No. 25-____

IN THE

Supreme Court of the United States

SHOP RITE, INC.,

Petitioner,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 12, 2026

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED FOR REVIEW

Whether administrative agency enforcement action that reflects internally contradictory reasoning or inconsistent interpretation of applicable regulatory standards is arbitrary and capricious per se.

LIST OF PARTIES

Petitioner	Shop Rite, Inc.
Respondent	United States Small Business Administration

RULE 29.6 DISCLOSURE STATEMENT

Shop Rite, Inc. is a privately owned Louisiana corporation with no parent corporation. No parent or publicly traded company owns 10% or more of the stock of Shop Rite, Inc**.**

RELATED CASES

Shop Rite, Inc. Plaintiff-Appellant, vs. United States Small Business Administration, Defendant-Appellee, No. 25-30028, U.S. Fifth Circuit Court of Appeal

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The original opinion of the SBA Office of Hearings & Appeals is attached at Appendix B, p. 5a.

The opinion of the SBA Office of Hearings & Appeals on Petition for Rehearing is attached at Appendix C, p. 40a.

The decision by the Fifth Circuit under review, No. 25-30028, *Shop Rite, Inc. Plaintiff-Appellant, vs. United States Small Business Administration, Defendant-Appellee* (Appendix E, p. 69a) was not designated for publication.

The decision of the United States District Court for the Western District of Louisiana (Appendix D, p. 45a) is reported at *Shop Rite, Inc. v. United States SBA*, Case No. 6:23-CV-000456, 2024 U.S. Dist. Lexis 230138, 2024 LX 30470, 2024 WL 5183329.

JURISDICTION

The date of the judgment sought to be reviewed is November 14, 2025. This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

A. 5 U.S.C.S. § 706(2)(C)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(C) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

B. CARES Act Affiliation Waiver

During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for—(I) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (II) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; (III) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681);

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), 15 U.S.C.S. § 636(a)(36)(D)(iv), Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286-94 (2020)

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13 C.F.R. § 121.107

13 C.F.R. § 121.301(a)(1)

13 C.F.R. § 121.301(a)(2)

13 C.F.R. § 121.301(b)(2)

13 C.F.R. § 121.301(f)[1]

STATEMENT OF THE CASE

Petitioner Shop Rite, Inc. seeks review of a ruling by the U.S. Fifth Circuit Court of Appeal that affirmed SBA's denial of Shop Rite's eligibility for a Paycheck Protection Program ("PPP") loan under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act of 2020.

Petitioner owns and operates convenience stores and gas stations. More than 70% of its stores contain limited service deli-style restaurants, and more than 70% of its employees are engaged in providing restaurant service to Shop Rite's customers.

The U.S. Small Business Administration (SBA) denied Petitioner's eligibility for a CARES Act Payroll Protection Plan (PPP) Loan, because the Agency determined the Borrower, together with alleged affiliates, exceeded the small business size standard of 500 employees.

Shop Rite met the small business standard because it had on average fewer than 500 employees of its own, and in the CARES Act Congress waived the SBA

[1] Appendix I.

affiliation rules for entities that were engaged in a restaurant business assigned NAICS Code 72.

On appeal, SBA contended the Act and regulatory framework required the agency to determine the borrower's primary industry, and to override the borrowers' self-designated NAICS code 72 if the agency determined its primary business activity was other than restaurants.

In another case with similar facts, in order to deny loan eligibility SBA took the opposite position. SBA contended in court filings, under the Act and regulatory framework "there was no place for considering what Plaintiff's primary industry should have been".

The District Court and Fifth Circuit affirmed rulings by the SBA Office of Hearings & Appeals that denied Petitioner's loan eligibility. The Fifth Circuit panel concluded SBA could choose to apply what the agency and the court deemed applicable regulatory guidance in Shop Rite's case, and choose to disregard that same guidance in another case with similar facts, without being arbitrary.

The Fifth Circuit decision and opinion conflict with decisions from other Circuits and this Court on that same important matter.

The Court should grant the Petition to bring needed uniformity in enforcement of the rule that internally contradictory reasoning and inconsistent interpretation of applicable regulatory standards by an administrative agency are arbitrary and capricious per se, and as a reminder of the judiciary's role and obligation to prevent an agency's arbitrary management of its legislative mandate.

SBA denied Shop Rite's application for loan forgiveness because the Agency determined the Borrower, together with alleged affiliates, exceeded the small business size standard of 500 employees.

Shop Rite met the small business standard because (a) it had on average fewer than 500 employees of its own during the qualifying period, and (b) in the CARES Act Congress waived the SBA affiliation rules for entities that were engaged in a restaurant business assigned NAICS Code 72.[2]

Shop Rite appealed the final loan decision, contending the Agency engaged in arbitrary and capricious rule making, by applying inconsistent standards and interpreting regulatory guidance differently in cases with similar facts, in order to deny eligibility.

On appeal, SBA argued Section 7 loan regulatory guidance allowed the agency to disregard Shop Rite's properly self-designated NAICS industry code 72 (Restaurants), and make its own determination as to the Borrower's proper "primary industry". The district court and the Fifth Circuit agreed.[3]

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[2] A set of "affiliation rules" based on certain factors dictate when the "size of the applicant combined with its affiliates" standard applies under 13 C.F.R. § 121.301(a)(2). *See* 13 C.F.R. § 121.103(a)(8); 13 C.F.R. § 121.301(f). Panel Opinion, Appendix E, p. 72a. The CARES Act waives the affiliation rules for businesses assigned a NAICS code beginning with 72. 15 U.S.C.S. § 636(a)(36)(D)(iv).

[3] Appendix D, pp. 60a – 61a; Appendix E, pp. 78a – 78b, 81a – 82a. SBA's "primary industry" argument was a prohibited *post hoc* justification for agency's action not raised in the final loan decision, which merited reversal for that reason alone. *See Wages and White Lion Investments, LLC v. FDA*, 90 F.4th 357

The Fifth Circuit panel opinion summarized the issue as follows:

> "Shop Rite argues that because it validly self-certified as having a NAICS code associated with limited-service restaurants, it is subject to the Affiliation Waiver, and therefore, is eligible for PPP loan forgiveness. Shop Rite argues that SBA unlawfully applied the primary industry test. We disagree."[4]

Essential to that conclusion was the finding that SBA's application of the "primary industry" standard to deny Shop Rite's eligibility for the Affiliation Waiver not was not arbitrary and capricious.

SBA's application of the primary industry standard in Shop Rite's case was patently arbitrary and capricious, because the Agency applied regulatory guidance in completely different ways in cases with similar facts, for no apparent reason except the result was to deny eligibility in both.

In *Horseshoe Bay Resort Holdings v. SBA,* No. 1:24-cv-00040-DAE, 2025 WL 2697494 (W.D. Tex. 2025) SBA declined to exercise its alleged authority under Section 7(a) to ensure a PPP Borrower was assigned the appropriate NAICS code, in circumstances where doing so would result in eligibility.

(5th Cir.2024) (en banc), *vacated* 604 U.S. 542 (2025). The panel concluded post hoc doctrine did not apply because the agency's primary industry rationale was a mere clarification of the reasons stated in the loan decision. Appendix E, p. 81a. That conclusion conflicts with *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 21, 140 S. Ct 1891, 207 L. Ed 2d 353 (2020), because the "primary industry" argument was not a clarification but a brand new argument, raised for the first time on appeal.

[4] Appendix E, p. 77a.

According to pleadings filed in that case, Horseshoe Bay and its affiliates (HBRH) operate a resort that includes a golf course, spa, restaurants and bars. HBRH focused on operation of a Club that provided among other things food and beverage services. In its tax returns and PPP Loan application HBRH self-identified as NAICS code 713900 (Other Amusement & Recreation Industries).

Relying primarily upon the Borrower's self-identification in NAICS code 71, SBA rejected HBRH's claim to the CARES Act Affiliation Waiver for Code 72 restaurant businesses. The Agency explained:

> NAICS codes are self-assigned, meaning nobody else "assigns" a code; the business itself selects the code that best describes its primary business activity and then uses it when asked for their code. The only instances in which a code cannot be fully self-assigned for official purposes is within OSHA, the EPA and DEP, which assign codes based on environmental factors, not revenue. See What is a NAICS Code and Why do I Need One?, NAICS Association (last visited December 19, 2024).[5]

In *Horseshoe Bay* SBA argued placing "great weight" on the Borrower's self – assigned NAICS code was consistent with SBA's regulations, and the Borrower's self-assigned NAICS Code (71) was sufficient evidence to deny the Affiliation Waiver. [6]

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[5] Appendix J, p. 117a. *Horseshoe Bay Resort Holdings v. SBA*, No. 1:24-cv-00040 U.S. Dist. Ct., WD TX, Doc 36, p. 2/17, Note 3.

[6] *Id.*

SBA denied outright the premise that it could or should disregard the Borrower's self-assigned NAICS Code and conduct a "primary industry" analysis to determine whether the Affiliation Waiver applied:

> Plaintiffs cite no authority that under Section 121.107 SBA is required to disregard an applicant's self-assigned NAICS code. Plaintiff cites no authority for the proposition that SBA must weigh or consider any particular factor over another, when the express language of the regulation states that SBA may consider "other factors." 13 C.F.R. § 121.107. Likewise, there is no authority cited for the proposition that Section 121.107 requires SBA to take it upon itself to re-assign Plaintiff's NAICS code retroactively to when the loan was disbursed, when that would be directly at odds with Plaintiff's loan application, request for forgiveness and certifications to both SBA and the IRS.[7]

In *Horseshoe Bay* SBA took the exact opposite approach from that which its lawyers argued on appeal in OHA and the District Court here. If the Agency were to be consistent on this issue, it would have concluded Shop Right's assignment of NAICS Code 722513 was entitled to "great weight" under the applicable regulations and was sufficient in itself to apply the Affiliation Waiver, never mind that more than 70% of Appellant's facilities and human resources are involved in the restaurant business.

The issue is not whether SBA's interpretation of the CARES Act and regulations in Shop Rite's case, or in *Horseshoe Bay* is correct. In either case, the inescap-

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[7] *Id*., pp. 12-13/17.

able conclusion is, at least with regard to the CARES Act Affiliation Waiver SBA will apply inconsistent, contrary and even conflicting interpretations in order to deny PPP loan eligibility, which is the definition of arbitrary administrative action and abuse of discretion.

The Panel below concluded it was not arbitrary for SBA to decide that reviewing a Borrower's self – certified NAICS Code is "an appropriate methodology under the regulatory framework" for determining eligibility in Shop Rite's case, and choose to disregard that methodology in another case with similar facts and issues, for no apparent reason other than the goal and the result in both instances was to deny certification.

> "Although the SBA *chose not to change the borrower's self-certified NAICS code* in Horseshoe Bay, it is not arbitrary and capricious for the SBA to here decide that the methodology outlined in the Section 7(a) framework is an appropriate method to determine Shop Rite's loan compliance, especially considering the IFR's clear guidance to review self-certification. Therefore, Shop Rite's argument fails."

Appendix E, p. 82a (emphasis added)

The highlighted language in the panel opinion understates SBA's position in the comparator case. The characterization of the Agency's action in *Horseshoe Bay* as a choice, permissible under the applicable regulatory framework, overlooks the Agency's actual re-interpretation of its authority under the regulations in a manner irreconcilable with its action in this case.

The reported decision in *Horseshoe Bay* more accurately describes SBA's position

> Plaintiff argues that pursuant to 5 U.S.C. § 706(2)(C) the SBA exceeded its statutory authority by stating in the Final Decision that under the PPP rules, "there is no place for considering what [Plaintiff's] 'primary industry' should have been." (Dkt. # 30-43 at 193.)

2025 U.S. Dist. LEXIS 180241, *10 (emphasis added).

Appendix H, p. 98a.

Adopting SBA's argument that no statute or regulation required SBA to assess a concern's primary industry for PPP loan eligibility, the *Horseshoe Bay* court concluded:

> "In the absence of such authority, the court cannot say SBA exceeded its statutory authority in stating there was 'no place' for considering what Plaintiff's 'primary industry' should have been. 5 U.S.C. § 706(2)(C)."[8]

Which is diametrically opposite of the position SBA took in Shop Rite's case. Suffice it to say, if SBA's interpretation of the regulations as stated in *Horseshoe Bay* were applied consistently, there was 'no place' for SBA's determination in Shop Rite of what Petitioner's primary industry should have been, Shop Rite's self-designation in NAICS Code 72 would stand, and the Affiliation Waiver would apply.

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[8] 2025 U.S. Dist. LEXIS 180241, *11-12, App. H, p. 99a.

REASONS FOR GRANTING THE PETITION

The principal purpose for exercising certiorari jurisdiction is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. S. Ct. Rule 10. *Braxton v. United States*, 500 U.S. 344, 347 (1991)

Certiorari is appropriate in this case under subsection (c) of Rule 10 because the Fifth Circuit has decided an important question of federal administrative law in a way that conflicts with relevant decisions of another Circuit, and this Court.

The question is whether administrative agency enforcement action that reflects internally contradictory reasoning and inconsistent interpretation of applicable regulatory standards is arbitrary and capricious per se.

The Ninth Circuit decided that question differently in *Defenders of Wildlife v. United States EPA,* 420 F.3d 946 (9th Cir. 2005)

> Agency decisions may not, of course, be inconsistent with the governing statute. 5 U.S.C. § 706(2)(A) (instructing courts to "set aside" agency action "not in accordance with law"). Also, internally contradictory [**32] agency reasoning renders resulting action "arbitrary and capricious;" such actions are not "'founded on a reasoned evaluation of the relevant factors.'" *Ariz. Cattle Growers' Ass'n v. U.S. FWS*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989)); *see also Gen. Chem. Corp. v. United States*, 260 U.S. App. D.C. 121, 817 F.2d 844, 857 (D.C. Cir. 1987)

> (finding agency action "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

Def. of Wildlife v. United States EPA, 420 F.3d 946, 959.

Settlement of the issue by this Court is important to the public interest in uniformity and consistency in administrative agency enforcement action, and necessary to prevent arbitrary mismanagement of an agency's legislative mandate.

Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary. *Vargas v. INS,* 938 F.2d 358, 362 (2nd Cir. 1991), cit. *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976); [**12] *NLRB v. Washington Star Co.*, 235 U.S. App. D.C. 372, 732 F.2d 974, 977 (D.C. Cir. 1984) ("The present sometimes-yes, sometimes-no, sometimes-maybe policy . . . cannot, however, be squared with our obligation to preclude arbitrary and capricious management of the Board's mandate."); *Doyle v. Brock*, 821 F.2d at 786 & n.7; *Professional Airways Systems Specialists v. Federal Labor Relations Auth.*, 258 U.S. App. D.C. 14, 809 F.2d 855, 859 (D.C. Cir. 1987).

The Court granted certiorari in *Def. of Wildlife v. EPA* to resolve a split in circuit authority as to the ultimate substantive question.[9] In granting the writ the Court requested the parties to brief and argue, in

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[9] *Def. of Wildlife v. EPA, c/w Nat'l Assoc. of Homebuilders v. Def. of Wildlife,* 2007 U.S. LEXIS 11, 549. U.S. 1105, 127 S. Ct. 852, 166 L. Ed. 2d 681, 75 U.S.L.W. 3349 (2007). The substantive issue involved resolution of conflicting requirements of the Clean Water Act and the Endangered Species Act that affected EPA's decision to transfer water permitting authority to a state.

addition to the questions presented by petitioners, the question presented here:

> "Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, *see* 33 U.S.C. § 1342(b), *was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act* of 1973, 16 U.S.C. § 1536(a)(2); and, if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2)."[10]

Ultimately the Supreme Court did not find it necessary to decide the issue raised by this Petition, concluding EPA's action was correct as a matter of law.[11]

However the Court did answer the second question in the affirmative. With respect to the ruling that EPA's decision was arbitrary and capricious because it was based on inconsistent interpretations of the statute:

> As an initial matter, we note that if the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the Agency for

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[10] *Id.* (emphasis added).

[11] The Court held the no-jeopardy duty under the Endangered Species Act only applied to discretionary actions and thus it did not apply to the permitting transfer approval, which was mandatory under the Clean Water Act once the specified triggering criteria were met. 551 U.S. 644, 649.

> clarification of its reasons. *See Gonzales v. Thomas*, 547 U.S. 183, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006) *(per curiam).* Indeed, the court below expressly recognized that this finding required it to "remand to the Agency for a plausible explanation of its decision, [*658] based on a single, coherent interpretation of the statute." App. to Pet. for Cert. in No. 06-340, at 28. But the Ninth Circuit did not take this course; [****28] instead, it jumped ahead to resolve the merits of the dispute. In so doing, it erroneously deprived the Agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions. *We need not examine this question further,* however, because we conclude that the Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record.[12]

Defenders of Wildlife v. EPA demonstrates why certiorari should be granted here. The first sentence of the foregoing passage

> "…..if the EPA's action was arbitrary and capricious, *as the Ninth Circuit held,* the proper course would have been to remand to the Agency for clarification of its reasons.

presumes internally contradictory reasoning or inconsistent interpretation of regulatory standards is

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[12] *Nat'l Assoc. of Homebuilders v. Def. of Wildlife*, 551 U.S. 644, 657-658, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (emphasis added).

arbitrary and capricious per se (as the Ninth Circuit held), which does conflict with the Fifth Circuit's ruling in this case.

Secondly, by instructing the parties in *Def. Wildlife v. EPA* to brief that specific issue, the Court signaled the issue is important, worthy of consideration under Rule 10, and ultimately worthy of resolution by this Court.

CONCLUSION

The issue raised by this Petition is an important question of federal law, which the Court has deemed proper for consideration on a writ of certiorari, but has not yet decided.

The Court should grant a writ of certiorari to maintain uniformity with respect a basic precept of administrative law, and bring the Fifth Circuit in line with other circuits and this Court that hold an administrative agency's patently inconsistent application of regulatory guidance in similar situations is arbitrary.

WHEREFORE, Petitioner prays this application be granted.

Respectfully submitted,

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February 12, 2026

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APPENDIX A

SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

06/01/2022

VIA FORGIVENESS PLATFORM

James Lyons

First National Bank of Louisiana

Re: PAYCHECK PROTECTION PROGRAM FINAL SBA LOAN REVIEW DECISION
Borrower: SHOP RITE, INC.
SBA Loan No.: 1031327200
Approved Loan Amount: $2,502,750.00
Loan Approval Date: 04/15/2020
Lender Forgiveness Decision Submission Date: 08/10/2021
Lender Forgiveness Decision Amount: $2,502,750.00
SBA Final Forgiveness Amount: $ 0.00

Dear: James Lyons

The U.S. Small Business Administration (SBA) has completed its review of the above-referenced Paycheck Protection Program (PPP) loan. Based on a review of lender and/ or borrower submissions, and consideration of the facts and circumstances, SBA has made a final SBA loan review decision.

SBA has determined that the borrower was ineligible for the PPP loan. The reason(s) for SBA's decision is as follows:

After review of the documentation provided, the SBA concludes the Borrower's business, or together with its affiliates, exceeds the maximum allowable number of employees and the SBA small business size standards.

The aggregate of loans for this affiliation exceeds the maximum allowable number of employees. The Borrower defines itself as a small business concern utilizing the Employee Size Standard and their employee count from all affiliations is 896; therefore, this loan is deemed ineligible. The Borrower has received requests from the SBA for additional documentation on multiple occasions. However, the documentation received is incomplete and does not substantiate eligibility under the SBA Size Standards or Alternative Size Standards.

Based on the above stated reason(s), SBA has determined that forgiveness in the amount of $0.00 is appropriate. Additional details regarding the forgiveness payment amount (if any) will be provided in a Notice of Paycheck Protection Program Forgiveness Payment.

Within 5 business days of the date of this letter, you must provide a copy of this final SBA loan review decision to the borrower.

You must continue to service the loan. You must notify the borrower that the remaining balance of the loan after application of the forgiveness payment (if any) must be repaid on or before the maturity date. The notification must include the date on which the first principal and interest payment is due and the amount of the borrower's regular payment. As set forth below, if the borrower files a timely appeal with SBA's Office of Hearings and Appeals (OHA), the deferment period of the loan will be extended pursuant to 13 CFR § 134.1211.

Pursuant to 13 CFR § 134.1201(b), the borrower has the right to appeal to SBA's Office of Hearings and Appeals a final SBA loan review decision that the borrower:

1. was ineligible for a PPP loan;
2. was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;
3. is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA; and/or
4. is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.

Any appeal must be made in accordance with the SBA Rules of Practice for Borrower Appeals of Final SBA Loan Review Decisions Under the Paycheck Protection Program, located at 13 CFR § 134.1201, et seq., including but not limited to the following:

- An appeal petition must be filed with SBA's Office of Hearings and Appeals (OHA) within 30 calendar days after the borrower's receipt of the final SBA loan review decision. 13 CFR § 134.1202(a). To file and manage an appeal of a final SBA loan review decision with OHA, refer to Office of Hearings and Appeals.
- Borrower must include, among other things, a copy of this final SBA loan review decision with its appeal. 13 CFR § 134.1204(a).

- Borrower must provide you (the lender) with a copy of the timely appeal petition filed with OHA so that you can extend the deferment period of the loan. 13 CFR § 134.1202(b).
- An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA loan review decision may be sought in a federal district court. 13 CFR § 134.1201(d).

Thank you for your cooperation.

Sincerely,

Office of Capital Access
U.S. Small Business Administration

CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2022, I served the foregoing by e-mail upon the following:

Shop Rite, Inc.
PPP# - 1031327200
Christopher Zaunbrecher, Attorney
Lafayette, LA, 70505
Email: clzaunbrecher@brineyforet.com

Tabitha Mangano, General Attorney
U.S. Small Business Administration
Washington, DC
Email: Tabitha.Mangano@sba.gov
Email: olitservice@sba.gov

/s/ Lily McLane-Dalton
Lily McLane-Dalton
Office of Hearings and Appeals

APPENDIX B

UNITED STATES SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

PAYCHECK PROTECTION PROGRAM APPEAL OF:

SHOP RITE, INC.

Appellant

Appealed from

SBA PPP Loan Number: 1031327200

Issued: October 18, 2022
Decision No. PPP- 1031327200

APPEARANCES

Christopher Zaunbrecher, Esquire, Counsel for the Appellant

Tabitha Mangano, Esquire, Counsel for the Small Business Administration

DECISION

I. Introduction and Jurisdiction

On June 01, 2022, the U.S. Small Business Administration (SBA) Office of Capital Access issued a final Paycheck Protection Program (PPP) loan review decision. On June 30, 2022, Appellant filed the instant appeal from that final SBA loan review decision. Appellant argues that the SBA final loan review decision is clearly erroneous, and requests that OHA reverse it, and find Appellant is eligible for full PPP

loan forgiveness in the amount of $2,502,750.00. For the reasons discussed infra, I *Deny* the appeal and *Affirm* the SBA loan review decision.

