No. 24-30319

In the United States Court of Appeals for the Fifth Circuit

DACO INVESTMENTS, L.L.C., *doing business as* OUPAC FINANCIAL SERVICES; AMERICAN FINANCIAL SERVICES ASSOCIATION; WESTSIDE CREDIT CORPORATION, INCORPORATED; MOTORISTS ACCEPTANCE CORPORATION, *doing business as* SADDLEBACK ACCEPTANCE CORPORATION; CHALLENGE FINANCIAL SERVICES, ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION; ISABELLA CASILLAS GUZMAN, *in her official capacity as Administrator of Small Business Administration*; JANET YELLEN, *Secretary, U.S. Department of Treasury*; UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Louisiana,
No.6:22-cv-01444 (Summerhays, J.)

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 24-30319

DACO INVESTMENTS, L.L.C., *doing business as* OUPAC FINANCIAL SERVICES; AMERICAN FINANCIAL SERVICES ASSOCIATION; WESTSIDE CREDIT CORPORATION, INCORPORATED; MOTORISTS ACCEPTANCE CORPORATION, *doing business as* SADDLEBACK ACCEPTANCE CORPORATION; CHALLENGE FINANCIAL SERVICES, ET AL.,

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Defendants-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. 5th Cir. R. 28.2.1. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

1. Link Holding LLC is the parent company of Plaintiff-Appellant DACO Investments, LLC, *d/b/a* OUPAC Financial Services. No publicly held corporation owns 10% or more of stock in Link Holding LLC or DACO Investments, LLC, *d/b/a* OUPAC Financial Services.

2. Plaintiffs-Appellants American Financial Services Association; Westside Credit Corporation, Inc.; Motorists Acceptance Corporation, *d/b/a* Saddleback Acceptance Corporation; Challenge Financial Services; Eagle Financial Services, Inc.; Sunrise Finance Company; Moore Finance Company Inc.; and Vehicle Acceptance Corporation do not have any parent companies. No publicly held corporation owns 10% or more of stock in American Financial Services Association; Westside Credit Corporation, Inc.; Motorists Acceptance Corporation, *d/b/a* Saddleback Acceptance Corporation; Challenge Financial Services; Eagle Financial Services, Inc.; Sunrise Finance Company; Moore Finance Company Inc.; or Vehicle Acceptance Corporation.

3. Veros Financial Holdings, Inc. is the parent company of Plaintiff-Appellant Veros Credit, LLC. No publicly held corporation

owns 10% or more of stock in Veros Financial Holdings, Inc. or Veros Credit, LLC.

4. Plaintiff-Appellant Deep South Financial Services, Inc. is the parent company of Plaintiff-Petitioner Southland Finance Co. Deep South Financial Services, Inc. does not have a parent company. No publicly held corporation owns 10% or more of stock in Deep South Financial Services, Inc. or Southland Finance Co.

5. Plaintiffs-Appellants TEBO Financial Services, Inc.; Time Investment Company, Inc.; Friendly Finance Corporation; Pronto Finance, Inc.; Credit Concepts, Inc.; New Southern Loans, Inc.; Money Lenders Finance Co.; First Financial Loans, Inc.; Wagner Financial Services, Inc.; Southern Loans, Inc.; and Carvant Financial, LLC do not have any parent companies. No publicly held corporation owns 10% or more of stock in TEBO Financial Services, Inc.; Time Investment Company, Inc.; Friendly Finance Corporation; Pronto Finance, Inc.; Credit Concepts, Inc.; New Southern Loans, Inc.; Money Lenders Finance Co.; First Financial Loans, Inc.; Wagner Financial Services, Inc.; Southern Loans, Inc.; or Carvant Financial, LLC.

Counsel For Plaintiffs-Appellants

Counsel for Plaintiffs-Appellants below and here are Misha Tseytlin, Jeremy Rosenblum, Kevin M. LeRoy, Emily A. O'Brien, Jeff P. Johnson, and Elizabeth P. Waldbeser of Troutman Pepper Hamilton Sanders, LLP, 227 W. Monroe Street, Ste. 3900, Chicago, IL 60606, and Anna St. John of St. John Law Firm LLC, 1900 General Taylor St., New Orleans, LA 70115.

Defendants-Appellees

Defendants-Appellees are the U.S. Small Business Administration; Isabella Casillas Guzman, in her official capacity as Administrator of the U.S. Small Business Administration; Janet Yellen in her official capacity as U.S. Secretary of Treasury; and the United States of America.

Counsel For Defendants-Appellees

Counsel for Defendants-Respondents below is Indraneel Sur of the U.S. Department of Justice, 1100 L St. N.W., Washington, DC 20005. Counsel for Defendants-Respondents on appeal are Adam C. Jed and Michael S. Raab of the U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530.

Other Interested Persons

Any small lending business that received Paycheck Protection Program funds and complied with the CARES Act but was excluded from loan forgiveness under the Exclusion Rule promulgated by the Small Business Administration is financially interested in the outcome of this case.

Dated: August 5, 2024

/s/Misha Tseytlin

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.3, counsel for Plaintiffs-Appellants states as follows:

Given the significance of the issues at stake in this appeal—namely, whether the Small Business Administration acted contrary to law and/or arbitrarily and capriciously in promulgating and enforcing the Exclusion Rule, 85 Fed. Reg. 20,811 (Apr. 15, 2020)—Plaintiffs-Appellants respectfully request that this Court hold oral argument.

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INTRODUCTION

The Small Business Administration ("SBA") has claimed for itself the unilateral authority to decide whether small lending businesses (or any type of small business) will receive billions in Payment Protection Program ("PPP") loan forgiveness under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or "Act"), Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286–94 (2020) (largely codified at 15 U.S.C. § 636(a)(36)), even though the Act provides in its statutory text that "any business concern" with up to 500 employees "shall be eligible" to receive such loan forgiveness, 15 U.S.C. § 636(a)(36)(D)(i). Having asserted this atextual discretion to make decisions of "vast economic and political significance" worth billions of dollars, *West Virginia v. EPA*, 597 U.S. 697, 716, 721 (2022) (citations omitted), SBA has refused to offer any rationale for *why* it exercised this claimed discretion to exclude small lending businesses. Instead, SBA relied upon a remarkable, made-for-litigation declaration from an SBA official to argue now that it was too busy in 2020 to exercise (or even explain) the use of the very discretion that SBA claims Congress gave it. Nor has SBA even attempted to provide any cogent, consistently applied principle that would explain its decision to

deny loan relief to all small lenders, but give such relief to businesses such as gambling establishments.

This Court should reverse the district court's blessing of SBA's bureaucratic gamesmanship, while making clear that basic principles of statutory interpretation and reasoned administrative rulemaking under the Administrative Procedure Act ("APA") apply no matter how busy an agency claims to have been during the COVID-19 crisis.

In the CARES Act, Congress provided in clear statutory text that "any business concern" "shall be eligible" for first-draw loan forgiveness under the new PPP. 15 U.S.C. § 636(a)(36)(D)(i). Neither SBA nor the district court even attempted to defend the statutory rationale that SBA initially offered for its position on the rule at issue—the Exclusion Rule—which was that all small businesses previously excluded from a different SBA loan program must be excluded from PPP loan forgiveness. Instead, SBA and the district court claimed that the CARES Act gave SBA unilateral discretion to pick and choose winners as to what businesses would be eligible for first-draw PPP loan forgiveness. This justification for the Exclusion Rule is a clear nonstarter under the APA and the *Chenery* doctrine because it is found nowhere in the Rule itself, and is

contrary to the CARES Act's text, context, the major questions doctrine, and principles of constitutional avoidance in any event.

But if this "pick-and-choose" theory of the CARES Act were correct (which it is clearly not), then SBA violated the APA by not explaining in the Exclusion Rule itself *why* it was excluding small lending businesses from first-draw PPP loan forgiveness. After all, if the CARES Act gave to SBA the discretion that it now claims, then the APA required SBA to offer a contemporaneous explanation in the Rule as to *why* SBA was exercising its claimed discretion to exclude small lending businesses. SBA gave no such explanation in the Exclusion Rule. And, indeed, no explanation is possible, given that SBA still cannot offer any reason—even four years after it adopted the Exclusion Rule—why small lending businesses should be excluded from this critical program, under the same standards SBA used to give forgiveness to other categories of small businesses, such as gambling establishments. That SBA attempted to defend its actions below by submitting an improper made-for-litigation declaration—which claimed SBA had too many other obligations when it issued the Exclusion Rule to explain its use of its claimed discretion—only underscores how legally indefensible SBA's actions were.

