grant than a true loan.[134]

When considering the structural context of the CARES Act, the canon against surplusage seems to suggest PPP loans should not be construed as grants within the meaning of section 525(a).[135] Under the canon, a statutory interpretation should not render one or more parts of the statute redundant.[136] Section 1110 of the CARES Act provides for $10 billion to fund advances expressly classified as "Emergency EIDL Grants."[137] It could be argued the express inclusion of EIDL grants would indicate that the legislature intentionally labeled the PPP as a "loan" program rather than a "grant" program. However, the Supreme Court has stated "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."[138] Construing the PPP loans as "grants" would not render the EIDL Grant program superfluous, given the two programs serve different business purposes. The PPP loans are to be used specifically to cover payroll costs, whereas the EIDL Grant is not subject to any requirements on fund use.[139] Thus, while this construction of the PPP loan could be said to inject redundancy into the CARES Act, it does not rise to the superfluous standard iterated by the Supreme Court.

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[132] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1106, 134 Stat. 281, 297–301 (codified as amended at 15 U.S.C. § 636m).

[133] *Id.*

[134] Grants provided by the federal government are typically awarded for a specific purpose and are not required to be repaid so long as the grantee fulfills the requirements of the program for which the grant was awarded. For example, consider the Pell grant for undergraduate education. It is awarded to those who have demonstrated substantial financial need and need not be repaid unless the grantee fails to complete the academic program or receives additional funds for the same purpose from an outside source. *See Federal Grants Are Money to Help Pay for College or Career School*, U.S. DEP'T OF EDUC., https://studentaid.gov/understand-aid/types/grants (last visited Nov. 12, 2022).

[135] *See* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) (stating that the canon against surplusage is strongest when a particular reading of a provision renders one or more parts of the statute superfluous); *see also* Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1102(a)(2), 134 Stat. at 290–91 (codified as amended at 15 U.S.C. 636(a)(36)(F)(i)); *id.* § 1106, 134 Stat. at 297–301; *id.* § 1110, 134 Stat. at 306–08.

[136] FTC v. Health Rsch. Labs., LLC, No. 2:17-cv-00467, 2020 U.S. Dist. LEXIS 135698, at *13 n.3 (D. Me. July 31, 2020) (defining the canon against surplusage as "the principle that courts should avoid interpretations that render terms . . . redundant").

[137] Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1110(e)(7), 134 Stat. at 308.

[138] *Marx*, 568 U.S. at 386.

[139] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 §§ 1106, 1110, 134 Stat. at 297–301, 306–08.

At best, the canon against surplusage provides a small amount of support for classifying the PPP as a true loan program rather than a grant program.[140] However, the prominence of the repayment provisions of the PPP is more demonstrative of the legislature's intent in drafting the CARES Act. Specifically, because the terms of the PPP directly align with the business meaning of grant, it is more likely Congress intended the program to function as a grant.

Given PPP loans do seem to qualify as "grants," the question becomes whether they are grants similar to the other interests protected under section 525(a). Under *ejusdem generis*, an established canon of statutory construction, words grouped together in a provision often share a characteristic of some kind.[141] In *Stoltz v. Brattleboro Housing Authority*, the U.S. Court of Appeals for the Second Circuit iterated there are two shared characteristics among licenses, permits, charters, franchises, and other similar grants—each are property interests which cannot be obtained in the private sector and are necessary to provide a debtor with a fresh start.[142] While loans are, in general, readily available in the private sector, the loan forgiveness provisions included in PPP loans are relatively unique to federal disaster relief loan programs.[143] Moreover, the PPP loans are necessary to provide a fresh start, given that a requirement for eligibility is that the loan itself be necessary to maintain normal operations.[144] Accordingly, the PPP loans would qualify as an "other similar grant" under the framework of *Stoltz.*

The current majority rule is that to qualify as an "other similar grant," the item must "implicate the government's gate-keeping role."[145] Courts have used this definition to support the idea PPP loans are not protected under chapter 5.[146] This point of view fails to consider both the reason PPP loans are being provided

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140 *See Marx*, 568 U.S. at 385 (2013) ("The canon against surplusage is not an absolute rule . . . .").

141 *Ejusdem Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

142 Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 90 (2d Cir. 2002).

143 A comparative review of public and private sector loan terms reveals a lack of forgiveness provisions available in the private sector. To obtain loan forgiveness in the context of natural disasters, small businesses must look to the public sector and federal programs specifically; however, even public sector loans do not contain forgiveness provisions as generous as those of the PPP. *See Forgiveness Platform Lender Submission Metrics*, *supra* note 112 (stating that 95% of PPP loans have been forgiven as of Aug. 21, 2022); *see also PPP Loan Forgiveness*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness (last visited Nov. 12, 2021) (outlining the PPP loan forgiveness application process).

144 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1102(a)(2), 134 Stat. at 291 (codified as amended at 15 U.S.C. 636(a)(36)(G)(i)).

145 U.S. Small Bus. Admin. v. Roman Cath. Church of the Archdiocese of Santa Fe, 632 B.R. 816, 833 (Bankr. D.N.M. 2021).

146 *See id.* at 835.

by the government and the prerequisites for loan approval. The CARES Act and the PPP were passed to keep small businesses afloat in the face of an unprecedented pandemic. In the eyes of the government, a large number of small businesses would be unable to survive the financial hardships of COVID-19 without government intervention.[147] To that end, one prerequisite to qualification for a PPP loan is "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."[148] Thus, the necessity of loan receipt to continued business operations is a preliminary requirement for application consideration. Therefore, the PPP provides borrowers with the means to take an action which could not be taken otherwise, satisfying the very definition of "other similar grant" adopted by courts upholding the SBA's conduct.