OHA conducts Paycheck Protection Program (PPP) appeals under the authority of 13 C.F.R. part 134 Subpart L.

II. Background

On April 03, 2020, the Appellant, Shop Rite Inc., applied for a PPP loan with First National Bank of Louisiana (Lender). On April 15, 2022, the loan was approved. On April 15, 2022, the SBA disbursed a PPP loan of $2,502,750.00 to Appellant through Lender. On June 23, 2021, the Appellant filed for PPP loan forgiveness.

A. Final SBA Review Decision

On June 01, 2022, SBA issued its final loan review decision finding that Appellant was ineligible for the amount of PPP loan it received and therefore was not eligible for PPP loan forgiveness. Specifically, the SBA found that After review of the documentation provided, the SBA concludes the Borrower's business, or together with its affiliates, exceeds the maximum allowable number of employees and the SBA small business size standards.

B. Appeal

On June 30, 2022, Appellant filed the instant appeal arguing the final SBA loan review decision is clearly erroneous and requests the Office of Hearings and Appeals (OHA) to reverse that decision and find that the Appellant is eligible for the full amount of PPP loan forgiveness in the amount of $2,502,750.00.

On July 25, 2022, the undersigned issued a Notice and Order directing the SBA to file the Administrative

Record (AR) by August 15, 2022. The AR was filed on August 15, 2022. The Appellant had until August 24, 2022, to file an Objection to the AR. The Appellant did not file an Objection to the AR. On September 08, 2022, the undersigned issued an Order for SBA to respond. The SBA filed a Response to the Appeal on September 29, 2022.

III. Discussion

The PPP Loan Program is a temporary SBA 7(a) program designed to provide emergency assistance to certain small businesses during the COVID-19 crisis. Its purpose was to help businesses keep their workers paid and employed. The program was established under Section 1102 of the Coronavirus Aid Relief, and Economic Security (CARES) Act (Pub. L. 116-136) signed into law March 27, 2020, and subsequently revised and expanded by other statutes.

A. The Paycheck Protection Program & Authority of SBA to Regulate PPP Loans

In general, PPP loans were open to all American small businesses with 500 or fewer employees, including sole proprietorships, independent contractors, and self-employed individuals. 15 USC § 636(a)(36)(D). Other types of entities, such as nonprofit organizations and housing cooperatives could also be eligible under certain circumstances.

Under PPP, borrowers obtain loans through an SBA approved lender, rather than from SBA itself, and the lender services the PPP loan. SBA implements the program and guarantees 100% of PPP loans in the event of default.

Borrowers were permitted to apply for both an Economic Injury Disaster Loan and a PPP loan but

could not utilize the loans for the same purpose. 15 U.S.C. § 636(a)(36)(Q).

PPP loans could be used for payroll and employee benefits costs, as well as other operating expenses, including mortgage interest payments (not principal), rent and lease payments, and utilities. 15 U.S.C. § 636(a)(36)(F).

As a condition for obtaining a PPP loan, a borrower was required to certify that PPP funds would be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments. 15 U.S.C. § 636(a)(36)(G). PPP funds could not be used for compensation of employees whose principal place of residence was outside the United States. Further, salary expenditures were capped at no more than $100,000 annually per employee. 15 U.S.C. § 636(a) (3 6) (A) (viii) (II).

Businesses applying for a second PPP loan were required to demonstrate at least a 25% reduction in gross receipts between comparable quarters in 2019 and 2020. 15 U.S.C. § 636(a) (37)(A) (iv).

B. PPP Loan Forgiveness

To seek loan forgiveness, a PPP borrower must submit a Loan Forgiveness Application (Form 3508) to its lender, with supporting documentation of its expenditures. 15 U.S.C. § 636m(e). Within the application, the borrower must certify that PPP funds were utilized for authorized purposes, and that all documentation provided is true and correct. 15 U.S.C. § 636m(e)(3). Forgiveness is prohibited without appropriate supporting documentation, or without the required certification. 15 U.S.C. § 636m(f). In general, a PPP borrower may obtain forgiveness, up to the full amount of its loan, for eligible expenses made during the loan's

"covered period" (typically, 24 weeks from the date of loan origination). 15 U.S.C. § 636m(b).

To be eligible for loan forgiveness, at least 60 percent of the PPP loan must have been used to fund payroll and employee benefits costs. 15 U.S.C. § 636m(d)(8). The remaining portion (up to 40 percent) of the loan may have been used for mortgage interest, rent, and other eligible expenses. Subject to certain exceptions, the amount that can be forgiven may be reduced in proportion to any reductions in the number of full-time equivalent employees, or if employee salary or wages were reduced by more than 25%. 15 U.S.C. § 636m(d)(2) and (d) (3).

The lender reviews the application and makes an initial decision regarding loan forgiveness. 15 U.S.C. § 636m(g). Following issuance of an initial decision, the Office of Capital Access may issue a final SBA loan review decision. This official written decision issued by the SBA Office of Capital Access reviews the PPP loan and can find a borrower:

(1) Was ineligible for a PPP loan:.

(2) Was ineligible for the PPP loan amount received or used PPP loan proceeds for unauthorized uses:

(3) Is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to the SBA: and/or,

(4) Is ineligible for PPP loan forgiveness in any amount when the lender issued 4 full denial decision to SBA. 13 C.F.R. §134.1201(b)(1)-(4).

The Lender must provide a copy of the final SBA loan review decision to the borrower within five (5)

business days of the date of the decision (SBA Procedural Notice #500020077, effective January 15, 2021).

OHA conducts PPP appeals under the authority of 13 C.F.R. part 134 Subpart L. The Appellant has the burden of proving all elements of the appeal. Specifically, the Appellant must prove the final SBA loan review decision was based upon a clear error of fact or law. 13 C.F.R. § 134.1210. Only a borrower on a loan, or its legal successor in interest, has standing to appeal a final SBA loan review decision. 13 C.F.R. §134.1203.

Congress granted SBA broad authority to make rules and regulations, to take actions that "are necessary or desirable in making loans," 15 U.S.C. § 634(b)(6)-(7), and to establish general policies to "govern the granting and denial of applications for financial assistance by the Administration," 15 U.S.C. § 633(d). This authority extends to the PPP lending program. Additionally, the CARES Act expressly provides the PPP lending program as being a part of SBA's 7(a) Loan Program. Congress made the decision not to enact the PPP as a freestanding program, but rather to utilize the pre-existing infrastructure of SBA's Section 7(a) Loan Program. See 85 Fed. Reg. at 20811 (recognizing the CARES Act "temporarily adds a new product, titled the 'Paycheck Protection Program,' to [SBA's] 7(a) Loan Program"). This decision was reinforced by Congress placing the PPP lending program within the Section 7(a) lending program by specifying that "[e]xcept as otherwise provided", the Administrator may guarantee PPP loans "under the same terms, conditions, and processes" as a loan made under Section 7(a). 15 U.S.C. § 636(a)(36)(B). This

subjects the PPP lending program to the policies and regulations applicable to SBA's 7(a) Loan Program.

C. Finding of Fact and Analysis

As previously noted herein, the SBA Final Loan Review Decision stated that the Appellant business was ineligible for the PPP loan amount it received. Specifically, the SBA stated that:

> "After review of the documentation provided, the SBA concludes the Borrower's business, or together with its affiliates, exceeds the maximum allowable number of employees and the SBA small business size standards. The aggregate of loans for this affiliation exceeds the maximum allowable number of employees. The Borrower defines itself as a small business concern utilizing the Employee Size Standard and their employee count from all affiliations is 896; therefore, this loan is deemed ineligible. The Borrower has received requests from the SBA for additional documentation on multiple occasions. However, the documentation received is incomplete and does not substantiate eligibility under the SBA Size Standards or Alternative Size Standards."[1]

Appellant states in his appeal in pertinent part:

> "SBA Area Office's size determination, based on clear error of fact or law. 13 C.F.R. § 134.314. E. Allegations of Error
>
> 1. The SBA erred in concluding Borrower was ineligible for a PPP loan because

[1] Final SBA Loan Review Decision (*June01, 2022*).

Borrower's business together with "affiliates" exceeded the maximum allowable number of employees under SBA small business size standards (Included in this allegation of error are SBA's conclusions (i) the aggregate of loans for this affiliation exceeds the maximum allowable number of employees, and (ii) the employee count from all affiliations is 896).

2. The SBA erred in failing to apply an affiliation exemption to Borrower, which is engaged in food service business assigned NAICS Code 722513 (limited-service cafés, deli and carryout restaurants).

3. Alternatively, SBA erred in determining certain entities were affiliates of Borrower.

4. SBA erred in finding Borrower's response to requests for documentation was incomplete.

Argument

Borrower is exempt from the Affiliation Rule because it is engaged in food service business assigned NAICS code beginning with 72. SBA erred as a matter of law in failing to apply the exemption.

1. Under the APA, a court must set aside agency action that is arbitrary or capricious. 5 U.S.C.S. § 706(2)(A). While a court is not to substitute its judgment for that of the agency, the court must satisfy itself that the agency considered the relevant factors and explained the facts and policy concerns on which it relied, and that those

facts have some basis in the record. Larry Grant Constr. v. Mills, 956 F. Supp. 2d 93, 93 (D.D.C. 2013)

2. A decision by the SBA is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before it. Id.

3. In response to SBA's communication of 4/11/22, reserving all previous arguments in opposition to affiliation on any bases, Borrower submitted that the affiliation rules do not apply to Shop Rite, Inc., because it has 500 or fewer employees and is engaged a food services business with a NAICS classification beginning with 72.

4. SBA's final loan decision did not address that issue.

5. Borrowers and lenders may rely on SBA - Treasury document "PPP Loans - FAQ" (7/29/21) @treasury.gov, ("SBA Guidance") as SBA's interpretation of the CARES Act and the PPP Interim Final Rules.

6. SBA Guidance provides SBA's affiliation rules (13 CFR 121.103 and 13 CFR 121.301) do not apply to any business entity that is assigned a NAICS code beginning with 72 and that employs not more than a total of 500 employees (or 300 employees for a Second Draw PPP loan). Example 3. Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates of

one another). Company Y owns a restaurant with 400 employees. Company Z is a construction company with 400 employees. Company Y is eligible for a First Draw PPP Loan because it has 500 or fewer employees. The affiliation rules do not apply to Company Y, because it has 500 or fewer employees and is in the food services business (with a NAICS code beginning with 72)." 3 (emphasis added)

7. In response to SBA's communication of 4/11/22, Borrower provided evidence to SBA that shows Borrower is in a food service business that has an NAICS code beginning with 72.

8. A substantial part of Borrower's business (>70% of Shop Rite locations, and 72% of its employees) are engaged in the preparation and provision of meals, snacks, and beverages for immediate on-premises and off-premises consumption. In addition, Shop Rite owns and operates two (2) full-service restaurants.

9. NAICS assigns Code 722513 (limited-service cafés, deli and carryout restaurants) to that business.

10. The correct answer to Borrower's SBA Form 3511 Part B, §I (Affiliation Waiver) Question No. 1: Is Borrower assigned a North American Industry Classification System (NAICS) code beginning with 72 (Accommodation and Food Service Industries? Is YES.

11. Borrower's initial negative response to the NAICS Code 72 question in SBA Form 3511, was based on an implication inherent in the question that only one NAICS Code can apply to Borrower's business, or that an applicant must be assigned NAICS Code 72 by SBA or the Census Bureau in order to for the Affiliation Waiver to apply. Neither is correct.

12. Petitioner corrected its response to the NAICS Code 72 question in response to SBA's request for information dated 4/11/22.

13. The NAICS Association (NAISCA) website states: "NAICS is a Self-Assigned System; no one assigns you a NAICS Code. What this means is a company selects the code that best depicts their primary business activity and then uses it when asked for their code. If your Business Activities include more than one Unique Line of Business, you may want to use more than one NAICS Code."

14. Federal agencies allow business concerns and entities more than one NAICS code. For instance, SAM (System for Award Management), where businesses register to become federal contractors, will accept up to ten classification codes per establishment.

15. Under SBA's interpretation of the Interim Final Rule, Affiliation Waiver applies if the applicant "....is in a food service business

with an NAICS Code beginning with 72". There is no requirement that food service be the applicant's primary business activity in order to for the Affiliation Waiver to apply.

16. There is no requirement that an applicant be assigned NAICS Code 72 by SBA or the Census Bureau in order to for the Affiliation Waiver to apply. 5

17. Unlike other SBA applications that use NAICS to small business determinations, in the context of PPP loan program NAICS Codes are self-designated. There is no provision in the Act or the regulation for an administrative determination of the proper NAICS classification by the SBA, either in the initial application, or on review of eligibility.

18. Under SBA's interpretation of the CARES Act and PPP regulation, if the borrower is engaged in a business described by NAICS Code 72 by OMB, the exemption applies even though the applicant's business may have other components.

19. There is no requirement in the Act or the regulations that an applicant's NAICS Code reflect consideration of the relative value and importance of the different components of the business.

20. Even in other contexts, where such considerations may be relevant, e.g., using NAICS Codes for small business qualification in government procurement contracts, there is no requirement that SBA

apply the NAICS Code for the component that accounts for the largest share of the business or contract value. *Paradigm Eng'rs & Constructors, PLLC v. United States,* 147 Fed. Cl. 487, 497 (2020), applying 13 C.F.R. §121.412(b). Conclusion

21. The Final Loan Review Decision does not reflect consideration of the relevant factors bearing upon application of the Affiliation Exemption. The Decision does explain the facts or policy concerns on which it relied in rejecting the exemption, nor show that conclusion has some basis in the record. For those reasons, the decision is arbitrary and capricious and should be reversed. Larry Grant Constr. v. Mills, 956 F. Supp. 2d 93, 93 (D.D.C. 2013)

In the alternative, Petitioner avers:

The Final Loan Review Decision conclusion, that certain entities were affiliates of Borrower, is not supported by the evidence and is erroneous as a matter of law.

22. By letter of 9-15-21, SBA requested additional information for review in connection with certain entities the Agency described as potential affiliates of the Borrower through common owners or principals. The listed companies were Rice City Storage, L.L.C., Tobacco Plus, Inc., Acadia Wholesale & Tobacco Company, Inc., Deep South Enterprises Inc., and J.D. Gielen & Family LLC.

23. Borrower responded on reasonable inquiry it appeared none of the listed

companies or concerns is an affiliate of Shop Rite, Inc. under the stated criteria, with the possible exception of Rice City Storage, LLC, for the reasons stated in the response, to wit:

24. The owners of 20% or more of the equity of the Borrower are: Owner Name Title Ownership % M. Stefanski Shareholder 21.9% Shop Rite, Inc. Voting Trust Shareholder 60.92%

25. Applying the stated criteria "owner of 20% or more of the equity", neither Borrower nor any of the above listed persons owned a 20% interest in any of the listed entities, with the possible exception of Rice City Storage, LLC.

26. The registered owners of 20% or more of the Applicant's stock owned the following percentage of stock or membership interests in the listed entities: % ownership interest in: Owner M. Stefanski Owner SRI Voting Trust Tobacco Plus, Inc. 0 0 Acadia Wholesale and Tobacco Co., Inc. 0 0 Deep South Enterprises, Inc 0 0 J.D. Gielen & Family, LLC 0 0 Rice City Storage, LLC 25% 0

27. Petitioner showed none of the entities listed as potential affiliates owned or had the power to control more than 50 percent of Borrower's voting shares, its Board of Directors or executive management.

28. Petitioner showed Borrower did not own or have the power to control more than 50 percent of the shares or interests of any

listed entity, nor the power to control the directors or managers of any of those concerns.

29. Shop Rite, Inc. and Rice City Storage, L.L.C. submitted Affiliation Worksheet (SBA 3511), and 941's, Income Statements/P&L, and number of employees on October 4, 2021.

30. On 11-5-21, in response to a request for additional information, Borrower provided SBA a completed Form 3511 for Rice City Storage, LLC, and Beneficial Ownership Lists and Documentation for Rice City Storage, LLC; Tobacco Plus, Inc., Shop Rite, Inc., Acadia Wholesale & Tobacco Co., Inc., Deep South Enterprises, LLC, and J.D. Gielen & Family, LLC.

31. The Lender provided SBA the financial information requested for Tobacco Plus, Inc., Acadia Wholesale & Tobacco Co., Inc., Deep South Enterprises, Inc., and J. D. Gielen & Family, LLC. 6

32. On or about February 24, 2022, SBA Office of Financial Program Operations (OFPO) advised the Lender OFPO was considering recommending denial of Borrower's Application for Forgiveness.

33. OFPO stated based on preliminary review of information previously submitted, the Agency "has an understanding of an affiliation" between Borrower and one or more of five listed entities, "through familial ties and/or common management through an individual (PG) either as co-

owner, co-beneficial owner of the respective voting trusts, or co-member."

34. The reference to "familial ties" implicates the Identity of Interests basis for affiliation, i.e. a relationship between two or more persons and entities, where one of the entities is owned or controlled by a person whose spouse, parent, child, or sibling owns or controls the other entity.7 6Rice City Storage 3 employees, Tobacco Plus, Inc. 249, Acadia Wholesale 171, DSE 0, JDG&F 0. 713 CFR §121.301(f) "Close Relative" is defined as a spouse, a parent, or a child or sibling, or the spouse of any such person. 13 C.F.R. §120.10. 9

35. The Agency's understanding of affiliation by virtue of familial ties through one named individual as an owner, member, or co-beneficial owner of a voting trust, could be correct only if both the named individual and a child or sibling of that person (or spouse of any such child or sibling) owned 20% or more of the equity interests in both Borrower and a listed entity.

36. Borrower provided information to SBA that showed the interests of the named individual in the listed entities on the Date of Loan Application (05/04/20).

37. Borrower advised SBA that prior to December 14, 2020, no children or siblings of the named individual nor their spouses owned individually or in the aggregate 20% or more of the equity in a listed entity,

except for Rice City Storage, LLC, and J.D. Gielen & Family, LLC.

38. Two of named individual's children (together with their spouses) each owned a 25% membership interest in Rice City Storage, LLC, and J.D. Gielen & Family, LLC.

39. For purposes of aggregation under the Employee size standard, those relationships are inconsequential; Rice City Storage, LLC had three employees. J.D. Gielen & Family, LLC had none.

40. OFPO's understanding of affiliation by virtue of common management through the named individual as an owner, member or co-beneficial owner of voting trust shares, is likewise incorrect.

41. Borrower demonstrated the named individual's interests as a co-beneficial owner of Voting Trust Shares did not translate into control of Borrower or any other listed entity. The interest included the right to receive distributions or dividends (if any) declared but did not include the right to vote the shares or otherwise participate in management of Borrower, or of any other listed entity. 10

42. Information provided by Borrower as of 4-8-22, demonstrated there was no affiliation based on either ownership or identity of interests with respect to the above listed Companies.

43. The information showed further that none of the business entities listed above, nor any third party, owned or had the power to control more than fifty percent of the shares or interests of another listed entity, nor the power to control the directors or managers of any of those concerns.

44. Petitioner showed further each of the listed entities are separate businesses, operated independently of each other, i.e., with separate employees, separate payrolls, and separate and independent operational management groups headed by Directors of Operation with no ties to any other listed entity.

45. The Final Loan Review Decision does not reflect consideration of the relevant principles and factors bearing upon a finding of Affiliation. The Decision does explain any factual, legal, or regulatory basis for the conclusion that Borrower and any listed entity are affiliates, nor show that the Agency's conclusion has some basis in the record. The decision is therefore arbitrary and capricious and should be reversed."[2]

The Appellant advances two central arguments on the Appeal: (1) SBA erred in determining certain entities were affiliates of borrower and the SBA's decision does not consider the relevant principles in the finding of affiliation and (2) Borrower is exempt from the Affiliation Rule because it is engaged in food service business with an NAICS Code beginning with

[2] Appellant's Appeal Letter (*June 30, 2022*).

72 and is entitled to a waiver. The Appellant did not challenge the SBA regulations regarding size standards, and thus the validity of the SBA regulations governing affiliation and size standards is not before OHA.

Pursuant to the CARES Act, SBA promulgated several regulations concerning PPP eligibility, including the First IFR. See Paycheck Protection Program, 85 Fed. Reg. at 20811 (posted on the SBA and Treasury websites on April 2, 2020, and effective April 15, 2020); CARES Act § 1102, 134 Stat. at 287 (codified 15 U.S.C. § 636(a) (36)(B)). The First IFR, which was available at the time of Appellant's PPP loan application, advised all PPP lenders and applicants of the basic PPP eligibility criteria, including the incorporation of the Small Business Act's definition of "small business concern" and 13 C.F.R. § 120.301. The First IFR informed PPP lenders and applicants that to be eligible, an applicant must have "500 or fewer employees," or must "meet the applicable SBA employee-based size standards for that industry," and be a "small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act" 85 Fed. Reg. 20812 (April 15, 2020).

The SBA argues Regardless of whether Appellant was specifically aware of these requirements, it is charged with notice of that provision. *See In re: Epiphany Management Solutions, LLC,* SBA No. SIZ-5657 *2 (May 11, 2015) (internal citations omitted) (stating that it is well settled law that all persons are charged with knowledge of what is in the regulations regardless of actual knowledge or of the hardship resulting from innocent ignorance). Indeed, the loan

application required Appellant to certify that it was "eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule)."[3]

Affiliation rules applicable to SBA's Financial Assistance Programs, including the SBA's Paycheck Protection Program ("PPP") are found in 13 CFR 121.301(0 (4):

> *"Affiliation based on identity of interest* states: Affiliation arises when there is an identity of interest between close relatives, as defined in 13 CFR 120.10, with identical or substantially, identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area).Where SBA determines that interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interest deemed to be one are in fact separate."[4]

"Close Relative" is defined in 13 CFR 120.10 as "a spouse; a parent; or a child or sibling, or the Spouse of any such person."

---

[3] SBA Appeal Response (*filed September 20, 2022*).

