No. 25-____

IN THE

Supreme Court of the United States

ESSINTIAL ENTERPRISE SOLUTIONS, LLC,
Petitioner,

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; ADMINISTRATOR UNITED STATES SMALL BUSINESS ADMINISTRATION; SECRETARY UNITED STATES DEPARTMENT OF TREASURY; THE UNITED STATES OF AMERICA, APPELLANTS,
Respondents..

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Paycheck Protection Program ("PPP") defines "payroll costs" to include "the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation." Petitioner applied for a PPP loan after the government's own authorized lender expressly advised that independent contractors "are allowed to be included in payroll costs"; thereafter, when federal guidance suggested that independent contractors would not qualify for loan *forgiveness*, petitioner—out of an abundance of caution—exclusively spent its loan proceeds on employee wages and other statutorily authorized costs. The SBA denied eligibility even though at the time of application the SBA's own agent was clear independent contractors should be included in the calculation loan forgiveness anyway.

The question presented is whether the statutory definition of "payroll costs" includes payments to independent contractors.

PARTIES TO THE PROCEEDING

Petitioner, who was the plaintiff below, is Essintial Enterprise Solutions, LLC.

Respondents, who were defendants below, are the United States Small Business Administration; the Administrator of the United States Small Business Administration; the Secretary of the United States Department of the Treasury; and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows: Essintial Enterprise Solutions, LLC states that it has no parent corporation, and that no corporation owns 10% or more of its stock.

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INTRODUCTION

This case presents a straightforward question of statutory interpretation with sweeping practical consequences for small businesses that rely on independent contractors, and it does so in a context different from the other cases involving the question presented currently pending before this Court on petitions for writs of certiorari. *Veltor Underground, LLC v. SBA*, No. 25-956 (U.S., Pet. Filed Feb. 9, 2026); *Seville Indus., LLC v. SBA*, No. 25-954 (U.S., Pet. Filed Feb. 9, 2026). The CARES Act defines "payroll costs" to include both "the sum of payments of any compensation with respect to employees" and "the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation." 15 U.S.C. § 636(a)(36)(A)(viii)(I). On its face, subsection (bb) covers "compensation to … [an] independent contractor," including wages and commissions—language that straightforwardly encompasses what a business pays to the independent contractors who do its work.

The Third Circuit rejected this plain-language reading, limiting subsection (bb) to only what a self-employed individual pays themself and excluding from "payroll costs" a business's payments to independent contractors. The Third Circuit committed this error largely to address policy concerns about "double-dipping," but the statute's plain syntax already prevents both parties from claiming the same amount.

This case is particularly compelling because Petitioner received an explicit representation from its

lender, Berkshire Bank, that independent contractor expenses were allowable payroll costs—representations made before Essintial submitted its loan application and on which Essintial relied in good faith. On or after April 2, 2020, the date the SBA published a draft of the Interim Final Rule, the lending bank advised Essintial's principal that "1099 employees are allowed to be included in payroll costs" for purposes of a PPP loan. Pet. App. 4a. Two days later, Essintial submitted its application, calculating its loan based on the guidance it had received and the Payroll Definition as described in the loan application. The lender approved the full loan amount and submitted it to the SBA, which likewise approved it without objection. Although Essintial included both W-2 employee wages and independent contractor compensation in calculating its loan amount, based on its lender's advice it only expended its PPP loan proceeds on W-2 employee wages and statutorily authorized overhead costs; none of the funds went to independent contractors. When Essintial applied for forgiveness in January 2021, the lender again approved the forgiveness application for full forgiveness and submitted it to the SBA for approval. Only then, after the lender had twice confirmed that Essintial's treatment of independent contractor expenses was proper, did the SBA reverse course and deny full forgiveness.

Fairness and reliance interests favor Petitioner. Small businesses structured their PPP applications, and as a result their business plans more broadly, based on the statute's plain language and contemporaneous guidance from their lenders. And affected individuals are entitled to assume statutory

terms bear their ordinary meaning—especially unsophisticated parties who cannot track changing agency interpretations and follow guidance from their more sophisticated financial counterparts instead. Moreover, the stakes are exceptionally high and nationwide, affecting hundreds of thousands of borrowers and substantial sums in unforgiven loans.

The issue is time-sensitive and ripe for resolution now. Congress designed the PPP as a one-time, emergency program that closed to new lending in mid-2021, and the forgiveness review life-cycle is reaching its end, with the final wave of contested determinations cresting now as five-year forgiveness windows close. As agency dashboards sunset and files close, the opportunity for a uniform, system-wide rule will narrow rapidly. Further percolation will not improve the record but will instead entrench disparate and/or unfair results based on geography and timing. Only this Court can provide the needed clarity on the statutory definition that the government itself has recognized as central to a coherent forgiveness scheme.