This Court should reverse the district court's decision, and remand for entry of judgment in Plaintiffs' favor.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to permit an interlocutory appeal under 28 U.S.C. § 1292(b), after a district court enters a written certification order. On April 30, 2024, the district court entered such an order. ROA.5472–77. The district court had jurisdiction over Plaintiffs' challenge under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. ROA.241–42.

STATEMENT OF ISSUES

1. Whether the Exclusion Rule violates the CARES Act by excluding small businesses primarily engaged in the business of lending from first-draw PPP loan forgiveness, given that the CARES Act provides that "*any* business concern" with up to 500 employees "*shall be eligible* to receive" such loan forgiveness. 15 U.S.C. § 636(a)(36)(D)(i) (emphases added).

2. Whether the Exclusion Rule is arbitrary and capricious under the APA because SBA failed to provide a contemporaneous, reasoned, consistently applied explanation for SBA's exclusion of small lending businesses from first-draw PPP loan forgiveness.

STATEMENT OF THE CASE

A. The CARES Act Makes "Any" Small Business "Eligible" For First-Draw Loan Forgiveness

In the early days of the COVID-19 pandemic, Congress created the PPP to provide struggling small businesses with federally backed loan commitments to keep Americans in their jobs, amounting to more than eight billion dollars. *See generally* 15 U.S.C. § 636(a)(36). Congress designed the PPP to permit small business employers to maintain payroll for workers and receive forgiveness of loans used for this purpose. *See* 15 U.S.C. § 636m(b), (d). Congress tasked SBA with administrating this new program because SBA also administers several small business loan programs. *See generally* 13 C.F.R. § 120.1. One of those programs—the so-called Section 7(a) program—guarantees loans from private institutions to small business concerns, rather than "disburs[ing] funds directly." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 n.3 (1979). Congress concluded that the Section 7(a) disbursement mechanism would allow for rapid deployment of funds to small businesses during the COVID-19 crisis.

To understand the dispute between the parties in this case, some background on this preexisting Section 7(a) program is instructive. The

Section 7(a) program provides loans to small businesses through a disbursement mechanism by which private institutions loan aid. *See* 13 C.F.R. § 120.2(a)(2). SBA regulations also provide that certain categories of businesses are ineligible to receive Section 7(a) loans, including "[f]inancial businesses primarily engaged in the business of lending," *id.* § 120.110(b); "[l]ife insurance companies," *id.* § 120.110(d); "[b]usinesses located in a foreign country," *id.* § 120.110(e); "[b]usinesses deriving more than one-third of gross annual revenue from legal gambling activities," *id.* § 120.110(g); "[b]usinesses engaged in any activity that is illegal," *id.* § 120.110(h); certain "[p]rivate clubs," *id.* § 120.110(i); "[g]overnment-owned entities," *id.* § 120.110(j); certain "[b]usinesses . . . of a prurient sexual nature," *id.* § 120.110(p); and "[b]usinesses primarily engaged in political or lobbying activities," *id.* § 120.110(r).

The PPP uses Section 7(a)'s loan-disbursement mechanism by allowing SBA to guarantee loans "under the same terms, conditions, and processes as a loan made under" the Section 7(a) program, 15 U.S.C. § 636(a)(36)(B), but the PPP fundamentally differs from the Section 7(a) program. Most importantly, while PPP loan recipients are generally entitled to full loan forgiveness, making the program function as

essentially a grant program, *see id.* § 636(a)(2)(F), (a)(36)(D)(i), Section 7(a) requires borrowers to repay their loans, along with interest and any other fees charged by the lender, *see id.* § 636(a)(1)–(7); 13 C.F.R. §§ 120.212–.214, 120.221. Further, while PPP loans are 100% guaranteed, 15 U.S.C. § 636(a)(2)(F), (a)(36), Section 7(a) loans can only be guaranteed up to "a maximum guaranty of 85 percent" for "[l]oans of $150,000 or less" and "a maximum guaranty of 75 percent" for "[l]oans more than $150,000," 13 C.F.R. § 120.210; 15 U.S.C. § 636(a)(2)(A).

Most relevant for purposes of this case, the eligibility criteria for the PPP program and the Section 7(a) program are different. As noted above, certain categories of businesses are not eligible for Section 7(a) loans under SBA regulations, including "[n]on-profit businesses," "[g]overnment-owned entities," "[b]usinesses deriving more than one-third of gross annual revenue from legal gambling activities," and "[f]inancial businesses primarily engaged in the business of lending." 13 C.F.R. § 120.110. But for first-draw PPP loan forgiveness, the CARES Act specifically and unambiguously provides that *all* small businesses over a certain size are eligible for loan forgiveness: "*any business concern . . . shall be eligible to receive a covered loan*" so long as the business

concern or other qualifying entity "employs not more than" specific numbers of employees. 15 U.S.C. § 636(a)(36)(D)(i) (emphasis added).

One other statute provides useful context for this dispute. Months after enacting the CARES Act, Congress recognized the need for some continued relief and allowed small businesses to apply for a second draw of CARES Act funds. Congress thus enacted the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act ("EAA"), authorizing "second-draw" loans for a more limited set of businesses. Pub. L. No. 116-120, § 311(a), 134 Stat. 1182, 2001–06 (2020). In contrast to the CARES Act's rule for first-draw eligibility, this time Congress limited eligibility by amending the definition of "eligible entity" to exclude "any entity that is a type of business concern (or would be, if such entity were a business concern) described in" 13 CFR § 120.110, meaning that for second-draw PPP loans, Congress largely aligned the preexisting Section 7(a) and EAA eligibility criteria, 15 U.S.C. § 636(a)(37)(A)(iv)(III).

B. In The Exclusion Rule, SBA Declares That All Businesses Previously Listed In 13 C.F.R. § 120.110 Are Ineligible For First-Draw Loan Forgiveness

SBA published the Exclusion Rule, the rule in dispute here, on April 15, 2020. 85 Fed. Reg. 20,811 (Apr. 15, 2020). Without even

mentioning the CARES Act's explicit directive that "any business concern" with a sufficient number of employees "shall be eligible to receive a covered loan," 15 U.S.C. § 636(a)(36)(D)(i), SBA purported to exclude as ineligible all businesses that are ineligible under the Section 7(a) program, 85 Fed. Reg. at 20,812, including "[f]inancial businesses primarily in the business of lending," 13 C.F.R. § 112.110(b). In essence, SBA imposed on first-draw grants much the same eligibility restriction that Congress in the EAA later mandated for second-draw grants. *See* 15 U.S.C. § 636(a)(37). Remarkably, the entirety of the Exclusion Rule's rationale for excluding businesses listed in 13 C.F.R. § 120.110 from CARES Act loan-forgiveness was: "[b]usinesses that are not eligible for PPP loans are identified in 13 C.F.R. 120.110 and described further in [SBA guidance], except that nonprofit organizations . . . are eligible." 85 Fed. Reg. at 20,812. SBA issued the Rule as an interim final rule without receiving public comments, although it advised that it could consider post-promulgation comments. *Id.* at 20,811.

Interested parties, including Plaintiff American Financial Services Association ("AFSA"), submitted post-promulgation comments arguing that the Rule unlawfully excluded small lending and other businesses.

See ROA.1240–42. AFSA explained that the CARES Act's directive that "[d]uring the covered period, *any business concern . . . which employs not more than 500 employees shall be eligible* to receive a [PPP] loan . . . in addition to small business concerns" showed "Congress' clear intent" to make small lending businesses, and other business concerns excluded under the Section 7(a) program, "eligible for PPP loans." ROA.1241 (citing 15 U.S.C. § 636(a)(36)(D)(i)). AFSA emphasized the vital role of its members as "community-based lenders in cities and towns nationwide," and noted that "[a]t times of economic turmoil, access to financial services, particularly for the most vulnerable who do not have banking relationships, is essential to minimizing hardship and setting the stage for eventual recovery." ROA.1240. SBA to this day has not addressed these comments in any way.