[4] Affiliation Rules for Paycheck Protection Program," effective April 3, posted on the SBA's website at: *haps://www.sba.gov/document/support-affiliation-rules-paycheck-protection-program.*

The Appellant argues, the SBA requested additional information for review in connection with certain entities the Agency described as potential affiliates of the Borrower through common owners or principals. The listed companies were Rice City Storage, L.L.C., Tobacco Plus, Inc., Acadia Wholesale & Tobacco Company, Inc., Deep South Enterprises Inc., and J.D. Gielen & Family LLC. Borrower responded on reasonable inquiry it appeared none of the listed companies or concerns is an affiliate of Shop Rite, Inc. under the stated criteria, with the possible exception of Rice City Storage, LLC, for the reasons stated in the response, to wit:

The owners of 20% or more of the equity of the Borrower are:

Owner Name	**Title**	**Ownership %**
M. Stefanski	Shareholder	21.9%
Shop Rite, Inc. Voting Trust	Shareholder	60.92%

Applying the stated criteria "owner of 20% or more of the equity", neither Borrower nor any of the above listed persons owned a 20% interest in any of the listed entities, with the possible exception of Rice City Storage, LLC. The registered owners of 20% or more of the Applicant's stock owned the following percentage of stock or membership interests in the listed entities:

% Ownership interest in:	Owner M. Stefanski	Owner SRI Voting Trust
Tobacco Plus, Inc.	0	0
Acadia Wholesale and Tobacco Co	0	0
Deep South Enterprises, Inc.	0	0
J.D. Gielen & Family, LLC	0	0
Rice City Storage, LLC	25%	0

The Appellant further argues, "SBA showed none of the entities listed as potential affiliates owned or had the power to control more than 50 percent of Borrower's voting shares, its Board of Directors or executive management. Petitioner showed Borrower did not own or have the power to control more than 50 percent of the shares or interests of any listed entity, nor the power to control the directors or managers of any of those concerns. The Agency's understanding of affiliation by virtue of familial ties through one named individual as an owner, member, or co-beneficial owner of a voting trust, could be correct only if both the named individual and a child or sibling of that person (or spouse of any such child or sibling) owned 20% or more of the equity interests in both Borrower and a listed entity. Borrower provided information to SBA that showed the interests of the named individual in the listed entities on the Date of Loan Application

(05/04/20). Borrower advised SBA that prior to December 14, 2020, no children, or siblings of the named individual nor their spouses owned individually or in the aggregate 20% or more of the equity in a listed entity, except for Rice City Storage, LLC, and J.D. Gielen & Family, LLC. Two of named individual's children (together with their spouses) each owned a 25% membership interest in Rice City Storage, LLC, and J.D. Gielen & Family, LLC. For purposes of aggregation under the Employee size standard, those relationships are inconsequential; Rice City Storage, LLC had three employees. J.D. Gielen & Family, LLC had none. The information showed further that none of the business entities listed above, nor any third party, owned or had the power to control more than fifty percent of the shares or interests of another listed entity, nor the power to control the directors or managers of any of those concerns. Petitioner showed further each of the listed entities are separate businesses, operated independently of each other, i.e., with separate employees, separate payrolls, and separate and independent operational management groups headed by Directors of Operation with no ties to any other listed entity".

The SBA argues that Appellant, Shop Rite, has been deemed to be part of an affiliation family of 6 different companies with a total of 896 employees. 4 of the companies took out PPP loans in an amount of $5,467,962.00. Breakdown is as follows:

PPP Loan Number	Entity	# Of Employees	Loan Amount
1031327200	Shop Rite, Inc.	473	$2,502,750.00
8805927308	Rice City Storage LLC	3	$11,262.00
1065687201	Tobacco Plus, Inc.	249	$1,359,250.00
3897687105	Acadia Wholesale & Tobacco Company, Inc.	171	$1,594,700.00

The SBA explains the factual background above, Tobacco Plus, Shop Rite and Acadia wholesale are more than 50.1% owned by three different voting trustees. These voting trusts are all listed as 100% owned by Peggy Angelle Gielen which would affiliate these 3 companies together based on identity of interest as outlined in 13 CFR 121.301(f)(4). A summary of the total employees of these 3 companies alone gives the family an 893-employee count. Although Peggy Angelle Gielen only has 25% ownership of Rice City Storage she was listed as the managing member which would give her control over the company and affiliate Rice City storage with the other companies and add its 3 employees to the total count, giving the family a total employee count of 896. SBA has been deemed that none of these companies qualify for any waivers and as such do not qualify as a small business and as such are not eligible for a PPP loan.

The Appellant counters the SBA position by stating that these entities are not affiliates because Peggy Gielen does not have control or ability to vote shares or participate in management. The voting trust agreement for Shop Rite, Inc. shows that John Cody Gielen as the Trustee does have the control, ability to vote share and participate in management. (AR 1487-1500) Shop Rite and the affiliated entities were founded/purchased by John Dan Gielen. (AR 1579, 1595) After his passing Shop Rite's ownership was transferred to his wife, Peggy, his sister (Mary Anne Stefanski), four daughters (Shawnee Gielen Gardiner and her husband Todd Gardiner, Arlise Gielen, Tracy Gielen, Heidi Gielen Viator and her husband Dirk Viator), and grandson (John Cody Gielen). (AR 1579, 1595) A list of the officers and manager of the other Trust owned entities with PPP loans shows that John Cody Gielen is the President, Chief Executive Officer of Shop Rite, Inc., Tobacco Plus, Inc. and Acadia Wholesale & Tobacco Co, Inc. (AR 1579, 1595-1596) This family is affiliated via identity of interest because all the entities are majority-owned and/or controlled by close members of the Gielen family. (AR 1595-1598).

The SBA promulgate procedures for determining affiliation, specifically the Affiliation Rules Applicable to U.S. Small Business Administration Paycheck Protection Program published April 03, 2020, provided,

> "Four tests for affiliation based on control apply to participants in the Paycheck Protection Program.[5] For purposes of the determining the number of employees of an applicant to the Paycheck Protection

[5] 13 CFR 121.301(f).

Program, the applicant is considered together with its affiliates. Following is a summary of the applicable affiliation tests.

Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties' controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. Affiliation under any of the circumstances described below is sufficient to establish affiliation for applicants for the Paycheck Protection Program.

1) Affiliation based on ownership. For determining affiliation based on equity ownership, a concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity. If no individual, concern, or entity is found to control, SBA will deem the Board of Directors or President or Chief Executive Officer (CEO) (or other officers, managing members, or partners who control the management of the concern) to be in control of the concern. SBA will deem a minority shareholder to be in control, if that individual or entity has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

2) Affiliation arising under stock options, convertible securities, and agreements to merge.

a. In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

b. Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and are thus not given present effect.

c. Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

d. An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agree-

ments to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns', or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

3) Affiliation based on management. Affiliation arises where the CEO or President of the applicant concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns. Affiliation also arises where a single individual, concern, or entity that controls the Board of Directors or management of one concern also controls the Board of Directors or management of one of more other concerns. Affiliation also arises where a single individual, concern or entity controls the management of the applicant concern through a management agreement.

4) Affiliation based on identity of interest. Affiliation arises when there is an identity of interest between close relatives, as defined in 13 CFR 120.10, with identical or substantially, identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area).

> Where SBA determines that interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.
>
> Waiver. The affiliation rules described above are waived for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the SBA; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681)."[6]

The Administrative Judge agrees with the SBA's findings that the Gielen family is affiliated via identity of interest prong 4 of the affiliation test, because the businesses Shop Rite, Inc., Rice City Storage LLC, Tobacco Plus, Inc. and Acadia Wholesale & Tobacco Company, Inc. are majority-owned and/or controlled by close members of the Gielen family. Furthermore, the Gielen family members are "Close Relative" as defined in 13 CFR 120. The SBA has shown that the affiliation relationship from the list of the officers and manager

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[6] Affiliation Rules for Paycheck Protection Program, effective April 3,2020 (*https://home.treasuly.gov/system/files/136/Affiliation%20rules%20overview%20%28for%2Opublic%29.pdf*).

of the other Trust owned entities with PPP loans shows that John Cody Gielen is the President, Chief Executive Officer of Shop Rite, Inc., Tobacco Plus, Inc. and Acadia Wholesale & Tobacco Co, Inc.

The Appellant's second argument is that Shop Rite, Inc. is exempt from the affiliation rule because it is a business engaged in food service by an assigned a NAICS code beginning with 72. On 4/11/22, "Borrower provided evidence to SBA that shows Borrower is in a food service business that has an NAICS code beginning with 72. A substantial part of Borrower's business (>70% of Shop Rite locations, and 72% of its employees) are engaged in the preparation and provision of meals, snacks, and beverages for immediate on-premises and off- premises consumption. In addition, Shop Rite owns and operates two (2) full-service restaurants. NAICS assigns Code 722513 (limited-service cafés, deli and carryout restaurants) to that business. Under SBA's interpretation of the CARES Act and PPP regulation, if the borrower is engaged in a business described by NAICS Code 72 by OMB, the exemption applies even though the applicant's business may have other components. There is no requirement in the Act or the regulations that an applicant's NAICS Code reflect consideration of the relative value and importance of the different components of the business. Even in other contexts, where such considerations may be relevant, e.g., using NAICS Codes for small business qualification in government procurement contracts, there is no requirement that SBA apply the NAICS Code for the component that accounts for the largest share of the business or contract value. *Paradigm Eng'rs & Constructors, PLLC v. United States,* 147 Fed. Cl. 487, 497 (2020), applying 13 C.F.R. §121.412(b).

As outlined in the Affiliation Rules for Paycheck Protection Program, the affiliation rule is waived for any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72.[7] The SBA Argues that 13 CFR §121.107 defines how the SBA determines a company's Primary industry, "In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees, and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. The SBA may also consider other factors, such as the distribution of patents, contract awards, and assets." Shop Rite, Inc. presented a forgiveness application listed as NAIC code 447110 in which it states it is Gasoline Stations with Convenience Stores. The Borrower provided a Profit and loss statement which validates the company type, showing 3 years of financial statements with more than 50% of its income from gasoline sales (AR 1598-1599). After the review of the record, the Administrative Judge finds that the Appellant, Shop Rite, company financials show that the company expenses of running the deli are around two (2) percent of total expenses. The Appellant's argument that they qualify for a PPP loan under the NAIC code 72 waiver exception for Food Service businesses, because they are a carryout restaurant under NAIC code 722513 (Limited-Service Carryout Restaurants)

[7] Affiliation Rules for Paycheck Protection Program," effective April 3,2020 posted on the SBA's website at: https://www.sba.gov/document/support-affiliation-rules-paycheck-protection-program).

is not persuasive. Review of Profit Loss Statements and past three (3) years of financial records, clearly show that the Deli provided less than ten (10) percent of total income to the company and approximately two (2) percent of cost of running the business. The Administrative Judge agrees with SBA's argument that the record demonstrates Shop Rite, Inc. are Gasoline Stations with Convenience Stores, as presented on the PPP Loan forgiveness application. Accordingly, I find the Appellant would not qualify for the NAIC code 72 Waiver, because the Appellant's primary industry is not in food service. The Appellant presented *Paradigm Eng'rs & Constructors, PLLC v. United States,* 147 Fed. Cl. 487, 497 (2020), applying 13 C.F.R. §121.412(b) to show there is no requirement that SBA apply the NAICS Code for the component that accounts for the largest share of the business or contract value, However, Congress specifically empowered the SBA to specify detailed definitions or standards by which a business concern maybe determined. 15 U.S.C.S. § 632(a)(2)(A). When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal 13 CFR 121.402(e). The designated NAICS Code and corresponding size standard are final unless timely appealed to the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). 13 C.F.R. § 121.402(d). If a NAICS Code designation is challenged, the OHA's decision is final, 13 C.F.R. § 134.316(d), (f), unless appealed to a court. While I agree with the Appellant's assertion that a company may have more than one NAIC code as a business is charged with self-identifying, that does infer that the NAIC codes a business uses accurately

represents the primary industry classifying the business establishment. Here, the Appellant's Deli represents a small portion of the Appellant's business and would not afford them the right to qualify for the NAIC code 72 wavier under the SBA regulations and statutes governing the PPP Loan Program and would not allow the Appellant to be exempt from the total affiliation family count.

In the SBA's final argument, it states that Shop Rite on its own exceeds the maximum number of employees. Specifically arguing, "even if Shop Rite were not found to be affiliated with these entities, Shop Rite on its own exceeds the maximum allowable number of employees. Appellant's 2019 IRS Forms 941 show Appellant had over 500 employees during each quarter of 2019. (Dkt. Appeal Ex. B) Appellant's 2019 wage and payroll reports also show over 500 employees for each quarter. (Dkt. Appeal Ex. C) Appellant has failed to show SBA made an error in determining that Appellant exceeds the size standards to be eligible for a PPP loan. Additionally, Appellant did not submit any information to evaluate any other size standards (Revenue Based Size Standard or Alternative Size Standard) or exemptions. The Appellant provided evidence that supports Shop Rite's employee count exceeded the 500-size standard in their Appeal Exhibit B and Exhibit C filed July 01, 2022, showing employee counts are more than 500 employees for Quarters 1 through 4 of 2019. The Appellant on its own exceeds the size standard but further exceeds the threshold with its affiliate and would not qualify for the PPP loan and thus cannot be given PPP loan forgiveness". Review of the Appellant's 2019 corporate Tax returns support the SBA's conclusion that the Appellant has exceeded the size standard for PPP Loans. The

Employee count for Shop Rite for Quarters 1, 2, 3, and 4 exceeds the 500-employee threshold.

The SBA regulations make clear that borrowers would not receive loan forgiveness for ineligible loans made under the CARES Act. See e.g. CARES Act § 1106(b), 134 Stat. at 298 (codified at 15 U.S.C. § 636(b))("An eligible recipient shall be eligible for forgiveness...); Paycheck Protection Program-Requirements-Loan Forgiveness, 85 Fed. Reg. 33004, 33005 (May 28, 2020) ("If SBA determines in the course of its review that the borrower was ineligible for the PPP loan the loan will not be eligible for loan forgiveness."); Paycheck Protection Program-Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 Fed. Reg. 8283, 8296 (February 3, 2021) (consolidates and restates multiple PPP Interim Final Rules regarding forgiveness requirements, including requirement that ineligible borrowers will not receive loan forgiveness). Therefore, eligibility is a prerequisite to reaching the issue of forgiveness (i.e. whether Appellant properly used the PPP loan funds.)

The Appellant has the burden of showing that the SBA loan review decision is not based on a clear error of fact or law, there is no evidence, and the law does not support PPP Loan applications that exceed the size standard. The record demonstrates SBA properly applied the applicable laws, regulations, and policy when calculating Appellant's eligible PPP loan amount, and in the amount of the PPP loan forgiveness. I therefore find the final SBA loan review decision is not based on a clear error of fact or law. I hereby DENY the Appellant's appeal and AFFIRM the SBA final loan review decision.

IV. Standard of Review

Appellant has the burden of proving all elements of the appeal. Specifically, Appellant must prove that the final SBA loan review decision is based upon a clear error of fact or law. 13 C.F.R. § 134.1210.

V. Conclusion

Appellant has failed to establish that the final SBA loan review decision is based on a clear error of law or fact. I therefore Deny the appeal and affirm the final SBA loan review decision.

This is an initial agency decision. However, unless a request for reconsideration is filed within 10 calendar days pursuant to 13 C.F.R. § 134.1211(c), this decision shall become the final decision of SBA 30 calendar days after its service. 13 C.F.R.§ 134.1211.

/s/ James M. Caulfield
JAMES M CAULFIELD
Administrative Judge

APPENDIX C

UNITED STATES SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

PAYCHECK PROTECTION PROGRAM APPEAL OF:

SMALL BUSINESS ADMINISTRATION

Petitioner

Appealed from

SBA PPP Loan Number
1031327200

Decided: February 9, 2023
Decision No. PPP-1o31327200

APPEARANCES

Christopher Zaunbrechcr, Esquire, Counsel for the Appellant

Tabitha Mangano, Esquire, Counsel for the Small Business Administration

DECISION

I. Introduction and Jurisdiction

On June 1, 2020 the U.S. Small Business Administration (SBA) Office of Capital Access issued a final Paycheck Protection Program (PPP) loan review decision finding Shop Rite, Inc. (Appellant) was ineligible for its PPP loan. On January 30, 2022, Appellant filed an appeal from that final SBA loan review decision. Appellant argued that the Final SBA

Loan Review Decision was clearly erroneous, and requested that OHA reverse it, and find Appellant was eligible for full PPP loan forgiveness in the amount of $2,502,750.00. On October 18, 2022 the undersigned issued a decision in that appeal Affirming the SBA Loan Review Decision and denying the Appellant full forgiveness of their PPP loan. On October 28, 2022 counsel for the Appellant filed the instant Petition for Reconsideration of that decision. The initial decision of October 18, 2022 is incorporated in this decision on the Appellant's Petition for Reconsideration as if fully written herein. For the reasons discussed in the initial decision of October 18, 2022, I AFFIRM that initial decision upholding the SBA loan review decision which denied the Appellant full forgiveness of their PPP loan.

OHA has jurisdiction to decide this PFR. See 13 C.F.R. Part 134, Subpart L.

II. Background

On April 03, 2020, the Appellant, Shop Rite Inc., applied for a PPP loan with First National Bank of Louisiana (Lender). On April 15, 2020 the loan was approved. On April 15, 2020, the SBA disbursed a PPP loan of $2,502,750.00 to Appellant through the Lender. On June 23, 2021 the Appellant filed for PPP loan forgiveness.

A. Final SBA Review Decision

On June 01, 2022, SBA issued a Final Loan Review Decision finding that Appellant was ineligible for the PPP loan that it received and therefore was not eligible for PPP loan forgiveness. Specifically, the SBA found that after review of the documentation provided, the SBA concluded that the Borrower's business, or together with its affiliates, exceeded the maximum

allowable number of employees and the SBA small business size standards.

B. Appeal

On June 30, 2022, Appellant filed the instant appeal arguing the Final SBA Loan Review Decision was clearly erroneous and requested the Office of Hearings and Appeals (011A) to reverse that decision and find that the Appellant was eligible for PPP loan forgiveness. On July 25, 2022, the undersigned issued a Notice and Order directing the SBA to file the Administrative Record (AR) by August 15, 2022. On August 15, 2022, the SBA filed the Administrative Record (AR). The Appellant had until August 24, 2022 to file an objection to the AR. The Appellant did not file an Objection to the AR. On September o8, 2022 the undersigned issued an Order for the SBA to file a Response to the appeal. The SBA filed a Response on September 29, 2022. On October 18, 2022 the undersigned Administrative Judge issued a decision denying the appeal and Affirming the SBA loan review decision. On October 28, 2022 the Appellant filed the instant Petition for Reconsideration.

Discussion & Analysis

As noted above, my original decision of October 18, 2022 is incorporated into this decision as if fully rewritten herein. After considering the Petition for Reconsideration and the arguments advanced therein, I find nothing new or persuasive that alters my logic or rationale for the initial decision of October 18, 2022. Specifically, I do not find a clear error of law or fact material to that initial decision. Accordingly, the SBA's Petition for Reconsideration is DENIED. My decision of October 18, 2022 is Affirmed, and the Appellant's

original Appeal is of the SBA Final Loan Review Decision is DENIED.

Standard of Review

A Petitioner for Reconsideration has the burden of clearly showing an error of fact or law material to the decision. 13 C.F.R. § 134.1211(c).

Conclusion

Petitioner/Appellant has not established that the Initial decision was based on a clear error of law or fact material to the decision. I therefore DENY the Petition for Reconsideration and AFFIRM the Initial Decision Affirming the Final SBA Loan Review Decision.

Unless the SBA Administrator, solely within her discretion, elects to review and/or reverse this decision per 13 C.F.R. §134.1211(d), this decision will become the SBA's final decision 3o calendar days after it is served. See 13 C.F.R. § 134.1211(b). The discretionary authority of the Administrator to review and/or reverse a decision does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter. See id. Once the OHA decision becomes final or the Administrator issues a final decision, the final decision may be appealed to the appropriate Federal district court. 13 C.F.R. § 134.1211(d). This decision is non-precedential but may be published. 13 C.F.R. § 134.1211(e) and (f).

/s/ James M. Caulfield
JAMES M CAULFIELD
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2023, I served the foregoing by e-mail upon the following:

Shop Rite, Inc.
PPP# - 1031327200
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/s/ Lily McLane-Dalton
Lily McLane-Dalton
Office of Hearings and Appeals

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Case No. 6:23-CV-00456

SHOP RITE INC

versus

U.S. SMALL BUSINESS ADMINISTRATION

JUDGE ROBERT R. SUMMERHAYS

MAGISTRATE JUDGE CAROL B. WHITEHURST

MEMORANDUM RULING AND ORDER

The present matters before the Court are cross motions for summary judgment filed by the plaintiff, Shop Rite, Inc. [ECF No. 25], and the defendant, the United States Small Business Administration [ECF No. 33]. Both motions are opposed.

I.

BACKGROUND

Shop Rite, Inc. ("Shop Rite") challenges the decision of the United States Small Business Administration (the "SBA") denying its application to forgive loans advanced to Shop Rite under the Paycheck Protection Program ("PPP") created by the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the "CARES Act" or "the Act"). Under Section 7(a) of the Small

Business Act, codified at 15 U.S.C. § 636(a), the SBA is authorized to make business loans to eligible small business concerns.[1] SBA regulations establish the eligibility requirements for SBA small business loans, including size, location, and demonstrated need for credit.[2] These regulations set "size standards" that "define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for 'small business' concerns."[3] These size standards turn, in part, on the industry in which a borrower operates.[4] The SBA classifies industries using the North American Industry Classification System ("NAICS"), which assigns codes to various categories of economic activity.[5] The SBA then sets size limits for the maximum revenue or number of employees to qualify as an eligible "small business" by NAICS code.[6] The employee size limit ranges from 125 to 1,500 employees, depending on the NAICS category.[7] The regulations place businesses in the relevant NAICS category based on the borrower's "primary industry":

> In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the

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[1] ECF Nos. 24-2 at 3-6; 35-2 at 1-10.

[2] 13 C.F.R. § 120.101.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] 13 C.F.R. § 121.201.

[7] *Id.*

> most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.[8]

The SBA's regulations also include "affiliation" rules governing when related business are grouped together for purposes of applying the size limits.[9]

In 2020, Congress passed, and the President signed, the CARES Act which, *inter alia,* created the PPP.[10] The CARES Act directed the SBA to administer the PPP under the agency's pre-existing Section 7(a) small business loan program, and provided that PPP loans could be forgiven if used for certain authorized purposes.[11] In this regard, the CARES Act states that "[e]xcept as otherwise provided in [the PPP], the [SBA] may guarantee covered loans *under the same terms, conditions, and processes* as a loan made under this subsection [Section 7(a)][12] The CARES Act expanded eligibility for PPP loans in certain respects compared to traditional Section 7(a) loans.[13] One of the areas where the CARES Act expanded eligibility for PPP loans is relevant here—the waiver of the affiliation rules for restaurant and hospitality businesses.[14] Specifically, the CARES Act provides that:

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[8] 13 C.F.R. § 121.107.

[9] 13 C.F.R. § 121.103.

[10] CARES Act, Pub. L. No. 116-136, 134 Stat. 281. The PPP is codified at 15 U.S.C. § 636(a)(36).

[11] *Id.*

[12] CARES Act, 134 Stat. 287; 15 U.S.C. § 636(a)(36)(B) (emphasis added).

