Supreme Court, U.S.
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No. 24A- 107

In the Supreme Court of the United States

JBG SMITH PROPERTIES, LP FIRST RESIDENCES,
Plaintiff-Respondent,

v.

JORDAN POWELL,
Defendant-Third-Party-Plaintiff-Applicant,

v.

THE UNITED STATES SMALL
BUSINESS ADMINISTRATION,
Third-Party-Defendant-Respondent.

On Application from the United States Court of Appeals
for the District of Columbia Circuit, Case No. 24-5023
Before The Honorable Wilkins, Childs, and Pan, Circuit Judge

EMERGENCY APPLICATION FOR STAY OF THE U.S. DISTRICT COURT'S REMAND ORDER AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT'S PENDING MADATE, PENDING THE FILING AND DISPOSITION OF A PERTITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTRODUCTION

This case concerns remand following removal from the Superior Court of the District of Columbia to the United States District Court for the District of Columbia and dismissal from the United States Court of Appeals for the District of Columbia Circuit on judgement that the circuit court lacks jurisdiction under 28 U.S.C. § 1447(d) because Appellant did not remove the case pursuant to §1442 or §1443.

A motion for stay and petition for rehearing and rehearing en banc are currently pending in the circuit court. Pursuant to Rule 23 of this Court and 28 U.S.C. §§ 1331, 1651, and 2101(f) Appellant respectfully applies for stay of the district court order and, circuit court judgement if necessary, pending the consideration and disposition of a forthcoming petition for writ of certiorari and any further proceedings in this Court.

Moving first in the district court was impracticable[1] because the district court "remanded" "this matter" and "terminate[d] the case." *JBG Smith Properties, LP First Residences v. Powell*, No. 1:23-cv-3663 (D.D.C.) (ECF. No. 5). While the district and circuit dockets reflect all three parties, the district court's order appears to have dropped the SBA[2] matter and remanded the JBG matter. Meanwhile, the district court had subject matter jurisdiction over SBA (15 U.S.C. § 634), supplemental jurisdiction over

1 Fed. R. App. P. 8(a)(2)(A)(i).

2 ECF No. 7 at 1 (Notice of appeal case caption for SBA: "Status Indiscern[i]ble").

JBG (28 U.S.C. § 1367) and, federal question jurisdiction over the entire case (§1331).

Until recently, any motion for stay would likely have been "moot" as seen at the outset of *Denizen Dev., L.L.C. v. Saxon,* 850 F. App'x 7, 8 (DC Cir. 2021) because the superior court case there was also "closed" with "hearing cancelled." On June 13, 2024 however, the superior court granted JBG's motion for a status hearing now scheduled for July 31, 2024. The status hearing notice for each party there includes one for SBA. However, since the district court does not appear to have remanded the SBA matter, the SBA is unlikely to appear there despite the notice's warning of default. Appellant also asserted on appeal that no judicial power over SBA is available there, further made evident by their double-digit failures to appear in recent years. *JBG,* No. 24-5023 (C.A. Doc. 2046395 at 30-31).

While the superior court case remains closed, the hearing itself presents certain irreparable harm to Appellant there in the form of *res judicata* from *Powell v. SBA*, 1:24-cv-207 (D.D.C.) (ECF No. 4) which reflects the third-party claim made in *JBG* but as a direct action. Meanwhile, that case is now on appeal with a very strong likelihood to succeed on the merits. See *Powell v. SBA*, No. 24-5167 (C.A.D.C.). This alongside the impending claim preclusion harm is seen further below.

The other parties interested in the proceeding are unlikely to experience any substantial harm because, for one, the only place for JBG to obtain the relief requested is in federal court because SBA is a required party to the cause of action. Moreover, SBA

will be able to file a motion or answer once service of process is made complete and the case is randomly[3] assigned to a U.S. district judge.