Since the enactment of section 525(a), courts have contemplated the meaning of "other similar grant" in various contexts.[149] For example, in *Ayes v. United States Department of Veterans Affairs*, the U.S. Court of Appeals for the Fourth Circuit determined that VA home loans do not qualify for anti-discrimination protections as "other similar grants."[150] In reaching this conclusion, the court reasoned that because the applicant had means of obtaining housing other than through a VA home loan, the VA was entitled to deny applicants based on their status in bankruptcy.[151] The court contrasted a home loan with a real estate license, which the denial of would prohibit the debtor from pursuing a specific career path.[152]

Similarly, the U.S. Court of Appeals for the Third Circuit found in *Watts v. Pennsylvania Housing Finance Co.* that loans for emergency mortgage assistance also did not qualify as "other similar grants" within the meaning of section 525(a).[153] In construing the language of the statute to exclude such loans, the court looked to the fresh start purpose of the Code.[154] Specifically, the court determined that because the mortgage assistance would be reinstated once the stay was lifted in the bankruptcy proceeding, the ability of the debtor to obtain

[147] *See generally* Coronavirus Aid, Relief, and Economic Security Act of 2020, 134 Stat. 281.

[148] *Id.* § 1102(a)(2), 134 Stat. at 291 (codified as amended at 15 U.S.C. 636(G)(i)).

[149] *See* Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006); Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1094 (3d Cir. 1989); Elter v. Great Lakes Higher Educ. Corp. (*In re* Elter), 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989).

[150] *Ayes*, 473 F.3d at 109.

[151] *Id.*

[152] *Id.*

[153] *Watts*, 876 F.2d at 1094.

[154] *Id.*

a fresh start was not legitimately impacted by a suspension of mortgage financing upon the debtor filing a bankruptcy petition.[155]

In the context of student loans, courts have found that a denial of a loan application based on the applicant's status in bankruptcy does not violate section 525(a).[156] In *In re Elter*, the Bankruptcy Court for the Eastern District of Wisconsin articulated the items enumerated in section 525(a) that "refer[] to privileges of citizens to exercise their livelihood . . . . These rights preserve the debtor's fresh start; but the mandatory granting of a student loan after discharge would give the debtor a running start, well ahead of those who had never declared bankruptcy."[157] This distinction implies that section 525(a) protects debtors from discrimination only in the context of programs which would place the debtor on equal footing with those who have not previously filed bankruptcy.

PPP loans are distinguishable from each of these circumstances. In the context of VA home loans and emergency mortgage assistance loans, denying debtors access to those programs would not significantly impair the debtor's access to similar benefits from other programs.[158] As the court explained in *Ayes*, veterans could obtain housing from other lenders, by using guarantees from family members, or by leasing property.[159] Similarly, denying debtors access to emergency mortgage assistance loans does not disadvantage the debtors because temporarily halting assistance does not legitimately impair the debtors' ability to obtain a fresh start.[160] In contrast, denying a business a PPP loan based on its status in bankruptcy could effectively eliminate the applicant's ability to survive in the wake of the pandemic. As discussed, the requirement that applicants require loan funds to maintain normal operations ensures that the applicants' pre-pandemic business structure would not be able to survive without receipt of a PPP loan.[161] Denying such assistance amounts to a forced shutdown for a business in need, rendering the business unable to reap the benefits of the fresh start awarded by a successful petition for bankruptcy.

Additionally, PPP loans are distinguishable from student loans in that a PPP award would not give a debtor a "running start" compared to other businesses. The program is not intended to disproportionately advantage small businesses

155 *Id.*
156 Elter v. Great Lakes Higher Educ. Corp. (*In re* Elter), 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989).
157 *Id.*
158 *See* Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006); *Watts*, 876 F.2d at 1094.
159 *Ayes*, 473 F.3d at 109.
160 *Watts*, 876 F.2d at 1094.
161 Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 291 (codified as amended at 15 U.S.C. 636(G)(i)).

over large businesses. Instead, the program is intended merely to keep small businesses, which do not have the cash reserves to survive the pandemic without government intervention, in their pre-pandemic status quos.

The PPP is more akin to a subsidized public housing lease due to the expectation of nonrepayment upon the fulfillment of specific requirements. Under the section 8 subsidized public housing program, applicants are required to make certain disclosures and meet a number of requirements; after approval, there is no expectation of repayment of the voucher funds.[162] Similarly, under the PPP, recipients are not obligated to repay the disbursed funds if they comply with the terms of use of the program.[163] For this reason, PPP loans should receive the same treatment under section 525(a) as subsidized public housing leases. The U.S. Bankruptcy Court for the Western District of Pennsylvania articulated in *Housing Authority of the City of Pittsburgh v. Smith* that such leases fall within the meaning of "other similar grants" because the same type of housing assistance cannot be easily obtained from the private sector and is essential to the tenant/debtor's fresh start.[164] In the same way no-repayment housing assistance is unobtainable from the private sector, small businesses cannot readily obtain from private lenders emergency funding with achievable loan forgiveness provisions.[165] Moreover, given the necessity provisions included as PPP qualification requirements, there is no denying such assistance is vital to the business's fresh start post-pandemic.[166] Accordingly, funds received through the PPP should be subject to the anti-discrimination provisions of section 525(a) as an "other similar grant."

5. *Violation of Section 525(a)*

Section 525(a) states, in pertinent part, "a governmental unit may not deny . . . a license, permit, charter, franchise, or other similar grant to . . . a person that is or has been a debtor under the Bankruptcy Act . . . *solely* because such bankrupt or debtor is or has been a debtor under this title."[167] The SBA is an administrative agency of the federal government which is tasked with providing

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[162] *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Nov. 12, 2022).

[163] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1106, 134 Stat. at 297–301 (codified as amended at 15 U.S.C. § 636m).

[164] Hous. Auth. of Pittsburgh v. Smith (*In re* Smith), No. 09-21638, 2014 Bankr. LEXIS 2266, at *19–20 (Bankr. W.D. Pa. May 20, 2014).

[165] *See* 15 U.S.C. § 636(a)(1)(A); *see also In re* Penobscot Valley Hosp., 626 B.R. 350, 356–57 (Bankr. D. Me. 2021); *PPP Loan Forgiveness*, *supra* note 143.

[166] *See* Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1102(a)(2), 134 Stat. at 291 (codified as amended at 15 U.S.C. 636(G)(i)).