SBA ignored AFSA's concerns, and five days after the Exclusion Rule became effective, SBA promulgated an additional interim final rule giving PPP loan relief to gambling establishments as identified in 13 C.F.R. § 120.110. 85 Fed. Reg. 21,747, 21,751 (Apr. 20, 2020); *see* 85 Fed.

Reg. 23,450, 23,451 (Apr. 28, 2020).[1] SBA's entire rationale for including gambling establishments within first-draw loan forgiveness, notwithstanding its explanation in the Exclusion Rule that all 13 C.F.R. § 120.110 excluded business are ineligible for such loan forgiveness, was that this was "more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses." 85 Fed. Reg. at 23,451. SBA has never explained, then or later, why this rationale does not apply equally to small lending businesses.

C. SBA Applies The Rule To Deny Loan Forgiveness To Plaintiffs

Between April 6, 2020, and June 25, 2020, SBA approved first-draw PPP loans totaling more than $11 million for the individual business Plaintiffs and many millions more for AFSA members. ROA.568–76, 593, 616, 632, 652, 668, 754, 790, 837, 858, 886, 922, 937, 952, 977, 1054, 1072, 1099, 1131, 1159, 1173, 1197, 1218. After deploying the proceeds on covered expenses, each Plaintiff and many SBA members submitted applications for forgiveness of their loans. ROA.567–76. SBA denied forgiveness to Plaintiffs and many AFSA members without disputing

[1] This additional rule also permitted government-owned hospitals to receive first-draw loan forgiveness. 85 Fed. Reg. at 23,451.

that these small businesses deployed their loan proceeds in compliance with the CARES Act. ROA.567–76; *see* 15 U.S.C. §§ 636(a)(36)(D)(i)(I), (F)(i), (T), 636m(a)(11). Instead, SBA issued each Plaintiff a denial letter stating that "SBA has determined that the borrower was ineligible for the PPP loan" based on SBA's "conclu[sion] that Borrower is a financial business primarily engaged in lending." *See, e.g.*, ROA.616. All Plaintiffs administratively appealed these denials. SBA's Office of Hearings and Appeals rejected each appeal and affirmed SBA's denial of forgiveness in all cases, apart from Plaintiff Vehicle Acceptance Corporation ("VAC"), whose appeal is still pending. *See* ROA.1221–38.

Despite denying forgiveness to Plaintiffs and many AFSA members under the Exclusion Rule, SBA granted over $800 billion of PPP loan forgiveness to numerous other companies that SBA itself classifies as lending, finance, or mortgage companies. *See* ROA.577–78. SBA also granted loan forgiveness to gambling companies and other categories of small businesses listed in Section 120.110. *Supra* pp.10–11.

D. Procedural History

On May 27, 2022, Plaintiffs filed this action against SBA in the Western District of Louisiana. ROA.28, 238–83. The parties then filed

cross-motions for summary judgment, ROA.540–49, with the briefing concluding on December 9, 2022, ROA.540–49.

In their summary judgment papers, Plaintiffs argued that SBA violated the CARES Act and the APA in three ways. First, the Exclusion Rule violates the text of the CARES Act, and any other conclusion would violate the non-delegation doctrine and major questions doctrine. ROA.540–49. Plaintiffs' textual argument here aligned with the Sixth Circuit's approach in *DV Diamond Club of Flint, LLC v. SBA*, 960 F.3d 743 (6th Cir. 2020), which held "Congress made clear" in the CARES Act's plain text "that the SBA's longstanding ineligibility rules are inapplicable given the current circumstances," *id.* at 747. Second, Plaintiffs argued that the Exclusion Rule is arbitrary and capricious in violation of the APA because SBA failed to provide in the Rule a contemporaneous, reasoned, and consistently applied explanation for denying forgiveness to small lending businesses. ROA. 549–52. Third, Plaintiffs explained that SBA's arbitrary enforcement of the Exclusion Rule violated the APA because SBA inexplicably granted first-draw loan forgiveness to thousands of small businesses classified as lending,

finance, or mortgage companies, while simultaneously denying forgiveness to Plaintiffs and numerous AFSA members. ROA.552–54.

In response and in support of its own cross-motion for summary judgment, SBA first asserted that the CARES Act empowered the agency to decide unilaterally which categories of small business would be eligible for PPP loan forgiveness. ROA.3976–86. SBA pointed to nothing in the Exclusion Rule that took this position, as the Rule appeared on its face to assert that the Act itself required excluding businesses listed in Section 120.110 from the PPP. *Compare* 85 Fed. Reg. at 20,812, *with* ROA.3984–85. Next, addressing Plaintiffs' arbitrary-and-capricious arguments, SBA asserted that the Exclusion Rule reflected reasoned decisionmaking, ROA.3989–93, relying upon a post hoc, made-for-litigation affidavit from Diana Seaborn, Director of Financial Assistance in the Office of Capital Access at SBA. The Seaborn Declaration claimed that the Section 7(a) ineligibility criteria was a "key provision[ ]" that did not need to be "waived or modified," if SBA did not want to do so. ROA.4022–23. "Clearly, Congress had issued a mandate to SBA to alter certain terms and conditions ordinarily applied to Section 7(a) loans when guaranteeing PPP loans." ROA.4019. But "time would not have

permitted the agency, prior to launch, to meaningfully evaluate each of these restrictions." ROA.4022. SBA argued that the Seaborn Declaration "demonstrates that SBA considered the relevant factors" when adopting the Exclusion Rule. ROA.3991; *see* ROA.4017–23. Finally, SBA further defended its actions in granting forgiveness to some financial businesses, like mortgage companies, and not Plaintiffs, based upon a different agency declaration. ROA.4026–28, 4031–32.

On February 22, 2024, the district court entered a partial-summary-judgment order, granting SBA summary judgment as to most of Plaintiffs' claims, while concluding that a trial was necessary to resolve Plaintiffs' arbitrary-enforcement claim. ROA.5386–423. The district court first held that the Exclusion Rule "did not violate [the] CARES Act" and granted summary judgment to SBA on this claim, ROA.5396–405. In the district court's view, the CARES Act gave SBA "discretion" to impose the Exclusion Rule, with the court finding that "Congress did not express its intent in the CARES Act to include borrowers typically excluded by Section 120.110." ROA.5401–02. Next, the district court upheld SBA's denial of forgiveness to small lenders because it concluded SBA's failure to provide a reasoned explanation with the Rule did not

violate the APA, accepting SBA's post hoc Seaborn Declaration. ROA.5405–09. Finally, the court determined that factfinding was necessary to decide Plaintiffs' arbitrary-enforcement claim, denying summary judgment to all parties here. ROA.5414–17.

On March 21, 2024, Plaintiffs moved the district court to enter partial final judgment on its decision granting judgment on Plaintiffs' purely legal claims or, alternatively, to certify the final judgment on those claims for interlocutory appeal. ROA.5424–25. SBA consented to the relief requested in that motion. ROA.5472. The district court granted Plaintiffs' motion in part on April 29, 2024, certifying Plaintiffs' already adjudicated claims for interlocutory appeal under 28 U.S.C. § 1292(b). ROA.5472–77. The court concluded its partial-summary-judgment decision satisfies Section 1292(b) because the dismissed claims "turn on pure questions of law" for which "there is substantial ground for difference of opinion, as evidenced by disagreement between circuit courts on some of the precise questions involved." ROA.5476. The court found an "immediate appeal would advance the ultimate termination of litigation and conserve judicial and party resources." ROA.5476. The

district court also granted SBA's unopposed motion to stay proceedings pending this Court's review. ROA.5477.

Plaintiffs then filed a Petition for Leave to Appeal the legal claims resolved by the district court's summary judgment order. No.24-90012 (5th Cir. May 13, 2024). On May 21, 2024, this Court granted the Petition. ROA.5478–79.

