

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

HIDALGO COUNTY EMERGENCY )  
SERVICE FOUNDATION, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JOVITA CARRANZA, )  
 )  
Defendant. )

CASE NO: 20-02006  
ADVERSARY  
Houston, Texas  
Friday, April 24, 2020  
(9:01 a.m. to 10:04 a.m.)

HEARING

BEFORE THE HONORABLE DAVID R. JONES,  
UNITED STATES BANKRUPTCY JUDGE

REMOTE AND TELEPHONIC APPEARANCES:

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1 Houston, Texas; Friday, April 24, 2020; 9:01 a.m.

2 (Remote and telephonic appearances)

3 (Call to order)

4 **THE COURT:** All right, good morning, everyone. This  
5 is Judge Jones. Today is Friday, April the 24th, 2020, which  
6 is the docket for Corpus Christi, Texas.

7 First matter on this morning's docket is Adversary  
8 Number 20-2006, Hidalgo County Emergency Services versus the  
9 director of the Small Business Administration. Take  
10 appearances, please.

11 Mr. Holzer, I see you there, you want to lead us off,  
12 please.

13 **MR. HOLZER:** Pete Holzer, your Honor, for the  
14 Plaintiff, Hidalgo County Emergency Service Foundation. I  
15 believe my co-counsel, Kay Walker, is on the line, and also  
16 believe the Chief Restructuring Officer of the Debtor,  
17 Mr. Romero, was going to call in.

18 **THE COURT:** All right, thank you. Good morning to  
19 everyone.

20 Mr. Kincheloe, and I look at the official title, I  
21 said director of the SBA. I see that the title is  
22 administrator. I meant nothing by it, my apologies. Do you  
23 want to go ahead and make your appearance, please?

24 **MR. KINCHELOE:** Thank you, your Honor, Rick Kincheloe  
25 for the Defendant.

1           **THE COURT:** All right, thank you. Anyone else wish  
2 to make an appearance?

3           **MR. ELLIOTT:** This is David Elliott (indisc.) for  
4 Hidalgo County.

5           **THE COURT:** All right, thank you, Mr. Elliott. Good  
6 morning to you. Anyone else?

7           **MR. ELLIOTT:** Good morning (indisc.)

8           **THE COURT:** All right, thank you, Mr. Castillo. Let  
9 me -- Mr. Holzer and Mr. Kincheloe, let me sort of bring you  
10 sort of full circle in my thoughts since yesterday. I spent a  
11 good part of the night reading the entirety of the CARES Act.  
12 I have come to conclude it is a very long and often complicated  
13 document to work your way through, but I spent a lot of time  
14 with it. I also have spent significant time reviewing the  
15 SBA's final interim (indisc.) I believe the number is 2020-  
16 0015. I have also looked at relevant provisions governing --  
17 and, again, I will apologize if I don't get the title right,  
18 but SBA 7(A) loans. I have also thought a great deal about the  
19 jurisdictional issues that are present. And I have gone back  
20 and reviewed some recent decisions by my circuit. And I am --  
21 it is very clear to me that my circuit has concerns as to just  
22 how far the jurisdiction of an Article One court goes. And I  
23 don't want to entertain that argument today. And so to the  
24 extent that I grant any relief, it will be as to this debtor  
25 only in this adversary only. And to the extent that there are

1 what I'm going to call class-like issues, I do not want Rule 23  
2 or anything close to Rule 23 to become part of this discussion.  
3 I -- for a couple of reasons. Number one, it's my belief that  
4 by the time that we were able to work through all of those  
5 issues, the Debtor's economic situation might probably have  
6 dictated the outcome. And that shouldn't be anyone's goal. I  
7 also think that to the extent that there are (indisc.) 23  
8 issues in a case like this, they are better left to my Article  
9 Three colleagues. I think that's all I wanted to say in terms  
10 of what I've done in preparation. Obviously I've read  
11 everything. Mr. Kincheloe, I have read your brief. I have had  
12 a time -- I have had an opportunity to review the authorities  
13 cited in that brief. I've had a chance to do my own research.  
14 So I feel like as though I'm fairly well-educated on the  
15 applicable law. I think I understand the issue. That doesn't  
16 mean that you shouldn't take the opportunity to advance any  
17 position that you think. But I am prepared to talk about a  
18 number of issues as we work our way through that. Any  
19 questions before we get started?

20 **MR. HOLZER:** No, your Honor.

21 **MR. KINCHELOE:** No, your Honor.

22 **THE COURT:** All right, thank you. Mr. Holzer, I  
23 think that it is your burden so if you'd like to lead off,  
24 please.

25 **MR. HOLZER:** Thank you, your Honor. Pete Holzer for

1 the Plaintiff, Hidalgo County Emergency Services Foundation. I  
2 know the Court is up to speed. I'm not going to belabor the  
3 facts that have before you in the three sworn declarations.  
4 The one of Mr. Romero in the sworn complaint, certain  
5 paragraphs of that factual basis. There is a sworn declaration  
6 of Mr. Elliott that was filed last night. And then just a few  
7 moments ago Mr. Ponce's declaration hit the docket. I don't  
8 know if the Court has had a chance to see Mr. Elliott and  
9 Mr. Ponce's declarations.

10 **THE COURT:** I've read Mr. Elliott's. I did not see  
11 Mister you said Ponce, I've not seen (indisc.) --

12 **MR. HOLZER:** Mr. Ponce.

13 **THE COURT:** Yes, I have not seen that one. I am  
14 reading it as you talk. So go ahead.

15 **MR. HOLZER:** I was going to let you finish reading,  
16 Judge.

17 **THE COURT:** Pretty short, direct, four paragraphs, I  
18 got it.

19 **MR. HOLZER:** Okay, so Mr. Ponce really talks about  
20 the background of the company and where it is and touches on  
21 the impact of the coronavirus problem.

22 Mr. Elliott is certainly much more specific addressed  
23 a few things that may have not been in the complaint that we  
24 talked about yesterday, that is the process by which we got to  
25 where we are and what we think happened and so forth.