[167] 11 U.S.C. § 525(a) (emphasis added).

financial assistance to businesses experiencing a period of financial distress.[168] Given the limited resources of the SBA, a necessary part of carrying out that function is providing aid to some businesses while denying aid to others.[169] In the context of COVID-19 relief and the PPP specifically, courts have seen an onslaught of litigation concerning the factors on which the SBA bases its decisions on whether to provide aid.[170] A large number of the challenges are predicated on alleged violations of section 525(a).[171]

Under the language of chapter 5, a denial of financial aid in this context would constitute impermissible discrimination only if the denial is based solely on the applicant's status in bankruptcy.[172] In other words, the question is whether an applicant, who is engaged in a bankruptcy petition and denied financial assistance, would be granted financial assistance if it were not for their status in bankruptcy. Notwithstanding chapter 5, the SBA has taken the position in its April 28, 2020 Interim Final Rule that regardless of whether an applicant satisfies the other requirements for PPP eligibility, present involvement in bankruptcy alone would disqualify the applicant from consideration.[173] According to the guidance offered by the SBA in FAQ 67, three events would terminate an applicant's "present involvement in [a] bankruptcy": (1) the entry of a discharge in a chapter 7 bankruptcy case; (2) the confirmation of a plan in a chapter 11, 12, or 13 bankruptcy case; or (3) the entry of an order dismissing the case.[174] Therefore, it follows from the Rule and FAQs that if an applicant is involved in a bankruptcy proceeding, and none of these three conditions are met prior to submission of the PPP application, the SBA would deny the application solely based on the applicant's status in bankruptcy.

This has been the case for many small businesses who have sought SBA assistance to survive COVID-19. For example, in *Henry Anesthesia Associates, LLC v. Carranza*, the plaintiff indicated on its PPP application that it was presently involved in a bankruptcy proceeding, given it was operating as a debtor

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168 *See Penobscot Valley*, 626 B.R. at 356–57.

169 *Id.*

170 *See, e.g.*, *id.* at 350; Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020).

171 *See, e.g.*, *Penobscot Valley*, 626 B.R. 350; *Springfield Hosp.*, 618 B.R. 70; *Hidalgo Cnty.*, 962 F.3d 838.

172 11 U.S.C. § 525(a).

173 Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21).

174 In order for the bankruptcy involvement to be terminated by any of these three circumstances, the relevant orders must have been entered prior to submission of a PPP application. *Frequently Asked Questions*, *supra* note 29, at 30.

in possession after filing a chapter 11 petition.[175] Plaintiff's lender thereafter provided notice that "the SBA denied the [a]pplication based on Plaintiff's status as a chapter 11 debtor."[176] The U.S. Bankruptcy Court for the Northern District of Georgia stated under those circumstances, "there [was] no dispute that . . . the [a]pplication was denied solely on the basis that Plaintiff [was] currently a debtor in bankruptcy."[177] In general, the SBA does not dispute that its denial of similar applications is based solely on the applicant's status in bankruptcy; instead, it relies on the *Chevron* Doctrine to shield its conduct from judicial scrutiny.[178]

As discussed, PPP loans are more similar to grants within the meaning of section 525(a).[179] Because the PPP falls within the scope of protections awarded by that section, any denial of PPP relief based on an applicant's status in bankruptcy would constitute an impermissible violation of chapter 5.[180] The recent stream of litigation on this matter demonstrates the SBA has denied countless PPP loan applications solely based on the applicants' involvement in bankruptcy proceedings. Accordingly, the SBA is in direct violation of the Code's provisions protecting debtors, and should be prevented from following similar practices moving forward.

III. IMPLICATIONS BEYOND COVID-19

Though the SBA's denial of PPP loans based on an applicant's status in bankruptcy appears to be limited to the context of the COVID-19 pandemic, the resolution of the judicial split will impact bankruptcy law long after the pandemic is over. In particular, the decision or refusal of Congress to legislatively resolve the issue has the potential to shape four areas of bankruptcy: (A) the future availability of disaster relief loans to small businesses; (B) the availability of other government programs to debtors who are involved in bankruptcy; (C) the inclusion of minority business owners in government relief programs; and (D) the improvement of the judicial economy surrounding section 525(a) litigation.

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[175] Henry Anesthesia Assocs. LLC v. Carranza (*In re* Henry Anesthesia Assocs. LLC), No. 20-06084, 2020 Bankr. LEXIS 1471, at *2, *4, *6 (Bankr. N.D. Ga. June 4, 2020).

[176] *Id.* at *6.

[177] *Id.* at *9.

[178] *See, e.g.*, U.S. Small Bus. Admin. v. Roman Cath. Church of the Archdiocese of Santa Fe, 632 B.R. 816, 828 (Bankr. D.N.M. 2021).

[179] *Cf.* Napoleon v. Shows, Cali & Walsh, LLP, No. 20-1775, 2021 WL 5630895, at *7 (E.D. La. Dec. 1, 2021) (citing *Grant*, BLACK'S LAW DICTIONARY (8th ed. 2004)); *First Draw PPP Loan, supra* note 130.

[180] *See* 11 U.S.C. § 525(a).

A. Economic Injury Disaster Loans

The implications of the SBA's denial of PPP funds based on the applicant's status in bankruptcy is clear: in a large number of cases, PPP loan denial effectively closes the doors of many small businesses.[181] However, this issue is not one which will cease to exist at the conclusion of the COVID-19 pandemic. In fact, this issue has the potential to one day impact small businesses which were specifically awarded PPP loans. If the SBA is permitted to deny disaster assistance loans, such as the PPP, to entities which are currently or have previously filed bankruptcy, such denial could have harsh implications for business owners who find themselves struggling in the face of natural disasters moving forward.

Suppose a small business is granted a PPP loan. That business is later unable to maintain normal operations and therefore does not qualify for PPP loan forgiveness. The weight of the PPP loan debt is too heavy a burden, so the business files for bankruptcy. Under the stance adopted by courts in the majority of circuits,[182] this small business would be denied emergency financial aid should it be incapacitated by another natural disaster. This inequitable result runs directly contrary to the essential purpose of the Bankruptcy Code: to provide businesses under duress with a fresh start.[183]

B. Meaning of "Other Similar Grant" in Other Contexts

In addition to impacting the availability of disaster loans to small businesses going forward, the outcome of this issue will shape future interpretations of the Bankruptcy Code and section 525(a) specifically. As indicated by the Senate Reports surrounding section 525(a), that provision was drafted in a way to allow for "further development to prohibit actions" which could impede a debtor's ability to obtain a fresh start.[184] Despite this showing of legislative intent, courts have often adopted a narrow interpretation of "other similar grant," thereby

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[181] *See* Ruth Simon, *COVID-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (Apr. 16, 2021, 9:43 AM), https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619.