Essintial's unique circumstances compel this Court's review regardless of what it does with the *Veltor* and *Seville* petitions. In this case, Essintial received an unambiguous, affirmative representation from the government's own authorized lender, relied on that representation and provided 100% loan disbursement to employees and statutorily authorized costs—which provides a particularly compelling context in which to address the statutory interpretation question. If the Court grants review in either *Veltor* or Seville, *Essintial* should also be taken for review—either independently or consolidated—or,

at minimum, held for consideration after full review of *Veltor* and/or *Seville*. If the Court denies review in *Veltor* and *Seville*, *Essintial's* particular factual context provides a particularly good vehicle for this Court's review.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit reversing partial summary judgment for Petitioner is reported at 166 F.4th 380, and reproduced at Pet. App. 1a–20a.

The decision of the United States District Court for the Middle District of Pennsylvania granting summary judgment to Petitioner is not reported, but is available at 2024 WL 5248242 (M.D. Pa. Dec. 30, 2024), and is reproduced at Pet. App. 21a–47a.

JURISDICTION

The United States Court of Appeals for the Third Circuit reversed the grant of summary judgment to Petitioner on February 3, 2026. Petitioner timely sought review. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The United States statutes at issue, 15 U.S.C. §§ 636(a), 636m, are included in relevant part in the Appendix at Pet. App. 68a–120a.

STATEMENT

I. Statutory Regime

Congress enacted the PPP as part of the CARES Act to provide forgivable loans to small businesses facing

acute financial distress during the COVID-19 pandemic. The PPP's statutory architecture involved three distinct stages, each governed by its own provisions. First, loan eligibility required lenders to evaluate whether a prospective borrower "had employees for whom the borrower paid salaries and payroll taxes; or paid independent contractors, as reported on a Form 1099-MISC." 15 U.S.C. § 636(a)(36)(F)(ii)(II)(bb). Second, the maximum loan amount was calculated using a formula based on the borrower's "payroll costs," defined to include both "the sum of payments of any compensation with respect to employees" (15 U.S.C. § 636(a)(36)(A)(viii)(I)(aa)) and "the sum of payments of any compensation to or income of a sole proprietor or independent contractor" (*id.* § 636(a)(36)(A)(viii)(I)(bb)). Third, loan forgiveness required borrowers to use at least sixty percent of the covered loan amount on "payroll costs"—a term that carries the same statutory definition at the forgiveness stage as at the loan-amount stage. *Id.* § 636m(a)(12) (cross-referencing *id.* § 636(a)(36)). Critically, the eligibility provision expressly references payments to independent contractors, and the "payroll costs" definition that governs both the loan amount and forgiveness encompasses "compensation to or income of … an independent contractor."

Yet the forgiveness-specific provisions—which reduce forgiveness based on reductions in the "number of employees" or cuts to employees' "salary or wages," *id.* § 636m(d)(2), (d)(3)(A)—reference only employees, not independent contractors.

On April 15, 2020, the SBA issued a rule stating that businesses were only eligible for the PPP if they

"either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form1099-MISC." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811-01, 20812 (Apr. 15, 2020). However, the Rule excluded independent contractors from an employer's PPP calculations noting that independent contractors do not "count as employees for purposes of PPP loan calculations." *Id.* at 20813. The Rule also excluded independent contractors from the forgiveness stage noting that independent contractors do not "count as employees for purposes of PPP loan forgiveness." *Id.* at 20814.

II. Factual Background

Petitioner Essintial Enterprise Solutions, LLC ("Essintial") is a technology services company that provides onsite support to customers in the retail, hospitality, restaurant, and hotel industries. App Record A90. Like countless small businesses nationwide, Essintial experienced severe financial hardship during the pandemic. App Record A91. On April 4, 2020, Essintial applied for a PPP loan in the amount of $7,028,800 from Berkshire Bank ("the Lender"). Essintial calculated the maximum loan amount based on "Payroll Costs" as defined by the CARES Act, including the sum of Gross Pay, State Unemployment Tax, Independent Contractor Compensation, and Health Care Expenses.

Before Essintial submitted its application, its lender provided an assurance that independent contractor expenses were properly included in payroll costs. On or after April 2, 2020, the date the SBA posted its draft Interim Final Rule on the Treasury

website, Berkshire Bank sent an email to Essintial's principal stating that "1099 employees are allowed to be included in payroll costs" for purposes of a PPP loan. Pet. App. 19a. The bank was not shooting from the hip; "[a]s a long time SBA7a lender," it later put in writing to the SBA, "we have historically been accustomed to processing 7a loans according to our interpretation of the regulations prior to any Policy Notice that gets issued by the Agency." Pet. App 124a. That means the advice Essintial received was standard policy, and that Essintial reasonably relied on the bank's express representation from the government's own authorized and approved lender when calculating its payroll costs and submitting its application two days later.