The public interest lies in favor of stay because joinder by right is law in D.C. and required removal remanded improvidently also "subjects" the District of Columbia "to ongoing irreparable harm[because] "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."" *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (*internal citation omitted*). See Brief of Appellant argument one in this case for a complete picture in this respect. *JBG*, No. 24-5023 (C.A. Doc. 2046395 at 11-35).

As to the strong likelihood of success on the merits regarding the issues now on appeal in the direct action *Powell v. SBA*, (C.A.D.C.) (No. 24-5167): this very quick introduction to the argument; (1) shows the district court has subject matter jurisdiction because Plaintiff has prudential standing as signatory of an SBA agreement and claims injury within the zone of interests Congress sought to protect; (2) Plaintiff stated a relief grantable claim because 15 U.S.C. § 634 does not preclude judicial review given the same general kind canon (*ejusdem generis*) applied to the statutory interpretation of §634 clearly shows that commanding compliance is suitable while restraining duty is not

3 See United States Courts, Judiciary News, Judicial Conference of the United States, Conference Acts to Promote Random Case Assignment, Published on March 12, 2024, available here: https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment; see also, Administrative Conference of the United States, Choice of Forum for Judicial Review of Agency Rules Committee on Judicial Review Draft Recommendation for Committee | April 3, 2024, available here: https://www.acus.gov/sites/default/files/documents/Choice-of-Forum-Draft-Recommendation-for-Committee-2024.03.29.pdf.

and; (3) under §636(b)(2) agency action is not committed to agency discretion by law because a presidential declaration under 42 U.S.C. § 5191(b) modified the Administrator's duty from discretionary to mandatory and that duty remains incomplete.

A detailed summary of the strong likelihood of success including a balance of the four stay factors is shown as heavily weighted in favor of Plaintiff's very strong story much further below. It also regards Fed. R. Civ. P. 12(b)(1) and 12(b)(6) which are basically motions to dismiss by the district court as allowed in fee waiver cases, also explained there further below.

ARGUMENT

I. THE REMOVAL AND REMAND CONTROVERSY

Now as to the immediate matter pending rehearing and stay of the district court's remand order. (C.A. No. 24-5023). The circuit court held, per curiam, that Appellant "did not purport in his notice of removal to remove the case pursuant to § 1442 or § 1443." However, this Court held that "[t]o remove a case "pursuant to" §1442 or §1443, then, just means that a defendant's notice of removal must assert the case is removable "in accordance with or by reason of" one of those provisions." *See BP p.l.c. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1538 (2020). Appellant furnishes earnest reason that the circuit court's interpretation of *BP p.l.c.* was imprecise here because "purport in" imperfectly reflects the "by reason of" option for a defendant's notice of removal to be asserted as pursuant to §1442 or §1443.

The circuit court cited *Denizen Dev., L.L.C. v. Saxon,* 850 F. App'x 7, 8 (D.C. Cir. 2021) as persuasive authority. However the contrast in competing scopes here between *BP p.l.c.*'s "notice is removable ... by reason of" and *Denizen*'s "purported in" reflects a narrowing of the Supreme Court's scope. *Denizen*'s use of the preposition "in" requires the assertion to be made complete within the notice itself. Comparatively, *BP p.l.c.*'s use of the verb "is" when applied to the "by reason of" option for removal allows the assertion "to be" made complete "by means, act, or instrumentality." *Black's* 4th ed. Meanwhile, this case is thoroughly distinguished from *Denizen* because Saxon makes no assertion of racial discrimination by any means, act, or instrumentality throughout all 620 pages of the superior court record there, nor anywhere else of any reference.

1. <u>The Notice of Removal and Pleadings Nexus</u>

Here, Appellant's three page district notice of removal entitled "Grounds for Removal" under §1446(a), not the state notice under §1446(d), states "*provided* the motion" defined as "on the condition that" the motion (a legal instrument), which acted as a means to include an assertion of racial discrimination. The motion incorporates the superior court Third-Party Complaint[4] by reference which exhibits a district court Third Party Complaint[5] as a means to incorporate by reference a petition and appendix which altogether assert §1442 *and* §1443 grounds for removal. Regarding such instrumentality the Supreme Court held: "[C]ourts must consider the complaint in its entirety, as well as

4 ECF No. 7 at 8, 14 (see clerical error notes).
5 ECF. No. 2-1 at 1-58 (entry error apart from Super. Ct. record (ECF. No. 1-2)).

other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. See 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007)." *Tellabs*, 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007).