[182] *See, e.g.*, *In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021); Tradeways, Ltd. v. U.S. Dep't of the Treasury, No. 20-1324, 2020 U.S. Dist. LEXIS 110737 (D. Md. June 24, 2020).

[183] *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) (quoting Stellwagen v. Clum, 245 U.S. 605, 617 (1918)).

[184] *See* S. REP. NO. 95-989, at 81 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5867; H.R. REP. NO. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6322.

excluding various interests from section 525(a) protections.[185] Courts have declined to extend these protections to VA home loans, emergency mortgage assistance loans, and student loans, largely based on finding such programs are not necessary to obtaining a fresh start.[186] In each of these cases, the courts rested on the purpose of the Code, rather than its text, to support their conclusions.[187] Therefore, such interests were excluded from section 525(a) protections, not because the language of the provision so required, but because the ambiguities left room for such a result.

Moreover, the current treatment of "other similar grant" has led to inconsistent interpretations in contexts which appear functionally similar.[188] For example, courts have determined subsidized public housing leases fall within the protections of section 525(a), despite not being specifically enumerated as a protected interest.[189] The primary reason courts have reached this conclusion is the lack of an equivalent option in the private market.[190] The factor rendering these leases unique from options found in the private sector is the lack of an obligation of repayment upon satisfaction of specific requirements.[191] This line of reasoning, articulated in the first prong of the *Stoltz* test,[192] has yet to be widely adopted by the courts in regard to disaster loan programs such as the PPP.

The terms of the PPP make clear that repayment of disbursed loans is not required so long as the business maintains compliance with the very requirements that must be satisfied prior to loan approval.[193] Indeed, over one million PPP loans had been forgiven as of the start of 2021, with loan relief totaling just over $100 billion.[194] Structurally, this program is administered in a

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[185] *See* Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006); Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1094 (3d Cir. 1989); Elter v. Great Lakes Higher Educ. Corp. (*In re* Elter), 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989); *Penobscot Valley*, 626 B.R. at 355.

[186] *Ayes*, 473 F.3d at 109; *Watts*, 876 F.2d at 1094; *Elter*, 95 B.R. at 622.

[187] *Ayes*, 473 F.3d at 109; *Watts*, 876 F.2d at 1094; *Elter*, 95 B.R. at 622.

[188] *Compare* Hous. Auth. of Pittsburgh v. Smith (*In re* Smith), No. 09-21638, 2014 Bankr. LEXIS 2266, at *19–20 (Bankr. W.D. Pa. May 20, 2014), *with Penobscot Valley*, 626 B.R. 350.

[189] *See Smith*, 2014 Bankr. LEXIS 2266, at *19–20.

[190] *See id*.

[191] *See id.*

[192] *See* Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70, 87 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022).

[193] *See* Skefos v. Carranza, No. 19-29718, 2020 Bankr. LEXIS 1479, at *32 (Bankr. W.D. Tenn. June 2, 2020) ("Given the effect of the lockdown, many, perhaps most, applicants would not be able to repay their PPP loans. They don't have to, because the 'loans' are really grants. Repayment is not a significant part of the program. That is why Congress did not include creditworthiness as a requirement.").

[194] *1.1 Million Paycheck Protection Program Loans Forgiven So Far Totaling Over $100 Billion*, U.S. SMALL BUS. ADMIN. (Jan. 12, 2021), https://www.sba.gov/article/2021/jan/12/11-million-paycheck-protection-program-loans-forgiven-so-far-totaling-over-100-billion.

very similar way to the section 8 subsidized public housing program. Despite the similarities, courts have declined to apply the same analysis to PPP applicants.

C. Disparate Impact on Minority Communities

For minority business owners, the discriminatory treatment of disaster relief loans is compounded by a lack of private-sector financial resources made available to minorities. Historically, minority business owners have had a much more difficult time obtaining loans through traditional lending channels than their white counterparts.[195] For this reason alone, those same marginalized groups were put at a disadvantage within the framework of the PPP, since many banks issuing PPP loans only accepted applications from businesses which had a preexisting relationship with the bank.[196] As one article iterated, this restriction alone "left out many minority-owned businesses, which often have weak relationships with banks as a result of years of systemic exclusion."[197] Early in the pandemic, the Center For Responsible Lending found a large majority of minority-owned businesses had an extremely low chance of obtaining a PPP loan through traditional channels.[198] This issue is exacerbated by the discriminatory treatment of PPP loans by the SBA.

The SBA-imposed requirements limiting the resources available to businesses involved in bankruptcy disproportionately impact minority-owned businesses. Specifically, in the context of small businesses, the financial position of their owners is greatly reflected in the financial health of the business. This is notable due to the racial difference in bankruptcy filings.[199] Nationally, bankruptcy filings are much higher among black people than among white people.[200] As such, black business owners, who have a higher likelihood of involvement in bankruptcy, will be disproportionately affected by policies which discriminate based on bankruptcy status.

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195 *See* Emily Stewart, *The PPP Worked How It Was Supposed to. That's the Problem.*, VOX (July 13, 2020, 8:00 AM), https://www.vox.com/recode/2020/7/13/21320179/ppp-loans-sba-paycheck-protection-program-polling-kanye-west.

196 Tommy Beer, *Minority-Owned Small Businesses Struggle to Gain Equal Access to PPP Loan Money*, FORBES (May 18, 2020, 5:14 PM), https://www.forbes.com/sites/tommybeer/2020/05/18/minority-owned-small-businesses-struggle-to-gain-equal-access-to-ppp-loan-money/?sh=3f0362175de3/.

197 Stewart, *supra* note 195.

198 *See* Beer, *supra* note 196.