SUMMARY OF THE ARGUMENT

I.A. The Exclusion Rule violates the CARES Act's text and is thus unlawful. The Exclusion Rule, as written, is best read as taking the position that the CARES Act requires applying the Section 7(a) program's exclusions (13 C.F.R. § 120.110) to first-draw loan forgiveness eligibility. This reading violates the Act's plain language that "any business concern" means every business concern. 15 U.S.C. § 636(a)(36)(D)(i). Moreover, if Congress had desired that result, it could have written a different statute, as it did when it later enacted the EAA that applied Section 120.110 exclusions to second-draw loan forgiveness. Notably, neither SBA nor the district court even attempt to defend the Exclusion Rule's construction of the CARES Act.

I.B. The district court, instead, adopted the "pick-and-choose" theory of the CARES Act, which is that SBA is not *bound* by the

ineligibility criteria in the Section 7(a) program, but that Congress gave the agency "discretion" to impose those Section 120.110 ineligibility criteria (or some subset of them) on the new PPP. The district court's conclusion is legally wrong for numerous reasons.

As a threshold matter, the district court's adoption of an interpretation of the CARES Act not found in the Exclusion Rule violates the *Chenery* doctrine. Under bedrock APA principles, judicial review must be limited to the grounds that the agency invoked. It is undisputed that the Exclusion Rule does not say SBA exercised its discretion to exclude whole swaths of small businesses, and therefore the district court committed clear legal error in upholding the Rule on those grounds.

Further, the district court's "pick-and-choose" theory contradicts the Act's text. Congress did not grant SBA authority to determine what businesses are eligible by permitting SBA to guarantee loans on the "same terms, conditions, and processes" as the Section 7(a) program. 15 U.S.C. § 636(a)(36)(B). The phrase "terms, conditions, and processes" describes the contents of or how to carry out an agreement, while "eligible" describes the subject of a program and whether that subject is fit to participate. The district court erred by failing recognize this

distinction: eligibility describes the party receiving the loan and "terms, conditions, and processes" describe the loan agreement. The decisions of the Second and Eleventh Circuits that the district court relied upon do not warrant this Court adopting the district court's position, including because those courts deferred to SBA under the now-overruled *Chevron* doctrine.

Finally, the "pick-and-choose" theory violates the major questions and non-delegation doctrines. These closely related doctrines enforce the requirement that Congress makes major policy decisions and provides agencies with an intelligible principle on how to use delegated discretion. SBA cannot point to a clear congressional authorization to exercise discretion to determine which businesses are eligible for an $800 billion loan program. And SBA has not identified any statutory text providing guidance on how Congress wants SBA to decide which categories of small businesses receive first-draw loan forgiveness. Because courts must avoid statutory constructions that would violate the Constitution, the pick-and-choose theory is a nonstarter on this additional basis.

II. If SBA actually had the vast discretion that the district court read into the CARES Act, then the Exclusion Rule is clearly unlawful under the APA in two, independently fatal respects.

First, the Exclusion Rule is unlawful because SBA completely failed to offer a contemporaneous, reasoned explanation in the Rule as to why it was exercising its claimed discretion to exclude small lending businesses from PPP first-drawn loan forgiveness. Indeed, the district court admitted that "[n]either party has identified any contemporaneous explanation in the administrative record," ROA.5406, which should have been the end of the analysis. While the district court sought to rely upon the post hoc Seaborn Declaration, consideration of that Declaration was obviously improper under basic APA principles. And, in any event, the Declaration's core reason as to why the Exclusion Rule provided no actual rationale for excluding small lending business from PPP loan relief—that SBA was then too busy to exercise its discretion or offer any explanation—could not uphold the Rule because an agency cannot excuse a failure to comply with the APA on the basis asserted here.

Second, the Exclusion Rule is illegal because SBA has not provided a consistently applied principle for including or excluding categories of

businesses from the PPP. SBA's reason for granting eligibility to gambling establishments—that such relief satisfies the CARES Act's "policy aim of making PPP loans available to a broad segment of U.S. businesses," 85 Fed. Reg. at 23,451—plainly applies on its face to small lending businesses and SBA does not even attempt to argue otherwise.

ARGUMENT

This Court reviews de novo a "grant of summary judgment, using the same standards as the district court." *Fam. Rehab., Inc. v. Becerra*, 16 F.4th 1202, 1204 (5th Cir. 2021). On appeal, legal issues are reviewed de novo. *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 368 (5th Cir. 2018). Here, the district court committed multiple legal errors, each warranting reversal and entry of judgment in Plaintiffs' favor.

I. The Exclusion Rule And All Loan Denials Under That Rule Violate The CARES Act

A. The Statutory Text Refutes The Exclusion Rule's Core Premise That Businesses Listed In 13 CFR § 120.110 Must Be Ineligible For First-Draw Loan Forgiveness

1. "In ascertaining the plain meaning of the statute, [courts] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Inhance Techs., L.L.C. v. EPA*, 96 F.4th 888, 893 (5th Cir. 2024) (citation omitted). "[A]pplying the ordinary

tools of statutory construction," this Court "must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 730 (5th Cir. 2018) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

An agency rule violates the APA when it is contrary to how "Congress has directly addressed the precise question at issue." *Texas v. United States,* 809 F.3d 134, 179 (5th Cir. 2015) (citation omitted). Likewise, "[t]o the extent a regulation attempts to carve out an exception from a clear statutory requirement, the regulation is invalid." *Djie v. Garland*, 39 F.4th 280, 284 (5th Cir. 2022). Courts will not uphold agency action because the agency later suggests that "findings might have been made and considerations disclosed which would justify its order," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), because the "agency must defend its actions based on the reasons it gave when it acted," *R.J. Reynolds Vapor Co. v. Food & Drug Admin.*, 65 F.4th 182, 189 (5th Cir. 2023). The Supreme Court recently held in *Loper Bright Enterprises v. Raimondo*,

144 S. Ct. 2244 (2024), that courts can no longer defer to agency interpretations of statutes, explaining that "when the ambiguity is about the scope of an agency's own power," it is "perhaps the occasion on which abdication in favor of the agency is least appropriate." *Id.* at 2266.

2. In the Exclusion Rule, SBA provided the following justification for excluding small lending businesses from PPP loan forgiveness: "[b]usinesses that are not eligible for PPP loans are identified in 13 C.F.R. 120.110 and described further in [SBA guidance], except that nonprofit organizations . . . are eligible." 85 Fed. Reg. at 20,812. Plaintiffs respectfully submit that the fairest reading of this text is that SBA claimed that the CARES Act itself mandates excluding businesses listed in Section 120.110 from PPP loan forgiveness.

That interpretation of the CARES Act—which SBA refused to defend in this case, and which the district court did not even discuss in its opinion—contradicts the statutory text, as the Sixth Circuit correctly concluded in *DV Diamond Club*, 960 F.3d 743. The CARES Act specifically discusses what categories of small businesses are "eligible" for the new PPP, providing that "*any* business concern . . . *shall be eligible* to receive" a first-draw PPP loan, so long as the business concern

complies with the Act's size-limit requirements. 15 U.S.C. § 636(a)(36)(D)(i) (emphasis added). Simply put, "any business concern" means every business concern, except as limited by the statute. "It is well settled that the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Tula Rubio v. Lynch*, 787 F.3d 288, 293 (5th Cir. 2015). When "any" is used as a "singular noun in affirmative contexts," it "ordinarily 'refer[s] to a member of a particular group or class without distinction or limitation' and in this way 'impl[ies] every member of the class or group.'" *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 363 (2018) (quoting *Any*, OXFORD ENGLISH DICTIONARY (3d ed., Mar. 2016)). "[W]here, as here, Congress 'did not add any language limiting the breadth of [the] word,' any 'must' be read 'as referring to all' of the type to which it refers." *Tula Rubio*, 787 F.3d at 293 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)) (second bracket in original). Thus, the Exclusion Rule directly conflicts with the CARES Act's plain text, as "any business concern" simply means every business concern, except as limited by other statutory text. *See id.*

The CARES Act's context confirms that the Act forecloses the Exclusion Rule's reading. In enacting the CARES Act, Congress sought

"to alleviate the incredible economic hardship caused by the COVID-19 pandemic" immediately and to "support [ ] as many displaced American workers as possible." *DV Diamond Club*, 960 F.3d at 745–46. As a result, the PPP supported workers at "any business concern" with the requisite small number of employees "in addition to small business concerns." 15 U.S.C. § 636(a)(36)(D)(i). By rejecting any category-based eligibility exclusion for "any business concern," *id.* § 636(a)(36)(D), the CARES Act advances Congress' intent to provide relief to all categories of small businesses, *DV Diamond Club*, 960 F.3d at 747.