By using the word *provided* in the district notice of removal, Appellant argues that the circuit court has subject matter jurisdiction because of the connection "between the jurisdictional pleading requirement of Rule 8(a)(1) and § 1446(a) ... [where] the jurisdictional allegation requirement ... is for "a short and plain statement of the grounds" of jurisdiction."[6] "This language, which immediately calls to mind Rule 8, is not by coincidence. Section 1446 was amended in 1988 in the Judicial Improvements and Access to Justice Act to expressly delete the previous requirement that the petition for removal "state the facts supporting removal" and to follow instead Rule 8's formulation."[7] The relevance takes center stage here because as Lonny Hoffman writes for *Boston University Law Review* "[s]ection 1446(b) affirms the permissibility of looking to jurisdictionally relevant facts beyond the complaint and notice of removal, whether gathered through stipulation, pre-removal discovery or other means."[8]

Accordingly, the notice of removal asserted grounds in accordance with §1441(c) under §1331 and by reason of §1442 *and* §1443 "provided the motion." Therefore

6 Hoffman, Lonny, "Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings" *Boston University Law Review*, Vol. 88, 2008, at 1252-54.
7 *Id.* at 1245.
8 *Id.* at 1250.

Appellant's removal "grounds" were also on the condition that they include relevant facts beyond those "purport[ed] in" the notice of removal because "the court already has jurisdiction and the claim needs no new jurisdictional support." See Fed. Civ. P. 8(a)(1). The relevance here is introduced for consideration of circuit approaches to incorporation by reference in the scope of Rule 12 as it applies to judgement of pleadings under Rule 8 made comparable here under 1446(a) because of its nexus to Rule 8(a)(1).

2. Circuit Splits on Incorporation by Reference

To begin, consider this highlight from *The University of Chicago Law Review* Comment by Laura Geary: "The Exception to Rule 12(d): Incorporation by Reference of Matters Outside the Pleadings." According to Geary "[e]very circuit has addressed incorporation by reference at some point, but no uniform standard has emerged."[9] Therefore, a question of exceptional importance seems to arise here.[10] "The D.C. Circuit[] consistently describe[s] incorporation by reference as requiring both centrality *and* reference. This dual requirement means that ... the materials must be both central to the claim and referenced in the complaint for a judge to review those materials."[11]

This circuit's "centrality *and* reference" requirement regarding Fed. R. Civ. P. 10(c) is akin to the "Fifth, Sixth, [and] Tenth Circuits."[12] "The First, Third, Eighth[, and] Ninth Circuits" allow "centrality *or* reference."[13] The Second, Fourth, Seventh, and

9 Geary, Laura, "The Exception to Rule 12(d): Incorporation by Reference of Matters Outside the Pleadings" Comment: *The University of Chicago Law Review*, vol. 89, no. 4, 2022, at 999.
10 D.C. Cir. R. 35(a)(2).
11*Geary,* at 1007.
12 *Id.*
13 *Id.* at 1004-05.

Eleventh Circuits have more nuanced approaches requiring centrality, reference, *or* both; and in some cases additional factors. In the Fourth Circuit for instance, "“[a]n integral document is a document that by its 'very existence, and not the mere information it contains, gives rise to the legal rights asserted.'" As Judge Michelle Childs acknowledged, this description "appears to be a higher standard than that suggested" by the Fourth Circuit's "based on" or "form the basis for a claim" language."[14] (*Internal footnotes omitted*).