199 *See* Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, PROPUBLICA (Sept. 27, 2017), https://projects.propublica.org/graphics/bankruptcy-data-analysis#National.

200 *Id.*

Even for minority-owned businesses which were approved for a PPP loan, many owners reported dissatisfaction with the amount awarded.[201] Among all small businesses, only 38% of owners reported they had actually received the level of PPP funding they sought in their applications.[202] Over half of survey respondents reported they would have to lay off employees despite the PPP loans they had already been approved for.[203] Therefore, the PPP is at least partially ineffective at achieving its stated goal, and even more so ineffective for minority-owned businesses, given the difference in proportion of bankruptcy filings.[204] Legislative action to put an end to the discriminatory treatment of disaster relief programs is essential to achieving a different result in the wake of future natural and economic disasters.

D. Judicial Economy

In examining the implications of ambiguous statutory language, other scholars have pointed to the effects of the ensuing litigation on judicial economy.[205] Though the U.S. is widely understood to be particularly litigious as a society, a good portion of courts' caseloads could be alleviated through more effective drafting of legislation. Particularly with regard to issues such as treatment of PPP loan applications, where there are competing demonstrations of legislative intent, only Congress has the ability to lessen the burden of litigation by statutorily closing the gap in existing law.[206] Not only would this substantially alleviate the bankruptcy court system of the anticipated inundation of case filings,[207] but this can be achieved in a way that adds in necessary protections for appropriate interests without stripping the SBA of all rule-making authority on the matter.

IV. RECOMMENDATION

A. The Proposal

Because the CARES Act was drafted ambiguously in regard to bankruptcy status as a factor in PPP loan application approval, and subsequent legislative

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201 *See* Beer, *supra* note 196.
202 *Id.*
203 *Id.*
204 *See* Kiel & Fresques, *supra* note 199.
205 *See* Park, *supra* note 86, at 38.
206 *See id.*
207 *See* Benjamin Iverson, Jared A. Ellias & Mark Roe, *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. ONLINE, 2020–2021, at 1 (presenting data to show the need to hire additional bankruptcy judges).

history indicates discretion lies with the SBA, courts have relied upon the *Chevron* Doctrine to shield the SBA's interpretation from judicial intervention.[208] Leaving the SBA's interpretation subject to judicial review will lead to uneven application of law across jurisdictions.[209] Specifically, it will allow for a discrepancy in the extent to which debtors enjoy the full benefit of the Bankruptcy Code. Therefore, judicial action is insufficient to safeguard the purpose of the Bankruptcy Code in this respect. To ensure the purpose of the Bankruptcy Code is not undermined by gaps in the statutory language, the legislature should take action to clarify what constitutes an "other similar grant" within the meaning of section 525(a). In particular, three changes need to be legislatively incorporated into the Bankruptcy Code: (1) definitions of "loan" and "grant" in the context of section 525(a); (2) a provision explaining that an interest may be fluid in regard to its classification; and (3) a subsection expressly including disaster loans in the interests protected by section 525(a).[210]

1. Definitions

As it stands, section 525(a) reads: "a governmental unit may not deny… a license, permit, charter, franchise, or other similar grant to… a person that is or has been a debtor under [Title 11]."[211] The portion of this provision that has caused discord among the court system is the inclusion of the catch-all language of "other similar grant" in the list of enumerated interests.[212] Many cases have been litigated in the hopes of expanding the scope of these anti-discrimination protections to various government programs.[213] Therefore, it is fair to say the disputes surrounding this section are largely caused by the intentionally ambiguous language of "other similar grant."[214] While articulating each and every interest which could ever fall within the protections of this section is

[208] The *Chevron* Doctrine grants deference to the statutory interpretations of administrative agencies where the agency is reasonably interpreting ambiguous statutory language. *See* Chevron, U.S.A., Inc, v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

[209] *Compare In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021), *with* Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022).

[210] *See infra* Addendum: Proposed 11 U.S.C. § 525.

[211] 11 U.S.C. § 525(a).

[212] *See, e.g.*, Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 90 (2d Cir. 2002) ("[T]he debate over section 525(a) . . . has centered on [] the precise contours of the 'other similar grant[s]' at stake.").

[213] *See, e.g.*, Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006); Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1094 (3d Cir. 1989); Elter v. Great Lakes Higher Educ. Corp. (*In re* Elter), 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989); Hous. Auth. of Pittsburgh v. Smith (*In re* Smith), No. 09-21638, 2014 Bankr. LEXIS 2266, at *19–20 (Bankr. W.D. Pa. May 20, 2014).

[214] *See, e.g.*, *Stoltz*, 315 F.3d at 90 ("[T]he debate over section 525(a) . . . has centered on the precise contours of the 'other similar grant[s]' at stake . . . .").

impractical, if not impossible, Congress should incorporate language covering interests which are core to the underlying goals of the Bankruptcy Code. Otherwise, the Code will ultimately be ineffective in achieving its purpose.[215]

The most recent such interest which has been extensively litigated with no unanimous resolution is the PPP loan.[216] As discussed, extending section 525(a) protections to disaster relief loans, such as the PPP, is vital to upholding the purpose of the Code.[217] Allowing the SBA to deny relief based on an applicant's bankruptcy status should be treated as a direct violation of section 525(a). However, due in large part to the *Chevron* Doctrine, courts have declined to hold the SBA accountable for this conduct.[218] This court split illustrates the need for greater clarity in this section of the Code. Such clarity could be achieved through the addition of definitions of the most disputed categories of interests. Arguably, one area heavily saturated with litigation surrounding the question of the applicability of section 525(a) is the area of government-subsidized loan programs.[219] This is seen with regard to VA home loans, emergency mortgage assistant loans, student loans, and now disaster relief loans.[220] Therefore, it would be prudent for Congress to legislatively resolve many of these issues by incorporating definitions of "grant" and "loan" into the language of section 525(a).

Congress's inclusion of "other *similar* grant" in the list of protected interests indicates those interests specifically enumerated share characteristics, and any other interest intended to be awarded the same protections would share those same characteristics. Naturally, this determination requires some level of analysis of the enumerated interests and their commonalities. The consensus among many courts is that the protected interests are exclusionary in some

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215 *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) (quoting Stellwagen v. Clum, 245 U.S. 605, 617 (1918)).