1           So I think what I really want to do is talk sort of  
2 in general about some of the issues that Mr. Kincheloe raised  
3 in his brief, which is actually quite helpful in my thinking  
4 about how things go together and what the administrator does  
5 and how the government looks at these kind of issues. I think  
6 one very important thing is that despite what we now know from  
7 Mr. Kincheloe's brief, we still don't know who, where, why, or  
8 how the bankruptcy exclusion came to be -- came about as part  
9 of the application form. There's no doubt that it's there in  
10 the form. And I do see the I'll call it a tenuous connection  
11 that the government makes between the implementing rule and  
12 that there's a form, okay, so there is a connection. But it  
13 doesn't really tell us -- we just have no understanding and no  
14 knowledge or any idea how, who, where, or why this exception  
15 language showed up in this application on the PPP loan program.  
16 I can speculate, and here's what my speculation is. First of  
17 all, I think we're all aware that there are other lawsuits now,  
18 a lot of them from what I've read in the papers, where the SBA  
19 is being sued about giving these PPP loans to a larger  
20 corporation, Fortune 500 companies, that really didn't make any  
21 sense to be allowed under the PPP loan program and wound up  
22 exhausting it, all these big-monied corporations. And so  
23 that's ongoing. That's not really before this Court but it's  
24 certainly out there. But it looks to me like what happened in  
25 this agency is they took this CARES Act, which I agree, I've

1 read the whole thing, too, and it's, you know, about what you'd  
2 expect from legislation that occurred over just a period of a  
3 few days and weeks. There is a section that has loans for  
4 large companies and like the airlines and so on and so forth  
5 that does have a bankruptcy exclusion, it's a specific one in  
6 there. And then there's the paycheck protection loan under --  
7 in Section 1100, 1102, that does not. And so it looks to me  
8 like what the SBA has done is they then drafted the bankruptcy  
9 exclusion in the large company section and they've applied it  
10 also to the PPP loan protection. And then conversely they let  
11 the --

12 **THE COURT:** (Indisc.)

13 **MR. HOLZER:** -- large companies into the PPP  
14 (indisc.) --

15 **THE COURT:** Mr. Holzer, if I could just interrupt you  
16 because I want to make sure that the record is clear. The  
17 bankruptcy exclusion is actually in the section for midsized  
18 businesses defined those companies with more than 500, less  
19 than 10,000 employees, can be found at page 193 of the Act. I  
20 have read it, I'm familiar with it. I just -- I don't think  
21 there necessarily is a section that I read with respect to  
22 large-sized businesses. The actual subtitle of the provision  
23 are loans for midsized businesses.

24 **MR. HOLZER:** All right, (indisc.) --

25 **THE COURT:** (Indisc.)

1           **MR. HOLZER:** -- then I apologize, Judge. I conflated  
2 those two and I've done the same mistake that I'm accusing the  
3 SBA of. So I'm not -- I guess the point being, there's no ill  
4 will. This is not a intentional ill will, they're out to get  
5 the bankrupt companies. I think it's just a mistake in a badly  
6 implemented process that they've done here, as evidenced by the  
7 lawsuits for the big companies getting into this program and  
8 exhausting it. In any event, I think it's an abuse of  
9 discretion the way they've handled this and the way they've put  
10 this bankruptcy exception. They've conflated these two  
11 different programs. And then we're faced with this form that  
12 has this exception and bank lenders that look at the form and  
13 say, well, here's the exception, it's right here in the form I  
14 have to use so I can't give you a loan. So with respect to the  
15 abuse of discretion, and we are arguing, Judge, both Section  
16 525, 523, I forget the number, is discrimination and a exercise  
17 of authority that doesn't comply with the statute. And then so  
18 I want to jump down to some cases Mr. Kincheloe has. His brief  
19 talks about the Anti-Injunction Act in section -- in the Small  
20 Business Act. And I looked at those cases. I have a couple of  
21 cases, your Honor, if you need them that explain why in a  
22 situation like this, the -- in a situation where the  
23 administrator of a government agency exceeds the scope of their  
24 authority like they're arguing here, that Anti-Injunction Act  
25 doesn't apply. And I would start with the Supreme Court. It's

1 the case is -- oh, where'd it go? *South Carolina versus Regan*  
2 at 465 U.S. 367 from 1984. That case is a holding where the  
3 anti-injunction provisions are inapplicable where Congress  
4 didn't provide the plaintiff with an alternative legal way to  
5 challenge the administration's ruling. And that was a case  
6 related to taxes. We have *Canterbury Career School versus*  
7 *Riley*, District of New Jersey, 1993, 833 F.Supp. 1097 basically  
8 saying the same thing. This is a Secretary of Department of  
9 Education has a similar anti-injunction provision in their  
10 statute. The court said if the defendant, the Secretary of  
11 Department of Education, has exceeded the scope of his  
12 authority, then this court has jurisdiction to grant  
13 appropriate injunctive relief, notwithstanding the anti-  
14 injunction provision. And then, lastly, a case out of this  
15 court from Judge Schmidt back in 1992, an unreported case, it's  
16 a 1992 Westlaw 551256 pointing out that the Fifth Circuit has  
17 left (indisc.) by implication recognizing that injunctive  
18 relief is permissible where the government agency exceeds its  
19 statutory authority. So with those cases and my arguments, I  
20 think the question of whether or not this Court has  
21 jurisdiction authority to enter an injunction, I think it does.  
22 And I think it's well-supported in the law and under the facts  
23 of this case.

24           So I wanted to talk about next a -- what I think is  
25 why this statute does exceed the administrator's authority.

1 And it's partly a policy argument. So let's talk about a  
2 hypothetical. So let's say you have a loan applicant who's  
3 preparing for bankruptcy, hired bankruptcy counsel, hired the -  
4 - hired a -- hired bankruptcy lawyer, paid them a retainer,  
5 they're working on the schedules, but they haven't filed  
6 bankruptcy yet. And so would that company -- would that  
7 potential debtor qualify for these loans? Yes, because they  
8 could answer that question "no." Let's talk about another  
9 company (indisc.) --

10 **THE COURT:** Could they? I mean, Mr. Holzer, could  
11 they?

12 **MR. HOLZER:** Could they --

13 **THE COURT:** (Indisc.)

14 **MR. HOLZER:** Could they?