[13] 15 U.S.C. § 636(a)(36)(D).

[14] 15 U.S.C. § 636(a)(36)(D)(iv).

> [d]uring the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for—(I) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72....[15]

NAICS codes beginning with "72" include hotels and motels, casino hotels, bed and breakfast inns, and other similar types of hospitality businesses.[16] The category also includes full and limited-service restaurants, caterers, "drinking places," snack and nonalcoholic beverage bars, and other food service-related businesses.[17]

The CARES Act directed the SBA to promulgate regulations implementing the PPP within fifteen (15) days of enactment, "without regard to the notice requirements under section 553(b) of [T]itle 5, United States Code."[18] On April 15, 2020, the SBA issued an Interim Final Rule ("First IFR"), which Plaintiffs refer to as the "Exclusion Rule," detailing the SBA's interpretation of the PPP provisions in the CARES Act and how the SBA would administer the new program.[19] The First IFR stated that the PPP is a "new

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[15] 15 U.S.C. § 636(a)(36)(D)(iv)(I).

[16] 13 C.F.R. §121.201.

[17] *Id.*

[18] CARES Act, Sec. 1114, 134 Stat. at 312; 15 U.S.C. § 9012.

[19] Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811-01.

[Section] 7(a) program."[20] The First IFR declared SBA's understanding that "[t]he intent of the [CARES] Act is that SBA provide relief to America's small businesses expeditiously ... by giving all lenders delegated authority and streamlining the requirements of the regular [Section] 7(a) loan program."[21] As part of that "streamlining," the First IFR stated that businesses identified in Section 120.110 as ineligible for traditional Section 7(a) loans were *also* not eligible for PPP loans, "except that nonprofit organizations authorized under the [CARES] Act are eligible."[22]

On April 3, 2020, Shop Rite applied for a PPP loan with the First National Bank of Louisiana ("FNB") and, on April 15, 2020, the bank approved the loan and disbursed $2,502,750 to Shop Rite.[23] Shop Rite filed an application for PPP loan forgiveness on June 23, 2021, and FNB recommended that the loan be forgiven.[24] Shop Rite's initial application for forgiveness included an SBA Form 3508 EZ prepared by Shop Rite indicating that its NAICS code was 447110, which is the code for "Gasoline Stations with Convenience Stores."[25] In August 2021, the SBA informed FNB that it was reviewing Shop Rite's eligibility under the PPP program and requested information and documents from Shop Rite pertaining to the number of persons it employs, its affiliates, and its revenues to determine whether Shop Rite satisfies the SBA's size require-

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[20] *Id.* at III(1).

[21] *Id.*

[22] *Id.* at III(2)(c).

[23] ECF No. 24-9 at 1476-77.

[24] *1d.* at 1481-83.

[25] *Id.* at 9.

ments for participation in the PPP program.[26] The SBA issued its final loan review decision in June 2022, finding that Shop Rite was not eligible for the PPP loan it received and, accordingly, was not eligible for forgiveness of the loan.[27] The SBA determined that Shop Rite exceeded the 500–employee eligibility limit when the total number of employees of Shop Rite and its affiliates were considered. Specifically, the SBA found that the Shop Rite and its affiliates employed a total of approximately 896 individuals.[28]

Shop Rite timely appealed the SBA's loan review decision to the Office of Hearings and Appeals ("OHA"), arguing that the SBA clearly erred in its affiliation findings and that Shop Rite was eligible for the affiliation waiver under 15 U.S.C. § 636(a)(36)(D)(iv)(I).[29] Shop Rite argued before the OHA that substantial parts of its business—over 70% of its locations and 72% of its employees—"are engaged in the preparation and provision of meals, snacks, and beverages for immediate on-premises and off-premises consumption."[30] Shop Rite argued that the NAICS code applicable to "limited-service restaurants" (722513) applies to this aspect of its business and, therefore, Shop Rite qualifies for the affiliation waiver for borrowers engaged in a business that falls under a "72" series NAICS code.[31] The Administrative Law Judge ("ALF) rejected Shop Rite's argument, concluding that Shop Rite's "primary industry" is "gasoline stations with

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[26] ECF No. 24-7 at 1455-56.

[27] *Id.* at 5, 17-20, 22-23, 1588-1601.

[28] Administrative Record, ECF No. 24-9 at 4.

[29] Administrative Record, ECF No. 24-1.

[30] Administrative Record, ECF No. 24-10 at 17.

[31] *Id.*

convenience stores," which is covered under NAICS code 447110.[32] In this regard, the ALJ noted that "[r]eview of profit / loss statements and past three (3) years of financial records, clearly shows that [Shop Rite's] deli provided less than ten (10) percent of total income to the company and approximately two (2) percent of cost of running the business."[33] Accordingly, the ALJ affirmed the SBA's final loan decision rejecting Shop Rite's application for forgiveness. Shop Rite filed the present action seeking judicial review of the SBA's decision.[34]

II.

SUMMARY JUDGMENT STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."[35] "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[36] "A genuine issue of material fact exists when the evidence is such that a reasonable [factfinder] could return a verdict for the non-moving party."[37] As summarized by the Fifth Circuit:

When seeking summary judgment, the movant bears the initial responsibility of demonstrating the

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[32] *Id.* at 18.

[33] *Id.* at 18.

[34] *Id.*

[35] Fed. R. Civ. P. 56(a).

[36] *Id.*

[37] *Quality Infusion Care, Inc. v. Health Care Service Corp.,* 628 F.3d 725, 728 (5th Cir. 2010).

absence of an issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. However, where the nonmovant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting tria1.[38]

When reviewing evidence in connection with a motion for summary judgment, "the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached."[39] "Credibility determinations are not part of the summary judgment analysis."[40] Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof."[41]

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[38] *Lindsey v. Sears Roebuck and Co., 16* F.3d 616, 618 (5th Cir. 1994) (internal citations omitted).

[39] *Roberts v. Cardinal Servs., Inc.,* 266 F.3d 368, 373 (5th Cir. 2001); *see also Feist v. Louisiana, Dept. of Justice, Office of the Atty. Gen.,* 730 F.3d 450, 452 (5th Cir. 2013) (court must view all facts and evidence in the light most favorable to the non-moving party).

[40] *Quorum Health Resources, L.L.C. v. Maverick County Hosp. Dist.,* 308 F.3d 451, 458 (5th Cir. 2002)(citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

[41] *Patrick v. Ridge,* 394 F.3d 311, 315 (5th Cir. 2004) (alterations in original) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)).

II.

DISCUSSION

A. The Standards For Judicial Review of the SBA's Action.

The APA provides that a "reviewing court shall ... hold unlawful and set aside agency action ... found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory Rite."[42] Until the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo,*[43] courts generally applied the two-step *Chevron* framework in determining whether an agency's action exceeded its statutory authority.[44] Under this framework, courts were required to first exhaust the traditional tools of statutory construction to determine whether "Congress has directly spoken to the precise question at issue;" if it has, the court's inquiry ended and the court had to "give effect to the unambiguously expressed intent of Congress."[45] If the statute was silent or ambiguous as to the legality of the agency's action, a court would proceed to step two of the *Chevron* framework and determine whether the agency's action was "based on a permissible construction of the statute."[46] "If a statute is ambiguous, and if the

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[42] 5 U.S.C. § 706(2); *Texas v. United States,* 809 F.3d 134, 178 (5th Cir. 2015).

[43] _U.S._, 144 S. Ct. 2244, 2261-63 (2024)

[44] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-44 (1984); *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n,* 2 F.4th 421, 433-34 (5th Cir. 2021).

[45] *Chevron,* 467 U.S. at 842-43.

[46] *Alenco,* 201 F.3d at 619 (quoting *Chevron,* 467 U.S. at 843).

implementing agency's construction [of the statute] is reasonable," a court would generally defer to the agency's interpretation of the statute.[47]

The Supreme Court overruled *Chevron* in *Loper Bright Enter.*[48] Now, when an agency's interpretation of statute is challenged, the agency is not entitled to deference even when a statute is ambiguous.[49] Rather, the APA requires courts to "exercise independent judgment in determining the meaning of statutory provisions."[50] Courts may consider an agency's interpretation as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[51] especially when the interpretation "rests on factual premises within the agency's expertise."[52] But an agency's interpretation of a statute cannot supplant the role of the judiciary as the final arbiter of a statute's meaning.[53] Courts might also consider "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time," when determining the statute's meaning.[54]

Statutes may authorize an agency to exercise discretion, and that discretion could take many

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[47] *Acosta v. Hensel Phelps Constr. Co.,* 909 F.3d 723, 730 (5th Cir. 2018).

[48] *Loper BRite Enter.,* 144 S. Ct. at 2261-63.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 2259.

[52] *Id.* at 2267 (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA,* 464 U.S. 89, 98, n. 8 (1983)).

[53] *Id.*

[54] *Id.* at 2262.

forms—including the authority to define a statutory term that Congress chose not to elucidate,[55] the authority to "fill up the details" of a statutory scheme,[56] or merely the authority to regulate within the clear limits of statute in a manner that is "appropriate" or "reasonable.[57] When statute delegates authority to an agency, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits" by "recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decision-making within those boundaries."[58]

Under the APA, courts must set aside "agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[59] Agency action does not violate this standard so long as it is "reasonable and reasonably explained," in other words, so long as the agency "has acted within a zone of reasonableness and, in particular, that the agency has reasonably considered the relevant issues and reasonably explained the decision."[60] To act reasonably, the agency "must examine the relevant data and

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[55] *Id.* at 2263 (citing *Batterton v. Francis,* 432 U.S. 416, 425 (1977))

[56] *Id.* (quoting *Wayman v, Southard,* 10 Wheat. 1, 43, 6 L.Ed. 253 (1825)).

[57] *Id.*

[58] *Id.* (internal quotations, citations, and brackets omitted).

[59] 5 U.S.C. § 706(2)(A).

[60] *BNSF Ry. Co. v. Fed. R.R. Admin.,* 62 F.4th 905, 910 (5th Cir. 2023) (quoting *FCC v. Prometheus Radio Project,* 592 U.S. 414, 423, 141 S. Ct. 1150, 1158, 209 L.Ed.2d 287 (2021)).

articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[61] Reasoning that "fails to account for relevant factors or evinces a clear error of judgment" must be set aside.[62] In general, an agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that either runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[63] The reasoning on which an action was based must be articulated by the agency at the time the decision was made, and not developed after the fact.[64] The reasoning need not be perfectly clear, but it is sufficient so long as "the agency's path may reasonably be discerned."[65]

B. The "Primary Industry" Rule and the Applicability of the Affiliation Waiver.

Shop Rite first challenges the SBA's ruling that it is not eligible for the "affiliation waiver" in 15 U.S.C. § 636(a)(36)(D)(iv)(I). Shop Rite argues that the SBA's use of a "primary industry" test to assign a single

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[61] *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut, Auto. Ins, Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983))(internal quotations omitted).

[62] *Id.* (quoting *Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health & Hum. Servs.,* 985 F.3d 472, 475 (5th Cir. 2021))(internal quotations omitted).

[63] *Id.* (quoting *State Farm,* 463 U.S.at 43).

[64] *Id.* (quoting *Texas v. United States,* 40 F.4th 205, 226-27 (5th Cir. 2022)).

[65] *Id.* (quoting *State Farm,* 463 U.S. at 43).

NAICS code to a borrower for purposes of determining whether the waiver applies is inconsistent with the text of section 636(a)(36)(D)(iv)(I).[66] According to Shop Rite, a borrower who is involved in any business activities that could be classified under an NAICS code beginning with "72" is eligible for the affiliation waiver, even if those activities are not a primary part of its business. Shop Rite argues that the SBA's determination otherwise violates the CARES Act. Alternatively, Shop Rite argues that the SBA's decision that it does not qualify for the affiliation waiver is arbitrary and capricious.[67]

1. Statutory Authority.

The Section 7(a) program makes SBA business loans available to eligible small business concerns. The statute governing the Section 7(a) program is silent as to the methodology for determining the size eligibility for loans under the program. Accordingly, Congress empowered the SBA to establish rules and regulations governing the Section 7(a) small business loan program.[68] Based on that authority, the SBA adopted rules and regulations governing the program, including the long-standing eligibility requirements for Section 7(a) loans.[69] Sub-part A of 13 C.F.R. part 121 forms part of those eligibility regulations. These provisions set forth the SBA's size eligibility regulations for the Section 7(a) small business loan program. Section 121.101 explains that the SBA's size standards are based on the "types of economic activity,

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[66] ECF No. 25-1 at 4.

[67] *Id.* at 4-5.

[68] 15 U.S.C. §§ 633(d), 634(b)(6), 634(b)(7).

[69] *In re Gateway Radiology Consultants, P.A.,* 983 F.3d 1239, 1248 (11th Cir. 2020).

or industry, generally under the [NAICS]."[70] Under these provisions, the SBA determines a borrower's "primary industry" based on section 121.107:

> In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.[71]

Section 121.201 provides a table of small business size standards matched to NAICS industry codes.[72] Accordingly, under the SBA's regulations, the applicable eligibility limit for a borrower under the Section 7(a) loan program is determined by a single NAICS code that reflects a borrower's primary business.[73]

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[70] 13 C.F.R. § 121.101.

[71] 13 C.F.R. § 121.107.

[72] 13 C.F.R. § 121.201.

[73] 13 C.F.R. § 121.301. This provision states:

> (a) For Business Loans (other than for 7(a) Business Loans) and for Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:
>
> (1) The size of the applicant alone (without affiliates) must not exceed the size standard designated for the *industry in which the applicant is primarily engaged;* and
>
> (2) The size of the applicant combined with its affiliates must not exceed the size standard designated for either *the primary industry* of the applicant alone or *the primary industry* of the applicant and its affiliates,

Instead of creating an entirely new loan program, the CARES Act placed the PPP loan program under the pre-existing Section 7(a) loan program. The Cares Act provides that the SBA may guarantee PPP loans "under the same *terms, conditions, and processes"* as a loan made under Section 7(a) "[e]xcept as otherwise provided."[74] Those "terms, conditions, and processes" governing the Section 7(a) program include the SBA's methodology for assigning an NAICS code based on a borrower's primary industry. Shop Rite, however, argues that the affiliation waiver provision in section 636(a)(36)(D)(iv)(I) alters these eligibility rules. Shop Rite essentially argues that, under section 636(a)(36)(D)(iv)(I), if a business concern has less than 500 employees on a stand-alone basis—without considering affiliates—and can point to some part of its business that qualifies as "food service" under one of the "72" series of NACIS codes, it is entitled to the waiver even if that food service business is only a small

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> which ever is higher. These size standards are set forth in § 121.201.
>
> (b) For 7(a) Business Loans and Development Company programs, an applicant business concern must meet one of the following standards:
>
> (1) *The same standards applicable under paragraph (a) of this section;* or
>
> (2) Including its affiliates, tangible net worth not in excess of $20 million, and average net income after Federal income taxes (excluding any carry over losses) for the preceding two completed fiscal years not in excess of $6.5 million."

Shop Rite does not argue that it meets the definition of a small business concern given in section 121.301(b)(2).

[74] 15 U.S.C. § 636(a)(36)(B)(emphasis added).

part of its operations.[75] Put another way, according to Shop Rite, its business activities may fall under multiple NAICS codes and any discrete activities that involve food service entitle it claim the affiliation waiver. Accordingly, Shop Rite argues that the SBA violated section 636(a)(36)(D)(iv)(I) by relying on 13 C.F.R. § 121.107 to assign Shop Rite a single NAICS code corresponding to a "primary industry" that is not eligible for the affiliation waiver.[76]

The Court first turns to the text of the statute. Section 636(a)(36)(D)(iv)(I) states that it applies to "any business concern with not more than 500 employees that ... is assigned a North American Industry Classification System code beginning with 72." This text does not detail how the SBA is to apply the 500-employee size standard or how the SBA is to assign the applicable NAICS code to a borrower. Nor does the statute expressly displace the "primary industry" methodology of 13 C.F.R. § 121.107 for purposes of the waiver, or otherwise state that a borrower may be assigned multiple NAICS codes. Given this statutory silence, the SBA relied on its 13 C.F.R. Part 121 regulations governing eligibility under the Section 7(a) loan program to determine that Shop Rite was not eligible for the waiver.

The SBA's approach here is consistent with statute. The CARES Act states that the PPP loan program may be administered according to the same "terms, conditions, and processes" as the Section 7(a) loan program. Under the pre-existing "terms, conditions, and processes" of the Section 7(a) loan program, the SBA determines a borrower's NAICS code based on its

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[75] ECF No. 30 at 8-12.

[76] *Id.*

primary industry, and this NAICS code determines which size limit applies for purposes of eligibility. Using this methodology to determine eligibility for the affiliation waiver is consistent with the statute because the waiver is framed in terms of a size limit (500 employees) and the assignment of an NAICS industry code (a code beginning with "72"). Because Congress expressly legislated against the backdrop of an existing statutory and regulatory scheme, it may be presumed that Congress was aware of the pre-existing rules and regulations of the Section 7(a) program—including the eligibility regulations in Sub-part A of 13 C.F.R. part 121—when it placed the PPP under Section 7(a).[77] Congress expressly referenced the SBA's affiliation regulation-13 C.F.R. 121—in the text of section 636(a)(36)(D)(iv)(I). Congress did not, however, reference or alter the remaining eligibility rules in Sub-part A of 13 C.F.R. part 121. In short, the SBA did not violate section 636(a)(36)(D)(iv)(I) by using 13 C.F.R. § 121.107 to determine that Shop Rite's "primary industry" did not fall under an NAICS code beginning with "72."

Shop Rite makes two additional arguments supporting its position that the SBA's decision violates the CARES Act. First, Shop Rite appears to argue that the SBA erroneously applied the "primary industry" methodology for determining the applicable NAICS code for purposes of the affiliation waiver "by analogy" from the SBA's rules governing small business procurement and contracting."[78] The Court disagrees. Shop Rite is correct that SBA's regulations do not address how to

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[77] *Pharaohs GC, Inc. v. United Slates Small Bus. Admin,* 990 F.3d 217, 227 (2d Cir. 2021).

[78] ECF No. 30 at 12.

determine eligibility for the affiliation waiver; nor does section 636(a)(36)(D)(iv)(I). But the SBA's pre-existing Section 7(a) regulations do address how to determine eligibility under the Section 7(a) program in general, and the CARES Act expressly provided that the SBA could rely on these pre-existing rules. Contrary to Shop Rite's argument, these Section 7(a) rules are not limited to procurement and contracting programs but are included under the caption "Provisions of General Applicability."[79]

Shop Rite next argues that 13 C.F.R. § 121.402 allows it to use multiple NAICS codes to describe various aspects of its business and thus does not limit eligibility for the affiliation waiver to a single NAICS code for its primary industry.[80] This argument is also without merit. Section 121.402 falls under a set of SBA regulations governing the "Size Eligibility Requirements for Government Procurement" and not the Section 7(a) loan program.[81] Section 121.402, in particular, allows for the assignment of multiple NAICS industry codes for multiple award contracts, but not Section 7(a) loans.[82] The CARES Act provides that the PPP loan program is to be administered under the Section 7(a) loan program, not the SBA's procurement and contracting program.

In sum, the SBA did not violate section 636(a)(36)(D)(iv)(I) by using 13 C.F.R. § 121.107 to determine that Shop Rite's "primary industry" did not

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[79] 13 C.F.R. Part 121, Subpart A (subcaption stating "Provisions of General Applicability").

[80] ECF No. 30 at 12.

[81] 3 C.F.R. § 401 (caption preceding text stating "Size Eligibility Requirements for Government Procurement").

[82] 13 C.F.R. § 121.401.

fall under the NAICS code beginning with "72." The Court, therefore, grants summary judgment with respect to Shop Rite's claim that the SBA violated the CARES Act.

2. Was the SBA's Application of the "Primary Industry" Test Arbitrary and Capricious?

Shop Rite next argues that the SBA's affiliation waiver determination is arbitrary and capricious. To the extent that Shop Rite argues that the SBA's determination is arbitrary and capricious based on its statutory arguments that the SBA violated the CARES Act by relying on the "primary industry" test in its pre-existing Section 7(a) eligibility regulations, the Court concludes that Shop Rite's arguments fail for the same reasons explained above. Shop Rite, however, appears to further argue that the administrative record does not support the SBA's conclusion that Shop Rite's "primary industry" does not fall under one of the NAICS codes beginning with "72." Shop Rite contends that it submitted evidence that greater than "70% of Shop Rite locations, and [greater than] 72% of its employees are engaged in the preparation and provision of meals, snacks, and beverages for immediate on-premises and off-premises consumption."[83] Shop Rite also contends that it submitted evidence that it "also owns and operates two full — service restaurants."[84] Shop Rite argues that this evidence supports a finding that its "primary industry" falls under the one of the NAILS codes beginning with "72" that cover the food service industry.[85]

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[83] ECF No. 25-2 at 5.

[84] *Id.*

[85] *Id.*

The SBA, however, points to evidence in the record showing that "the bulk of Plaintiff s income and costs of doing business are related to the sale of gasoline, cigarettes, and gaming, rather than to , its deli business."[86] The SBA points to Shop Rite's "statements of financial condition" for 2017 through 2019, which show that Shop Rite received $81,909,708 and income from the sale of fuel and that the costs associated with its fuel sales was $74,176,557.[87] In contrast, Shop Rite "received $13,893,477 and income from cigarette sales, $22,597,338 in gaming revenue, and only $8,607,236 from deli sales."[88] The costs associated with Shop Rite's deli sales over that period totaled $3,675,244.[89]

13 C.F.R. § 121.107 states that, in "determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which the business operations occurred for the most recently completed fiscal year." The SBA defines "receipts" as "all revenue in whatever form received or accrued from whatever source, including from the sales of products or services."[90] It appears from the record that the SBA considered the factors set forth in section 121.107, including the distribution of receipts and the costs of doing business among Shop Rite's different business activities.[91] Considering these factors, the revenues and costs associated with Shop

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[86] ECF No. 33-1 at 10-11.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] 13 C.F.R. § 121.104.

[91] Administrative Record, ECF No. 24-7 at 705-721; 1602-1603.

Rite's food service activities are only about 10% of its revenues and costs associated with its gasoline sales. Accordingly, even assuming that 70% of Shop Rite's locations and employees have some involvement in food sales, the SBA did not clearly err in concluding that, on balance, Shop Rite's primary industry does not fall under one of the NAICS codes beginning with "72" based on its sales of food items. The Court, therefore grants summary judgment with respect to Shop Rite's claim that the SBA acted arbitrarily and capriciously.