216 *See, e.g.*, *In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021); Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020).

217 *See Appling*, 138 S. Ct. at 1758.

218 *See, e.g.*, *Penobscot Valley*, 626 B.R. 350; Tradeways, Ltd. v. U.S. Dep't of the Treasury, No. 20-1324, 2020 U.S. Dist. LEXIS 110737 (D. Md. June 24, 2020).

219 *See, e.g.*, Ayes v. U.S. Dep't of Veterans Affs., 473 F.3d 104, 109 (4th Cir. 2006); Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1094 (3d Cir. 1989); Elter v. Great Lakes Higher Educ. Corp. (*In re* Elter), 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989); Hous. Auth. of Pittsburgh v. Smith (*In re* Smith), No. 09-21638, 2014 Bankr. LEXIS 2266, at *19–20 (Bankr. W.D. Pa. May 20, 2014).

220 *See, e.g.*, *Ayes*, 473 F.3d at 109; *Watts*, 876 F.2d at 1094; *Elter*, 95 B.R. at 622; *Smith*, 2014 Bankr. LEXIS 2266, at *19–20.

way.[221] Courts in the Tenth Circuit have iterated the interests "implicate the government's gate-keeping role in determining who may pursue certain livelihoods" or activities.[222] In other words, to qualify for section 525(a) protections, an interest must be one which could not be pursued but for its provision by the government.[223] Though courts adopting this interpretation generally do not find PPP loans meet this threshold, it is analogous to an argument accepted by courts finding the opposite, which is that an interest must not be obtainable from the private sector to qualify for section 525(a) protections.[224]

Based on these stances, an appropriate course of action to resolve this dispute is to draft what could be 11 U.S.C. § 525(a)(1) to read: "In this section, "grant" means any interest provided by the government which permits the recipient to pursue some activity, and which is unobtainable from the private sector." For added clarity on the issue of when loans will qualify, a potential section 525(a)(2) could read: "For purposes of this section, a loan will be considered a "grant" if it otherwise meets the requirements of section 525(a)(1)." Including these two provisions would go far to eliminate the ambiguity at issue in many cases involving the inclusion of loans in the protections of section 525(a). However, in the case of PPP loans specifically, under the definitions proposed, the availability of anti-discrimination protections could vary based on the borrower's compliance with the terms of the loan agreement.[225] Therefore, additional legislative actions are necessary to fully reflect the Congressional intent displayed in the PPP loan terms.

2. *Fluidity of Classification*

The PPP eligibility requirements contained in the CARES Act indicate a congressional intent to provide as much financial assistance to small businesses as possible. This is further demonstrated by the inclusion of expansive loan forgiveness provisions, which take effect upon mere compliance with the loan terms themselves, and the provisions allowing PPP funds to be used to satisfy

221 *See* U.S. Small Bus. Admin. v. Roman Cath. Church of the Archdiocese of Santa Fe, 632 B.R. 816, 833 (Bankr. D.N.M. 2021).

222 *Id.*

223 *See id.*

224 *See* Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 90 (2d Cir. 2002).

225 *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 2(a), 133 Stat. 1079, 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")); Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136 § 1106, 134 Stat. 281, 297–301 (codified as amended at 15 U.S.C. § 636m).

pre-existing debts.[226] Moreover, the prior enactment of subchapter V is indicative of a Congressional intent to extend bankruptcy resources to small businesses.[227] Even if those showings of Congressional intent were insufficient to demonstrate a heightened attention to small business assistance, the subsequent passing of the CRRSAA further proves Congress's desire to make the PPP available to bankrupt applicants.[228] Each of these demonstrations of legislative intent indicates an objective to provide aid to small businesses, regardless of bankruptcy status, amid the financial crisis accompanying the pandemic. It is, however, important to note the limitations on the aid included in the language of the CARES Act. Namely, the loan forgiveness provisions only take effect upon satisfaction of the terms of the loan agreement.[229]

Under the suggested provisions defining the contours of "other similar grant," PPP loans have the potential to shift in classification. The element of the PPP which renders it "unobtainable from the private sector" is the availability of loan forgiveness through compliance with the loan agreement terms.[230] As discussed, though loans are readily available in the private market, loans with such forgiveness terms are not readily available, particularly for small businesses which have filed bankruptcy.[231] Because the primary characteristic qualifying the PPP for section 525(a) protections under the proposed provision is one which is dependent on the satisfaction of loan terms, it is necessary to also include a provision allowing for fluidity in classification of an interest under section 525(a).

Inclusion of such a provision also serves to maintain a system of checks and balances on the PPP loan approval process. To allow for SBA review of section 525(a) protection qualification, a subsection should be added to section 525(a), becoming section 525(a)(3): "In the case of PPP loans awarded under the CARES Act, the classification of the loan as a 'grant' under section 525(a)(1) can be revoked upon a finding by the SBA that the borrower failed to comply with the terms of the loan agreement." In so doing, the status of PPP loans under

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226 *See* Small Business Reorganization Act of 2019 § 2(a), 133 Stat. at 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")); Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1106, 134 Stat. at 297–301 (codified as amended at 15 U.S.C. § 636m).

227 *See* 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization").

228 *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 320, 134 Stat. 1182, 2015.

229 *See* Small Business Reorganization Act of 2019 § 2(a), 133 Stat. at 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")); Coronavirus Aid, Relief, and Economic Security Act of 2020 § 1106, 134 Stat. at 297–301 (codified as amended at 15 U.S.C. § 636m).

230 *See PPP Loan Forgiveness*, *supra* note 143.

231 *Id.*

section 525(a) is made clearer while allowing the SBA to maintain an active role in the award process.

3. Disaster Loans

A potential issue with limiting the statutory changes to the above two proposals is the possible exclusion of other disaster relief loans extended by the SBA. As mentioned, the characteristic qualifying PPP loans for section 525(a) protections under the proposed section 525(a)(1) is the inclusion of extensive loan forgiveness provisions.[232] Unlike the PPP, traditional SBA disaster relief loans do not include loan forgiveness in their terms.[233] Such loans are nevertheless deserving of inclusion in the anti-discrimination protections of section 525(a). Moreover, inclusion of these loans is essential to upholding the fresh-start purpose of the Bankruptcy Code.