A. The Divide Before the Split

Although, due to the fact that the legal instruments were assembled in superior court for jurisdictional analysis at the time of removal, the circuit court must apply local common law precedent and comments to local rules of civil procedure.[15] The comments to D.C. Superior Court Rule 10(c) are distinct from the Federal Rules, in particular: "Note that the requirements of Rule 10 apply not only to pleadings but also to the form of all motions and other papers provided for by the civil rules." D.C. Super. Ct. R. 10(c), Cmnt. Accordingly in this case, the Motion there referenced the Third Party Complaint there and attached the Exhibit there of a Third Party Complaint in district court format including reference material in that pleading for Rule 10(c) review duality. Review pursuant to 1447(d) by reason of grounds by reference under Rule 10(c) in light of Rule 8(a)(1) here is only under a federal rule lens on "provided the motion" as a

14 *Id.* at 1003.
15 See *West v. AT&T Co.*, 311 U.S. 223, 236-237 (1940).

removal condition in the notice. The entire set of reference material incorporated through the motion by local Rule 10(c) establishes grounds beyond the notice by "pre-removal discovery or other means."[16] The notice of removal *proviso* referenced ("the motion") with local Rule 10(c) vided for the reference *and* made central to the "legal rights asserted"[17] thereby suitably fitting the D.C. Circuit standard.

Across the Circuits, "there is a willingness to look beyond the removal documents in deciding whether to credit the defendant's jurisdictional allegations at removal."[18] More to the point, in the words of this Court: "The inquiry, as several Courts of Appeals have recognized, is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs*, 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007).

The district court's original jurisdiction over SBA is abundantly clear as seen in Appellant's Brief and thereby needing no further grounds under 8(a)(1)—nevertheless, §1447(d)'s review threshold was also met because the notice of removal asserted a jurisdictionally relevant condition in the short and plain statement where second and third degree incorporations by reference, "taken collectively," assert grounds for removal pursuant to §1442 *and* §1443. Ultimately, this opened the door to the circuit

16 *Hoffman*, at 1250.
17 *Geary*, at 1003.
18 *Id.* at 1249 fn. 187 ("14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3734, at 370 (3d ed. 1998) ("[I]n practice, the federal courts usually do not limit their inquiry to the face of the plaintiff's complaint, but rather consider the facts disclosed on the record of the case as a whole in determining the propriety of removal."); accord *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (citing WRIGHT ET AL., supra)").

court's remand review jurisdiction pursuant to §1291—of the entire order. See *BP p.l.c. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1538 (2020).

Please note, Appellant's assertion of removal pursuant to §1443 argument has to be read in conjunction with Appellant's leading argument on preemption made complete by compulsory joinder because SBA is a required party. See Appellant's Br. At 11-35.

Accordingly, the motion incorporates the single page superior court Third-Party Complaint that says "Defendant/Third-Party Plaintiff ASSERTS against [SBA] a claim that arose ... out of the lease transaction... due to [SBA]'s failure ... proscribed by statute and the U.S. Constitution, as seen in the Third-Party Complaint Exhibit [A]."[19] (*Emphasis added*). Also, liberally reading commas as perhaps missing from this sentence (added either after "failure[,]" and after "duties[,]" or, just after "duties[,]") and perhaps misplaced ones there (taken after "Columbia[]") may be read to say both that SBA committed proscribed acts and did not commit prescribed ones.[20] Given a liberal reading,[21] this says SBA did not do what they must and did what they are strictly disallowed because this, Exhibit A, and public record, taken together, include assertions of federal officer directives (seen below) in contrast with SBA failures and, racial inequity that led in parts to the cause of action, each intrinsically or extrinsically apparent at the time of removal.

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19 ECF No. 7 at 15.

20 See *Chubirko v. BBB of S. PIEDMONT, INC.*, 763 F. Supp. 2D 759, 764 (Dist. Court, WD N.C. 2011) ("the Court will not penalize pro se Plaintiff ... for failing to recognize the legal difference between "Verizon Communications Inc." (without a comma), "Verizon Communications, Inc." (with a comma)").