C. Was the SBA's Conclusion that Shop Rite Was Part of an Affiliated Group Arbitrary and Capricious?

Shop Rite next challenges the SBA's affiliate grouping determination. 13 C.F.R. § 121.103(a) provides the general rules for determining whether business concerns or entities are "affiliates" and thus grouped together for purposes of applying the employee-size standards under 13 C.F.R. § 121.201. Section 121.103 states that business concerns and entities "are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both."[92] This regulation further states that "it does not matter whether control is exercised, so long as the power to control exists."[93] The SBA found that Shop Rite was related to five other companies: Tobacco Plus, Inc. ("Tobacco Plus"), Acadia Wholesale & Tobacco Co. ("Acadiana Wholesale & Tobacco"), Deep South Enterprises, Inc. ("Deep South Enterprises"), J. D. Gielen & Family, LLC, and Rice City Storage, LLC

[92] 13 C.F.R. § 121.103.

[93] *Id.*

("Rice City Storage").[94] Of these companies, the SBA notes that Shop Rite, Rice City Storage, Tobacco Plus, and Acadia Wholesale & Tobacco all took out PPP loans. The record further reflects that Shop Rite, Tobacco Plus, and Acadia Wholesale & Tobacco are "more than 50.1% owned by three different voting trusts."[95] According to the SBA, these trusts "are all listed as 100% owned by Peggy Gielen which would affiliate these three companies together based on identity of interest."[96] The SBA notes that these three companies alone exceed the employee eligibility threshold because they have a total of 893 employees.[97] The SBA also notes that a single individual who is a close member of Peggy Gielen's family, John Cody Gielen, "is the President [and] Chief Executive Officer of Shop Rite, Inc., Tobacco Plus, Inc., and Acadia Wholesale & Tobacco Co., Inc."[98]

Shop Rite argues that these three business concerns are not affiliates by virtue of Peggy Gielen's ownership of trust certificates for the trusts holding the equity interests in those business concerns. According to Shop Rite, this evidence "does not show common ownership of the three entities, because ownership of a trust certificate evidencing a beneficial interest in shares owned by the trust, is not the legal or functional equivalent of ownership of shares in the company."[99] These "three entities were majority owned by three different voting trusts, which are legal entities distinct

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[94] ECF No. 24-10 at 9-14.

[95] *Id.* at 14.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 16.

[99] ECF No. 30 at 20

from each other."[100] Shop Rite also argues that these three business concerns do not share an identity of interest based on Mrs. Gielen's ownership of the trust certificates.[101] Shop Rite, however, does not address the SBA's finding that one person, who is a close member of Mrs. Gielen's family, serves as the President and CEO of all three business concerns.

Considering the record as a whole, the Court concludes that the SBA did not act arbitrarily or capriciously, or otherwise commit a clear error in concluding that Shop Rite was affiliated with two other entities and that the total number of employees for these three entities combined exceeded the eligibility threshold in 13 C.F.R. § 121.201. Section 121.103 makes control the diapositive factor in determining affiliation. The record indicates, and Shop Rite apparently does not dispute, that Mr. Gielen served as the President and CEO of all three entities—including Shop Rite. As the President and Chief Executive Officer of these three entities, Gielen had the power to control each of the three entities. One of the factors that SBA considers in determining affiliation is not only ownership, but common management.[102] Here, the record reflects common management. Accordingly, the SBA did not act arbitrarily or capriciously, or otherwise commit a clear error, when it concluded that, under the applicable statutes and regulations, Shop Rite, Tobacco Plus, and Acadia Wholesale & Tobacco are affiliated and that, combined, they employ approximately 893 employees. The Court grants the SBA summary judgment on Shop

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[100] *Id.*

[101] *Id.*

[102] 13 C.F.R. § 121.103(a)(2).

Rite's claim that the SBA acted arbitrarily and capriciously in applying the affiliation rule in 13 C.F.R. § 121.103.

IV.

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Shop Rite's Motion for Summary Judgment [ECF No. 25] is DENIED.

IT IS FURTHER ORDERED that the SBA's Motion for Summary Judgment [ECF No. 33] is GRANTED. Shop Rite's claims asserted herein are DISMISSED.

THUS DONE in Chambers on this 19th day of December, 2024.

/s/ Robert R. Summerhays
ROBERT R. SUMMERHAYS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: November 14, 2025]

No. 25-30028

SHOP RITE, INCORPORATED,

Plaintiff-Appellant,

versus

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
USDC No. 6:23-CV-456

Before HIGGINBOTHAM, HO, and DOUGLAS, *Circuit Judges.*

PER CURIAM:[*]

Shop Rite, Inc. ("Shop Rite") appeals the Western District of Louisiana's grant of summary judgment in favor of the United States Small Business Administration ("SBA"). For the reasons that follow, we AFFIRM the district court's decision.

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[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

I

On April 3, 2020, Shop Rite applied for a loan through the Paycheck Protection Plan ("PPP") with National Bank of Louisiana ("Lender"). On April 15, 2020, the Lender approved the loan and disbursed $2,502,750.00 to Shop Rite. Shop Rite applied for PPP loan forgiveness on June 23, 2021. The SBA Office of Capital Access issued a final PPP loan review decision finding that Shop Rite is not eligible for loan forgiveness because it was ineligible for the PPP loan. The SBA determined that Shop Rite was ineligible because it, combined with its affiliates, exceeded the 500-employee limit. The SBA specifically found that Shop Rite and its affiliates have 896 employees and that, despite numerous requests by the SBA, Shop Rite has not provided documentation proving that it did not exceed the employee limit.

Shop Rite timely appealed the loan review decision with the SBA Office of Hearings and Appeals ("OHA"), arguing that SBA erred in applying the primary industry test to determine whether Shop Rite was eligible for an affiliation waiver. The OHA affirmed the final PPP loan review decision, determining that Shop Rite, alone and combined with its affiliates, exceeded the 500-employee eligibility limit. The OHA further determined that Shop Rite should not be assigned an industry code associated with restaurants and it was therefore ineligible for a waiver that would exclude the employee count of its affiliates. Shop Rite timely filed an amended request for reconsideration. Finding no clear error of law, the OHA denied Shop Rite's petition for rehearing and affirmed the initial decision affirming the final SBA loan review decision.

Shop Rite appealed the OHA 's decision in the Western District of Louisiana. Shop Rite and the SBA

filed cross motions for summary judgment. Holding that the SBA did not act arbitrarily or capriciously or otherwise clearly err, the district court denied Shop Rite's motion and granted SBA's motion.[1] Shop Rite then filed the present appeal.

II

Congress enacted the Small Business Act of 1953, which later established the SBA to "`aid, counsel, assist, and protect . . . small business concerns." 15 U.S.C. § 631(a); *see* 15 U.S.C. § 633(a). The SBA "was given extraordinarily broad powers to accomplish these important objectives," *SBA v. McClellan*, 364 U.S. 446, 447 (1960), including rulemaking authority, *see* 15 U.S.C. § 634(b); investigatory authority, § 634(b)(11); and authority to take "any and all actions" that are "necessary or desirable in . . . dealing with or realizing on loans made under [Section 7(a)]," § 634(b)(7).

A

The SBA finances and guarantees private loans, known as "Section 7(a) loans," to address small business concerns. *Seville Indus., L.L.C. v. U.S. SBA*, 144 F.4th 740, 742 (5th Cir. 2025); *see* 15 U.S.C. § 636(a). Generally, Section 7(a) determines whether an applicant constitutes a "small business concern" based on size standards associated with the business's North American Industry Classification System industry code ("NAICS code") related to its "types of economic activity or industry." *Id.* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 121.101(a) (citation modified); *see* 13 C.F.R.

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[1] The district court did not address the OHA 's determination that Shop Rite alone exceeded the 500-employee eligibility threshold. Our court, likewise, does not address this issue.

§ 120.100(d). For example, NAICS code "722513" is appropriate for "limited-service restaurants" and other codes beginning with "72" are appropriate for other types of "food services and drinking places."[2] 13 C.F.R. § 121.201. To qualify for Section 7(a) loan eligibility, a business must fall within the annual revenue limits or maximum employment values the SBA has established for each NAICS code. *See id.*

More specifically, a Section 7(a) business loan applicant must satisfy two size criteria. 13 C.F.R. § 121.301(a). First, the applicant, by itself, "must not exceed the size standard designated for the industry in which the applicant is *primarily engaged.*"[3] 13 C.F.R. § 121.301(a)(1) (emphasis in original). Second, "[t]he size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher." 13 C.F.R. § 121.301(a)(2). A set of "affiliation" rules, based on certain factors, dictate when the second size criteria provided in Section 121.301(a)(2) applies. *See* 13 C.F.R. § 121.103(a)(8); 13 C.F.R. 121.301(f).

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[2] Another pertinent example is NAICS code "457110," which includes "gasoline stations with convenience stores." 13 C.F.R. § 121.20. Initially, in its loan forgiveness application, Shop Rite self-certified as having NAICS code "447110," which it contended is associated with "gasoline stations with convenience stores."

[3] Section 121.301(6)(1) indicates that the same standards outlined in paragraph (a) of this section apply to Section 7(a) loans. 13 C.F.R. § 121.301(b)(1). Paragraph (b)(2) of the same section provides alternate standards applicable to Section 7(a) loans, but Shop Rite does not argue that these alternate standards apply to it. 13 C.F.R. § 121.301(b)(2).

Section 121.107 dictates the SBA's method to determine a borrower's primary industry:

> In determining the primary industry in which a [business] or a [business] combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

13 C.F.R. § 121.107.

B

The SBA was critical in providing relief to small businesses during the C OVID-19 Pandemic. In response to the Pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to provide emergency assistance to Americans. Pub. L. No. 116-136, § 1102,134 Stat. 281, 286-94 (2020). Among other forms of relief, the CARES Act provided small businesses with forgivable, low-interest loans that were guaranteed by the federal government and promoted employment continuity for employees of small businesses. *Seville Ind*., 144 F.4th at 742 (citing *Ramey & Schwaller*, *LLP* v. *Zions Bancorporation NA*, 71 F.4th 257, 258 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 571 (2024)). To achieve this goal, the CARES Act created the Paycheck Protection Program ("PPP") "to help small businesses keep workers employed during the crisis." *Seville*, 144 F.4th at 742 (quoting *Ramey & Schwaller*, 71 F.4th at 258) (citation modified); *see* 15 U.S.C. § 9001.

Congress authorized the SBA to "guarantee covered loans under the same terms, conditions, and processes as a loan made under [Section 7(a)]" "[e]xcept as otherwise provided in [Section 636(a)]." 15 U.S.C. § 636(a)(36)(B). While most of the provisions of Section 7(a) apply to the PPP loan program, Section 636(a) provides two notable differences. First, Section 636(a) expanded loan eligibility beyond the "small business concerns" covered by Section 7(a) to include "any business concern" with 500 employees or fewer.[4] 15 U.S.C. § 636(a)(36)(D)(i). Second, Section 636(a) created an exception to the affiliation rule ("Affiliation Waiver") applicable to businesses with fewer than 500 employees and a NAICS code associated with restaurants and other hospitality-related industries. 15 U.S.C. § 636(a)(36)(D)(iv)(I).

The CARES Act was enacted quickly in response to the Pandemic. Congress instructed the SBA to implement the PPP within fifteen days of the Act's efficacy.[5] *See* 15 U.S.C. § 9012; *Seville*, 144 F.4th at 743-44. The SBA issued an interim final rule ("IFR") within its fifteen-day deadline. The First IFR, issued on April 15, 2020, indicated that the PPP is a "new Section 7(a) program" and that businesses that are ineligible for Section 7(a) loans under Section 120.110 are likewise

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[4] This provision includes an alternate size criteria which states, "if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern . . . operates." 15 U.S.C. § 636(a)(36)(D)(i)(II). Shop Rite has not argued that it falls under the alternate size criteria provided in 15 U.S.C. § 636(a)(36)(D)(i)(II).

[5] Due to the swift implementation, Congress directed the SBA to disregard the APA's notice requirement under 5 U.S.C. § 553(b). *See* 15 U.S.C. § 9012; *Seville*, 144 F.4th at 743-44.

ineligible for PPP loans. 85 Fed. Reg. 20811 (April 15, 2020).

Prior to Shop Rite's PPP application, the SBA issued a Second IFR on June 1, 2020, establishing a PPP loan review program pursuant to its authority to audit and investigate loan compliance established by 15 U.S.C. § 634(b)(6), (7), and (11). *See* 85 Fed. Reg. 33010 (June 1, 2020); *see also Seville*, 144 F.4th at 744. The loan review program helped the SBA combat abuse of the PPP loan program. *See Seville*, 144 F.4th at 744 (providing that "[t]he PPP's rapid implementation and reliance on self-certification in the early days of the pandemic made it a target for fraud"). The Second IFR clearly provides that "SBA may undertake a review at any time in SBA's discretion." 85 Fed. Reg. 33010 (June 1, 2020). This audit includes reviewing a "borrower['s] certifications and representations regarding the borrower's eligibility for a PPP loan." 85 Fed. Reg. 33010 (June 1, 2020). The expeditious implementation of the PPP meant that the program was a source of confusion for many businesses, especially in the early years of the Pandemic.

III

We review the district court's grant of summary judgment de novo, and we review the SBA's actions under the standard of review outlined in the Administrative Procedure Act ("APA "). *Bruckner Truck Sales*, *Inc. v. Guzman*, 148 F.4th 341, 344 (5th Cir. 2025) (citing *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001)). The APA mandates that a reviewing court set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction . . . ;" or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (C), and (E).

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court overruled the deferential standard created by *Chevron*, *U.S.A.*, *Inc. v. Natural Resources Defense Council*, *Inc.*, 467 U.S. 837 (1984). Under *Loper Bright*, we must "'exercise [our] independent judgment in deciding whether an agency has acted within its statutory authority.'" *United Nat. Foods*, *Inc. v. NLRB*, 138 F.4th 937, 946 (5th Cir. 2025) (quoting *Loper Bright*, 603 U.S. at 412). While an agency's interpretation may not supersede the role of the judiciary in interpreting statutory meaning, "'when a particular statute delegates authority to an agency consistent with constitutional limits, [we] must respect the delegation.'" *United Nat. Foods*, 138 F.4th at 946 (quoting *Loper Bright*, 603 U.S. at 412-13).

When Congress has statutorily "delegate[d] discretionary authority to an agency, the role of the reviewing court under the APA is . . . to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 603 U.S. at 395. The reviewing court must "ensur[e] the agency has engaged in "'reasoned decisionmaking'" within [the] boundaries" of its delegated authority. *Loper Bright*, 603 U.S. at 395 (citing *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Allentown Mack Sales & Service*, *Inc.* v. *NLRB*, 522 U.S. 359 (1998))). In so doing, the reviewing court may consider an agency's statutory interpretation as "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Loper Bright*, 603 U.S. at 394 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

IV

To be eligible for PPP loan forgiveness under the facts of the present case, Shop Rite must either have fewer than 500 employees when combined with its affiliates or be properly assigned a NAICS code associated with the restaurant industry such that it qualifies for the Affiliation Waiver.[6] It is undisputed that the number of employees of Shop Rite, combined with those of its affiliates, exceeds the PPP eligibility threshold.[7] Shop Rite argues that because it validly self-certified as having a NAICS code associated with limited-service restaurants, it is subject to the Affiliation Waiver, and therefore, is eligible for PPP loan forgiveness. Shop Rite argues that SBA unlawfully applied the primary industry test. We disagree.

The district court found that, in accordance with *Loper Bright*, Congress empowered the SBA to promulgate regulations that establish the methodology to determine the size eligibility for Section 7(a) loans.[8] *Shop Rite*, No. 6:23-CV-00456, 2024 WL 5183329, at *5

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[6] Restaurant-related businesses are associated with NAICS codes in the "72" series. *See* 13 C.F.R. § 121.201. Shop Rite does not argue that an ineligible PPP loan recipient would nevertheless be eligible for loan forgiveness. Regardless, our court recently foreclosed this theory in *Bruckner Truck Sales, Inc. v. Guzman*, 148 F.4th 341 (5th Cir. 2025) (holding that a borrower who is ineligible to receive a PPP loan is de facto ineligible for PPP loan forgiveness).

[7] Although Shop Rite argued in its reply brief that the district court erred in affirming SBA's decision that Shop Rite is affiliated with certain entities, we do not consider this issue because Shop Rite failed to raise it in its opening brief. *See Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015).

[8] Shop Rite does not challenge on appeal the SBA's authority to promulgate the regulations set forth in Section 121.

(W.D. La. Dec. 19, 2024) (citing 13 C.F.R. 121.101-1103). As detailed *supra*, Section 121 indicates that loan eligibility is determined based on size standards established in accordance with the NAICS code associated with the borrower's primary industry. The district court also found that the CARES Act "does not detail how the SBA is to apply the 500-employee size standard or how the SBA is to assign the applicable NAICS code to a borrower" and that the SBA was entitled to utilize the primary industry size standards established in the Section 7(a) program to administer PPP loans. *Id.* at *6.

Shop Rite posits four primary issues on appeal: (A) whether SBA violated the CARES Act by using Section 7(a) loan affiliation rules to determine Shop Rite's PPP loan eligibility; (B) whether SBA had authority to assign a NAICS code to Shop Rite after it had self-certified; (C) whether the SBA's reasoning for denying Shop Rite's eligibility for the Affiliation Waiver was arbitrary and capricious; and (D) whether the application of the primary industry method was prohibited *post hoc* justification. We address each issue in turn.

A

First, the district court did not err in affirming SBA's application of the primary industry test to determine Shop Rite's PPP loan eligibility. Like the district court, we first look to the text of the statute at issue, which states that the Affiliation Waiver is available to "any business concern with not more than 500 employees that . . . is assigned a North American Industry Classification System code beginning with 72." 15 U.S.C. § 636(a)(36)(D)(iv)(I). The text neither explains how to assign the applicable NAICS code nor forecloses use of the primary industry standard.

Because of the statutory silence, the SBA relied on its clearly granted authority to administer the PPP loan program under the Section 7(a) loan eligibility framework. *See* 15 U.S.C. § 636(a)(36)(B).

The CARES Act specifically provides that the SBA may rely on Section 7(a) "terms, conditions, and processes" to guarantee PPP loans "except as otherwise provided." 15 U.S.C. § 636(a)(36)(B). Further, the First IFR indicated that any business that is ineligible under Section 7(a) is also ineligible to receive a PPP loan. 85 Fed. Reg. 20811 (Apr. 15, 2020). Thus, Congress clearly intended for the SBA to rely on its Section 7(a) loan framework.

Looking to the eligibility provisions outlined in Section 7(a), eligibility is determined based on a borrower's primary industry: a borrower "must not exceed the size standard designated for the industry in which the applicant is *primarily engaged.*" 13 C.F.R. § 121.301(a)(1) (emphasis added). Therefore, the SBA appropriately relied on the loan eligibility framework established in the provisions governing Section 7(a) loans to determine that the primary industry test should be used to determine Affiliation Waiver eligibility. Thus, the district court correctly determined that "the applicable eligibility limit for a borrower under the Section 7(a) loan program is determined by a single NAICS code that reflects a borrower's primary business." The district court, therefore, did not err in affirming the SBA's decision to determine Shop Rite's PPP loan eligibility based on its primary industry.

Shop Rite makes two additional, related arguments: that the SBA's application of the primary industry requirement to preclude its eligibility for the Affiliation Waiver (1) conflicts with the agency's published guidance on the subject and (2) violates the

Fair Notice and Good Fatih Reliance doctrine. As to the first argument, Shop Rite cites to answer number twenty-four to a set of frequently asked questions ("FAQs") related to PPP compliance published by the SBA in July of 2021. SBA, *FAQ for PPP Borrowers and Lenders*, U.S. Small Bus. Admin. (Oct. 21, 2025), https://www.sba.gov/document/support-faq-ppp-borrowers-lenders. The answer to question number twenty-four states, in pertinent part, that "SBA's affiliation rules . . . do not apply to any business entity that is assigned a NAICS code beginning with 72 and that employs not more than a total of 500 employees . . . ."[9] *Id.* As explained earlier in this subsection A, like the text of the CARES Act itself, the FAQ that Shop Rite invokes neither provides a method by which to assign a NAICS code to an applicant nor forecloses the use of the eligibility rules established under the Section 7(a) loan program.

Regarding its Fair Notice and Good Faith Reliance argument, Shop Rite analogizes its situation to that in *Wages and White Lion Investments, L.L.C.* v. *Food & Drug Administration*, 90 F.4th 357 (5th Cir. 2024) (en banc), *vacated*, 604 U.S. 542 (2025), in which our court held that an entity cannot be penalized for reliance on an agency's previous position when the agency has violated the change-in-position doctrine or changed its position without giving proper public notice. 90 F.4th at 371. We fail to understand how this holding in *Wages and White Lion Investments* precludes the SBA's determination that Shop Rite is ineligible for loan forgiveness because Shop Rite has

[9] Our court addresses Shop Rite's argument without commenting on the binding effect of the FA Qs or the applicability of FAQs published after the final SBA loan review decision was entered.

indicated no prior agency position on which it relied.[10] Shop Rite merely contends that the SBA's "guidance documents on PPP Affiliation Waiver" do not clearly indicate that eligibility would be determined based on a borrower's primary business activity. This argument does not indicate a shift in agency position, as was at issue in *Wages and White Lion Investments*; rather, it restates Shop Rite's prior argument that the primary industry test should not apply because the CARES Act does not specifically require it. Again, Shop Rite does not cite any position on which the SBA has changed its stance. Therefore, the analysis provided earlier in this sub-section A applies here as well.

As detailed earlier in this subsection A, both the CARES Act, itself, and the aforementioned IF Rs published alongside it clearly establish that typical requirements pertaining to Section 7(a) loan eligibility apply to PPP loan eligibility. The authorities that Shop Rite cites do not controvert the eligibility framework applicable to Section 7(a) loans; therefore, Shop Rite's arguments are unconvincing.

B

Next, the SBA did not exceed its congressionally delegated authority to assign a NAICS code to Shop Rite. Shop Rite argues that the SBA did not have authority to "clarify, complete, or supply" a NAICS code to an entity that already has self-certified a NAICS code. As described earlier, Congress granted the SBA

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[10] Furthermore, the Supreme Court vacated our court's holding that the agency at issue in *Wages and White Lion Investments* violated the change-in-position doctrine. *Wages and White Lion Invs.*, 604 U.S. at 569-86. For this reason, as well, Shop Rite cannot rely on *Wages and White Lion Investments* to bolster its argument.

authority to administer the PPP loan program as it would Section 7(a) loans. Congress granted the SBA broad authority to administer the Section 7(a) loan program, including investigatory authority. Pursuant to that authority, the SBA issued the Second IFR that detailed how it would ensure compliance with the PPP loan program, and we find that, in so doing, the SBA "engaged in 'reasoned decisionmaking' "within [the] boundaries" of its delegated authority. *Loper Bright*, 603 U.S. at 395 (citing *Michigan*, 576 U.S. at 750 (quoting *Allentown Mack Sales & Service*, 522 U.S. at 374)); see 85 Fed. Reg. 33010 (June 1, 2020). Therefore, as part of its loan review program, the SBA had authority to ensure Shop Rite was assigned the appropriate NAICS code.