That Congress later chose to exclude businesses listed in 13 CFR § 120.110 from *second-draw* PPP loan eligibility in the EAA provides yet another powerful reason for rejecting the Exclusion Rule's rewriting of the CARES Act as *sub silentio* imposing this limit on first-draw loans. With the EAA, Congress in December 2020 provided additional federal aid to a narrower set of small businesses, amending the definition of "eligible recipient" from "an individual or entity that is eligible to receive a covered loan," 15 U.S.C. § 636(a)(36)(A)(iv), to exclude "any entity that is a type of business concern (or would be, if such entity were a business concern) described in" 13 CFR § 120.110 from receiving second-draw

loans, *id.* § 636(a)(37)(A)(iv)(III)(aa). That Congress chose different eligibility requirements to apply to first- and second-draw loans further refutes the Exclusion Rule's attempt to write additional limitations on business-category eligibility into the CARES Act.

B. This Court Should Reject The District Court's Rewriting Of The Exclusion Rule Under A Theory Of SBA "Discretion"

Before the district court, SBA did not defend (or even discuss) the Exclusion Rule's premise that the CARES Act itself excluded small lending businesses from PPP loan forgiveness. Instead, the district court adopted the position that the Second Circuit articulated in *Pharaohs GC, Inc. v. SBA*, 990 F.3d 217 (2d Cir. 2021): "Congress gave the SBA Administrator discretion to exclude certain types of businesses from the Program," based upon the CARES Act's use of the phrase "the same terms, conditions, and processes" as the Section 7(a) program,. *id.* at 226 (quoting 15 U.S.C. § 636(a)(36)(B)). The district court adopted this interpretation, holding that "Congress deliberately chose not to change the Administrator's statutory discretion to excludes businesses." ROA.5402 (citation omitted). The district court's holding is legally wrong for multiple, independently fatal reasons.

First, the district court committed clear legal error under the APA by allowing SBA to abandon the Exclusion Rule's rationale—that the CARES Act *requires* excluding the businesses listed in 13 C.F.R. § 120.110—to uphold the Exclusion Rule based upon a theory that the CARES Act gave *discretion* whether to exclude some of the categories of businesses listed in Section 120.110 from first-draw PPP loan forgiveness based upon the phrase "same terms, conditions, and processes." ROA.1723–24, 1728–30. But under the *Chenery* doctrine, *see Chenery Corp.* 318 U.S. at 92, an "agency must defend its actions based on the reasons it gave when it acted," *R.J. Reynolds*, 65 F.4th at 189. Indeed, nowhere in the Exclusion Rule did SBA claim that the CARES Act gave it the discretion to choose the eligibility requirements for the PPP's first-draw loan forgiveness, whether based upon the "same terms, conditions, and processes" phrase or otherwise. *See generally* 85 Fed. Reg. at 20,812.

Below, Plaintiffs pointed out this fatal defect, arguing in their opposition to SBA's motion for summary judgment that the agency was now advocating a different rationale for its actions than that found in the Exclusion Rule, in violation of the *Chenery* doctrine. ROA.5178. The district court entirely ignored this argument, violating the rule that

"judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (citation omitted); *see BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 911 (5th Cir. 2023).

Second, the district court's position that "Congress expressly granted the SBA authority" to choose whether to adopt eligibility criteria "under the same terms, conditions, and processes as the Section 7(a) program," ROA.5419, violates the plain text and basic statutory construction.

The district court improperly gave no weight to the plain text that "any business concern" shall be "eligible" for the first-draw PPP loans, 15 U.S.C. § 636(a)(36)(D)(i), and, instead, concluded that the statutory phrase "the Administrator may guarantee [PPP] loans under the same terms, conditions, and processes" as the Section 7(a) program means SBA may impose the same eligibility exclusions on the PPP, but only if it wants to, ROA.5401–02 & n.93; *see* 15 U.S.C. § 636(a)(36)(B).

As a matter of plain English, Congress used "eligible" to denote the type of businesses that could receive PPP loans and "terms, conditions, and processes" to explain how the loan program would operate. Here,

Congress specifically said what businesses are "eligible" for the first-draw loans. Thus, even if the phrase "same terms, conditions, and processes" could otherwise be read as including "eligibility" in another statutory context, *but see infra* pp.30–31, that Congress specifically addressed eligibility through the "any business concern" language settled the issue for purposes of the CARES Act. After all, "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails." *Hopkins v. Watson*, No.19-60662, 2024 WL 3448028, at *5 (5th Cir. July 18, 2024) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)); *accord NLRB v. SW Gen., Inc.*, 580 U.S. 288, 305 (2017).

The district court improperly dismissed Section 636(a)(36)(D)(i)'s eligibility provision as only serving to expand eligibility based on the size of the organization. ROA.5402. But that simply rewrites the statutory text that Congress itself adopted. To be sure, subsection (36)(D)(i) creates a bright-line rule that eligible entities will have 500 or fewer employees unless covered by existing SBA size regulations. But the provision's plain text that "any business concern" of a certain size is eligible for the new

PPP means what it says. SBA has no statutory authority to add additional eligibility criteria, size-based or otherwise.

Even if this Court were to put aside the case-ending point that the CARES Act already deals with eligibility through the "any business concern" provision, the meaning of "terms, conditions, and processes" does not include *eligibility* requirements, even if Section 636(a)(36)(D)(i) was not in the statute. "Terms" are "[p]rovisions that define an agreement's scope; conditions or stipulations," *Term*, BLACK'S LAW DICTIONARY (12th ed. 2024)—a definition that omits a party's eligibility to enter into said agreement. Likewise, "conditions" are "term[s], provision[s], or clause[s] in a contract," *Condition*, BLACK'S LAW DICTIONARY, *supra*, and "processes" are "series of actions or operations conducing to an end," *Process*, MERRIAM-WEBSTER ONLINE (2024)[2]—which also do not cover "eligibility." These definitions all describe the contents of or how to carry out an agreement. "Eligible" means "[f]it and proper to be selected or to receive a benefit," *Eligible*, BLACK'S LAW DICTIONARY, *supra*, and describes the subject of a program. Plaintiffs'

[2] Available at https://www.merriam-webster.com/dictionary/process#dictionary-entry-1 (last visited Aug. 4, 2024).

definitions (that the decision relegated to a footnote) give these words different meanings: eligibility describes the party receiving the loan and "terms, conditions, and processes" describe the loan agreement.

The district court's reasoning improperly elevates statutory inferences over the CARES Act's text, as well as the mechanism Congress chose to provide relief over the statutory design of making PPP loans available to a broad segment of the economy. The district court believed that because Congress granted SBA authority to establish the 13 C.F.R. § 120.110 exclusions under a different loan program and "placed the PPP under the pre-existing Section 7(a) loan program," that Congress granted SBA the same discretion for the PPP. ROA.5401–02. The general presumption that Congress legislates against the background of existing law—to the extent it has any relevance to the parties' dispute here at all when dealing with a new grant program, not the old loan program—must yield to the plain eligibility text in Section 636(a)(36)(D)(i). *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 623 (5th Cir. 2013).

Third, the district court relied heavily upon a later-enacted exception to SBA's exclusion criteria for faith-based businesses as evidence that Congress somehow ratified the Exclusion Rule. ROA.5409.

That provision cannot carry the great weight that the district court placed upon it. As noted above, in the EAA, Congress changed the eligibility requirements for second-draw loans to exclude "any entity that is a type of business concern (or would be, if such entity were a business concern) described in" 13 CFR § 120.110. 134 Stat. at 2002; 15 U.S.C. § 636(a)(37)(A)(iv)(III). But that provision only applies to second-draw loans. 15 U.S.C. § 636(a)(37)(A); *see* 134 Stat. at 2001. Congress then expressly made religious groups eligible for both first- and second-draw loan forgiveness. 134 Stat. at 2007. It made sense for Congress to single out religious businesses for such specifically favorable treatment, given the First Amendment's significant antidiscrimination protections for religious groups. *See Camelot Banquet Rooms, Inc. v. SBA*, 14 F.4th 624, 629 n.1 (7th Cir. 2021).