On April 10, 2020, the Lender approved Essintial's Loan Application for the maximum loan amount, acting as the delegee of, and without objection from, the SBA. Pet. App. 49a. Notably, although Essintial included both W-2 employee wages and independent contractor compensation in calculating its loan amount, it expended 100% of the PPP loan proceeds on W-2 employee wages alone—no independent contractor received any PPP funds from Essintial. Pet. App. 50a. On January 6, 2021, Essintial applied for full forgiveness of the Loan, having expended the Loan proceeds for Payroll Costs entirely on W-2 wages. Pet. App. 25a. The Lender approved the Forgiveness Application for full forgiveness of the Loan and submitted it to the SBA for its approval on January 18, 2021. Pet. App. 25a. This represented the second time that Essintial's lender had confirmed that the company's treatment of its PPP loan was proper.

Despite the Lender's repeated approvals, the SBA subsequently opened a review of the bank's forgiveness determination. *Id.* In June 2021, the SBA notified Essintial that "[t]he loan documentation does not fully support the disbursed loan amount" because "ineligible payroll expenses were included in the calculation of the loan amount: 1099 Contractor costs." Pet. App. 55a. After recalculating, the SBA forgave only $3,703,011.60 of the over $7 million loan—leaving more than $3.3 million unforgiven based solely on its interpretation of "payroll costs." *Id.* at A82, A84.

The SBA's denial of forgiveness rested entirely on its interpretation of the statutory term "payroll costs"—an interpretation that differed from the guidance Essintial had received from the government's own authorized lender prior to submitting its application. Essintial's conduct throughout the process was consistent with that guidance.

III. Proceedings Below

In June 2021, the SBA determined that only $3,469,174.00 of its $7,028,800.00 loan would be forgiven. Pet. App. 57a. The SBA recalculated the maximum loan amount on the ground that the original Loan amount "included compensation to independent contractors which cannot be substantiated as an eligible payroll" cost. Pet. App. 58a. Notably, the Final Decision cited no statutory or regulatory support for this recalculation. Pet. App. 57a–60a.

Essintial timely appealed the SBA's determination to the agency's Office of Hearings and Appeals

("OHA"). Pet. App. 61a. During the course of that appeal, the SBA increased the forgiveness amount by an additional $233,837.60, bringing the total amount forgiven to $3,703,011.60—and leaving an unforgiven balance of $3,325,788.40. Pet. App. 25a. The OHA ultimately affirmed the SBA's final decision, denying Essintial's appeal. Pet. App. 25a. Essintial then filed a Petition for Reconsideration with the OHA, which the OHA likewise denied. Pet. App. 65a–67a. Thirty days after Essintial's receipt of the Reconsideration Decision, it became the final decision of the SBA, entitling Essintial to seek judicial review in federal court. *See* 13 C.F.R. § 134.1211(c), (g).

In 2022, Essintial filed suit in the United States District Court for the Middle District of Pennsylvania against the SBA and related government actors, seeking review of the agency's final decision. Pet. App. 5a. The parties filed cross-motions for summary judgment. On December 30, 2024, the district court ruled for Essintial. Pet. App. 23a. The court found that the statutory definition of "payroll costs" is unambiguous and, when read according to its plain terms, includes payments to independent contractors. Pet. App. 36a. The court explicitly rejected the SBA's argument that its April 15, 2020 guidance governed the analysis, finding instead that the guidance was not retroactively applied to Essintial's loan. Pet. App. 30a–33a. Turning to the merits, the court applied traditional tools of statutory construction and concluded that "the sum of payments of any compensation to or income of a sole proprietor or independent contractor" plainly encompasses what a business pays to its independent contractors. Pet. App. 44a.

The district court further declined to refer to other statutory provisions the SBA cited because, in its view, "the statute is not ambiguous and the plain language of the statute controls." *Id.* at *9. The court declared that the SBA's decision to deny full forgiveness "on the ground that plaintiff included the independent contractor expenses in its calculation of payroll costs was an error of law and thus arbitrary and capricious." *Id.* The court remanded the case to the SBA for further proceedings consistent with its opinion.

The SBA timely appealed to the Third Circuit. On February 3, 2026, a panel of the Third Circuit reversed. Pet. App. 22a. Writing for the panel, Judge Bove held that the "payroll costs" definition creates "alternative meanings" for businesses with employees (subsection (aa)) and for sole proprietors or independent contractors themselves (subsection (bb)). Pet. App. 8a. The court concluded that "neither subsection covers Essintial's payments to independent contractors." Pet. App. 8a. In reaching this conclusion, the Third Circuit faulted the district court for operating under what it considered a *Chevron*-era "misimpression" that the court "need not refer" to various statutory sections cited by the SBA outside of the statutory definition. Pet. App. 8a. The panel held that because the scope and application of "payroll costs" was "plainly subject to a reasonable dispute between the parties," it was error to confine the SBA's structural arguments about other relevant features of the CARES Act to a footnote without analysis. Pet. App. 8a.