15 **THE COURT:** I mean, if you look at the -- if you  
16 compare the wording in the portion of the statute involving  
17 midsized debtors, it actually says you aren't eligible if you  
18 are a debtor in a case. The words in the form are: "presently  
19 involved in a bankruptcy case." What does that mean? Does  
20 that mean that if you (indisc.) a claim against someone in  
21 bankruptcy, that you're not eligible under the Act? Does it  
22 mean that if you consult with a bankruptcy (indisc.)  
23 contemplated bankruptcy that you are not eligible for  
24 participation (indisc.). What do the words "presently  
25 involved" actually mean in your mind?

1           **MR. HOLZER:** Yes, I don't know because you're right,  
2 a creditor in a bankruptcy could be presently involved. A  
3 (indisc.) --

4           **THE COURT:** What if you're (indisc.) who has a lease,  
5 are you presently involved in a bankruptcy case?

6           **MR. HOLZER:** Right. I do think the most natural  
7 construction there is that you're a debtor in bankruptcy. I'm  
8 not sure that there's any difference in the way I look at that  
9 language and the way the government looks at the language. But  
10 I do agree with the Court that there is some ambiguity. But  
11 that's -- if you look at that language, a company that's  
12 preparing to file bankruptcy is not presently involved in a  
13 bankruptcy. It's just thinking about it. And if it hasn't  
14 already, would it qualify for this loan, could it check the  
15 "no" box on that form? I think there's no doubt it could and  
16 should and would qualify for a loan. So let's talk about  
17 another company that's insolvent and hasn't hired a bankruptcy  
18 lawyer, but they're broke, they (indisc.) business, all the  
19 employees have gone home, they're out of money, and they have  
20 no idea whether they're going to survive, and can they apply  
21 for a loan, you know, get the employees (indisc.) and the  
22 answer is, yes, they would check that box "no." And so another  
23 company that's virtually shut down, it's overdrawn on its bank  
24 account, and would they be able to check the "no" box? The  
25 answer is of course, they check the "no" box. And so all three

1 of those hypotheticals are ways where a company who is  
2 completely uncreditworthy can get one of these PPP loans. So  
3 compare that to a debtor in possession that's operating,  
4 complying with all the rules, filing its monthly operating  
5 reports, running its business, and not only that, it's a  
6 systemically important business, particularly in the time of an  
7 active pandemic, and operating, but they don't qualify. It  
8 simply makes no sense for the other companies that would  
9 qualify to be able to get one of these forgivable loans and for  
10 my client (indisc.) that I'm (indisc.) is not.

11 **THE COURT:** Mr. Holzer, let me go back to your  
12 example because I'm not sure you really vetted that example  
13 out. What if you have a company that is as you said  
14 contemplating bankruptcy, and you have an owner in the business  
15 who owns one percent of that company and is a creditor in a  
16 large oil and gas bankruptcy case that's pending because they  
17 own -- that person owns a small royalty interest, could the  
18 company check the box or not?

19 **MR. HOLZER:** Haven't though through that one, Judge.  
20 I would think they could check the "no" box. But, you know,  
21 there's certainly a --

22 **THE COURT:** (Indisc.)

23 **MR. HOLZER:** -- (indisc.) of the language --

24 **THE COURT:** Read the language --

25 **MR. HOLZER:** -- that they would -- yeah.

1           **THE COURT:** Read the language. Is the business or  
2 any owner presently involved in any bankruptcy?

3           **MR. HOLZER:** That's right. I think that you're  
4 highlighting, your Honor, the flaws in this -- in what this  
5 form says and all the ambiguities that are evidence of a poorly  
6 instituted program beyond the administrator's authority. All  
7 right, so let's see. So that's arbitrary and capricious is  
8 what I think and gives you a basis to enter an injunction.

9           Let me just say that I do understand that the limit  
10 on the jurisdiction. We never intended to seek relief for  
11 anybody but my client, the Plaintiff in this lawsuit. Whether  
12 it would be appropriate for a nationwide injunction or even a  
13 Southern District injunction is not our concern. I'm only  
14 worried about my client. My client only cares about its  
15 survival.

16           So I wanted to then go to the question of whether or  
17 not this is bankruptcy discrimination. I do agree in reading  
18 Mr. Kincheloe's brief, he cited the Exquisito (phonetic) case  
19 out of the Fifth Circuit and the Ares (phonetic) case out of I  
20 believe it's the Fourth Circuit. And they're both in his brief  
21 and those are cases that we came up in our research as well.  
22 And I do think they -- those two cases are useful to compare  
23 and contrast. Exquisito involved a program that the court  
24 said, well, this is really about the jobs, not about a loan.  
25 And so the -- so it was discrimination. Ares was more about a

1 loan than anything else and so that was not. So the case law  
2 does say that if it's just a loan program, then the anti-  
3 injunction -- excuse me, the -- it's not bankruptcy  
4 discrimination.

5           So let's look at what we have here. Is this more  
6 like the facts in *Exquisito* or more like the facts in *Ares*? I  
7 think it's clearly this is more about saving jobs, preventing  
8 collapse of the economy. It's not really about a company  
9 borrowing money that under the statute it has to show its  
10 ability to pay back. And that's in fact if you read the  
11 requirements for qualify for a loan, that's just not in there.  
12 You just have to say what you're going to use it for and that's  
13 what my client needs it for is to pay payroll and help with the  
14 rent and the other permissible uses for the funds. It's really  
15 more of a grant to protect the economy, save jobs, than it is a  
16 straightforward loan. So I would say that the cases that say  
17 loans don't apply really don't have any impact here.

18           There's another case Mr. Kincheloe cited in his  
19 brief, the *Toth*, T-O-T-H, case, and that also involved an  
20 extension of credit which is really not what's happening here.  
21 This is a different animal. So with that, Judge, I think I've  
22 said everything I wanted to say for now. I think the facts are  
23 pretty clear what happened that we qualify, except for this  
24 arbitrary inclusion of a bankruptcy exception on the  
25 application form, and that it is bankruptcy discrimination and

1 the Court should grant an injunction.

2 **THE COURT:** All right, thank you. Mr. Kincheloe.

3 **MR. KINCHELOE:** Yes, your Honor, Rick Kincheloe.