Shop Rite further argues that the SBA's finding here contradicts its stance in another case regarding PPP loan eligibility, *Horseshoe Bay Resort Holdings v. U.S. SBA et. al*, No. 1:24-CV-00040-DAE, 2025 WL 2697494 (W.D. Tex. Sept. 15, 2025) (unpublished). Shop Rite incorrectly contends the SBA stated in *Horseshoe Bay* that it lacks authority to assign a NAICS code when a business has self-certified a NAICS code. Rather, the SBA argued that it is not *required to disregard* a business's self-certification. *Horseshoe Bay Resort Holdings*, 2025 WL 2697494, at *6. Although the SBA chose not to change the borrower's self-certified NAICS code in *Horseshoe Bay*, it is not arbitrary and capricious for the SBA to here decide that the methodology outlined in the Section 7(a) framework is an appropriate method to determine Shop Rite's loan compliance, especially considering the IF R 's clear guidance to review self-certification. Therefore, Shop Rite's argument fails.

C

Further, the SBA's decision to deny the Affiliation Waiver to Shop Rite was not arbitrary and capricious. Shop Rite argues that because more than seventy percent of its locations and employees are engaged in food service activities, SBA's denial of the Affiliation Waiver is arbitrary and capricious. Shop Rite contends that this level of involvement qualifies it for a NAICS code beginning with "72" associated with the food service industry. SBA's regulations permit SBA to "consider[] the distribution of receipts, employees and costs of doing business" when determining an entity's primary industry. 13 C.F.R. § 121.107. The SBA defines "receipts" as "all revenue in whatever form received or accrued from whatever source, including from the sales of products or services." 13 C.F.R. § 121.104.

Substantial evidence in the administrative record supports the SBA's decision not to assign Shop Rite a NAICS code beginning with "72." The district court found that "the revenues and costs associated with Shop Rite's food service activities are only about 10% of its revenues and costs associated with its gasoline sales." *Shop Rite*, 2024 WL 5183329, at *7. The OHA similarly determined that only about two percent of Shop Rite's company expenses and about ten percent of its total income come from running its deli. Thus, the "highly deferential" substantial evidence standard supports the SBA's finding that Shop Rite's primary industry is not correlated to a "72" series NAICS code. The district court, therefore, did not err in affirming the OHA 's decision that the SBA was entitled to deny Shop Rite's use of the Affiliation Waiver.

D

Finally, SBA's reliance on the primary industry test to deny Shop Rite's use of the Affiliation Waiver is not a prohibited *post hoc* justification for denying loan eligibility. In its argument to the contrary, Shop Rite again relies on our court's decision in *Wages and White Lion Investments*, in which we held that the FDA acted arbitrarily and capriciously because it "invent[ed] *post hoc* justifications" that were outside the administrative record to support its decision. 90 F.4th at 371. Here, the SBA articulated a reason for denying PPP loan forgiveness then clarified its holding when pressed on appeal. Shop Rite does not convince us that the SBA manufactured justification *post hoc*.

The final SBA loan review decision stated, "the Borrower's business, or together with its affiliates, exceeds the maximum allowable number of employees and the SBA small business size standards." The OHA then reviewed the administrative record and expressed in detail that Shop Rite and its affiliates exceed the eligibility threshold because the primary industry test forecloses Shop Rite's eligibility for the Affiliation Waiver. "When an agency's initial explanation indicates the determinative reason for the final action taken, the agency may elaborate later on that reason." *Bruckner*, 148 F.4th at 346 (quoting *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 21 (2020) (citation modified)). There is no indication that the OHA reached outside the administrative record to provide *post hoc* justification.

V

For the foregoing reasons, we AFFIRM the district court's decision.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: November 14, 2025]

No. 25-30028

Summary Calendar

SHOP RITE, INCORPORATED,

Plaintiff-Appellant,

versus

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:23-CV-456

JUDGMENT

Before HIGGINBOTHAM, HO, and DOUGLAS, Circuit Judges.

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellant pay to Appellee the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

APPENDIX G

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") 15 U.S.C.S. § 636(a) (36) (D) (iv), Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286-94 (2020)

§ 636. Additional powers

(a) Loans to small business concerns; allowable purposes; qualified business; restrictions and limitations. The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes, for purposes of this Act. Such financings may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis. These powers shall be subject, however, to the following restrictions, limitations, and provisions:

(36) Paycheck protection program.

(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 31(b)(2)(C) [15 U.S.C.S. § 657a(b)(2)(C)] 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.

(iv) Waiver of affiliation rules. During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for—(I) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (II) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; (III) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681);

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") 15 U.S.C.S. § 636(a) (36) (D) (iv), Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286-94 (2020)

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

No. 1:24-cv-00040-DAE

HORSESHOE BAY RESORT HOLDINGS, LLC,

Plaintiff,

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION and ISABELLA CASILLAS GUZMAN, in her official capacity as Administrator of the Small Business Administration,

Defendants.

September 15, 2025, Decided;

September 15, 2025, Filed

Reporter

2025 U.S. Dist. LEXIS 180241*;
2025 LX 350590; 2025 WL 2697494

Counsel: [*1] For Horseshoe Bay Resort Holdings LLC, Plaintiff: Adrienne Ellen Frazior, LEAD ATTORNEY, Ashley N. Gould, Tiffani Amber Skroch, Polsinelli PC, Dallas, TX; James W. Kim, Polsinelli PC, Washington, DC.

For Isabel Casillas Guzman, in her official capacity as Administrator of the Small Business Administration, The United States Small Business Administration, Defendants: Darryl S. Vereen, US Attorney's Office, San Antonio, TX.

Judges: David Alan Ezra, Senior United States District Judge. Opinion by: David Alan Ezra

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the Motion for Summary Judgment, filed on January 10, 2025, by Defendants the United States Small Business Administration (SBA) and Isabel Casillas Guzman ("Defendants"). (Dkt. # 36.) Plaintiff Horseshoe Bay Resort Holdings, LLC ("Horseshoe Bay" or "Plaintiff") filed a response on January 24, 2025. (Dkt. # 40.) Also before the Court is Plaintiff's Motion for Summary Judgment, filed on January 13, 2025. (Dkt. # 37.) Defendants filed a response on January 24, 2025. (Dkt. # 39.) Plaintiff filed a reply on February 7, 2025. (Dkt. # 42.)

The Court finds these matters suitable for disposition [*2] without a hearing. After careful consideration of the parties' briefs and the relevant law, the Court GRANTS Defendants' Motion for Summary Judgment

(Dkt. # 36) and DENIES Plaintiffs Motion for Summary Judgment (Dkt. # 37).

BACKGROUND

Plaintiff Horseshoe Bay appeals the denial of loan forgiveness under the Small Business Administration's Paycheck Protection Program (PPP). The Court first provides an overview of the legal framework before proceeding to the background of this case.

I. Legal Background

A. Section 7(a) of the Small Business Act

The Small Business Act of 1953 created the Small Business Administration to 'aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to preserve free competitive enterprise . . . and to maintain and strengthen the overall economy of the Nation.'" *SBA v. McClellan, 364 U.S. 446. 447. 81 S. Ct. 191, 5 L. Ed. 2d 200 (1960)* (quoting *15 U.S.C. § 631(a)).* In furtherance of these objectives, the Small Business Administration ("SBA") was given the power to lend money to small businesses. *Id.* (citing *15 U.S.C. § 631(a)). Section* 7(a) of the Act empowers the SBA to "make loans to any qualified small business concern." *15 U.S.C. § 636(a)*. A "small business concern" is one "which is independently owned and operated and which is not dominant in its field of operation." *15 U.S.C. § 632(a).*

The Small Business Act also grants the SBA Administrator the 3] ability to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter." *15 U.S.C. § 634(b)(6).* Accordingly, the SBA has promulgated various rules and regulations defining certain eligibility requirements to obtain a *Section 7(a)*

loan. One of those eligibility requirements is that an applicant be "small" under the "size requirements of part 121 of this chapter (including affiliates)." *13 C.F.R. § 120.100(d)*. Part 121 explains that the size standards define whether a business entity is "small," and therefore eligible for programs and preferences reserved for "small business" concerns. *13 C.F.R. § 121.101(a)*. In turn, the SBA has defined size standards for businesses based on the "primary industry" in which a business operates. When determining a business concern's "primary industry," the SBA considers:

> [T]he distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

13 C.F.R. § 121.107.

The size standards for each industry are generally established under the North American Industry Classification [*4] System (NAICS), which assigns codes to various categories of economic activity. *13 C.F.R. § 121.101(a)* ("Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System (NAICS)."). The SBA, in turn, sets for each NAICS code size limits for maximum revenue and number of employees for a business to be considered a "small business." *Id.*: see also *13 C.F.R. § 121.201* (providing table of NAICS codes and respective size standards for annual receipts and employees).

The regulations also contain "affiliation" rules, under which, in certain circumstances, the SBA includes other entities, or affiliates, owned by the business in determining the size of the business. *13 C.F.R. § 121.301* ("SBA interprets this statutory definition [of a small business concern] to require, in certain circumstances, the inclusion of other entities ("Affiliates") owned by the applicant or an owner of the applicant in determining the size of the applicant."); *13 C.F.R. § 121.103* (explaining how the SBA determines affiliation).

B. The CARES Act and the PPP

In response to the global coronavirus pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). *In re Hidalgo Cntv. Emergency Serv. Found.. 962 F.3d 838 (5th Cir. 2020)* (citing *Pub. L. No. 116-136, 134 Stat. 281 (2020)).* The CARES Act made [*5] government-guaranteed loans available to qualified small businesses through the Paycheck Protection Program ("PPP"). *Id.* The PPP was established under *Section 7(a) of the Small Business Act. 15 U.S.C. 636(a)(36).* Thus, generally, the Administrator "may guarantee covered loans under the same terms, conditions and processes" as other *Section 7(a)* loans. *Id.* at § *636(a)(36)(8).* The loans are made by the SBA's participating banks and guaranteed by the SBA. The Act provided that a qualified recipient is eligible for loan forgiveness on a covered loan to the extent it was used to pay expenses including payroll, mortgage interest, rent, and utilities. *15 U.S.C. §§ 636m(a)(4).*

The PPP expanded loan eligibility by declaring that, in addition to small business concerns, *"any* business concern" would be eligible for a covered loan if it employed "not more than the greater of—(I) 500

employees; or (II) if applicable, the size standard in the number of employees established by the Administration for the industry" in which the business concern operates. *15 U.S.C. § 636(a)(36)(D)(i)(I)-(II).* The PPP also waived the affiliation rules under *13 C.F.R. § 121.103* for "any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72." [*6] *15 U.S.C.* 4 *636(a)(36)(D)(iv).*

II. Factual and Procedural History

A. Factual Background

The following facts are taken from the administrative record.[1] See *Medina Cntv. Env't Action Assn v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010)* ("When reviewing an agency action under the APA, we review 'the whole record or those parts of it cited by a party.") (quoting *5 U.S.C. § 706).*

On April 28, 2020, Plaintiff applied for, and SBA approved, a loan in the amount of $2,370,747.50 for Plaintiff through the Paycheck Protection Program. (Dkt. # 30-24 at 22-23.) Plaintiff's Borrower Application Form listed 380 employees and separately listed several affiliated businesses. (*Id.* at 22, 24.) The Borrower Application Form did not request a NAICS Code. (*Id.*) On September 24, 2021, Plaintiff submitted a PPP Loan Forgiveness Application to the SBA. (Dkt. # 30-3 at 75.) The Loan Forgiveness Application identifies Plaintiff's NAICS Code as 713910. (*Id.* at 73.)

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[1] Plaintiff asserted in its response to Defendants' Motion that Defendants' "undisputed" facts were misleading because they omitted certain information. The Court presents the facts as found in the Administrative Record.

On January 24, 2023, the SBA issued its Final SBA Loan Review Decision ("Initial Decision"), finding that Plaintiff was ineligible for the PPP loan, and thus ineligible for loan forgiveness. (Dkt. # 30-2 at 38.) In its decision, the SBA found that Plaintiff exceeded the maximum allowable number of employees and the SBA small business size standards. (*Id.*) The SBA found Plaintiff [*7] and its affiliates to have a combined employee count of 593, which the SBA indicated exceeds its Employee-Based size standard of 500. (*Id.*) The SBA also found Plaintiff exceeded the Receipts-Based size standard. (*Id.*) The decision further indicated that the loan was ineligible for an affiliation waiver because Plaintiff does not have a NAICS code beginning with 72. (*Id.* at 39.)

Plaintiff then initiated an appeal to the SBA's Office of Hearings and Appeals ("OHA"). The OHA issued its Corrected Decision ("Final Decision")[2] on May 9, 2023. (Dkt. # 30-43 at 185.) The OHA Administrative Law Judge affirmed the SBA's Initial Decision that Plaintiff was not eligible for loan forgiveness, finding the Initial Decision was not based on clear error of fact or law. (*Id.* at 194.) Plaintiff then filed a petition for reconsideration with the SBA-OHA which was denied on June 16, 2023. (Dkt. # 30-43 at 178-183.)

B. Procedural History

Plaintiff appealed the SBA's Final Decision to this Court on January 10, 2024, in a Complaint brought against the SBA and Isabel Casillas Guzman in her official capacity as Administrator of the SBA. (Dkt. # 1.) Plaintiffs three-count First Amended Complaint,

[2] The OHA indicated that its "Corrected Decision" was issued only to clarify typographical errors, and that the substance "is unchanged." (Dkt. # 30-43 at 185.)

filed May 13, [*8] 2024, alleges that, pursuant to *5 U.S.C. § 706(2)(A),* the agency action was (1) not in accordance with law (Count I) and (2) arbitrary and capricious (Count II). Plaintiff also seeks a declaratory judgment pursuant to *28 U.S.C. § 2201* (Count III) that Plaintiff should be classified as a NAICS 72 entity and eligible for the affiliation waiver. (Dkt. # 21.)

Plaintiff and Defendants have now filed cross-motions for summary judgment on all counts. (Dkts. ## 36, 37.)

LEGAL STANDARD

"Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Vann v. City of Southaven, 884 F.3d 307, 309 (5th Cir. 2018)* (citations omitted); see also *Fed. R. Civ. P. 56(a).* In the context of a challenge to an agency action under the Administrative Procedure Act ("APA"), "[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review." *Blue Ocean Inst. v. Gutierrez. 585 F. Supp. 2d 36. 41 (D.D.C. 2008).* Therefore, in evaluating a case on summary judgment, the Court applies the standard of review from the APA. See *Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 627 (5th Cir. 2001);* see also *Tex. Oil & Gas Ass'n v. EPA. 161 F.3d 923, 933 (5th Cir. 1998).*

When reviewing for arbitrariness and capriciousness, a court considers whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory [*9] explanation for its action including a 'rational connection between the facts found and the choice made.' *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting *Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168. 83 S. Ct. 239, 9 L. Ed. 2d 207 (19621).* Agency action is arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* The scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Id.* Courts look to "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Judulang v. Holder, 565 U.S. 42, 53, 132 S. Ct. 476, 181 L. Ed. 2d 449 (2011).* Even though arbitrary-and-capricious review is narrow, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Id.*

The APA additionally requires courts to set aside agency action that exceeds statutory authority. *5 U.S.C. § 706(2)(C).* In determining whether an agency has acted within its statutory authority, courts "must exercise their independent judgment." *Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).*

DISCUSSION

The Court addresses [*10] the parties' summary judgment arguments in turn.

I. Whether the SBA Exceeded its Statutory Authority

Plaintiff argues that pursuant to *5 U.S.C. § 706(2)(C)*,[3] the SBA exceeded its statutory authority by stating in the Final Decision that under the PPP rules, "there is no place for considering what [Plaintiff's] 'primary industry' should have been." (Dkt. # 30-43 at 193.) Specifically, Plaintiff argues that SBA deviated from its statutory mandate to adhere to existing *Section 7(a)* loan processes by adopting the NAICS Code that Plaintiff listed on its tax returns and Loan Forgiveness Application, rather than conducting its own "primary-industry analysis" to determine whether that code was accurate. (Dkt. # 37 at 9-11.) In support of this view, Plaintiff argues that SBA regulations define a "primary industry analysis" which serves as a general provision that applies to *Section 7(a)* loans. Plaintiff also suggests it had no choice but to list the NAICS Code from its tax returns because the SBA's application instructions required applicants to do so.

Contrary to Plaintiffs assertions in its motion, none of the statutes or regulations to which Plaintiff directs the Court require the SBA to conduct a "primary-industry analysis"—whether for [*11] *Section 7(a)* or PPP loans. The term "primary-industry analysis" is

[3] Plaintiff cites this section of the APA, *5 U. S. C. § 706(2)(C),* in its motion for summary judgment. (Dkt. # 37 at 13.) The Court notes that Plaintiffs First Amended Complaint pleads violations only of *5 U.S.C. §* 706(2)(4 However, "[s]o long as a pleading alleges facts upon which relief can be granted, it states a claim even if it 'fails to categorize correctly the legal theory giving rise to the claim.'" *Homoki v. Conversion Servs.. 111C., 717 F.3d 388, 402 (5th Cir. 2013).* The First Amended Complaint can be fairly read to allege that the SBA exceeded its statutory authority. The Court thus proceeds with its analysis of Plaintiffs argument.

one which does not appear in any of the statutes, rules, or regulations Plaintiff or Defendants cite. The regulation Plaintiff cites as "set[ting] forth a primary-industry analysis," *13 C.F.R. § 121.107*,[4] provides only the following:

> In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

13 C.F.R. § 121.107. The regulation itself is titled, "How does SBA determine a concern's 'primary industry'?" *Id.* Although the regulation explains how the SBA determines a "primary industry," nothing in that regulation—or any statute, rule, or regulation the Court can find—requires the SBA to assess a concern's primary industry for PPP or *Section 7(a)* loans. In the absence of such authority, the Court cannot say that the SBA exceeded its statutory authority in stating that there was "no place" for considering what Plaintiffs "primary industry" should [12] have been. *5 U.S.C. § 706(2)(C)*. The Court thus DENIES Plaintiffs motion as to this point.

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[4] Note forty-two in Plaintiffs Motion for Summary Judgment indicates Plaintiff locates the "primary-industry analysis" in *13 C.F.R. § 121.107*. (Dkt. # 37 at 10, n.42.)

II. Whether the SBA's Action was Arbitrary and Capricious

For the reasons discussed below, the Court finds the SBA did not act arbitrarily or capriciously.

A. The SBA Action

Initial Decision. In its Initial Decision, the SBA first noted that Plaintiff exceeded both the Employee-Based size standard and the Receipts-Based size standard to be eligible for a PPP loan. (Dkt. # 30-2 at 38-39.) The SBA also found Plaintiff was ineligible for an affiliation waiver because it did not have a NAICS Code beginning with 72. (*Id.* at 39.) The SBA reasoned that Plaintiff's largest source of revenue was from membership as opposed to an industry with a NAICS Code beginning with 72. (*Id.*) Finally, the SBA noted that it had requested additional documentation to evaluate Plaintiff's eligibility under an alternative size standard, but that Plaintiff had failed to provide the requested documentation. (*Id.*)

SBA-OHA's Final Decision. Plaintiff's contention on appeal to the SBA-OHA was that the SBA conducted a "faulty 'primary industry' analysis," which led SBA to conclude that Plaintiff was not entitled to a NAICS Code 72 waiver. (Dkt. # 30-43 [*13] at 188.) In reaching that question, the SBA-OHA Administrative Law Judge ("ALJ") found the Initial Decision was not based on clear error to the extent the SBA declined to apply the NAICS code 72 waiver because "[a]lthough not discussed in the [Initial Decision], [Plaintiff] identified itself on its PPP Loan Forgiveness Application, as well as its tax returns as having a NAICS Code that begins with 71." (*Id.* at 191.)

The ALJ then explained that Plaintiff's argument flows first from *13 C.F.R. § 121.107,* which the Court has discussed above. Again, that provision provides:

> In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

13 C.F.R. § 121.107. The ALJ noted that Plaintiff's argument focused on what NAICS Code "should have been" assigned by the SBA to Plaintiff "long after the PPP loan was disbursed." (Dkt. 30-43 at 192.) As the ALJ correctly pointed out, the CARES Act waived [*14] affiliation rules only for a business concern who *"as of the date on which the covered loan is disbursed,* is assigned a North American Industry Classification System code beginning with 72." *15 USC 636(a)(36)(D)(iv)* (emphasis added). The ALJ reasoned that at the time the PPP loan was disbursed on April 28, 2020, Plaintiff "was assigned" NAICS Code 713900. That was the code listed on Plaintiff's 2019 tax return and its SBA Form 3511, even if Plaintiff advocated for changing the code. (Dkt. # 30-43 at 192.) The ALJ further reasoned that Plaintiff did not change its NAICS code for tax purposes until February 2023 when it informed the IRS of its plans to do so. (Dkt. # 30-43 at 192.)

The ALJ found that Plaintiff had not carried its burden of demonstrating that, as of the date the loan was disbursed, Plaintiff "was assigned" a NAICS code beginning with 72. The ALJ added that SBA's PPP

rules use the NAICS Code a borrower self-assigned for tax purposes, saying that "the PPP loan forgiveness application form [Plaintiff] used incorporate[s] the borrower's NAICS code from the borrower's tax return, and, in turn, SBA uses the PPP loan application form and PPP loan forgiveness application form to determine PPP eligibility." (*Id.* at 193.) [*15]

The ALJ considered Plaintiffs "primary industry" argument but concluded that the CARES Act considers the NAICS Code that a borrower 'is assigned' for wavier purposes, and that "SBA rules consider [Plaintiff]'s PPP Loan Forgiveness Application—which uses the NAICS Code that [Plaintiff] assigned itself—for determining eligibility." (Dkt. # 30-43 at 193.) The ALJ concluded by noting that both Plaintiff's PPP Loan Forgiveness Application, as well as its 2019 IRS Form 1065 and 2020 IRS Form 1065, list a NAICS code beginning with 71. (Dkt. # 30-43 at 194.)