The Third Circuit acknowledged that the case was "not a routine ground ball"—Essintial's arguments

"ha[d] merit" and presented "forceful arguments in support of the company's position." Pet. App. 14a. Judge Bove specifically noted that Essintial's reliance on the eligibility provision—which required lenders to consider whether borrowers "paid independent contractors"—was "another argument that has some purchase." Pet. App. 17a. Nevertheless, the court ultimately sided with the SBA based on structural concerns, the singular-plural distinction between "employees" and "independent contractor" in the statute, and policy worries about "double dipping." Pet. App. 13a–14a. The court joined the Fifth Circuit's decision in *Seville* and the Sixth Circuit's decision in *Veltor*, making the Third Circuit the third federal appellate court to rule against borrowers on this issue.

This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant Essintial's petition for three reasons:

1. First and foremost, the Third Circuit's opinion is manifestly wrong—reading "payroll costs" in a way the statute will not bear, and subordinating clear text to unfounded policy worries. When statutory words are unambiguous, judicial inquiry is complete. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last … judicial inquiry is complete."). The CARES Act defines "payroll costs" to include "the sum of payments of any compensation to or income of a sole proprietor or independent contractor." Read naturally, that language covers amounts a business paid to its independent contractors during the covered period.

Starting with the plain text, the CARES Act defines "payroll costs" to include "(aa) the sum of payments of any compensation with respect to employees … ; and (bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor." The ordinary meaning of "and" is conjunctive; the definition embraces both categories—payments to employees and payments to independent contractors.

The majority's structural arguments also fall flat. Reading subsection (bb) to capture only what sole proprietors and independent contractors pay themselves collapses "compensation to" into "income of," erasing words Congress chose and violating the canon against surplusage. Congress paired "compensation to" with "income of" in the same clause; the best reading gives both operative effect—"compensation to" as amounts given, "income of" as amounts received. Moreover, Congress listed explicit exclusions from "payroll costs" but never excluded payments to independent contractors. That omission confirms such payments are included.

Equally problematic, the Third Circuit's reading creates structural anomalies. Congress excluded certain employee-specific items from "payroll costs" but directed lenders to consider whether a borrower "paid independent contractors." Why highlight contractor payments for eligibility while silently barring them from "payroll costs"? The Third Circuit says that this clause merely "reflect[s] anti-fraud concerns." Pet. App. 18a. But as Judge White observed in her concurrence in *Veltor*, requiring lenders to consider contractor payments would have "no purpose if payments to independent contractors are not covered as 'payroll costs.'" *Veltor*

Underground, LLC v. U.S. Small Business Administration, 143 F.4th 727, 739 (6th Cir. 2025) (White, J., concurring).

What's more: The particular factual context here reinforces the absurdity of the government's position. Here, the client reasonably relied on the plain language of the statute and then ensured compliance with the government's guidance in terms of payments—and thus entirely removed the double dipping specter on which the government so heavily relies. Moreover, the plain text of the statute prevents double dipping. The statute includes "compensation to or income of" a contractor. Just as "and" is conjunctive, "or" is disjunctive: the statute allows either the payer's "compensation to" or the contractor's own "income"—but not both. That reading eliminates duplicative claims without rewriting subsection (bb). The program's documentation requirements already prevent abuse—Congress required applicants to certify that they had not already received PPP loans duplicative of the ones they were seeking. In attempting to dodge this hypothetical absurdity, the Third Circuit created a real one: If businesses cannot use PPP funds to pay their contractors, those contractors will have no incentive to continue working for the business—defeating the entire purpose of a program intended to maintain workforce continuity during the pandemic.

2. Second, this case exposes interpretive misgivings in three different circuits. While the government has prevailed in all three circuits to have considered this question, multiple judges have voiced reservations. For instance, in *Veltor*, the Sixth Circuit "[took] the point" that it would be "unfair to tell" small businesses

"that they cannot rely on the guidance they are given." *Veltor*, 143 F.4th at 738. And Judge White concurred "with reservations," observing that the eligibility provision's instruction that lenders consider contractor payments "would have no purpose if payments to independent contractors are not covered as 'payroll costs,'" and that "a business in [Veltor's] position could reasonably have believed when it applied for the loan that it would be forgiven if it continued to pay its independent contractors." *Veltor*, 143 F.4th at 738–40 (White, J., concurring).

In *Seville*, the Fifth Circuit itself conceded that "in a vacuum a business like Seville could read 'compensation to' as a reference to its outflow payments to independent contractors," *Seville Indus., L.L.C. v. U.S. Small Business Administration*, 144 F.4th 740, 746–47 (5th Cir. 2025), and recognized that subsection (bb) "expands the traditional meaning of payroll costs" in ways that may undercut the very dictionary definitions on which the government relies to exclude such payments. Yet the *Seville* panel never attempted to explain what purpose the eligibility provision's instruction that lenders consider contractor payments serves if those payments are wholly irrelevant to the loan calculation—the same textual anomaly that gave Judge White pause in *Veltor*.