EIDLs are awarded to small businesses who fall into financial distress following some natural disaster with the goal of aiding the business in recovery to return to normal operations.[234] This goal is aligned with the Code's purpose: to assist the unfortunate debtor who falls on hard times due to circumstances beyond his control.[235] PPP loans are one form of the pre-existing EIDLs. Just as it is impermissible to allow a government agency to discriminate against PPP loan applicants based on bankruptcy status,[236] it should be impermissible for a government agency to discriminate against other EIDL applicants on the same basis. It is counterintuitive to think the Code's purpose only extends to financial distress arising out of specific types of disasters. How effective can the bankruptcy system be at providing a fresh start if that fresh start is denied amidst a natural disaster such as, for example, a devastating hurricane or wildfire?[237] For these reasons, it is important to include EIDLs under the protections of section 525(a), though such loans do not fall within the provisions contained in the proposed sections 525(a)(1) and (2) above.

The issue of EIDLs is in many ways similar to the issue of government-operated student loan programs, which were incorporated directly into section

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[232] *See id.*

[233] *See Economic Injury Disaster Loans*, BENEFITS.GOV, https://www.benefits.gov/benefit/1504 (last visited Nov. 12, 2022).

[234] *See id.*

[235] *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) (quoting Stellwagen v. Clum, 245 U.S. 605, 617 (1918)).

[236] *See supra* text accompanying notes 167–180.

[237] *See* CONG. RSCH. SERV., R43139, FEDERAL DISASTER ASSISTANCE AFTER HURRICANES KATRINA, RITA, WILMA, GUSTAV, AND IKE (2019); *Federal Aid Programs for the State of California*, *supra* note 9.

525 in 1994.[238] In both circumstances, the interest in question is a program administered by the government, which has analogs in the private market, but which are defined by lower interest rates and more flexible repayment options than those in the private market.[239] Given the similarities of the loan programs, it is logical to model the proposed provision relating to EIDLs on that which pertains to government-administered student loans.[240] Accordingly, EIDLs should be incorporated into section 525 as subsection (d), which would read as follows:

> (1) A governmental unit that operates a economic injury disaster loan program and a person engaged in a business that includes the making of loans guaranteed or insured under an economic injury disaster loan program may not deny an economic injury disaster loan, loan guarantee, or loan insurance to 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 the debtor or bankrupt has been associated, because the debtor or bankrupt 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 a case under this title or during the pendency of 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.
>
> (2) In this subsection, "economic injury disaster loan program" means any program operated by a government unit for the purpose of providing relief to a business suffering from economic injury following a disaster.

By incorporating the above three statutory changes to section 525, Congress will provide clarity to an issue that has been extensively litigated and ensure the provisions of the section are effective in safeguarding the purpose of the Bankruptcy Code. Additionally, these goals will be achieved while maintaining a system of checks and balances in the extension of disaster relief loans. This proposal makes strides in adapting the Code to modern issues, but there will always be room for growth in how the Code's provisions are administered.

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[238] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 313, 108 Stat. 4106, 4141.

[239] *See Understand How Interest Is Calculated and What Fees Are Associated with Your Federal Student Loan*, U.S. DEP'T OF EDUC., https://studentaid.gov/understand-aid/types/loans/interest-rates (last visited Nov. 12, 2022); *Economic Injury Disaster Loans*, *supra* note 233.

[240] *See* 11 U.S.C. § 525(c).

B. Room for Growth

From the data that has emerged as a result of the impermissible treatment of PPP loans by the SBA, it is clear such application of the bankruptcy system has a disparate impact on minority business owners.[241] In particular, black business owners are more likely to file for bankruptcy than their white counterparts.[242] This disparity is exacerbated when government entities use bankruptcy as a basis for exclusion from government programs. In addition to examining further the effect improper administration of section 525 has on minority communities, future research should assess the parallels between small businesses and minority individuals. Both have a higher likelihood of filing for bankruptcy and will therefore feel the pressure accompanying an uneven application of bankruptcy law.[243] Therefore, this area of law could be vastly improved by proposals focusing on narrowing the gap between majority and minority segments of the population, as well as small and large businesses.

Moreover, a potential area of expansion for this line of research is the treatment of business physical disaster loans (BPDLs), also funded through the SBA.[244] The COVID-19 pandemic has drawn considerable attention to EIDLs, but because of the nature of the pandemic, there has not been a resulting increase in need for physical disaster assistance. Like EIDLs, BPDLs are funded by the SBA and are aimed at providing small businesses with assistance in recovering from other forms of natural disasters, such as the California wildfires.[245] Because the COVID-19 pandemic did not result in a high magnitude of devastation to physical property, research into possible discriminatory treatment of BPDLs is limited. However, if bankruptcy-based discrimination is occurring in such loan approvals, adjusting the Code language to include BPDLs could be necessary to improve the effectiveness of the Code's anti-discrimination provisions.

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[241] *See* Beer, *supra* note 196.

[242] Kiel & Fresques, *supra* note 199.

[243] *See Why Are Small Businesses More Likely to File for Bankruptcy?*, REINHERZ L. OFFS., https://reinherzlaw.com/why-are-small-businesses-more-likely-to-file-for-bankruptcy/ (last visited Nov. 12, 2022); Kiel & Fresques, *supra* note 199.

[244] *See Business Physical Disaster Loans*, U.S. SMALL BUS. ADMIN. (Feb. 11, 2022), https://disasterloanassistance.sba.gov/ela/s/article/Business-Physical-Disaster-Loans.

[245] *Federal Aid Programs for the State of California*, *supra* note 9.