21 See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("pro se document is to be liberally construed. As the Court unanimously held in *Haines*[], 404 U.S. 519 (1972)").

3. Asserted Pursuant to §1443

The notice of removal's inclusion of the letter to SBA by act and means of instrumentality asserted racial discrimination because the questions therein: ("[H]ow do we access equal … lending … as an African American owned [Tech] ... business? Is the shade of skin or the curl of my hair reason enough to deny me…?") were indirectly answered in this SBA context months later by facts of judicial notice resupplied here (from 2021) and combined with record evidence. See PT. App. at 810, 821.

As to judicial notice, the indisputable facts here also "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[22]

> OFFICIAL WHITEHOUSE.GOV TRANSCRIPT: "That — the data shows young Black entrepreneurs are just as capable of succeeding, given the chance, as white entrepreneurs are. But they don't have lawyers. They don't have — they — they don't have accountants, but they have great ideas. Does anyone doubt this whole nation would be better off from the investments those people make? And I promise you, that's why I set up the — a national Small Business Administration that's much broader." - President Biden[23]

As to record evidence, the SBA loan agreement here disallows precisely what President Biden considers as requisite to success.

> '"Borrower certifies that no fees have been paid, directly or indirectly, to any representative (attorney, accountant, etc.) for services provided or to be provided in connection with applying for or closing this Loan." SBA Loan Agreement'[24]

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22 Fed. R. Evid. 201.

23 Remarks by President Biden Commemorating the 100th Anniversary of the Tulsa Race Massacre: Greenwood Cultural Center Tulsa, Oklahoma (June 1, 2021 | Published June 2, 2021), The White House. (Ret. June 16, 2024). Available at: https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/02/remarks-by-president-biden-commemorating-the-100th-anniversary-of-the-tulsa-race-massacre/.

24 See 1:24-cv-00207, ECF. No. 8 at 3-4 (filed May 10, 2024); see also *JBG v. Jordan Powell*, 2023-LTB-007524 (D.C. Super. Ct. 2023), Third Party Complaint, Exhibit A, Petition Appendix (*incorporated by reference there*) at 5.

Together the facts and evidence show a contract restricting access to attorneys and accountants and an acknowledgement by President Biden that this prevents African American (so-called "Black") entrepreneurs from being successful. Moreover we see this administration's absentee enforcement of that issue now on appeal in a related case where Appellant was dismissed from district court for no counsel where none was allowed by contract. (C.A. No. 24-5167).

More to §1443, please take judicial notice of the record of the district court in the related proceeding which Appellant still seeks consolidation on remand and that has a direct connection to the issues on appeal.[25] See also *U.S. v. Hope*, 906 F. 2d 254, 260-61 n. 1 (7th Cir. 1990) ("we have the power to take judicial notice of "proceedings in other courts, both within and outside of the federal judicial system, if the proceedings have a direct relation to matters at issue." *Green*, 699 F.2d at 369. This is true even though those proceedings were not made a part of the record before the district court. *Colonial Penn Insurance*, 887 F.2d at 1239; *E.I. DuPont de Nemours & Co., Inc. v. Cullen*, 791 F.2d 5, 7 (1st Cir.1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir.1984)"); *Landy v. FDIC*, 486 F. 2d 139, 151 (3rd Cir. 1973) ("judicial notice may be taken at any stage of the proceeding, even on appeal. … See, e.g., *Johnson v. New York State Education Department*, 409 U.S. 75, 93 S.Ct. 259, 34 L.Ed.2d 290 (1972) (matter called to court's attention in one of the parties' briefs); *Bethlehem Mines Corp. v. United Mine Workers*,

25 *Id.*

480 F.2d 917 (3d Cir. 1973)"); and *Tellabs,* 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007) ("take judicial notice").