And in *Essintial*, the district court ruled squarely for the borrower. Applying traditional tools of statutory construction, Judge Munley found the statutory definition of "payroll costs" to be "unambiguous" and, on its plain terms, inclusive of payments a business makes to independent contractors. Pet. App. 36a. Moreover, the Third

Circuit itself acknowledged that Essintial's arguments "ha[d] merit," that Essintial presented "forceful arguments in support of the company's position," and that the surplusage argument based on the eligibility provision was "another argument that has some purchase"—before ultimately siding with the government on structural grounds. Pet. App. 17a. These misgivings show both that Petitioner's reading of the statute is reasonable and that this Court should review the question presented.

3. Third, this case presents an ideal vehicle for resolving the dispute. Essintial's case cleanly presents the statutory question and nothing else, arising on a final judgment after a straightforward administrative record review with no threshold obstacles or collateral issues. The district court ruled in Essintial's favor on the statutory interpretation question, and the Third Circuit reversed solely based on its contrary reading of the statute.

Essintial is a particularly compelling vehicle because it cleanly teases out the critical difference between qualifying for a PPP loan and qualifying for forgiveness of that loan. Essintial included $2,635,443 in independent contractor payments in its eligibility calculation—payments the lender considered, the SBA did not object to, and that resulted in a $7,028,800 loan. Pet. App. 49a. But once the loan was disbursed, Essintial spent every dollar on W-2 employees and statutorily authorized overhead costs—no independent contractor received a cent of Essintial's PPP funds. Pet. App. 50a. This posture eliminates the double-dipping concern entirely: 0% of its contractors received disbursement from Essintial. As the district court observed,

"[d]efendants' concerns of double-dipping are unfounded." Pet. App. 41a. And, indeed, the government has still yet to point to a single case in which an independent contractor was compensated twice by double-dipping PPP loans.

On or after April 2, 2020, the date the SBA posted its draft Interim Final Rule, Essintial's lender sent an email stating unequivocally that "1099 employees are allowed to be included in payroll costs." Pet. App. 4a. Essintial submitted its application just two days later, calculating its loan based on this guidance. Pet. App. 4a. The lender approved the loan. Pet. App. 4a. The SBA approved the loan. Pet. App. 24a. When forgiveness time came, the lender approved the forgiveness application. Pet. App. 25a. Only then—after multiple layers of approval based on the lender's own representations—did the SBA pull the rug out. Pet. App. 25a. A small business owner receiving guidance from its bank that "1099 employees are allowed" could reasonably rely on the lender who was actually processing its application. "[A]ffected individuals … are entitled to assume statutory terms bear their ordinary meaning." *Niz-Chavez v. Garland*, 593 U.S. 155, 163 (2021).

4. Fourth and finally, the stakes could hardly be higher and time is running out. Approximately 81.9% of small businesses are nonemployer firms, and 36%—about 10.25 million—use independent contractors. U.S. Small Business Administration, Office of Advocacy, Frequently Asked Questions About Small Business (July 2024); 2025 Report on Nonemployer Firms: Findings on Hiring Plans from the 2024 Small Business Credit Survey, Federal Reserve Banks (Oct. 2025). The Third Circuit's decision denies PPP

forgiveness to precisely those businesses for whom Congress designed a safety net to keep workers paid and employed. Across the PPP program, lenders approved roughly 11.47 million loans totaling about $792.6 billion. U.S. Gov't Accountability Off., Gao-22-105291, *Significant Improvements Are Needed For Overseeing Relief Funds And Leading Responses To Public Health Emergencies* 181 (2022). As of January 2023, about 940,000 PPP loans had not been forgiven; sole proprietors and independent contractors account for a substantial share of these unforgiven loans. *Id*. And the time to act is now. The PPP was a one-time, emergency response that closed to new lending on June 30, 2021; forgiveness can be sought up to five years from the loan date, U.S. Small Bus. Admin. Paycheck Protection Program Loan Forgiveness FAQs at 33 (SBA & Treasury) (May 9, 2024), meaning final contested determinations are cresting now. As forgiveness files close, the opportunity to resolve this question with system-wide effect will narrow dramatically.

I. The Third Circuit's Decision is Manifestly Wrong

A. Plain Text and Structure

The Third Circuit's opinion reads "payroll costs" in a way the statute will not bear, subordinating clear text to policy worries. "When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank*, 503 U.S. at 254. The CARES Act allows borrowers to obtain and forgive PPP loans for "payroll costs," and it defines those costs to include "the sum of payments of any compensation to or income of a sole proprietor or

independent contractor." 15 U.S.C. § 636(a)(36)(A)(viii)(I). Read naturally, that language covers the precise payments at issue here—amounts a business paid to its independent contractors to keep them working during the covered period.

Start with the Third Circuit's plain textual analysis. Title I of the CARES Act defines "payroll costs" to mean, in relevant part: "(aa) the sum of payments of any compensation with respect to employees …; and (bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor…." 15 U.S.C. § 636(a)(36)(A)(viii)(I). The ordinary, presumptive meaning of "and" is conjunctive, not disjunctive; the definition thus embraces both categories of labor compensation—payments to employees and payments to independent contractors.