B. SBA's Action was Not Arbitrary or Capricious

The record indicates that at the time Plaintiff's loan was disbursed, it was assigned a NAICS code that did not begin with 72. The CARES Act waived affiliation rules for "any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72." *15 U.S.C. § 636(a)(36)(D)(iv).* As of the date of disbursement (April 28, 2020), Plaintiff was assigned a NAICS code of 713900 since that code was listed on both its 2019 and 2020 tax returns. (Dkt. # 30-11 at 30; Dkt. # 30-16 at 35; Dkt. # 30-30 at 47; Dkt. [*16] # 30-43 at 192.) Plaintiff's Application for Loan Forgiveness, submitted on September 24, 2021, also listed a NAICS Code of 71390. (Dkt. # 30-3 at 73.) When Plaintiff submitted additional information to the SBA in April

2022, Plaintiff again acknowledged it used NAICS code 713900 for tax purposes but argued affiliation waiver should apply because Plaintiff's dominant employee count was in an industry beginning with 72. (Dkt. # 30-10 at 17-19.) Plaintiff sent the SBA additional information in September 2022 in further support that it should be considered a NAICS Code 72 entity. (Dkt. # 30-32 at 15-27.)

The ALJ correctly explained that the statute says only that waiver is based on what a business concern "is assigned," not what it "should have been assigned." 15 *U.S.C.* 4 *636(a)(36)(D)(iv)* (emphasis added). There is no statute, rule, or regulation requiring the SBA to conduct its own analysis of a borrower's primary industry for purposes of selecting a NAICS code for affiliation waiver purposes. *13 C.F.R. § 121.107* explains how the SBA assesses a concern's "primary industry," but it does not indicate that the SBA must engage in such assessment for evaluating eligibility for *Section* 7(a) or PPP loans.

As the ALJ explained, the SBA rules [*17] consider a borrower's PPP Loan Forgiveness Application, which directs borrowers to use the NAICS Code the borrower provided to the IRS for tax purposes.[5] The Loan

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[5] Plaintiff used the July 30, 2021 version of the SBA Form 3508EZ for its PPP Loan Forgiveness Application Form. (Dkt. # 30-3 at 73.) The All correctly noted that the instructions for that version direct borrower to use the NAICS Code from the borrower's tax return: "[i]f NAICS Code was not on the Borrower Application Form, match the business activity code provided on IRS income tax filings, if applicable." PPP Loan Forgiveness Application Form 3508EZ Revised July 30, 2021, *available* at https://home.treasury.gov/system/files/136/PPP—Forgiveness-Applications-and-Instructions--3508EZ-7-30-2021-508.pdf (last visited September 11, 2025).

Forgiveness Procedures Interim Final Rule provides that the Administrator may review a borrower's PPP eligibility based on the Loan Forgiveness Application Form. *Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 Fed. Reg. 8283, 8294(V)(1)(a) (Feb. 5, 2021).* Taken together, the Court finds it was not arbitrary or capricious for the SBA to rely on Plaintiff's self-classified NAICS Code. And given that on the date of loan disbursement, the NAICS Code listed on Plaintiff's 2019 tax return was not a 72 NAICS Code, the Court finds the ALJ's Final Decision was reasonable and not arbitrary or capricious. *Wages & White Lion Invs., L.L.C. v. United Slates Food & Drug Admin.. 16 F.4th 1130, 1136 (5th Cir. 2021).*

Plaintiffs arguments to the contrary are unavailing. Plaintiff first argues the SBA acted arbitrarily and capriciously by failing to articulate a sufficient explanation for departing from prior practice of considering PPP loans under general *Section 7(a)* loan rules. Plaintiff argues the SBA had a well-established practice of conducting a "primary-industry analysis," and that it disregarded that practice by suggesting that the PPP rules look only to self-classification.

As discussed, the term "primary-industry analysis" does [*18] not appear in the cited statutes, regulations, or rules. Plaintiffs authorities do not support the proposition that the SBA is required to conduct a specific analysis into a concern's primary industry for PPP or *Section* 7(a) loan eligibility purposes. See, e.g., *13 C.F.R. § 121.101(a)* (noting that size standards have been established generally under NACIS); *13 C.F.R. § 121.101(b)* (explaining NAICS); *13 C.F.R. § 121.107* (explaining *how* SBA determines a concern's "primary

industry," but not indicating SBA is *required* to evaluate a concerns "primary industry"); *13 C.F.R. § 121.301* (explaining what size standards and affiliation principles are applicable to financial assistance programs). Plaintiff cites several SBA-OHA decisions concerning appeals of size determinations for the proposition that an area office must conduct a "primary-industry analysis." (Dkt. # 37 at 13); see. e.g., *Size Appeal of: Mclendon Acres, Inc., Appellant. SBA No. SIZ-5222, 2011 SBA LEXIS 14 2011 WL 1661922 (Mar. 25, 20111* (concerning appeal of official size determination made by an Area Office); *Grp.* 0, *Inc., SBA No. SIZ-4441, 2001 SBA LEXIS 28, 2001 WL 789239 (June 28, 2001)* (same); Size Appeal of Sargent Pipe Co., Inc., SBA No. SIZ-2691, 1987 WL 93652 (June 16, 1987) (same). Those decisions are inapposite because they each concern a formal size determination—a distinct and separate process from determining PPP loan eligibility.[6] Moreover, Plaintiff does not assert that it ever requested a formal size determination.

Finally, Plaintiff argues the SBA conducted a faulty "primary-industry [*19] analysis" in the SBA's Initial Decision because the analysis ignored Plaintiff's affiliates and considered only Plaintiff's revenue, which Plaintiff argues is not an enumerated factor

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[6] A formal size determination may occur when SBA questions whether a business concern who has applied for financial assistance is "small." *13 C.F.R. § 121.303(a).* If an application for financial assistance is denied due to size ineligibility, an applicant may request a formal size determination. *13 C.F.R. § 121.303(d).* To do so, a formal request must be made to the Government Contracting Area Director serving the area where the applicant's headquarters is located. *Id.* An applicant may appeal adverse formal size determinations to the OHA. *13* C *F.R. § 121.1101.* A NAICS code designation made by a procuring activity contracting officer may also be appealed. *13 C.F.R. § 121.1102.*

under the "primary-industry analysis." Defendant responded to that argument by asserting that the Initial Decision considered an "entire set of financial data submitted by Plaintiff's attorneys as part of its multi-level forgiveness analysis." (Dkt. # 39 at 2.) Plaintiff replied that in making that argument, Defendants rely on improper *post hoc* rationalizations by conflating the Initial and Final decisions.

As Plaintiff itself notes, it is the SBA's Final Decision which is on appeal. (Dkt. # 42 at 6, n.17.) "The federal courts ordinarily are empowered to review only an agency's *final* action." *Nat'l Assn of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 659, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)* (emphasis in original). Moreover, even if an agency abandons an earlier ruling, "the dispositive factor is that the [agency] justif[ies] its position within the statutory framework." *Texaco, Inc. v. N.L.R.B., 700 F.2d 1039, 1043 (5th Cir. 1983);* see also *Orleans Audubon Soc. v. Lee. 742 F.2d 901, 907 (5th Cir. 1984)* (noting that "[e]ven when an agency abandons a prior determination the reviewing court should affirm the agency's decision if the *final* agency action is not arbitrary or capricious") (emphasis in original). The Court does [*20] not address this argument because it finds, as discussed above, that the SBA's Final Decision was not arbitrary capricious. *See Orleans. 742 F.2d at 907.*

For these reasons, the Court finds the decision was based on consideration of the relevant factors and further finds there has been no clear error of judgment. *Huawei Techs. USA, Inc. v. Fed. Commc'ns Comm'n, 2 F.4th 421. 434 (5th Cir. 2021)* (indicating the agency "must articulate a satisfactory explanation for its action," but that the Court "cannot substitute [its] judgment for that of the agency"). The Court therefore

GRANTS Defendants' motion for summary judgment, finding the SBA did not act arbitrarily or capriciously and DENIES Plaintiff's motion.

CONCLUSION

Accordingly, the Court: (1) DENIES Plaintiff's Motion for Summary Judgment (Dkt. # 36); and (2) GRANTS Defendants' Motion for Summary Judgment (Dkt. # 37). Plaintiffs claims are DISMISSED WITH PREJUDICE and the Clerk's Office is INSTRUCTED to ENTER

JUDGMENT and CLOSE the case.

IT IS SO ORDERED.

Dated: September 15, 2025.

/s/ David Alan Ezra
David Alan Ezra
Senior United States District Judge

APPENDIX I

13 C.F.R §121.103 How does SBA determine affiliation?

(a) General Principles of Affiliation.

(1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. However, SBA will not find that a minority shareholder has negative control where such minority shareholder has the authority to block action by the board of directors or shareholders regarding the following extraordinary circumstances:

(i) Adding a new equity stakeholder or increasing the investment amount of an equity stakeholder;

(ii) Dissolution of the company;

(iii) Sale of the company or all assets of the company;

(iv) The merger of the company;

(v) The company declaring bankruptcy;

(vi) Amendment of the company's corporate governance documents to remove the shareholder's authority to block any of (a)(3)(i) through (v); and

(vii) Any other extraordinary action that is crafted solely to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(6) In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(7) For SBA's Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs, the bases for affiliation are set forth in § 121.702.

(8) For applicants in SBA's Business Loan, Disaster Loan, and Surety Bond Guarantee Programs, the size standards and bases for affiliation are set forth in § 121.301.

13 C.F.R. § 121.107 How does SBA determine a concern's "primary industry"?

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

13 C.F.R. § 121.301 What size standards and affiliation principles are applicable to financial assistance programs?

The Small Business Act defines a small business concern as one which is independently owned and operated, and which is not dominant in its field of operation. SBA interprets this statutory definition to require, in certain circumstances, the inclusion of other entities ("Affiliates") owned by the applicant or an owner of the applicant in determining the size of the applicant.

(a) For Business Loans (other than for 7(a) Business Loans) and for Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:

(1) The size of the applicant alone (without affiliates) must not exceed the size standard designated for the industry in which the applicant is primarily engaged; and

(2) The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher. These size standards are set forth in § 121.201.

(b) For 7(a) Business Loans and Development Company programs, an applicant business concern must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of $20 million, and average net income after Federal income taxes (excluding any carry over

losses) for the preceding two completed fiscal years not in excess of $6.5 million.

[If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's "net income after Federal income taxes" will be its net income reduced by an amount computed as follows:] (i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation. (ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (b)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation. (iii) Sum the results obtained in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

§ 121.301 What size standards and affiliation principles are applicable to financial assistance programs?

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(f) Affiliation. Any of the circumstances described below establishes affiliation for applicants of SBA's Business Loan, Disaster Loan, and Surety Bond Programs. For this rule, the Business Loan Programs consist of the 7(a) Loan Program (Direct and Guaranteed Loans), the Microloan Program, the Intermediary Lending Pilot Program, and the Development Company Loan Program ("504 Loan Program"). The Disaster Loan Programs consist of Physical Disaster Business Loans, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program loans. The following principles apply for the Business Loan, Disaster Loan, and Surety Bond Guarantee Programs:

(1) Ownership.

(i) When the Applicant owns more than 50 percent of another business, the Applicant and the other business are affiliated.

(ii) When a business owns more than 50 percent of an Applicant, the business that owns the Applicant is affiliated with the Applicant. Additionally, if the business entity owner that

owns more than 50 percent of the Applicant also owns more than 50 percent of another business that operates in the same 3-digit NAICS subsector as the Applicant, then the business entity owner, the other business and the Applicant are all affiliated.

(iii) When an individual owns more than 50 percent of the Applicant and the individual also owns more than 50 percent of another business entity that operates in the same 3-digit NAICS subsector as the Applicant, the Applicant and the individual owner's other business entity are affiliated.

(iv) When the Applicant does not have an owner that owns more than 50 percent of the Applicant, if an owner of 20 percent or more of the Applicant is a business that operates in the same 3-digit NAICS subsector as the Applicant, the Applicant and the owner are affiliated.

(v) When the Applicant does not have an owner that owns more than 50 percent of the Applicant, if an owner of 20 percent or more of the Applicant also owns more than 50 percent of another business entity that operates in the same 3-digit NAICS subsector as the Applicant, the Applicant and the owner's other business entity are affiliated.

(vi) Ownership interests of spouses and minor children must be combined when determining amount of ownership interest.

(vii) When determining the percentage of ownership that an individual owns in a business, SBA considers the pro rata ownership of entities. For example, John Smith, Jane Doe, and Jane Doe,

Inc., each own an interest in the Applicant. Jane Doe owns 15 percent of the Applicant, and she also owns 100 percent of Jane Doe, Inc. Jane Doe, Inc. owns 50 percent of the Applicant. SBA considers Jane Doe to own 65 percent of the Applicant.

(2) Stock options, convertible securities, and agreements to merge.

(i) For purposes of this subparagraph, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the ownership of the entity. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(ii) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at a later date are not considered "agreements in principle" and are thus not given present effect.

(iii) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(iv) SBA will not give present effect to individuals', concerns', or other entities' ability to divest all or part of their ownership interest to avoid a finding of affiliation.

(3) Determining the concern's size. In determining the concern's size, SBA counts the receipts,

employees (see § 121.201), or the alternate size standard (if applicable) of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(4) Exceptions to affiliation. For exceptions to affiliation, see § 121.103(b).

(g) For COVID-19 Economic Injury Disaster (COVID EIDL) loans, an "affiliated business" or "affiliate" is a business in which an eligible entity has an equity interest or right to profit distributions of not less than 50 percent, or in which an eligible entity has the contractual authority to control the direction of the business, provided that such affiliation shall be determined as of any arrangements or agreements in existence as of January 31, 2020. For exceptions to affiliation, see § 121.103(b).

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. A:24-CV-00040-DAE

HORSESHOE BAY RESORT HOLDINGS, LLC

Plaintiff

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION, *et al.,*

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE UNITED STATES SMALL BUSINESS ADMINISTRATION ("SBA"), ISABEL CASILLAS GUZMAN ("the Administrator") and the UNITED STATES OF AMERICA ("the United States") (collectively "Defendants") move for summary judgment on Plaintiffs First Amended Complaint ("the Complaint") pursuant to Fed. R. Civ. P. 56 as follows:

BACKGROUND

This is an Administrative Procedure Act ("APA") and Declaratory Judgment Act ("DJA") case arising out of an SBA Paycheck Protection Program ("PPP")[1] loan to

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[1] The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") PPP was a temporary SBA program designed to

Plaintiff. Plaintiff and its various affiliates own and operate "the 4-star Horseshoe Bay Resort." ECF 21 ¶¶ 3, 30-34. Plaintiff received a $2,370,474.50 PPP loan and then sought forgiveness of the loan. *Id.* ¶ 3.[2] SBA denied forgiveness. *Id.* Plaintiff disagrees with SBA's denial, particularly SBA's consideration of Plaintiffs self-assigned North American Industry Classification System ("NAICS") code. *Id.* ¶ 4.

NAICS codes establish the "primary industry" of the borrower and are used in SBA's "size standards" to define whether a business is "small," and thus eligible for a loan. *See* 13 C.F.R. §§ 121.101, 121.201.[3] The

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immediately assist certain small businesses during the COVID-19 shutdowns by providing forgivable federally guaranteed loans to help maintain their payrolls. *E.g., Seville Indus., Inc. v. U.S. Small Bus. Admin.,* 2024 WL 697592 at *1-.3, No. 6:22-CV-06229 (E.D. Louisiana, February 20, 2024), *see also* SBA First IFR, 85 Fed. Reg. 20811 (effective April 15, 2020). The PPP was implemented under Section 7(a) of the Small Business Act and administered by SBA and its regulations promulgated under the act. *Id., 15 U.S.C.§ §* 636(a)(36), 636((b)(7), *In re Hidalgo Cnty. Emergency Serv. Found.,* 962 F.3d 838, 840 (5th Cir. 2020); *see also Brothers Petroleum, L,L.C., v United States,* 569 F. Supp 405, 414 (E.D. Louisiana, 2021). The PPP was a loan program, not a grant, and unless eligible for forgiveness, the maker (borrower) is expected to satisfy the debt. *Bruckner Truck Sales, Inc. v Guzman,* 2023 WL 860761 at * 1, 6, No. 2:23-CV-097-Z (N.D. Tex., Amarillo, December 12, 2023) (citing *Springfield Hosp., Inc.. Guzman,* 28 F.4' 403, 423 (2d. Cir. 2022)), *Brothers Petroleum, L.L.C.,* 569 F. Supp. at 414 (internal citations omitted).

[2] The CARES Act § 1106, as amended, allows "eligible recipients" of PPP loans to obtain forgiveness of their loans, meaning cancellation of their indebtedness, in whole or in part. 15 U.S.C. § 636m(b)-(d).

[3] NAICS codes are self-assigned, meaning nobody else "assigns" a code; the business itself selects the code that best describes its primary business activity and then uses it when asked for their code. The only instances in which a code cannot be fully self-

NAICS code is important because PPP eligibility depends on the "size" of the applicant combined with its 'affiliates." *See* 13 C.F.R. §§ 121.103(a); 121.301(a). However, the CARES Act waived the "affiliate rules" for PPP loans to certain "small" businesses with not more than 500 employees that were assigned a NAICS code "72"[4] *at the time a covered loan was disbursed.* 15 U.S.C. § 636(a)(36)(D)(iv)(I), *see also* SBA Second IFR 85 Fed. Reg. 20818 (emphasis added). So, a "small" business with a NAICS code beginning with "72" at the time the loan was disbursed would not be combined with its "affiliates" to determine its "size for loan eligbility." *See id., see also* ECF 21 114, 55-57.

SBA correctly recognized that Plaintiff is a business whose NAICS code begins with "71"[5] and for this and other reasons denied forgiveness of Plaintiffs loan. *Id.¶114,* 44-46. Here, Plaintiff now claims that notwithstanding its own self-assigned NAICS code of

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assigned for official purposes is within OSHA, the EPA and DEP, which assign codes based on environmental factors, not revenue. *See What is a NAICS Code and Why do I Need One?,* NAICS Association (last visited December 19, 2024).

[4] NAICS code 72 corresponds to businesses in the Accommodation and Food Service sector. *See Industries at a Glance, Accommodation and Food Services: NAICS 72,* Bureau of Labor Statistics, *available at* https://www.bls.gov/iag/tgs/iag72.htm (last visited Dec. 19, 2024). NAICS codes are revised periodically and the 2017 codes in effect at the time this loan was made (which are the same) can be found at *The United States Census Bureau, North American Industry Classification System, 2017 NAICS;* https://www.census.gov/naics/?58967?yearbck=2017 (last visited January 8, 2025).

[5] NAICS code 71 corresponds to businesses in the Arts, Entertainment, and Recreation sector. *See Industries at a Glance, Arts, Entertainment, and Recreation: NAICS 71, available at* https://www.bls.gov/iag/tgs/iag71.htm (last visited Dec. 19, 2024); *Id.*

"71," SBA should have found that Plaintiffs NAICS code was really "72" for purposes of its PPP loan forgiveness. *Id.* $11 53-57.

SBA's decision was fully affirmed twice at the administrative level by the SBA Office of Hearings and Appeals ("OHA"). *Id.* 11 58-59, 70. Plaintiff now claims that SBA's decision (and the OHA's) was (1) not in accordance with the law, and (2) arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A). *Id.* ¶¶ 60, 71-82. The Court should grant Defendant's motion and dismiss Plaintiffs claims since there is no genuine issue of fact that SBA acted reasonably, considered the relevant issues, reasonably explained its position, and did not act in an arbitrary or capricious manner.

SUMMARY JUDGMENT EVIDENCE/ADMINISTRATIVE RECORD

In an APA case, the court's review is limited to the administrative record that existed before the agency at the time of the decision. *National Ass'n for Gun Rights, Inc., v. Garland,* --- F.Supp.3d ---, 2024 WL3517504 at *15, No. 4:23-cv-00830-O (N.D. Tex., Fort Worth, July 23, 2024) (citations omitted). The parties filed the certified administrative record ("AR") on September 6, 2024. ECF 30, 30-43. All references to the summary judgment evidence are to the AR, by ECF document and page numbers, unless stated otherwise.

UNDISPUTED FACTS

The AR establishes the following undisputed facts:

1. On April 28, 2020, Plaintiff, through its lender, applied for a $2,370,474.50 PPP loan. To be eligible Plaintiff was required to certify the number of its employees and any other businesses that it owned or

shared common management (i.e. "affiliates"). ECF 30-24, pp. 22-26.

2. Plaintiff did not provide a NAICS code with its loan application. *Id.*

3. Plaintiff certified to SBA that it had 380 employees and provided a list of its affiliates. *Id.,* pp. 22, 24. The list did not include Plaintiff's wholly owned affiliate "Horseshoe Bay Resort Destinations, L.L.C." ("HB Destinations"). *Id.* pg. 24.

4. Based on the information Plaintiff provided, the lender immediately approved Plaintiff's application and the loan was disbursed the same day on April 28, 2020. ECF 30-30, pg. 47.[6]

5. On December 15, 2020 Plaintiff certified to the IRS that its NAICS code was "71900" in its 2019 tax return.[7] ECF 30-11, pg. 30.

6. On September 24, 2021, Plaintiff, through its lender, applied to SBA for forgiveness of the loan and certified to SBA that its NAICS code was "713910" and

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[6] Since the intent was to disburse PPP funds as quickly as possible, eligibility for PPP loans relaxed several 7(a) origination/underwriting requirements and was heavily dependent on self-certification by the borrower. *See* SBA First IFR, 85 Fed. Reg. 20811, ¶ 1. For example, Congress directed SBA to allow additional qualified lenders, who were not already accredited Section 7(a) lenders to participate in the PPP and mandated they be given "delegated authority" to make and approve PPP loans without prior SBA review. 15 U.S.C. § 636(a)(36)(F)(ii)(I).

[7] Plaintiff's 2019 tax year began on April 1, 2019 and ended on March 31, 2020. Ex. 30-11, pg. 30. The U.S. Bureau of Labor Statistics website lists NAICS code 71900 as "Other Amusement and Recreation Industries." *See United States Department of Labor, U.S. Bureau of Labor Statistics, Industries at a Glance, Data Tools* (Imps://www.bls.gpv/oes/2023/may/naics4_713900.htm) (last visited December 19, 2024).

that it had only 237 employees at the time of its loan application. ECF 30-3. pp. 73-75.[8]

7. On December 14, 2021 Plaintiff again certified to the IRS that its NAICS code was "71900" in its 2020 tax return.[9] ECF 30-16, pg. 35.

8. Plaintiffs self-assigned NAICS code was "71" at the time the loan was disbursed, as Plaintiff certified to both the IRS and SBA. ECF 30-11, 30-3, 30-16.

9. On April 11, 2022, SBA notified Plaintiff, through its lender, that it had identified eight (8) possible affiliates of Plaintiff and requested information on them, including HB Destinations. ECF 30-24, pp. 10-14.