4 (Indisc.) start with Mr. Holzer's discussion of he -- the  
5 reasons for the exclusion. And I will say I really appreciate  
6 Mr. Holzer sending me the cases he was going to discuss before  
7 today. It certainly was an extreme professional courtesy.

8 I have received a regulation that I understand is  
9 going to be published imminently like Monday. I can broadcast  
10 it for the Court if the Court would like to read it because I  
11 think it does explain (indisc.) saying about the wording of the  
12 application but the regulation that's going to be published  
13 does add some color to that. So just this is going to be at 13  
14 CFR (indisc.) and 121. And then the bankruptcy exclusion  
15 appears here. And so this is that if an applicant is currently  
16 a debtor in bankruptcy or if it files bankruptcy before the  
17 loan is funded, then it is ineligible. And this -- the second  
18 paragraph explains kind of the rationale. There's a concern  
19 that the SBA loses control over the funds because they become  
20 property of the estate. There's also a concern the Court --  
21 your Honor, is the Court done reading? I'll stop sharing so I  
22 can go back to video.

23 **THE COURT:** Yeah, no, I read it. Thank you.

24 **MR. KINCHELOE:** Okay.

25 **MR. HOLZER:** Mr. Kincheloe, I'm -- I didn't --

1           **MR. KINCHELOE:** Oh, I --

2           **MR. HOLZER:** -- (indisc.) second page.

3           **MR. KINCHELOE:** The second page --

4           **MR. HOLZER:** (Indisc.)

5           **MR. KINCHELOE:** -- is just -- I can send it to you  
6 shortly.

7           **MR. HOLZER:** Okay, that'll be fine.

8           **MR. KINCHELOE:** I don't think it was relevant. But  
9 the other concern is the pandemic has created a unique public  
10 need with unprecedented unemployment to get loans funded  
11 extremely quickly. And in this need for speed, the traditional  
12 underwriting is just not going to work. it's going to take too  
13 long. And so to avoid that traditional underwriting and to get  
14 this -- get these loans out guaranteed by SBA as quickly as  
15 (indisc.) could, the decision was made to say if you're in  
16 bankruptcy, you're excluded. We certainly had maybe a good --  
17 it can be argued whether that's a good or bad decision from  
18 public policy standpoint but at least that was the motivation  
19 is get these loans out quickly and minimize the amount of  
20 underwriting that needs to be done.

21           **THE COURT:** In fact there really is no underwriting  
22 that's done, right? I mean, aren't the lenders authorized to  
23 simply accept what's on the form and act just on the form, and  
24 so long as they rely on the form, then they are protected;  
25 isn't that the way that it works?

1           **MR. KINCHELOE:** From the interim rule I've read, yes.  
2 But from the --

3           **THE COURT:** (Indisc.)

4           **MR. KINCHELOE:** -- regulation I just posted, I  
5 haven't read the entire regulation. I got it maybe five  
6 minutes before we started. And so unless something in the  
7 regulation changes that, that's my understanding.

8           **THE COURT:** Got it.

9           **MR. KINCHELOE:** Turning to the jurisdictional issue,  
10 admittedly the provision in the Small Business Act is unique.  
11 I'm not aware of any other provision this broad. And certainly  
12 there are other anti-injunctive language that appears in  
13 various statutes. You know, the Anti-Injunction Act deals  
14 (indisc.) I think that's a little different. The one thing I -  
15 - there's a case -- well, it's -- there's so many other cases  
16 out there, and one that Mr. Holzer shared, where there's a  
17 statute that said except as otherwise provided herein, you  
18 can't issue an injunction. And certainly that language seems  
19 to suggest that, well, okay, if you violate the statute, we can  
20 enjoin you, we just can't enjoin you otherwise. For 634, 15  
21 USC 634, I don't see any similar condition. I mean, it just is  
22 (indisc.) the Fifth Circuit (indisc.) decision I cite at  
23 footnote six which, you know, I suppose we could, you know,  
24 dispute whether it's holding or dicta, but it's a pretty  
25 blanket assertion, thou shalt not enjoin the SBA. And again we

1 can argue whether Congress made a good or bad policy decision  
2 in enacting that but I think that's the law. And so turning to  
3 106, honestly 106 waives sovereign immunity for the entire  
4 Federal government for purposes of 525. But (a)(4) states that  
5 waiver is only to the extent it's consistent with applicable  
6 non-bankruptcy law, and so I think we have to turn to this  
7 likely unique provision applicable to the SBA administrator and  
8 say, courts can't enjoin the SBA. Whether that's a good or bad  
9 idea, so be it but that's what it says. And so I think  
10 106(a)(4) coupled with 15 USC 634 I think means that there is  
11 not a waiver of sovereign immunity for an injunction against  
12 the SBA, depriving the Court of jurisdiction.

13 On -- moving to the 525(a) argument, it -- in the  
14 Exquisito case, as I read it, it seemed to -- one thing that  
15 was distinguishable is there was a preexisting relationship  
16 between the SBA and the Air Force. That's one thing that's --  
17 is noteworthy. The injunction in that case was not against the  
18 SBA, it was against the Air Force. The -- there was a pre-  
19 bankruptcy relationship in that case. And the Fifth Circuit  
20 kind of thought through it and said, you know what, this  
21 program is really designed to train minority-owned businesses  
22 and so we view it more in the nature of a franchise. Fine, if  
23 you're going to call it a franchise then, yeah, it's covered  
24 under 525(a). What the Fifth Circuit has not decided, at least  
25 as far as I can find, which the (indisc.) court, the *Toth* court

1 and I believe the (indisc.) Watts (phonetic) court in the Third  
2 Circuit, and then the Second Circuit in Goldrich (phonetic) --  
3 well, Goldrich dealt with student loans which has been  
4 abrogated by 525(c), --

5 **THE COURT:** Right.