The Third Circuit's structural arguments fare no better. Reading subsection (bb) to capture only what sole proprietors and independent contractors pay themselves collapses "compensation to" into "income of," erasing words Congress chose and violating the canon against surplusage. 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb). Congress paired "compensation to" with "income of" in the same clause; the best reading gives both operative effect—"compensation to" as amounts given, "income of" as amounts received. 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb). Moreover, Congress listed explicit exclusions from "payroll costs" but never excluded payments to independent contractors; under *expressio unius*, this omission confirms such payments are included. 15 U.S.C. § 636(a)(36)(A)(viii)(II).

Equally problematic, the Third Circuit's reading creates structural anomalies. Congress excluded certain employee-specific items from "payroll costs" but directed lenders to consider whether a borrower paid independent contractors. 15 U.S.C. § 636(a)(36)(A)(viii)(II). Why would Congress highlight contractor payments for eligibility while silently barring those same payments from the borrower's "payroll costs"? *Id.*

As Judge White observed in her concurrence in *Veltor*—a case that the Third Circuit followed—"a business in [Petitioner's] position could reasonably have believed when it applied for the loan that it would be forgiven if it continued to pay its independent contractors." *Veltor,* 143 F.4th at 740 (White, J., concurring). Judge White further noted that the eligibility provision's "require[ment that] lenders … consider … payments" to independent contractors would have "no purpose if payments to independent contractors are not covered as 'payroll costs.'" *Id.* at 739.

The circuits that have ruled against borrowers have relied heavily on concerns about "double dipping"—the notion that both a business and its independent contractor might claim PPP relief based on the same payments. *Id.* at 737; *Seville,* 144 F.4th at 750. But the statute's plain syntax already prevents both parties from claiming the same amount. And, crucially, Essintial did not disburse its loan across both categories of workers; only its employees, not its independent contractors, received payment.

As the district court in this case correctly explained: "The statutory language, however, does not permit such double dipping. With regard to payroll costs and

independent contractors, the CARES Act 'includes the sum of payments of any compensation to or income of a sole proprietor or independent contractor.'" Pet. App. 41a. Under a plain reading, only one party—the payee or the payor—is eligible for the funds. Moreover, Congress required applicants to certify that they had not already received PPP loans duplicative of the ones they were seeking. 15 U.S.C. § 636(a)(36)(G)(i)(IV).

In attempting to dodge this make-believe absurdity, the Third Circuit created a real one: if businesses cannot use PPP funds to pay their contractors, those contractors will have no incentive to continue working for the business—defeating the entire purpose of a program intended to maintain workforce continuity during the pandemic.

B. Eligibility Versus Forgiveness Stages

The CARES Act's eligibility provisions expressly permitted independent contractor payments to be counted as payroll costs—and Berkshire Bank correctly advised Essintial to that effect. When the SBA subsequently promulgated guidance suggesting that independent contractors would not count toward forgiveness, Essintial, out of an abundance of caution, elected not to disburse any loan proceeds to its independent contractors at all, spending every dollar on W-2 employees and expressly permitted overhead costs. Even accepting the government's restrictive (and flawed) reading of the forgiveness provisions, Essintial did everything the law required under the government's reading and is being punished anyway.

At the eligibility stage, the CARES Act expressly includes independent contractor payments within the

definition of "payroll costs." The statute covers "the sum of payments of any compensation to or income of a sole proprietor or independent contractor," 15 U.S.C. § 636(a)(36)(A)(viii)(I), and separately requires lenders to consider whether a borrower "paid independent contractors, as reported on a Form 1099-MISC," *id.* § 636(a)(36)(F)(ii)(II)(bb). This was not ambiguous at the time of Essintial's application. Berkshire Bank read the statute as written and advised Essintial directly that "1099 employees are allowed to be included in payroll costs." Pet. App. 4a.

When the SBA subsequently issued guidance relevant to the forgiveness stage, that guidance arguably suggested that independent contractors might not count. The forgiveness provisions of the statute direct borrowers to document "the number of full-time equivalent employees on payroll and pay rates" and certify that forgiveness funds were "used to retain employees." 15 U.S.C. § 636m(e)(1), (3). Confronted with the regulatory uncertainty created by the SBA's unclear guidance, Essintial elected not to disburse any loan proceeds to its independent contractors. It spent every dollar of its $7,028,800 loan on W-2 employees and permissible overhead costs that were expressly authorized under the program—not a cent went to any independent contractor. Pet. App. 50a.

In short, Essintial bent over backwards to comply with the SBA. It used independent contractors to calibrate its loan size only upon express instruction from its government-approved lender and its reading of the statute's plain language; when it received indication that the forgiveness stage might operate by different rules, it altered its conduct to conform to

those rules. To still punish Essintial now raises the question: What should the company have done differently given the knowledge it had when it made its decisions? The Third Circuit provides no reasonable answer.