Although the district court saw this exemption for religious groups as proof that Congress agreed with the Exclusion Rule, ROA.5409, that is "a wafer-thin reed on which to rest such sweeping power," *Biden v. Nebraska*, 143 S. Ct. 2355, 2371 (2023) (citation omitted). By its plain statutory text, the religious exemption from SBA's ineligibility criteria does not purport to change retroactively the meaning of the CARES Act,

including Section 636(a)(36)(D)(i)'s eligibility provision, let alone in a manner that gives SBA unilateral authority to pick and choose winners among categories of small businesses. After all, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Fourth, the district court also briefly worried that reading "any business concern" to mean what it says would render "superfluous" certain other provisions of the CARES Act, ROA.5402–03, but there was no basis for the district court's concern on this front. For example, Section 636(a)(36)(J) provides that SBA may not impose guarantee or collateral requirements, and does not address what companies are eligible for the PPP. Likewise, Section 636(a)(36)(I) only establishes that PPP loans can be awarded in conjunction with other sources of credit, again saying nothing about the classes of borrowers that are eligible for those loans. And with Section 636(a)(36)(D)(iv), Congress expressly applied SBA's normal affiliation rules applicable to the Section 7(a) program to a broader set of businesses concerns in the CARES Act, 134

Stat. at 289, and then waived those rules for certain business concerns in subsequent amendments, *see* 15 U.S.C. § 636(a)(36)(D)(iv).

Fifth, the district court's invocation of the Eleventh Circuit's decision in *In re Gateway Radiology Consultants, P.A.,* 983 F.3d 1239 (11th Cir. 2020), and the Second Circuit's decision in *Pharaohs GC*, including those courts' reliance on the since-defunct *Chevron* deference framework, does not salvage its analysis. *See* ROA.5398–401.

Turning first to *Gateway*, the Eleventh Circuit did not address the Exclusion Rule at all, but dealt with the "sound value" rule, involving different provisions. 983 F.3d at 1248. Because SBA offered a contemporaneous reason for the "sound value" requirement, 13 C.F.R. § 120.150, that action did not suffer from the *Chenery* violation here, 983 F.3d at 1250. *Gateway* did not address whether SBA could exempt businesses from the "sound value" requirement because the Act did not waive this statutory requirement for PPP loans. *Id.* at 1257. Further, *Gateway* has no persuasive value, in any event, because the Eleventh Circuit expressly relied on the now-overruled *Chevron* framework to find an implicit delegation of authority for SBA to specify eligibility

requirements for the PPP, deferring to SBA's "reasonable" interpretation of the CARES Act. *Id.* at 1257–58, 1262.

The Second Circuit's decision in *Pharaohs GC* similarly does not salvage the Exclusion Rule. There, a business featuring nude dancing challenged the Exclusion Rule because, under 13 C.F.R. §120.110(p)(i), the Rule deemed the business ineligible since it "provid[ed] live entertainment of a prurient sexual nature." 990 F.3d at 225. The Second Circuit had no opportunity to address the *Chenery* violation presented here, as no parties raised the issue in that case. *See* Pl.-Appellant Br., *Pharaohs GC, Inc. v. SBA*, 2020 WL 4805770 (2d Cir. Aug. 7, 2020). The Second Circuit appeared to acknowledge that the plain language "any business concern . . . shall be eligible" means *every* business concern, 990 F.3d at 226, but, like the district court here, needlessly worried that reading this text for what it said would render other statutory provisions superfluous, *id.* at 227; *see supra* p.33 (addressing this concern). And the Second Circuit also applied the since-overruled *Chevron* deference framework to find SBA's interpretation reasonable. *Pharaohs GC*, 990 F.3d at 228.

Finally, the district court's theory of the CARES Act violates separation-of-powers principles because it would allow SBA to pick winners and losers when handing out over $800 billion in grants. ROA.5417–20; *see Solid Waste Agency of N. Cook Cnty. ("SWANCC") v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 173 (2001); *but see* ROA.5417–20. Under the district court's approach, SBA may apply the 13 C.F.R. § 120.110 exclusion categories to the hundreds of billions of dollars of first-draw PPP grants, or just reject those ineligibility categories only for the agency's favored industries (as SBA has actually done with regard to gambling establishments vis-à-vis small lending businesses, *see infra* pp.48–49), or, presumably, add new categorical exclusions not previously found in 13 C.F.R. § 120.110. Due to the size of the PPP and its urgency in a national crisis, giving SBA this type of pick-and-choose authority would allow it to decide unilaterally what types of businesses will thrive, and what type will die. The district court's conclusion that the CARES Act gave SBA that authority is contrary to both the major questions and non-delegation doctrines, and thus should be avoided.

The "closely related" major questions and non-delegation doctrines, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 123 (2022)

(Gorsuch, J., concurring), when combined with the constitutional avoidance principle, do not permit courts to assume that Congress handed over vast, unguided power to administrative agencies. The major questions doctrine teaches that courts must carefully review assertions of agency delegations that involve "economic and political significance of that assertion [and] provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 597 U.S. at 721 (citation omitted). Agencies may not use vague language from an "ancillary provision[ ]" "that was designed to function as a gap filler," *id.* at 724 (citation omitted), to effect a "fundamental revision of the statute," *id.* at 728 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231–32 (1994)). The non-delegation doctrine, in turn, requires Congress to provide an "intelligible principle" when it delegates legislative authority. *Gundy v. United States*, 588 U.S. 128, 140 (2019) (citation omitted). The court must "construe the challenged statute to figure out what task it delegates and what instructions it provides." *Consumers' Rsch. v. Fed. Commc'ns Comm'n*, No.22-60008, 2024 WL 3517592, at *10 (5th Cir. July 24, 2024) (en banc) (citation omitted). Interpretations of statutes that violate the non-delegation doctrine must

be avoided. *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

The district court's SBA-can-pick-and-choose theory of the CARES Act is a nonstarter under both the major questions doctrine and the non-delegation doctrine. As to the major questions doctrine, SBA cannot point to any "clear congressional authorization" that allows SBA to exercise such great power over the national economy, *see West Virginia*, 597 U.S. at 721, and the phrase "under the same terms, conditions, and processes as a loan made under" the Section 7(a) program, 15 U.S.C. § 636(a)(36)(B), does not come close to satisfying this doctrine's clear-statement standard. And the district court's theory of the CARES Act would also violate the non-delegation doctrine for much the same reasons. Neither the district court nor SBA identified an "intelligible principle" that guides SBA as to which businesses to exclude or include in the PPP under the district court's SBA-can-pick-and-choose theory—because none exists in the statutory text. Tellingly, when SBA decided

that gambling establishments should receive first-draw loan forgiveness, SBA said that its actions comported with "the policy aim of making PPP loans available to a broad segment of U.S. businesses." 85 Fed. Reg. at 23,451. That principle is found nowhere in the statutory text (or the Exclusion Rule) and, in any event, is so vague that it violates the non-delegation doctrine. *See Consumers' Rsch.*, 2024 WL 3517592, at *10.

The district court agreed that the "CARES Act addresse[s] a matter of national importance" "to confront an unprecedented economic crisis," ROA.5419, but then assumed Congress delegated the same power for the PPP as it did for the Section 7(a) program, ROA.5419, based on an "ancillary" provision, *see West Virginia*, 597 U.S. at 724. That was legal error. SBA "must point to 'clear congressional authorization' for the power it claims." *Id.* at 723. The district court also did not engage with the major questions doctrine because it attempted to cabin Plaintiffs' arguments to the small-lending-business aspect of the Exclusion Rule. ROA.5418–19. But Plaintiffs' arguments focused on the breathtaking power that SBA asserted that it had in this litigation—picking and choosing categories of businesses to receive first-draw loan forgiveness. ROA.5185–86. Nor did the district court identify the intelligible principle

in the CARES Act that guides SBA in using the discretionary authority that the district court read the CARES Act as giving the agency.