6 **MR. KINCHELOE:** -- those courts look at the decision  
7 to extend credit, more specifically in the (indisc.) case  
8 extend a guarantee of credit. That's something totally  
9 different. It doesn't trigger this traditional gatekeeper  
10 function of the government. Like, you know, for example, state  
11 bar licensing, 525 expresses this desire that we don't want  
12 lawyers to file bankruptcy, then they'd be unable to practice  
13 law because they filed bankruptcy. No, we want them to be able  
14 to continue to engage in the profession. Real estate brokers,  
15 any other number of professions, we want them to continue being  
16 able to engage in that profession and we don't want the  
17 government's gatekeeper role to be influenced by bankruptcy.  
18 That doesn't mean the government is not allowed to discriminate  
19 in other ways. Again, maybe right, maybe wrong, but 525(a)  
20 says it only bars discrimination in the context of licenses,  
21 permits, charters, franchises, or other similar grant. The  
22 (indisc.) case and the other ones, *Toth* and *Watts*, say that a  
23 loan guaranteeing a loan is not really similar to these other  
24 claims because it doesn't implicate this gatekeeper function.  
25 And because it's not similar, it's not covered by 525(a) so we

1 don't even need to get to the question of whether the  
2 government was motivated by the bankruptcy. It's just not  
3 covered.

4           On the -- I heard -- as I understand the complaint,  
5 there's not an APA claim asserted and so it's just whether  
6 statutory authority was exceeded. The language in the CARES  
7 Act is very broad. I mean, it's just the language for 1102  
8 implementing the PPP loan guarantees (indisc.) may and that  
9 leaves a very broad, open-ended grant of authority, leaves a  
10 lot of discretion in the administrator which makes sense given  
11 the context. I mean, this is imagine probably one of the  
12 fastest pieces of legislation ever to make it through House,  
13 Senate, and White House. And --

14           **THE COURT:** Well, wouldn't you agree that that  
15 discretion has certain boundaries on it? For instance, that  
16 discretion shouldn't be allowed to frustrate the purpose of the  
17 Act itself, agreed?

18           **MR. KINCHELOE:** (No audible response)

19           **THE COURT:** (Indisc.) there are limits. You simply  
20 can't say that you can implement rules and make an argument  
21 that says, well, that discretion allows me to implement rules  
22 that frustrate the application of the law.

23           **MR. KINCHELOE:** So, your Honor, --

24           **THE COURT:** (Indisc.)

25           **MR. KINCHELOE:** -- I agree that there are limits but

1 I think the use of the word "may," as I read the statute now  
2 (indisc.) didn't happen and no one intends for this to happen  
3 but if we're just taking the thought experiment to the extreme,  
4 I think the use of the word "may," the administrator can say,  
5 okay, I've got this authority, I don't have to exercise it.  
6 And I think Congress would probably come back and put a shell  
7 in there. But I think the way the statute's written, it's  
8 pretty broad. Now, there are other limits in the Small  
9 Business Act, like the administrator has to ensure that the,  
10 you know, loans made under this section are of such sound value  
11 or so secured as reasonably to assure repayment. So (indisc.)  
12 administrator doesn't do that, the administrator violates the  
13 statute. But because Congress prohibited injunctions on the  
14 SBA, it really creates this strange space where, yeah, the  
15 statute says the administrator has limits but I don't think the  
16 statutory -- the statute authorized an injunction against the  
17 administrator if the administrator exceeds those limits.

18 **THE COURT:** All right, so let me ask you this. And  
19 we're going to come back to that issue in a second. But do I  
20 even need to get there? Didn't the SBA effectively delegate  
21 the authority to determine who's eligible to the participating  
22 financial institutions?

23 **MR. KINCHELOE:** I don't (indisc.)

24 **THE COURT:** Let's take a practical example.

25 Mr. Holzer comes into his local financial institution for a PPE

1 -- I'm sorry, a PPP loan. He fills out the application. Who  
2 makes the decision of whether or not he's eligible?

3 **MR. KINCHELOE:** So the -- as I read (indisc.) then  
4 the bank has to receive the form, and as long as the bank  
5 follows the form and the guidance, it may issue the loan and  
6 it's going to be guaranteed by SBA. But it is still SBA who  
7 decided those parameters that go into the form.

8 **THE COURT:** I'm not arguing with you on that. I'm  
9 just saying who makes the decision of who's eligible and who's  
10 not? The bank. Has to be that way. SBA couldn't do it. SBA  
11 doesn't have enough employees, it doesn't have enough local  
12 offices. It had to delegate part of that process to financial  
13 institutions; otherwise, it would have been a program with  
14 absolutely no ability to implement. I'm not complaining. I'm  
15 just trying to be practical about it.

16 **MR. KINCHELOE:** Right, yeah. So again with the need  
17 for speed, the analysis of whether a borrower meets the  
18 appropriate criteria is sent to the banks.

19 **THE COURT:** Right. And in fact there really isn't an  
20 underwriting function. I mean, if your instruction is  
21 (indisc.) this form and you make the decision off the form,  
22 there really isn't an underwriting function. There's no  
23 evaluation of ability to repay, there's no evaluation of  
24 collateral. And you know what I'm doing, I'm undermining your  
25 argument that it's consistent with the (indisc.) power of SBA

1 7(A). You know, that just doesn't exist in this program. In  
2 fact, let's just be practical. The entire intent of the  
3 program is for people not to pay this back. It's a way of  
4 getting money from the government to people that are being  
5 harmed. And so long as they use it in the right way, they  
6 don't have to pay it back. Am I -- tell me where I'm wrong  
7 about that.

8 **MR. KINCHELOE:** Your Honor, I (indisc.) agree with  
9 the Court that the intent was to get money to people who needed  
10 it quickly. And certainly to the extent it's used for the  
11 proper purpose, it is intended to be forgiven. And, you know,  
12 I think the Court's correct, I mean, the amount of underwriting  
13 is virtually nil. I mean, the SBA set up parameters and said  
14 banks (indisc.) somebody meets these parameters, that's the  
15 amount of underwriting we're going to do. And one of the  
16 decisions made by SBA was, well, since we can't really -- we  
17 don't have the time to go through and do a traditional credit  
18 inquiry, we're going to exclude companies in bankruptcy, you  
19 know, together with this purpose of we can't control the money  
20 once it goes into the bankruptcy estate (indisc.)