II. The Courts of Appeals Have Expressed Substantial Misgivings About Their Rulings on The Question Presented

To be sure, the government has prevailed in all three circuits to have considered this question presented—but each court expressed meaningful reservations about the results they reached. This pattern of reluctant agreement is not a hallmark of a strong consensus. Rather, it shows that the question presented should be resolved definitively by this Court.

A. The Sixth Circuit

In *Veltor*, Chief Judge Sutton's majority opinion acknowledged the force of the borrower's reliance argument. The court stated that it "t[ook] the point" that "it would be unfair to tell" small businesses "that they cannot rely on the guidance they are given"—only to sidestep the concern on narrow factual grounds specific to Veltor's particular application conduct. *Veltor*, 143 F.4th at 738. That dismissal prompted a pointed response from Judge White, who concurred "with reservations." *Id.* at 738 (White, J., concurring). Her opinion identified a textual problem that the majority had not satisfactorily resolved: the statute's eligibility-considerations provision expressly requires lenders to evaluate whether a borrower "paid independent contractors, as reported on a Form 1099-MISC," a requirement that, in her view, would have

"no purpose if payments to independent contractors are not covered as 'payroll costs.'" *Id.* at 739–40. She further observed that "a business in Veltor's position could reasonably have believed when it applied for the loan that it would be forgiven if it continued to pay its independent contractors." *Id.* at 741.

B. The Fifth Circuit

Though the Fifth Circuit joined the Sixth Circuit's ultimate holding, the panel conceded room for Essinital's interpretation. Indeed, the panel indicated that it was "[t]rue" that "in a vacuum a business like Seville could read "compensation to" as a reference to its outflow payments to independent contractors." *Seville*, 144 F.4th at 746–47 (cleaned up). The panel also recognized that "subsection (bb) expands the traditional meaning of payroll costs so that self-employed individuals can also apply for paycheck protection under the CARES Act" perhaps undercutting some dictionary definitions of "payroll" which would exclude payments to Essintial's independent contractors. *Id.* at 747. Moreover, the panel did not even attempt to explain the purpose of the eligibility criterion that gave Judge White pause in the Sixth Circuit.

C. The Third Circuit

The litigation in *Essintial* began with a district court ruling that was unambiguous in plaintiff's favor. Applying traditional tools of statutory construction, Judge Munley found the statutory definition of "payroll costs" to be plain on its face: the word "and" joining subsections (aa) and (bb) "is conjunctive," the context did not "dictate otherwise," and "the language is not ambiguous." Pet. App. 37a. The court explicitly

rejected the SBA's invitation to look beyond the statutory text, holding that "[d]efendants do not provide a different meaning for the plain language used in the statute" and that it "cannot refer to other statutory provisions to create an ambiguity in a statute where no ambiguity exists otherwise." Pet. App. 44a.

While the Third Circuit joined the Fifth and Sixth Circuits on appeal, it did so with the most explicit reservations of the three. Judge Bove's opinion opened by observing that the interpretive question "is not a routine ground ball." Pet. App. 2a. The panel directly acknowledged that Essintial had presented "forceful arguments in support of the company's position" and that those arguments "ha[d] merit." Pet. App. 15a. It further conceded that Essintial's surplusage argument based on the eligibility-considerations provision was "another argument that has some purchase." Pet. App. 17a. These opinions express significant misgivings and acknowledge the forcefulness of Essintial's statutory interpretation.

III. This Case Is an Ideal Vehicle for Resolving the Question Presented

This case cleanly presents the statutory question and nothing else. It arises on a final judgment after a straightforward administrative record review and cross-motions for summary judgment, with no threshold obstacles or collateral issues that could obscure the merits.

A. Essintial's Circumstances Directly Tee Up the Interpretive Dispute

Petitioner's situation squarely presents the question of whether "payroll costs" include payments

to independent contractors. Essintial obtained a $7.028 million PPP loan in April 2020, calculated based on payroll costs that included independent contractor compensation. Pet. App. 79a. The district court ruled in Essintial's favor on the statutory interpretation question, and the Third Circuit reversed solely based on its contrary reading of the statute. The case comes free of jurisdictional tangles or ancillary legal issues. The narrow textual question is the only issue. This vehicle allows the Court to provide definitive guidance for thousands of pending forgiveness determinations turning on the same text.

B. Essintial Uniquely Highlights the Distinction Between Loan Eligibility and Forgiveness

Essintial is a particularly compelling vehicle to resolve the question presented because it exposes, with unusual clarity, the precise moment at which the government's position shifted and why that shift caused confusion that this Court must now resolve.