II. If The CARES Act Granted SBA The Vast Discretion That The District Court Claimed, Then SBA Violated The APA By Not Giving A Contemporaneous, Reasoned, Consistently Applied Explanation For Excluding Small Lending Businesses

If this Court concludes that the district court was nevertheless correct that the CARES Act gave to the SBA the "discretion" to pick and choose whether and to what extent the Section 7(a) ineligibility criteria would apply to the new PPP, ROA.5402, then the Exclusion Rule would be unlawful for another set of reasons: SBA's complete failure to provide a contemporaneous, reasoned, consistently applied explanation for *why* SBA was exercising that authority to exclude small lending businesses. The Exclusion Rule on its face contains no reason why SBA applied Section 120.110 to exclude small lending businesses. This is an obvious violation of the APA, *infra* Part II.B.1, which neither the district court's explanation nor SBA's post-hoc litigation rationale can evade, *infra* Part II.B.2. And SBA failing to provide a *consistently applied* method for deciding whether businesses excluded from the Section 7(a) program will

also be excluded from the first-draw PPP grant program, *infra* Part II.C.1, is independently fatal to the Rule.

A. The APA requires that "the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained." *Chenery Corp.*, 318 U.S. at 94. Specifically, the agency "must cogently explain why it has exercised its discretion in a given manner and must supply a reasoned analysis for any departure from other agency decisions." *Jupiter Energy Corp. v. FERC*, 407 F.3d 346, 349 (5th Cir. 2005) (citation omitted); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. C*o., 463 U.S. 29, 48–49 (1983).

An agency acts arbitrarily and capriciously when its action fails to "be reasonable and reasonably explained." *Texas v. Biden,* 10 F.4th 538, 552 (5th Cir. 2021) (citation omitted); *see also State Farm,* 463 U.S. at 42–44. Not providing a sufficient explanation for a rule also violates the APA. *State Farm,* 463 U.S. at 48; *see also, e.g., Sw. Elec. Power Co. v. EPA,* 920 F.3d 999, 1014 (5th Cir. 2019). Courts must invalidate agency action due to an "unexplained inconsistency in agency policy," *R.J. Reynolds*, 65 F.4th at 189 (citation omitted), or failure to "treat like cases

alike," *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 985 F.3d 472, 479 (5th Cir. 2021).

It is "a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents of the Univ. of Cal.*, 591 U.S. at 20 (citation omitted). Courts will not uphold agency action because the agency later suggests that "findings might have been made and considerations disclosed which would justify its order." *Chenery Corp.*, 318 U.S. at 94. The "agency must defend its actions based on the reasons it gave when it acted; [this Court] will not let the agency cut corners by entertaining post hoc rationalizations." *R.J. Reynolds*, 65 F.4th at 189 (citation omitted). "[L]itigation affidavits" are one form of post hoc rationalization that cannot supply an adequate basis for agency action. *Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419 (1971).

B.1. In the Exclusion Rule, SBA declared "[b]usinesses that are not eligible for PPP loans are identified in 13 CFR 120.110." 85 Fed. Reg. at 20,812. To the extent that the district court correctly held that SBA has discretion whether and to what to extent to apply the 13 C.F.R. § 120.110 eligibility exclusion to the PPP, *but see supra* Part I.B, this

conclusory sentence falls far short of the reasoned explanation requirement that the APA requires, *see Jupiter Energy Corp.*, 407 F.3d at 349; *State Farm,* 463 U.S. at 42–44. A reasoned explanation is an *essential* component of lawful agency action under the APA. To comply with the APA in issuing the Exclusion Rule, SBA was duty-bound to explain *why* it was excluding small lending businesses from PPP loan forgiveness along with the grounds and considerations underlying the decision. *Chenery Corp.*, 318 U.S. at 94; *see State Farm,* 463 U.S. at 42–44. Yet, the Exclusion Rule does not include *any* explanation whatsoever to the extent the district court is correct that the CARES Act gave SBA discretion here, let alone a "cogent[ ]" explanation sufficient to satisfy the APA. *Jupiter Energy Corp.*, 407 F.3d at 349.

The APA's contemporaneous explanation requirement is not optional. *See Regents of the Univ. of Cal.*, 591 U.S. at 20; *R.J. Reynolds*, 65 F.4th at 189. The APA does not require "artistic refinement" when an agency justifies its decisions, *Chenery Corp.*, 318 U.S. at 95, but an agency must connect its decision with a lawful rationale, *State Farm*, 463 U.S. at 48. SBA failed to do so in the Exclusion Rule itself, meaning that Rule must be vacated.

2. Neither SBA nor the district court pointed to anything in the Exclusion Rule that justifies SBA's decision to exercise its alleged discretion to exclude small lending businesses from PPP loan forgiveness. Indeed, the district court noted that "[n]either party has identified any contemporaneous explanation in the administrative record." ROA.5406. That should have ended the APA analysis. After all, SBA must "cogently explain why it has exercised its discretion in a given manner," *Jupiter Energy Corp.,* 407 F.3d at 349, at the time "*it took the action*," *Regents of the Univ. of Cal.*, 591 U.S. at 20 (emphasis added).

But, remarkably, the district court did not stop there, and instead permitted SBA to rely upon the agency's post hoc, made-for litigation Seaborn Declaration. In it, Director Seaborn "explain[ed] SBA's reasons for stating in the [Exclusion Rule] that '[b]usinesses that are not eligible for [PPP] loans are identified in 13 CFR 120.110,'" ROA.2892, asserting the lack of contemporaneous analysis was justified given the agency's interpretation of the CARES Act and "the extraordinarily short time available," ROA.2893–98. Relying on this declaration to uphold SBA's actions was obviously improper under *Chenery*, 318 U.S. at 95, and the asserted rationale in the declaration does not provide a lawful

justification for SBA's failure to exercise the discretion it now claims the CARES Act gives the agency with regard to first-draw eligibility.

As a threshold matter, the district court's reliance on the Seaborn Declaration clearly violated the APA. Allowing agencies to justify their actions with "*post hoc* rationalizations" deprives the public of fair notice and the opportunity to "respond fully and in a timely manner to an agency's exercise of authority," thus decreasing "agency accountability." *Regents of the Univ. of Cal.*, 591 U.S. at 22–23. "Permitting agencies to invoke belated justifications" can "upset 'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target." *Id.* (quoting *Chenery Corp.*, 318 U.S. at 94).

By relying on the Seaborn Declaration, the district court jettisoned this binding caselaw and the "important values of administrative law" that it serves, *id.* at 22, and instead relied on inapposite precedent to gut the APA's contemporaneous-explanation mandate, ROA.5408 n.125. Citing to a footnote from in *Harris v. United States*, 19 F.3d 1090, 1096 n.7 (5th Cir. 1994), and several district court decisions, the district court claimed that agency officials who participated in an agency action may "explain their actions through affidavits or testimony if no formal

findings were issued by the agency," ROA.5408. But the district court omitted the key point: this narrow exception *only* applies when there is a "strong showing of bad faith or improper behavior," so that the agency can explain that it did not engage in the alleged bad faith or other such misbehavior. *Citizens to Pres. Overton Park*, 401 U.S. at 420; *Ensco Offshore Co. v. Salazar*, No.10-1941, 2011 WL 13203198, at *2 (E.D. La. Apr. 26, 2011); *see City of Coll. Station v. U.S. Dep't of Agric.*, 395 F. Supp. 2d 495, 500 (S.D. Texas 2005). And in *Overton Park*, the Supreme Court made it plain that litigation affidavits are never sufficient. 401 U.S. at 419.

No support exists for the district court's further claim that the improper Seaborn Declaration was "consistent" with "explanatory statements made by the SBA in the [Exclusion Rule] itself." ROA.5408–09. That is, the district court asserted the "Summary" and "Background Information" sections of the Rule "announce SBA's understanding that the CARES Act created the PPP as part of the Section 7(a) loan program." ROA.5408. With all respect, nothing in the summary or background sections articulated anything like the Seaborn Declaration, which is

based upon the theory that SBA did not have sufficient time to exercise the discretion that SBA now claims the CARES Act gave to it.