21 **THE COURT:** (Indisc.) said that, I mean, (indisc.)  
22 hundred and eighty degrees wrong, I mean, isn't part of my job  
23 to ensure that debtors act in accordance with the law? I mean,  
24 I would think, I mean, assuming that I'm doing my job, and I  
25 try really hard to do my job every day, isn't there actually a

1 greater level of oversight than for someone who's not in  
2 bankruptcy who can simply theoretically do what they want to  
3 with the money once they get it?

4 **MR. KINCHELOE:** I disagree, your -- I disagree with  
5 your Honor's point. It's not a question of oversight. I think  
6 it's a question of the way the statute is written, if Hidalgo  
7 receives a PPP loan outside of bankruptcy, they are free to  
8 choose how to use those funds. Now, --

9 **THE COURT:** Are they?

10 **MR. KINCHELOE:** -- (indisc.) they use -- well, I  
11 think they are. But if they use it for certain purposes,  
12 they're required to repay it. If they use it for payroll  
13 (indisc.) gets forgiven but if let's say company receives a  
14 loan, a week later files bankruptcy. Well, all of those funds  
15 then become property of the estate, subject to administrative  
16 claims. And I don't think there's anything in the CARES Act  
17 which would cause the proceeds of a PPP guaranteed loan to be  
18 excluded from property of the estate or to be immune from the  
19 claim of (indisc.) creditors or priority creditors.

20 **THE COURT:** Okay.

21 **MR. KINCHELOE:** So that's the motivation. Again, the  
22 statutory authority is broad. I hear the Court's comment about  
23 underwriting and the requirement to make sound loans. This is  
24 the administrator's decision. But I go back to the anti-  
25 injunction language in the Small Business Act that even to the

1 extent the administrator is wrong, the United States has not  
2 waived sovereign immunity for an injunction to be issued  
3 against the administrator.

4           **THE COURT:** And tell me why I can't issue -- because  
5 it -- there's no doubt that the financial institution is  
6 (indisc.) participation with the SBA. I think you just told me  
7 they are given follow the form and process these loans. And  
8 Rule 65 gives me the ability to issue injunctive relief against  
9 anyone acting in participation with the parties, agreed?

10           **MR. KINCHELOE:** Would the Court give me a moment?

11           **THE COURT:** Of course. It would be 65(d)(2).  
12 Actually (d)(2)(C).

13           **MR. KINCHELOE:** So, your Honor, I don't think the  
14 Court can enjoin the bank. As I read this and I -- the Court  
15 knows it way better than I do, but at least my quick reading of  
16 the language of the rule is this would be if the Court enjoined  
17 the administrator and anyone acting in concert with her, that  
18 would capture this. I don't know that this lets the Court  
19 enjoin the bank without also enjoining the administrator;  
20 because without an injunction against the administrator, the  
21 administrator doesn't have to guarantee the loan.

22           **THE COURT:** Well, I think -- I agree with you that I  
23 can't order the SBA to guarantee a loan. I 100 percent agree  
24 with that. The issue is can I order that the application be  
25 considered without those four or five words. And if you're

1 telling me the person making that decision is, what was it,  
2 PlainsCapital Bank, Mr. Holzer?

3 **MR. HOLZER:** Yes, your Honor.

4 **THE COURT:** You're telling me that I can't order  
5 PlainsCapital Bank to consider the application without giving  
6 any consideration for those words in the form?

7 **MR. KINCHELOE:** Then again I don't know that it  
8 becomes a can't. I think it becomes a question of should or  
9 should not. And with that question of whether or not the Court  
10 should enjoin PlainsCapital Bank, I think there is a  
11 substantial threat of irreparable injury to the bank because if  
12 the bank --

13 **THE COURT:** (Indisc.)

14 **MR. KINCHELOE:** Well, because I think if the bank  
15 follows the Court's order, ignores that line, and then issues  
16 the loan, I think they are at risk if the SBA says we weren't  
17 ordered to guarantee it, we're not guaranteeing it.

18 **THE COURT:** Okay, so you just say that I need to  
19 order the SBA to comply with the law if I find discrimination.

20 **MR. KINCHELOE:** No, your Honor.

21 **THE COURT:** Is that it?

22 **MR. KINCHELOE:** I -- that -- your Honor, on that one  
23 I think it's a question of can or cannot.

24 **THE COURT:** All right. So you're telling me that I  
25 took an oath to uphold the statute, and if I find the statute's

1 been violated by the SBA, that I can do nothing about it?

2 **MR. KINCHELOE:** I think the Court is unable to issue  
3 an injunction against the SBA, even if the statute has been  
4 violated.

5 **THE COURT:** So tell me what it is I can do.

6 **MR. KINCHELOE:** I don't know, your Honor. For today  
7 (indisc.) TRO, I do not think the Court can enter a TRO.

8 **THE COURT:** Got it, okay. Anything else?

9 **MR. HOLZER:** Your Honor, briefly.

10 **THE COURT:** No, I don't need anything else.

11 **MR. HOLZER:** Okay (indisc.)

12 **THE COURT:** Anything else, Mr. Kincheloe?

13 **MR. KINCHELOE:** Yes, your Honor. Just in closing, I  
14 do dispute that the public policy considerations weigh in favor  
15 of enjoining -- of issuing an injunction allowing this loan to  
16 go -- to be made and guaranteed -- and/or guaranteed due to the  
17 policy considerations. If the SBA is required to implement  
18 traditional underwriting requirements, it is likely to slow  
19 down this program and likely to delay proceeds to other  
20 applicants.

21 **THE COURT:** Well how can it implement traditional  
22 underwriting when it's been told what to do?

23 **MR. KINCHELOE:** Your Honor, I mean --

24 **THE COURT:** Simply because if I were to say that  
25 there has been discrimination, that doesn't require the SBA to

1 do anything other than to not discriminate.

2 (Pause)

3 MR. KINCHELOE: Your Honor, I -- sorry, I don't think  
4 I understand the Court's point.

5 THE COURT: I got it. Anything else?

6 MR. KINCHELOE: No, your Honor.

7 THE COURT: All right. So I have before me the  
8 Debtor's request for a temporary restraining order against the  
9 administrator of the SBA. I do find that I have jurisdiction  
10 over the matter pursuant to (indisc.) Section 1334. I do find  
11 that the adversary and the request for injunctive relief  
12 constitutes a core proceeding under 28 USC Section 157. I  
13 further find that I have the requisite constitutional authority  
14 under the guidance given by our Supreme Court to enter, to the  
15 extent it is a final order, and I'm not sure it is, but it may  
16 practically be a final order, I do find that I have the  
17 requisite constitutional authority to enter final order.