10. On April 22, 2022, Plaintiff submitted its Form 3511 Affiliation Worksheet that disclosed HB Destinations for the first time. ECF 30-2, pp. 47-53, ECF 30-3, pp. 1-2. Plaintiff sought forgiveness based on an "employee size" standard and certified to SBA that it did not have a NAICS code 72, and again certified that its NAICS code was "713910." Id., Part B, Sections I-III. Plaintiff further certified that it had 380 employees and its affiliate HB Destinations had 294 employees. *Id.* Sections III, IV. Plaintiff further

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[8] Because Plaintiff did not disclose its NAICS code in its loan application, Plaintiff was required to use their tax return NAICS code in their loan forgiveness application. *See* PPP Loan Forgiveness Application Form 3508EZ and Instructions, Rev. July 30, 2021 (ittps://www.sba.govidocumentisba-form-3508ez-pop-ez-loan-forgiveness-application-instructions) (last visited December 17, 2024). NAICS code 713910 is for the primary industry of "Golf Courses and Country Clubs." *See NAICS Code Description,* NAICS Association, *available at* naics.com/naics-codedescription (last visited December 19, 2024).

[9] Plaintiff's 2020 tax year began on April 1, 2020 and ended on March 31, 2021. Ex. 30-16, pg. 35.

certified that HB Destinations had a NAICS code of 72110.[10] *Id.*

11. Plaintiff, together with its wholly owned affiliate HB Destinations, had more than 500 employees. *Id.*

12. Based on a September 9, 2022 letter from Plaintiff's attorney, and Plaintiff's 2019 Consolidating Statement of Operations, Plaintiff's largest source of revenue was Membership Dues and Fees, and its largest Departmental Payroll and "Departmental Other Expenses" was Golf. ECF 30-3, pp. 21, 24.

13. Based on Plaintiff's Statement of Operations 2019 and Statement of Operations 2020, the majority of Plaintiff's revenue was from Membership. ECF 30-3, pg. 30, ECF 30-10, pp. 23, 27.

14. Based on Plaintiff's 2019 Statement of Operation Revenue, the majority of Plaintiff's aggregated revenue, operating expenses and payroll was comprised of non-NAICS 72 operations. ECF 30-42, pp. 66, 69.

15. On January 24, 2023 SBA issued its Final Loan Review Decision ("FLRD") holding that Plaintiff was ineligible to receive a PPP loan and denied forgiveness. ECF 30-2, pp. 38-40.[11] As SBA explained, Plaintiff:

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[10] NAICS code 72110 is for the primary industry of "Hotels (except Casino Hotels) and Motels". ."*See NAICS Code Description,* NAILS Association, *available at* naics.com/naics-code-description (last visited December 19, 2024). Ironically, the NAICS website currently lists HB Destinations as one of the top businesses by annual sales for... NAICS code 713910 "Golf Courses and Country Clubs," along with the PGA Tour, among others. *Id.*

[11] Only an "eligible recipient" may receive forgiveness of a PPP loan 15 U.S.C. § 636m(b). If a borrower is found ineligible, forgiveness can be denied even if the borrower obtained the loan. *Bruckner Truck Sales, Inc.,* 2023 WL 860761 at * 1, 4-5, *see also*

1) had too many employees (over 500) to be eligible under a size-based standard, 2) made too much money to be eligible under a receipts-based standard, 3) did not have a NAICS code of "72" and thus the affiliation waiver did not apply, even considering SBA's analysis of the financial information provided by Plaintiff, and 4) didn't provide any of the information requested to be considered for eligibility under an alternative size standard. *Id.*

16. On February 10, 2023, only seventeen (17) days after the FLRD and almost three (3) years after the loan was disbursed, Plaintiff wrote to the IRS seeking to change its NAICS code to "72." ECF 30-43, pg. 164.

17. On May 9, 2023, the OHA fully affirmed the FLRD. ECF 30-43, pp. 185-195.

18. On June 16, 2023, the OHA denied Plaintiffs Petition for Reconsideration and again fully affirmed the FLRD. ECF 30-43, pp. 178-183.

SUMMARY JUDGMENT IS APPROPRIATE IN APA CASES

The Fifth Circuit has "consistently upheld" the use of summary judgment in judicial review of agency decisions. *Girling Health Care, Inc. v. Shalala,* 85 F.3d 211, 214-215 (5th Cir. 1996). "The summary judgement procedure is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency...[T]he administrative agency is the fact finder. Judicial review has the function of determining whether the administrative action is consistent with the law — that and no more." *Id.* (citations omitted).

SBA Loan Forgiveness IFR, 85 Fed. Reg. 33010 (effective June 1, 2020).

When assessing a summary judgment motion in an APA case, the district judge sits as an appellate tribunal, and the entire case on review is a question of law, and only a question of law. *Permian Basin Petroleum Ass'n v. Dept. of the Interior,* 127 F. Supp.3d 700, 706 (W.D. Tex., Midland-Odessa, 2015) (internal citations omitted). The summary judgment motion merely serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *M* The agency resolves factual issues to arrive at a decision supported by the administrative record, and the district court applies the APA standard of review to determine, as a matter of law, whether the evidence in the administrative record permitted the decision reached by the agency. *National Ass'n for Gun Rights, Inc.,* 2024 WL3517504 at *14.

THE STANDARD OF REVIEW IS WHETHER SBA'S DECISION WAS ARBITRARY AND CAPRICIOUS

The validity of agency action is "judged...by the appropriate standard of review." *Camp v. Pitts,* 411 U.S. 138, 143 (1973) (per curiam). The APA directs that agency actions be "set aside" if they are "arbitrary and capricious," and thus "otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Here, Plaintiff makes the exact same arguments in support of both counts, under the same statute, and they are one and the same. ECF # 21, ¶¶ 74, 80. The standard of review under Section 706(2)(A) is "arbitrary and capricious." *E.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.,* 463 U.S. 29, 41-43 (1983). The party challenging an agency action as arbitrary and capricious bears the burden of proof. *Permian Basin Petroleum Ass'n, 127* F. Supp.3d at 706.

An agency acts in an arbitrary and capricious manner if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm Mut. Auto. Ins.,* 463 U.S. at 43; *Restaurant Law Center v. United States Dept. of Labor,* 115 F.4th 396, 408 (5th Cir. 2024). The scope of review is narrow and the court must not substitute its judgment for that of the agency. *State Farm,* 463 U.S. 29 at 43; *F.C.C. v. Prometheus Radio Project,* 592 U.S. 414, 423 (2021). The arbitrary-and-capricious test is "highly deferential" and gives the court "the least latitude" to invalidate an agency's decision. *Fath v. Texas Dep't of Transp.,* 924 F.3d 132, 136 (5th Cir. 2018) (per curiam) (citations omitted).

Although the court's review is not "toothless," the court only considers the reasoning articulated by the agency itself, and simply ensures that the agency acted within a "zone of reasonableness" and "reasonably considered the relevant issues and reasonably explained the decision." *Data Mktg P'ship, L.P. v. U.S. Dept. of Lab.,* 45 F.4th 846, 855-56 (5th Cir. 2022) (citations omitted). The court does not "ask whether [the agency] decision was the best one possible or even whether it was better than the alternatives". *Dep't of Corn. v. New York,* 588 U.S. 752, 777 (2019) (citation omitted). The court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974). If the agency "articulate[s] a satisfactory explanation for its action including a rational connection between the facts and the choice made ... the court cannot substitute its judgment or

that of the agency." *Huawei Techs. USA, Inc. v. FCC,* 2 F.4th 421, 434 (5' Cir. 2022).

SUMMARY OF THE DISPUTE

Plaintiff appears to correctly concede, without ever expressly admitting, that without the affiliation waiver Plaintiff was (and still is) ineligible for the PPP loan, and thus ineligible for forgiveness. *See* ECF 21 55-57. Plaintiff does not allege that SBA's regulations are invalid or ambiguous, or that the affiliates identified by SBA are not Plaintiffs affiliates. Plaintiff does not deny they are too "large" with their affiliate(s) and made too much money under a receipts-based eligibility standard. Plaintiff does not deny that a NAICS code "71" business, which Plaintiff assigned itself, is not eligible for an affiliation waiver. There is no dispute that *when* SBA conducts a primary industry analysis, it does so pursuant to 13 § CFR 121.107.

The limited issue in this case is whether SBA reasonably decided, based on the AR, that Plaintiff was not eligible for the NAICS code 72 affiliate waiver at the time the loan was disbursed. The issue is not whether Plaintiff *was* a NAICS code 72 business when the loan was disbursed. They were not. The issue instead, as framed by Plaintiff, is that they *should have been* a NAICS code 72 business. So, following Plaintiffs reasoning, the Court would have to find that 1) despite Plaintiff self-assigning itself as a NAICS Code "71" business, 2) certifying this fact to the IRS in 2019 and again in 2020 when the loan was disbursed, 3) further certifying this to SBA multiple times when they asked for forgiveness, and then 4) waiting almost three years after the loan was disbursed to try and change its NAICS code with the IRS ... that SBA should have disagreed with Plaintiffs multiple certifications and "re-classified" Plaintiff as a NAICS code 72

business retroactively to when the loan was disbursed. In connection with this extraordinary request, Plaintiff does *not* want its affiliates to be considered for loan eligibility, but *does* want them considered for its NAICS classification, and thus in the end...loan eligibility. ECF 21 ¶¶ 29, 4849, 53, 57. Plaintiffs circuitous reasoning is itself arbitrary and capricious. Plaintiffs argument that SBA could have overruled Plaintiffs self-assigned NAICS code 71, and was therefore required to do so, fails to show any basis for relief under the APA.

PLAINTIFF'S AUTHORITIES DO NOT APPLY

Several of the authorities cited by Plaintiff are taken out of context and not applicable. For example, Plaintiff cites to 13 C.F.R. § 121.106(a) for the proposition that SBA "must consider the totality of the circumstances" and not just Plaintiffs tax returns in connection with Plaintiff s NAICS code and request for forgiveness. ECF 21 ¶¶ 22-23. First, SBA considered more than just Plaintiffs tax returns and analyzed the financial data submitted by Plaintiff. ECF 30-3, pp. 29-30, ECF 30-42, pp. 64-70. Second, the cited regulation only pertains to how SBA determines a concern's number of employees. *Id.* It has nothing to do with Plaintiffs self-assigned NAICS code. The affiliation provisions applicable to SBA's business loan programs, including the PPP, are set forth in 13 C.F.R. § 121.301(f) that has no "totality of the circumstances" test.[12] For that matter, Plaintiff doesn't allege that SBA got the number of its employees wrong, just that they shouldn't be counted together. As such, this

[12] "For applicants in SBA's Business Loan, Disaster Loan and Surety Bond Guarantee Programs, the size standards and bases for affiliation are set forth in §121.301." 13 C.F.R. §121.103(8).

regulation cited by Plaintiff is not applicable and does not stand for the proposition for which it is cited.

Next, Plaintiff cites to 13 C.F.R. §§ 121.402 and 121.1102 for the proposition that "SBA regularly overrules a borrower's own NAICS code determinations" and the appeal process associated therewith. ECF 21 ¶ 24. This again significantly misses the mark. Section 121.402 addresses when a procuring agency contracting officer designates a NAICS code in a federal government contracting program. 13 C.F.R. § 121.402. This case has nothing to do with government procurement or contracting and the regulation has nothing to do with the PPP loan in question. Further, Section 121.1101 pertains to la]ppeals from formal size determinations." 13 C.F.R. § 121.1101. Also, as noted by Administrative Judge Ambrow in the Decision on Petition for Reconsideration, "[t]he Rules of Practice for Appeals From Size Determinations and NAICS Code Designations in subpart C of this part do not apply to appeals of final SBA loan review decisions or to the PPP." ECF 30-43, pg. 183 (citing 13 C.F.R. §1201(g)).

Here, Plaintiff does not allege that it ever made a request for a formal size determination by SBA (it didn't), which is an entirely separate process.[13]

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[13] A concern that submits an application for financial assistance is deemed to have certified that it is "small" under the applicable size standard, but SBA may question that status based on information from any source. 13 C.F.R. § 121.303 (a). The issue of size is initially considered by the individual with final financial assistance authority, but this is *not* a formal size determination. *Id.* § 121.303(c) (emphasis added). If, like here, an applicant has been denied for size ineligibility, the applicant may request a formal size determination, but the formal request must be made to the Government Contracting Area Director serving the area where the applicant's headquarters is located. *Id.* § 121.303(d).

Plaintiff merely disagrees with SBA's loan eligibility decision, which although partly based on size, was not a formal size determination. The regulation cited by Plaintiff has nothing to do with this case, or the proposition for which it is cited. For example, the case of *McClendon Acres, Inc.,* 2011 WL 1661922 at * 1, SBA No. SIZ5222 (March 5, 2011), cited by Plaintiff, was an appeal from a request for a formal size determination (holding it was error to use two size standards, since there can be only one primary NAICS industry designation).

PLAINTIFF MISSTATES SECTION 121.107

Plaintiff alleges that SBA was *required* by 13 C.F.R. § 121.107, to consider its affiliates in connection with a primary industry analysis. ECF 21 ¶¶ 48-50. This misses the mark again. The regulation expressly describes a primary industry determination in which a concern, *or* a concern combined with its affiliates is engaged. 13 C.F.R. 121.107 (emphasis added). The regulation is phrased in the disjunctive, not conjunctive. Otherwise the words "of a concern" would be completely superfluous. Instead, the regulation would just say "a concern combined with its affiliates." It does not. In any event, Plaintiff was the only party (concern) that applied for this loan, not its affiliates. ECF 30-24, pp. 22-26. As such, Plaintiff was properly evaluated on its own. ECF 30-2, pp. 38-40, *see also* ECF 30-42, pg. 66 (appeal analysis explaining this concept). This threshold misstatement of section 121.107 underscores the misdirection of Plaintiff's entire case.

Adverse formal size determinations may be appealed to the OHA. *Id.* § 121.1101. A NAICS code designation made by a procuring activity contracting officer may also be appealed to OHA. *Id.* § 121.1102.

Plaintiff also alleges that SBA was wrong to "gloss over" certain data points emphasized by Plaintiff and that "membership" really includes "food and beverage." ECF 21 ¶ 52. This allegation attempts to downplay that Plaintiff's largest source of revenue is from "membership," and to show that Plaintiff is a NAICS code "71" Food and Beverage" business and not a NAICS Code "72" Golf/Country Club" business as self-assigned in Plaintiff's Affiliation Worksheet submitted to SBA. *See supra.* However, the AR shows that in Plaintiff's 2019 Consolidating Statement of Operations submitted to SBA, "Membership Dues" and "Membership Fees" are distinctly separate line items from "Food & Beverage." ECF 30-3, pg. 24.

Plaintiff further alleges that both SBA and OHA were wrong to rely "exclusively" on Plaintiff's self-assigned NAICS code from its tax return(s). ECF 21 ¶11 62-65, 74(b), 80(b). But, it is clear that the FLRD considered not just Plaintiffs tax return NAICS code, but also the financial data Plaintiff submitted to SBA. ECF 30-2, pp. 38-40. Also, OHA merely concluded the self-assigned tax return was enough evidence to support SBA's decision. ECF 30-43, pg. 191-193. Further, when denying Plaintiff's Petition for Reconsideration, Administrative Law Judge Ambrow correctly analyzed the significance of Plaintiffs tax return NAICS code in the CARES Act PPP scheme, pointing out that placing "great weight" on the tax return NAICS code is consistent with SBA's regulations, and further pointing out the inconsistencies in Plaintiff's argument, noting that tax return NAICS code's defining role in connection with the amount of a Second Draw PPP loans. ECF 30-43, pp. 182-183. OHA has also held, in the case cited by Plaintiff, that under 13 C.F.R. § 121.107 SBA may consider other factors such as the initial designation in the application to SBA, *which*

carries more weight than a later claim. McClendon Acres, Inc., 2011 WL 1661922 at * 4 (emphasis added). The AR is clear that at the time of Plaintiffs initial application, it had a self-assigned NAICS code of 71, and continuing thereafter, despite its later claim to be a NAICS code 72 business.

Plaintiffs cite no authority that under Section 121.107 SBA is required to *disregard* an applicant's self-assigned NAICS code. Plaintiff cites no authority for the proposition that SBA *must* weigh or consider any particular factor over another, when the express language of the regulation states that SBA *may* consider "other factors." 13 C.F.R. § 121.107. Likewise, there is no authority cited for the proposition that Section 121.107 *requires* SBA to take it upon itself to re-assign Plaintiff's NAICS code *retroactively* to when the loan was disbursed[14], when that would be directly at odds with Plaintiff's loan application, request for forgiveness and certifications to both SBA and the IRS.

SBA ACTED REASONABLY, CONSIDERED THE RELVANT ISSUES, REASONABLY EXPLAINED ITS POSITION AND ITS DECISION TO DENY FORGIVENESS WAS NOT ARBITRARY AND CAPRICIOUS

Although here Plaintiff parses out only one part of the FLRD, before reaching that limited issue, the Court should first consider the FLRD as a whole in connection with the allegation that SBA's decision was "arbitrary and capricious." First, SBA analyzed forgiveness based on size, as requested by Plaintiff in

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[14] Again, to be eligible for an affiliate waiver, Plaintiff must have had a NAICS code of "72" at the time the loan was disbursed, which it did not. *See* pg. 2 *supra.*

its application for forgiveness. ECF 30-2, PP. 38-39. When that failed, SBA then analyzed possible forgiveness based on receipts, even though Plaintiff sought forgiveness under a size-based standard. *Id.* Stated differently, SBA did not have to consider that issue, but did so for a possible basis for forgiveness. Having failed that, SBA then addressed a possible NAICS code 72 affiliation waiver. *Id.* Failing that, SBA was lastly unable to consider forgiveness under an alternate size-based standard because Plaintiff simply didn't comply with SBA's request for information, a fact that Plaintiff does not dispute here. *Id.* So, the FLRD shows the Plaintiffs request for forgiveness failed on four separate relevant levels, each analyzed and clearly explained by SBA. This is not a "clear error of judgment," nor does it contain any "unexplained inconsistency" that would be a "hallmark" of an arbitrary and capricious change in agency practice. *See Data Mktg P'ship, L.P., v. 45* F.4th at 855-57. Nor is SBA;s decision "so implausible" that it cannot be described as a difference in view. *State Farm Mut. Auto. Ins.,* 463 U.S. at 43.

When analyzing a possible NAICS code 72 waiver, SBA did not *assign* any NAICS code to Plaintiff, nor were they *required* to do so. *See supra.* SBA reasonably agreed with Plaintiff own self-assigned NAICS code(s) and multiple certifications to SBA and the IRS. Notwithstanding, SBA went further, at Plaintiffs invitation, and analyzed Plaintiff's own financial data. When doing so, SBA reasonably concluded and explained that Plaintiffs financials did not support a NACIS code 72 affiliate waiver. *Id., see also supra.* Based on the data, SBA reasonably concluded, based on Plaintiff's revenue, that Plaintiff was primarily in the Golf Course/Country Club business, which it most certainly is, and not primarily the Food and Beverage

business, even though that is a component of Plaintiffs business (along with an airport and aviation fuel sales). *See supra.* While Plaintiff argues that "revenue" is not a factor under 13 C.F.R. § 121.107, *see* ECF 21, ¶ 51, the court should recognize that a business cannot have "receipts" without "revenue," and the AR shows Plaintiff's largest revenue was "membership," its largest departmental payroll was "golf' and the majority of its aggregated revenue, operating expenses and payroll was comprised of non-NAICS 72 operations. *See supra.*

While Plaintiffs accountants and attorneys may view the data and do the math differently, depending on their purpose, all that is required is for SBA to have acted within a "zone of reasonableness" and "reasonably considered the relevant issues and reasonably explained the decision." *Data Mktg P'ship, L.P.,* 45 F.4th at 855-56. Clearly, SBA did so, and more, in connection with Plaintiffs request for forgiveness. Although Plaintiff complains this wasn't "the best possible decision" based on the AR and their math, that is not the standard. *Dep't of Com. ,588 U.S* . at 777 (2019). Clearly, this is a decision that could have been reasonably reached, and was. Since SBA "articulate[d] a satisfactory explanation for its action including a rational connection between the facts and the choice made ... the court cannot substitute its judgment or that of the agency." *Huawei Techs. USA, Inc. v. FCC,* 2 F.4th 421, 434 (5th Cir. 2022). So, even though the 4-star Horseshoe Bay Resort now does not consider itself a Golf/Country Club for purposes of having to repay its taxpayer funded PPP loan, the Court should grant summary judgment, affirm the SBA's FLRD, affirm both OHA rulings in favor of SBA, and dismiss Plaintiffs claims for relief under the APA.

SHOULD THE COURT FIND A FACT ISSUE, THE REMEDY SHOULD BE REMAND AND LIMITED DECLARATORY RELIEF

Plaintiff has essentially requested two alternative forms of relief: 1) an order setting aside SBA's decision and 2) a declaration stating how SBA was allegedly wrong. ECF 21, ¶11 81-82, 86-87. Both essentially request the same thing; vacatur and remand. The test for vacatur considers 1) the seriousness of deficiencies of action, that is, how likely the agency will be able to justify its decision on remand and 2) the disruptive consequences of vacatur. *Texas v. Biden,* 20 F.4th 928, 1000 (5th Cir. 2021) *reversed on other grounds and remanded,* 597 U.S. 785 (2022). Remand without vacatur is "generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision when given an opportunity to do so." *Id.* (citing *Tex. Ass'n of Mfrs. v. US. Consumer Prod. Safety Comm* 989 F.3d 368, 389-90 (5th Cir. 2021)). Courts have recognized that vacatur is an available remedy against SBA under the APA. *See Daco Investments, LLC v. US. Small Bus. Admin.,* 2024 WL 750594 at * 5-6, No. 6:22-CV-01444 (W.D. Louisiana, February 22, 2024).

The Fifth Circuit has consistently held the APA does not waive sovereign immunity for claims seeking injunctive relief against SBA and all such claims are *"absolutely prohibited,"* specifically in the context of PPP loan decisions. *In re Hidalgo Cnty. Emergency Serv. Found.,* 962 F. 3d 838, 840 (5th Cir. 2020) (emphasis original) (denial of PPP loan under CARES Act). As such, should the Court find a fact issue, any remedy should be limited to only what is necessary to decide this very narrow dispute; simply 1) any fact issue on whether SBA's decision and analysis was

arbitrary and capricious and 2) the lim[s]ited factual or legal declaration(s) associated with any such fact issue that 3) the Court believes SBA should consider on remand in connection with Plaintiff's request to be a NAICS code "72" business that 4) SBA hasn't already considered, if any. In other words, not to injunctively command a different result, but merely to require that SBA's action be reasonable and reasonably explained, and that SBA act within a zone of reasonableness and reasonably consider the relevant issues. *Data Mktg P'ship, L.P.,45* F.4th at 85556 (5th Cir. 2022).

WHEREFORE, Defendants respectfully pray that the Court grant this motion, enter summary judgment in Defendants' favor on all of Plaintiff's claims and grant Defendants such other and further relief to which they may be entitled.

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Respectfully submitted,

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