CONCLUSION

In its current form, section 525(a) does not adequately protect debtors seeking government-funded disaster aid from discrimination.[246] The SBA has exploited this gap in its administration of the PPP, denying applicants federal aid based on their status in bankruptcy.[247] Due to the policy of deference to agencies established by the *Chevron* Doctrine, the majority of courts have declined to rule against the SBA on this matter.[248] This reticence to condemn the actions of the SBA demonstrates the need for clarity in the Bankruptcy Code. Accordingly, section 525 should be amended in accordance with the recommendations set forth in this Comment to extend its anti-discrimination protections to SBA EIDLs, and the PPP specifically, as well as to provide general clarity on what constitutes an "other similar grant" within the meaning of the Code.

This need for clarity is demonstrated by the *Guzman* decision rendered by the Second Circuit in March 2022.[249] Though the opinion itself offered no new substantive perspectives on the legality of the SBA's conduct, it exemplified the ongoing litigation spurred by the Code's ambiguities. Not only is corrective action crucial to remedying this inconsistent application of the law, it is also supported by an examination of the legislative history of the CARES Act, the purpose of the Bankruptcy Code, and the language of section 525(a) itself.

An analysis of the legislative history of the CARES Act, the purpose of the Code and its provisions, and the textual context of "other similar grant" support a finding that disaster loans, and PPP loans specifically, should fall within the protections of section 525(a). Both the prior enactment of subchapter V[250] and the language used in the CARES Act indicate an intention to expand the resources available to small businesses.[251] In particular, the inclusion of extensive loan forgiveness terms and allowance of PPP fund use to make

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246 11 U.S.C § 525(a).

247 *See, e.g.*, *In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021); Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp. Inc.), 618 B.R. 70 (Bankr. D. Vt. 2020), *overruled by* Springfield Hosp., Inc. v. Guzman, 28 F.4th 403 (2d Cir. 2022); Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020).

248 *See* Chevron, U.S.A., Inc, v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

249 *See Guzman*, 28 F.4th 403.

250 *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 2(a), 133 Stat. 1079, 1079–84 (codified as amended at 11 U.S.C. §§ 1181–1195 ("Subchapter V: Small Business Debtor Reorganization")).

251 *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 290–91 (codified as amended at 15 U.S.C. 636(a)(36)(F)(i)); *id.* § 1106, 134 Stat. at 297–98.

payments on pre-existing debt exhibit Congress's intent to assist small businesses in recovering financially at no cost to the businesses themselves.[252]

Moreover, the purposes of the Bankruptcy Code[253] and its chapter 5[254] support the inclusion of PPP loans in the list of protected interests under section 525(a). Filing bankruptcy would not allow a distressed business to obtain a fresh start if that business was forced to enter a struggling market without the government aid available to other small businesses. The SBA's conduct in this regard also violates the one of the main purposes of chapter 5 of the Code, which is to ensure that entities which seek financial assistance in the form of bankruptcy are not punished for that decision down the road.[255]

Finally, an examination of the language of section 525 itself reveals the permissibility of extending the anti-discrimination protections to disaster loans under the language of the provision itself. Though "other similar grant" was intentionally left ambiguous for future developments,[256] comparing the shared traits of the enumerated interests supports the inclusion of disaster relief loans under the section's protection.[257] This is further proven by the judicial treatment of other interests provided by the government, such as subsidized public housing leases.[258]

For the reasons presented throughout this Comment, and summarized above, PPP loans, and EIDLs generally, should be protected against discriminatory treatment under section 525(a). Because these interests are not expressly listed in the Code's language, the *Chevron* Doctrine has opened the door for continued agency violation of these policies.[259] The effect arising from this conflict is the unequal application of Code provisions across jurisdictions.[260] Therefore, legislative action is crucial to upholding the purpose of the Bankruptcy Code and ensuring consistency in its administration. The legislative proposals outlined

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252 *See id.*

253 *See* Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) (quoting Stellwagen v. Clum, 245 U.S. 605, 617 (1918)).

254 *See* Penobscot Valley Hosp. v. Carranza (*In re* Penobscot Valley Hosp.), No. 19-10034, 2020 Bankr. LEXIS 1464, at *40 (Bankr. D. Me. June 3, 2020).

255 *See id.*

256 *See* S. REP. NO. 95-989, at 81 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5867; H.R. REP. NO. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6322.

257 *See* U.S. Small Bus. Admin. v. Roman Cath. Church of the Archdiocese of Santa Fe, 632 B.R. 816, 833 (Bankr. D.N.M. 2021); Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 90 (2d Cir. 2002).

258 *See Housing Choice Vouchers Fact Sheet*, *supra* note 162.

259 *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

260 *Compare* Hous. Auth. of Pittsburgh v. Smith (*In re* Smith), No. 09-21638, 2014 Bankr. LEXIS 2266, at *19–20 (Bankr. W.D. Pa. May 20, 2014), *with In re* Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021).

in this Comment attempt to add clarity to this area of the Code to achieve these ends.

KELLSIE DAVIS RUANE[*]

ADDENDUM – PROPOSED 11 U.S.C. § 525[261]

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, 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.

(1) In this section, "grant" means any interest provided by the government which permits the recipient to pursue some activity, and which is unobtainable from the private sector.

(2) For purposes of this section, a loan will be considered a "grant" if it otherwise meets the requirements of section 525(a)(1).

(3) In the case of PPP loans awarded under the CARES Act, the classification of the loan as a 'grant' under section

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261 *See* 11 U.S.C. § 525. The proposed additions to the existing statutory language are indicated in bold and italicized font.

> ***525(a)(1) can be revoked upon a finding by the SBA that the borrower failed to comply with the terms of the loan agreement.***

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

> (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
>
> (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
>
> (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

(c)

> (1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a student grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt 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 a case under this title or during the pendency of 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.
>
> (2) In this section, "student loan program" means any program operated under title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

(d)

> ***(1) A governmental unit that operates an economic injury disaster loan program and a person engaged in a business that includes the making of loans guaranteed or insured under an economic injury disaster loan program may not deny an economic injury disaster loan, a loan guarantee, or loan insurance to 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 the debtor or bankrupt has been associated, because the debtor or bankrupt 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 a case under this title or during the pendency of 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.

(2) In this section, "economic injury disaster loan program" means any program operated by a government unit for the purpose of providing relief to a business suffering from economic injury following a disaster.