18 I want to go through a couple of the arguments  
19 because, again, I spent a lot of time reading all of the  
20 relevant wording. And there are certainly the arguments that I  
21 simply -- they need to be addressed and I simply think that  
22 they just have no foundation in logic or law or fact. I want  
23 to start with the argument that (indisc.) that there remains  
24 intact, and I wrote it down as a quote, that there's this  
25 (indisc.) ensuring that there is sound value or so secure as to

1 reasonably assure repayment. That is so out of context in this  
2 program that it's a frivolous argument. The entire --  
3 everything said by our President, everything put out by our  
4 administration, everything put out by our Congress reflects  
5 that this was an emergency reaction to a series of events that  
6 had never before been experienced. This isn't a loan program.  
7 This is a support program. It is phrased the way it is to try  
8 and ensure that the money ends up in the right hands and used  
9 for the right purposes. It is intended to protect tax-paying  
10 citizens from the effects of government shutdowns, stay-at-home  
11 orders, and simply the public not being able to engage in  
12 ongoing commerce. To suggest that this is a program that  
13 enjoys underwriting and scrutiny in terms of who receives the  
14 money is to simply ignore the obvious. The SBA's own rules  
15 (indisc.) effectively look at the form, make the loans. You  
16 make the loans, and so long as they're used for the right  
17 purposes, there's no need to pay it back. That is not a  
18 traditional loan program. There is no collateral valuation,  
19 there is no credit worthiness test. And, again, to make that  
20 argument is simply frivolous.

21 I also want to talk about the 525 argument. And I  
22 take a quote out of the briefs. It says that issues under 525  
23 (indisc.) the gatekeeper role of the governments or a  
24 government entity in determining who may pursue certain  
25 livelihoods. All of the cases cited have dealt with the

1 government engaging in regulated commerce. There were  
2 commercial alternatives, there were private sector  
3 opportunities. Practically speaking, this program isn't  
4 designed to be a commercial product; it is a support product.  
5 The only entity that would ever engage in this type of activity  
6 is the government because, again, it's a support for citizens.  
7 I can think of no greater example of the government performing  
8 its gatekeeping role as to who can engage in commerce and  
9 pursue certain livelihoods than this particular program;  
10 because if we didn't have this program, there would be no  
11 ambulance services, there would be no nail salons, there would  
12 be no convenience stores. Society would be in a very difficult  
13 (indisc.) so I do think the requirements of Section 525(a) are  
14 absolutely in play. I do think that the choice of the words in  
15 the form -- and, again, I made the example with Mr. Holzer, and  
16 I am bothered by the use of the words. I disagree with  
17 Mr. Holzer that, well, of course everybody knows what that  
18 means, it's simply if you're a debtor. Couldn't be further  
19 from the truth. Congress knew how to say we don't give these  
20 loans to debtors. They did it within the CARES Act itself.  
21 And then to have a form that simply says if an owner or a  
22 business is presently involved in a bankruptcy, I have zero  
23 idea what that means. It means if you have filed a proof of  
24 claim in the General Motors bankruptcy umpteen years ago and  
25 haven't yet received a final distribution on your claim, you

1 have to check that box "no." That's silly. It's even sillier  
2 in light of the purpose of this program.

3 I also have found but I've not been cited to any  
4 legitimate basis for including that language in the form. I  
5 take umbrage of the fact that if I look at question one and I  
6 look at the list and I think just rules of normal construction,  
7 and I realize that this is not a statute but it's a form that  
8 is derived from a statute, it says if a business or owner is  
9 presently suspended, debarred, proposed to be debarred declared  
10 ineligible, voluntarily excluded from participation in this  
11 transaction by any (indisc.) department or agency all conduct  
12 which society frowns upon, involves potentially wrongful acts,  
13 involves potentially criminal conduct. And then as an add-on,  
14 it says: "Or presently involved in any bankruptcy." Plain  
15 meaning: as a creditor, as a landlord, as a partner in another  
16 business, as a shareholder in another business. It's entirely  
17 inappropriate that those words were added into that form in  
18 that list in that manner. And I see no authority anywhere for  
19 including those words in that form. It serves no purpose. I  
20 do find that by including the words "or presently involved in  
21 any bankruptcy," they are intended to be discriminatory. They  
22 are intended to be discriminatory toward debtors for reasons  
23 offered that somehow we lose control of the money, again I find  
24 to be completely frivolous. I cannot imagine anything less  
25 controlling than to simply give out money with no underwriting,

1 with no oversight, and then complain that if I have a Federal  
2 judge who makes sure that the debtor complies with the law,  
3 ensures that the debtors file monthly operating reports, ensure  
4 that copies of bank statements are filed on the docket every  
5 month, that they somehow lost control. I simply don't buy it.  
6 I find the arguments to lack any good faith.

7 I am worried about the argument that I cannot enjoin  
8 the administrator of the SBA. I agree I can't tell the SBA  
9 administrator what loans to guarantee, what loans to grant. I  
10 simply do not accept that when I have evidence of bankruptcy  
11 discrimination that I can do nothing about it. And if I am  
12 wrong about that, I am very certain that my Article Three  
13 colleagues will tell me that I am wrong, and I will accept that  
14 criticism. But this can't be what Congress intended. This  
15 can't be the way that we are supposed to treat our fellow man  
16 in this time. It's inconceivable to me that this distinction  
17 could be drawn. The people that need the most help and who  
18 have sought protection under our laws are the people who are  
19 the targets of discrimination in a government support program;  
20 can't possibly be.

21 So I am going to grant the TRO. I am going to enjoin  
22 the administrator of the SBA and all those acting in concert  
23 with her, which includes PlainsCapital Bank, in the following  
24 manner. I am requiring that the application form for the  
25 paycheck protection program submitted by Hidalgo County

1 Emergency Service Foundation be considered in accordance with  
2 the program without the words in question one: "or presently  
3 involved in any bankruptcy." They are stricken from  
4 consideration. The application shall be considered on its  
5 merits and in accordance with the law with those six words  
6 stricken. It is my hope that my government that I serve will  
7 realize the error that it has made and that it will act  
8 appropriately and ensure that all of our citizens have access  
9 to the support they needed.