In reference to an article cited in plaintiff's brief in the related case *Powell v. SBA,*[26] the Daily Wire Reported "President Joe Biden faced criticism on Tuesday over remarks that he made while speaking in Tulsa, Oklahoma, on race-related issues" which embedded response tweets from x.com (formerly Twitter.com) including the following:

> Lavern Spicer: "I'm black and I know exactly where to get lawyers and accountants, you racist." @lavern_spicer (June 1, 2021 at 5:28 PM) | David Steinberg: "...5 decades of Biden's racist bulls*** failed to deliver." (June 1, 2021 at 6:08 PM) | Seth Dillon: "In case you needed more evidence that Joe Biden thinks black people are utterly helpless and incompetent . . ." @SethDillon (June 1, 2021 at 6:15 PM) | Spencer Brown: "The President of the United States doesn't think black entrepreneurs have lawyers or accountants, which seems like some of that 'soft bigotry of low expectations' that's the ...'s favorite kind of racism." | Robert J. O'Neill: "Imagine if a white guy said this nonsense. Oh, wait..." (June 1, 2021 at 6:22 PM) @mchooyah | Jeffrey A Dove Jr.: "Why is it that every time he speaks about the black community he makes us seem incapable of the simplest tasks?..." @JeffreyADoveJr (June 1, 2021 at 6:29 PM) | Rita Panahi: "Biden & his bigotry of low expectations..." @ritaPanahi (June 1, 2021 at 6:56 PM) | Brit Hume: "How is this not a racist comment?" @brithume (June 1, 2021 at 8:31 PM) | Chris Krok: "Is this really what Joe thinks of African Americans??" (June 1, 2021 at 8:44 PM). (*Political party references omitted*).[27]

Altogether, granted the evidence of record included by means, act, and instrumentality of legal instruments made conditions of the notice of removal taken in concert with judicial notice of facts generally known, of record, or indisputable at the time of removal, Appellant highlights precisely how the assertion pursuant to §1443 was

26 1:24-cv-00207, ECF. No. 8 at 3-4.

27 "President Joe Biden faced criticism on Tuesday over remarks that he made while speaking in Tulsa, Oklahoma, on race-related issues" *Daily Wire News*, Biden: Black Entrepreneurs ... Don't Have Lawyers' Or 'Accountants', (published June 2, 2021), available at https://www.dailywire.com/news/biden-black-entrepreneurs-just-as-capable-aswhites-but-they-dont-have-lawyers-or-accountants (Ret. May 10, 2024).

made complete.

4. Asserted Pursuant to §1442

As to §1442, the present case is also removable under federal officer removal because CDC directed Appellant to sign Grant Assurances forms and SBA provided increase instructions and directed Appellant to complete and sign increase related forms. As to the federal officer from CDC's directive to sign the GSA standard "Assurances"[28] regarding the CDC program, Appellant (*signatory*) assured:

> "As the duly authorized representative of the applicant, I certify that the applicant: Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management and completion of the project described in this application. … [and] … [w]ill comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program."[29]

Together, compliance with these directives were pursued in reliance on the law regarding SBA and, related assurances were made to JBG, and thus the case was removed "for or relating to"[30] any act under color of office. See the circuit court's interpretation here:

28 Please take judicial notice of the grant program forms through notice of removal including degrees of incorporation by reference to *In Re Jordan Powell*, No. 22-7044, Petitioner Br. (S. Ct. 2023) at 13 and 16 ("preparing a grant application early mornings, late nights, and weekends while getting the company SAM (System for Award Management) registered. On May 5, 2020, the Company submitted a grant application to the Centers for Disease Control (CDC) … while awaiting a final decision from CDC on our grant application, on August 27, 2020, the Company made an increase request consistent with the provisions of the original agreement …"). In particular, the company was directed by Linton Browning from GSA by phone and email beginning August 17, 2020 to sign forms including the assurances (ASSURANCES - NON-CONSTRUCTION PROGRAMS, OMB Approval No. 0348-0040, Standard Form 424B (Rev. 7-97)). Note, the public record is a standard form suitable for judicial notice here pursuant to Fed. R. Evidence. 201.