The statutory text admitted no doubt on eligibility: "payroll costs" expressly included payments to independent contractors. 15 U.S.C. § 636(a)(36)(A)(viii). When Essintial calculated its loan amount—incorporating $2,635,443 in independent contractor payments—it did exactly what the statute authorized, what its lender confirmed, and what the SBA did not contest. Pet. App. 50a. The government's subsequent guidance complicated this picture, but only in terms drawn from the forgiveness provisions. The guidance said nothing that, on its face, explicitly excluded independent contractors from the eligibility calculation; the forgiveness provision it invoked

simply did not mention independent contractors at all. It did not exclude them—it merely omitted them. A reasonable reader could therefore conclude, as Essintial did, that the guidance had adjusted the forgiveness stage without disturbing the eligibility stage that had initially authorized the loan. That reading was more than reasonable and was strongly supported by the plain language of the statute.

Essintial's next move was fully appropriate. Reading the guidance in its most demanding light, Essintial spent every dollar of its $7,028,800 loan on W-2 employees and statutorily authorized payroll costs. Pet. App. 50a. No independent contractor received a cent. Pet. App. 50a. Essintial did not hedge; it complied fully at the forgiveness stage even under the government's own contested interpretation. Because Essintial disbursed nothing to contractors, that rationale reduces to a hypothetical fear untethered from any actual harm.

Essintial's case thus presents the eligibility-forgiveness issue in clear form: a borrower that qualified under the eligibility stage's unambiguous statutory text, received explicit lender confirmation, and then—without reservation—complied with the most rigorous reading of the forgiveness stage that the government's own guidance could support.

C. Essintial's Reliance on Lender Representations Makes This A Particularly Compelling Vehicle

Perhaps most importantly, this case features a reliance on clear lender representations in PPP independent contractor litigation. On or after April 2, 2020, the date the SBA posted its draft Interim Final Rule, Essintial's lender sent an email stating unequivocally that "1099 employees are allowed to be included in payroll costs." Pet. App. 4a. This was a direct, express representation from the government's authorized lender that Essintial's approach was permissible. And it appears the bank had made that representation to clients as a general matter; in a June 14 letter to the SBA, Greg Poehlman of Berkshire Bank noted that "[a]s a long time SBA 7a lender, we have historically been accustomed to processing 7a loans according to our interpretation of the regulations prior to any Policy Notice that gets issued by the Agency." Pet. App. 124a. It is telling that a government approved lender—which performed these operations at a broad scale—was, itself, blindsided by the government's current interpretation.

Essintial submitted its application just two days later, on April 4, 2020, calculating its loan based on this guidance. The lender approved the loan. The SBA approved the loan. Essintial used the funds as directed. When forgiveness time came, the lender approved the forgiveness application. Only then—after multiple layers of approval based on the lender's own representations—did the SBA pull the rug out.

The Third Circuit dismissed this concern, suggesting that Essintial could not "successfully

invoke equity after having received a clear indication of the government's position prior to the issuance of the loan." But this misses the point. Essintial received a clear indication from the *government's own authorized lender* that its approach was proper. The lender's email was on or after April 2, 2020, the date of the draft Interim Final Rule. A small business owner receiving conflicting guidance—one from its bank saying "1099 employees are allowed" and one from an agency website saying otherwise—could reasonably rely on the lender who was actually processing its application.

This record makes *Essintial* an ideal vehicle for addressing the reliance interests at stake. "[A]ffected individuals … are entitled to assume statutory terms bear their ordinary meaning." *Niz-Chavez*, 593 U.S. at 163. That is particularly true when the affected party is relying on an experienced, government authorized lender. Essintial followed the rules as its lender explained them. It made significant business decisions related to employee retention and hiring based on this reliance. It also did not seek support for other government programs in reliance on its PPP assurances. To now tell Essintial that it owes millions of dollars (that it spent 6 years ago) because it should have disregarded its lender's express guidance in favor of its own independent statutory analysis is fundamentally unfair—and contrary to the entire structure of a program that delegated authority to private lenders precisely so that small businesses could rely on lender guidance.

IV. The Stakes are High and Time is Running Out

Approximately 81.9% of small businesses are nonemployer firms, and 36%—about 10.25 million—use independent contractors. The Third Circuit's decision denies PPP forgiveness to precisely those businesses for whom Congress designed a safety net to "keep workers paid and employed."

Across the PPP program, lenders approved roughly 11.47 million loans totaling about $792.6 billion. As of January 2023, about 940,000 PPP loans had not been forgiven; sole proprietors and independent contractors account for a substantial share of these unforgiven loans. For these businesses—like Essintial—the stakes are existential.

And time is running out to rectify the situation. The Paycheck Protection Program was a one-time, emergency response that Congress designed to operate at "warp speed." The PPP closed to new lending on June 30, 2021. Forgiveness can be sought up to five years from the loan date, meaning final contested determinations are cresting now. As forgiveness files close, the opportunity to resolve this question with system-wide effect will narrow dramatically.

Further percolation will generate only disparate and/or unfair outcomes for similarly situated borrowers based on timing and geography. The questions at issue have already been fully joined in the lower courts. The government's own briefs below acknowledge the centrality of the statutory definition to a coherent forgiveness scheme.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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