But even if the Seaborn Declaration was somehow proper in an APA rulemaking challenge, that Declaration fails to offer a *legally sufficient* justification for the Exclusion Rule. The Declaration relies upon "the extraordinarily short time available to publish" the Rule, ROA.2896, but this is not a statutorily permissible reason to refuse to exercise lawfully the discretion that SBA claims it has under the CARES Act, *supra* pp.41–43. After all, the APA does not contain a "we were too darn busy" exemption to the reasoned explanation mandate. And the Declaration fails to explain how, given these time constraints, SBA managed five days later to issue another rule permitting gambling businesses (also listed in Section 120.110) to receive forgiveness because "this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses," 85 Fed. Reg. at 23,451—a reason that facially applies equally to small lending businesses. Far from supporting the Exclusion Rule's validity, the Seaborn Declaration only further confirms that SBA did not make "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

Finally, the district court's discussion of the Seaborn Declaration's time-constraint claims fails under the court's own logic. Specifically, the district court disagreed with Plaintiffs that the Seaborn Declaration "essentially claim[s] that [SBA] was simply too busy to consider all of the relevant factors and explain its reasoning," but then explained that "the relatively short timeline mandated by Congress—15 days for the SBA to issue rules" justified the Exclusion Rule's blanket adoption of Section 120.110's exclusions without reasoned explanation. ROA.5409 (citation omitted). But there is no difference between Plaintiffs' characterization of SBA as claiming it was "too busy," and the district court's excusing SBA's failure to provide a reasoned, contemporaneous explanation based upon the "relatively short timeline" at issue. *Id.*

C.1. The Exclusion Rule is also unlawful for the independent reason that SBA offered no *consistently applied* justification for excluding small lending businesses from PPP loan forgiveness. Five days after excluding lending companies from first-draw loan forgiveness because Section 112.110 exclusions apply to the Section 7(a) program, SBA provided that it would give forgiveness to gambling companies, even though those companies are also excluded under Section 112.110. SBA

claimed that this was justified because granting PPP relief to gambling establishments met "the policy aim of making PPP loans available to a broad segment of U.S. businesses," 85 Fed. Reg. at 23,451, without explaining why the Exclusion Rule did not grant relief to small lending businesses for the same reason. "[B]edrock" APA principles require SBA to "treat like cases alike." *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 479. SBA's failure to apply the same rationale to small lending companies, including failing to explain why small lending companies are not entitled to PPP loan relief under this same reason, violates the APA.

Throughout this litigation, SBA has been unable to explain how denying first-draw loan forgiveness to small lending companies comports with the standard that SBA apparently applied *sub silentio* under the CARES Act: "making PPP loans available to a broad segment of U.S. businesses." 85 Fed. Reg. at 23,451. Nor can it. It makes no sense to deny emergency relief to "financial services and lending services" companies that federal guidance identifies as vital components of the nation's critical infrastructure, while giving such relief to gambling establishments. ROA.5190 n.5. The APA requires reasoned decisionmaking. *Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d

at 479. Instead, SBA's actions "give free passes to its friends and hammer its enemies," something an agency may not do. *Id.* at 480.

2. Contrary to the district court's suggestion, Plaintiffs do not "object to SBA's creation of exceptions for . . . gambling concerns," ROA.5411–12; in fact, Plaintiffs understand the phrase "any business concern" under the CARES Act to cover such businesses, *see supra* Part I.A. Plaintiffs argue that the APA's equal treatment principle prohibits SBA from announcing and applying a standard of "the policy aim of making PPP loans available to a broad segment of U.S. businesses," 85 Fed. Reg. at 23,451, for giving PPP loan forgiveness to businesses—including those excluded from the Section 7(a) program—but for some unstated reason, refusing to apply that same standard to small lending businesses in the Exclusion Rule. The APA does not permit agencies to apply inconsistently the standards that apparently guide their exercise of discretion without reasoned explanation. *State Farm*, 463 U.S. at 48; *R.J. Reynolds*, 65 F.4th at 189.

Further, even putting the legality of the Exclusion Rule (as issued) aside, SBA acted arbitrarily and capriciously in denying loan forgiveness to Plaintiffs and Plaintiff SBA members on the basis that they are

"financial businesses primarily engaged in the business of lending" after SBA had granted loan forgiveness to gambling establishments. Every individual Plaintiff other than Plaintiff VAC[3] (and many AFSA members) challenge not only the Exclusion Rule, but also SBA's final action denying their loan-forgiveness appeals. ROA.249, 5196. The APA allows aggrieved parties to challenge agency action in court, *see* 5 U.S.C. §§ 553(e), 706, and the prohibition against arbitrary decision making applies to SBA denials of PPP loan forgiveness. As SBA cannot justify why gambling establishments receive first-draw loan forgiveness, but Plaintiffs do not, SBA's denial of loan-forgiveness violates the APA. *See Univ. of Tex. M.D. Anderson Cancer Ctr.*, 985 F.3d at 480.

Although the district court correctly noted that agencies need not solve every problem all at one time, and that Plaintiffs could choose to petition SBA for another rulemaking, ROA.5412, that does not come close to addressing Plaintiffs' ripe unequal-treatment concerns. Again, SBA announced in the Exclusion Rule that all businesses ineligible for

[3] Plaintiffs did not certify for appeal the district court's ruling improperly dismissing VAC in this interlocutory appeal, but Plaintiff VAC's challenge to the Exclusion Rule is itself plainly ripe and unhindered by SBA's regulation that only requires exhaustion of "a final SBA loan review decision." 13 C.F.R. § 134.1201(d).

Section 7(a) loans were statutorily ineligible for the new PPP. But, according to the agency's then-secret approach, SBA actually took the position that it has discretion to give forgiveness to any categories of small businesses listed in 13 C.F.R. § 120.110. Then, after AFSA submitted comments objecting to SBA's treatment of small lending businesses at SBA's invitation, 85 Fed. Reg. at 20,817, SBA granted such relief to a different category of small businesses (gambling establishments)—five days after the Exclusion Rule became effective—by relying upon a rationale that applies on its face with full force to small lending businesses, 85 Fed. Reg. at 21,751; *see* 85 Fed. Reg. at 23,451. Thereafter, SBA did nothing to provide relief to small lending businesses or even address AFSA's concerns for four years (to this day), all while denying loan forgiveness to Plaintiffs and many AFSA members under the Exclusion Rule. Nothing in the CARES Act or bedrock APA principles permits such Kafkaesque treatment of the nation's small lending businesses, who relied upon the Congress' promise of relief in the CARES Act to employee many American workers in the face of COVID-19-related restrictions and hardships.

CONCLUSION

This Court should reverse the district court's decision and remand for entry of judgment in Plaintiffs' favor.

Dated: August 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 5, 2024. I served all counsel of record by CM/ECF.

Dated: August 5, 2024

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 10,387 words.

Undersigned counsel certifies that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) Fifth Circuit Rule 32.1 and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2024 in 14-point Century Schoolbook font.

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ADDENDUM

Statutory Addendum

15 U.S.C. § 636. Additional powers

(a) **Loans to small business concerns; allowable purposes; qualified business; restrictions and limitations**

* * *

(36) Paycheck protection program.

* * *

(B) Paycheck protection loans.—

Except as otherwise provided in this paragraph, the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection.

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

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

(I) 500 employees; or

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

Regulatory Addendum

13 C.F.R. § 120.110. What businesses are ineligible for SBA business loans?

The following types of businesses are ineligible:

(a) Non-profit businesses (for-profit subsidiaries are eligible);

(b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);

(c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);

(d) Life insurance companies;

(e) Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);

(f) Pyramid sale distribution plans;

(g) Businesses deriving more than one-third of gross annual revenue from legal gambling activities;

(h) Businesses engaged in any activity that is illegal under Federal, State, or local law;

(i) Private clubs and businesses which limit the number of memberships for reasons other than capacity;

(j) Government-owned entities (except for businesses owned or controlled by a Native American tribe);

(k) [Reserved by 87 FR 38908]

(l) [Reserved by 82 FR 39502]

(m) Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;

(n) Businesses with an Associate who is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty, or is under indictment for a felony or any crime involving or relating to financial misconduct or a false statement;

(o) Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;

(p) Businesses which:

(1) Present live performances of a prurient sexual nature; or

(2) Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(q) Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;

(r) Businesses primarily engaged in political or lobbying activities; and

(s) Speculative businesses (such as oil wildcatting).