29 *Id.*

30 *Removal Clarification Act of 2011*, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545.

> "[I]n 2011, Congress broadened the statute to allow removal of suits "for or relating to" any act under color of such office. Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545, 545 (emphasis added). Courts have generally interpreted that amendment to permit removal over "actions, not just causally connected, but alternatively connected or associated, with acts under color of federal office."" *Dist. of Columbia v. Exxon Mobil Corp.*, 89 F. 4th 144 (D.C. Cir. 2023).

Accordingly, Appellee's relief may only be found through Appellant's relief, and jurisdiction only exists for this forum in federal court as asserted, and pursuant also to §1442 through legal instruments as a ground for removal. Notably "[this Court] has long "held that that the right of removal ... `should not be frustrated by a narrow, grudging interpretation' ...." *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981)." *State v. United States*, 7 F. 4th 160, 163 (4th Cir. 2021). Removal made pursuant to §1442 is also "neither subject to forfeiture nor excusable for equitable reasons." See *Infra.*

For instance, recall this Court's unanimous ruling in May: "What does that "pursuant to" mean? It cannot mean that a party may appeal only when his removal actually conformed to §1442 or §1443 (as the Government's argument here would imply). Whether the removal did so is the very question the appeal will decide. Instead, as we explained in *BP p.l.c.*, to remove a case "pursuant to" §1442 or §1443 "just means" that the defendant must have "assert[ed] the case is removable" under one of those provisions. 593 U.S., at 238. ... We have almost never treated the sort of routine rules swept up in the Government's "pursuant to" reading as absolute bars to judicial action, neither subject to forfeiture nor excusable for equitable reasons." *Harrow v.*

Department of Defense, No. 23-21 (S. Ct., May 16, 2024). Therefore, the circuit court's judgement conflicts with decisions of this Court.

Furthermore, the circuit court did not consider Appellant's supplemental argument where "§1447(d) as amended in 1964 made no confinement to race in the text nor does §1443" where "[a]fter all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020)."[31] While the Court may similarly "contend that few in 1964 would have expected [this] to apply" to civil rights here beyond race alone (such as the same rights and privileges afforded citizens of the 50 states) "legislative history has no bearing here, where no ambiguity exists." *Id.* at 1736. Thereby, the panel decision does not address this more recent decision of the United States Supreme Court in contrast with landmark cases including *Johnson*, *Rachel*, and *Greenwood*, making this a question of exceptional importance especially here in the District of Columbia and other non-state jurisdictions where national minority populations are the demographic majority of the local jurisdiction and remain subject, at-least concerning SBA and perhaps all commerce related agency matters, to outcome determinative discrimination by nature of the national removal scheme as applied here in D.C., and perhaps also in the American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands.[32]

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31 Appellant's Br. at 41.

32 "P2 HISPANIC OR LATINO, AND NOT HISPANIC OR LATINO BY RACE – 2020: DEC Redistricting Data (PL 94-171) – United States by State and Territory". *United States Census Bureau*. | "Decennial Census of

Accordingly, there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" as necessary to secure and maintain uniformity concerning rights, privileges, and equal protection thereof at the zenith review standard—strict scrutiny. See *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

II. EMERGENCY STAY IS JUSTIFIED

"[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."" As noted earlier, those legal principles have been distilled into consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton, supra*, at 776, 107 S.Ct. 2113." *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 1761 (2009) (*internal citations omitted*).

1. There is a Strong Likelihood of Success on the Merits

A. The District Court Has Subject Matter Jurisdiction

Returning to the direct action now on appeal (C.A. No. 24-5167) and the motion for stay factors relevant here, the district court has subject matter jurisdiction because Appellant has prudential standing as a real party in interest to the agreement with SBA where the agency failed to complete statutory duties resulting in constitutional

Island Areas DP1 GENERAL DEMOGRAPHIC CHARACTERISTICS - 2020: DECIA American Samoa [Guam, Northern Mariana Islands, and U.S. Virgin Islands] Demographic Profile[s]". *United States Census Bureau*.

violations. Furthermore, Appellant asserted more than plausible claims of injury within the zone of interests Congress sought to protect when enacting the statute. Jurisdiction is satisfied by the immunity waiver in 15 U.S.C. § 634 and federal question jurisdiction is established under 28 U.S.C. § 1331.