10 Mr. Holzer, I want you to prepare a revised TRO in  
11 accordance with the ruling that I've made on the record  
12 pursuant to 7052. Also want to go through in accordance with  
13 Rule 65, I am required to state, and I am incorporating my  
14 comments on the record, into the form of order to be submitted  
15 pursuant to 7052. I have stated the reasons why the temporary  
16 restraining order should issue. I have specifically stated its  
17 terms. I have specifically described in reasonable detail the  
18 limits of the TRO and those acts that are required under the  
19 TRO. I will find that pursuant to Bankruptcy Rule 7065, there  
20 is no security required. I am also required to set a hearing  
21 for issuance of a preliminary injunction. I don't know that it  
22 will be necessary because this may all become moot by then.  
23 And I recognize, Mr. Kincheloe, that at a preliminary  
24 injunction hearing, you may tell me that the law has changed.  
25 But as I sit here today, the CFR that you showed me, I'm not

1 aware it's actually governing law; is that correct?

2 **MR. KINCHELOE:** That's correct, your Honor. It has  
3 not been published in the register.

4 **THE COURT:** All right, thank you. Let's see,  
5 Mr. Kincheloe, Mr. Holzer, can you look at your collective  
6 schedules?

7 **MR. HOLZER:** Have it in front of me, Judge.

8 **THE COURT:** All right, today's the 24th. My guess is  
9 it's probably, and please tell me if you think I'm wrong, it's  
10 probably a better use of everyone's time if we simply go as  
11 close to the 14 days as possible to see what actually happens.  
12 It may very well be that without waiving any right of review or  
13 appeal that the SBA may have, it may make sense to extend the  
14 original time. But obviously we're not going to decide that  
15 today. Let me ask the parties, does it make sense to set this  
16 -- I'm issuing this at 10:00 o'clock on Friday, can we set this  
17 for 9:30 on Friday, May the 8th; does that make sense?

18 **MR. KINCHELOE:** Yes, your Honor. I was going to ask  
19 for May 8th so perfect.

20 **THE COURT:** Okay, fair enough. And, Mr. Holzer, does  
21 that work for your calendar?

22 **MR. HOLZER:** It does, your Honor.

23 **THE COURT:** All right, thank you. What I would like  
24 for you to do is once you finish drafting the TRO, I'd like for  
25 you to send it to Mr. Kincheloe to review as to form only.

1 Mr. Kincheloe, consistent with my normal practice, by agreement  
2 as to form only, you're not waiving any right of review or  
3 complaint that you may have, you're simply acknowledging that  
4 the paper is consistent with the ruling that I've made on the  
5 record. Is that enough of a (indisc.) that you feel  
6 comfortable looking at the document?

7 **MR. KINCHELOE:** Absolutely, your Honor. And I'll  
8 remain at my computer until I receive it from Mr. Holzer so  
9 there's no delay.

10 **THE COURT:** Terrific, thank you. Gentlemen, I very  
11 much appreciate the argument. Yes, sir.

12 **MR. HOLZER:** Just a clarification, and I'm trying to  
13 think practically about the next two weeks, I understand your  
14 ruling and I think I'll be able to get the TRO drafted  
15 correctly, but is my client authorized to resubmit an  
16 application form striking out that language about the  
17 bankruptcy and checking the "no" box in question one?

18 **THE COURT:** Yes. What I would envision, so that  
19 there is -- I don't want anyone at the bank to have an issue, I  
20 don't want anyone within the SBA to have an issue, is that what  
21 I would suggest that we do until this -- until we have an order  
22 to the contrary is that your client's authorized to strike  
23 through that language, check the box assuming that it (indisc.)  
24 and it satisfies all of the other requirements of question one,  
25 and then simply attach a copy of the TRO so that it's in the

1 file and everyone understands exactly what the issues are. I  
2 would hate for someone to --

3 **(Automated telephone recording played)**

4 **THE COURT:** I don't -- I have 50 people on the  
5 telephone so I'm not going to try to spend the time to figure  
6 out who that was. You're absolutely authorized to strike  
7 through the question. I can't remember where I stopped.  
8 Attach a copy of the TRO, that way there is absolutely no  
9 chance for error as to why the application was submitted the  
10 way it was. And if the Debtor doesn't need -- I want to make  
11 it very clear, if the Debtor doesn't meet the requirements,  
12 then I'm not changing that. All I'm simply requiring is the  
13 application be considered consistent with the (indisc.)  
14 practices and governing (indisc.) as all other applications  
15 with simply (indisc.) those six words stricken.

16 **MR. HOLZER:** Understood, your Honor. Thank you.

17 **THE COURT:** All right, Mr. Kincheloe, anything else  
18 that I -- any lack of clarification or any issues that we need  
19 to talk about?

20 **MR. KINCHELOE:** One issue, your Honor.

21 **THE COURT:** Certainly.

22 **MR. KINCHELOE:** (Indisc.) carry out instructions I  
23 need to ask the Court if it will entertain an oral motion for  
24 stay pending appeal.

25 **THE COURT:** Of course. And that's denied.

1           **MR. KINCHELOE:** Thank you, your Honor.

2           **THE COURT:** All right, anything else, folks? I very  
3 much appreciate the argument. Mr. Holzer, I appreciate the way  
4 in which you conducted yourself on behalf of the Debtor. And,  
5 Mr. Kincheloe, you know that I think you're the greatest thing  
6 ever and I very much appreciate what you do for our country.

7           **MR. KINCHELOE:** Thank you, your Honor.

8           **THE COURT:** Thank you, gentlemen.

9           **MR. HOLZER:** (Indisc.) have a good weekend.

10          **THE COURT:** (Indisc.)

11          **MR. KINCHELOE:** You, too, your Honor.

12          **(This proceeding was adjourned at 10:04 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



April 25, 2020

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Signed

Dated

*TONI HUDSON, TRANSCRIBER*