Accordingly, every precedent upon which the district court relies in the direct action *Powell v. SBA*, 1:24-cv-207 (D.D.C.) regarding Appellant's standing there while represented *pro-se* is sequentially distinguished in the Brief of Appellant (C.A.D.C. 24-5167). In sum, except for one case, the precedent cited by the district court is either a non-attorney attempting to represent another party named in the lawsuit or is akin to shareholder litigation where a shareholder is suing the corporation in which he owns shares and cannot appear *pro-se* as a representative of the class because that would be representing another. The one exception (*Huang v. Small Bus. Admin.*, No. 22-03363, 2023 WL 3028087, at *4 (N.D. Cal. Apr. 19, 2023) is highly distinguished because after numerous amendments to the complaint that court says the plaintiff summarily failed to express any injury to himself, whereas here, upon review of the entire record, the injury to Appellant is repeated and made abundantly clear.

In *Huang* that district court cites *Shell* and *RK Ventures* to say plaintiff there had no injury thereby no standing. "[A] shareholder does have standing, however, when he or she has been "injured directly and independently from the corporation." *Shell Petroleum,* 709 F.2d at 595." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057

(9th Cir. 2002). In *RK Ventures*, the plaintiffs "are the principal owners and shareholders of the corporation. ... they also allege personal injury. ... Accordingly, they have standing." *Id.*

Similarly here, an earlier petition to this Court incorporated in the complaint by reference and central to the cause of action shows "Petitioner [Powell] has and continues to detrimentally rely ... [where] the resultant impact on our ongoing reliance here ... appeared to be the result of some kind of unlawful retaliation ... [moreover] the Biden Administration's actions and/or omissions since that time, outlined here, have further degraded the Petitioner and the Company" including Appellant's reputation. *In Re Jordan Powell*, No. 22-7044, Petitioner Br. at 3, 18, 22, 23, 35, 40 (S. Ct. 2023).

Lastly in terms of 12(b)(1), to the extent the district court's memorandum opinion reaches beyond standing to the cause of action in order to question jurisdiction we must address that matter next regarding 12(b)(6) because ""'[w]hether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided.""' *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n. 3[] (1991) (citing *Burks v. Lasker*, 441 U.S. 471, 476 n. 5[] (1979)); see *Impro Products*, 722 F.2d at 846." *Trudeau v. Federal Trade Com'n.*, 456 F. 3d 178, 191 (D.C. Cir. 2006).

B. Plaintiff Stated a Relief Grantable Claim

Plaintiff stated a claim upon which relief can be granted because "the Administrative Procedure Act provides that the provisions of the Act authorizing

judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."" *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 156 (1970) (*internal citations omitted*). Here, the statute does not preclude judicial review nor is agency action committed to agency discretion by law.

i. There is No Preclusion Here

As to the non-existence of any preclusion here, applying the same general kind canon (*ejusdem generis*) to the statutory interpretation of 15 U.S.C. § 634 clearly shows that commanding compliance is suitable but restraining duty is not. For a detailed explanation of the underlying statutory interpretation applied by the D.C. Circuit and many other circuits, see *Tradeways, Ltd. v. United States Department Of The Treasury*, No. ELH-20-1324 (Md. U.S. Dist., June 24, 2020).

Essentially, prohibiting the Administrator from doing her duty was expressly excluded from the waiver of her sovereign immunity under §634. However, courts may and do consistently mandate the Administrator to do her duty or refrain from going outside the scope of her duty because that was a part of the waiver of her sovereign immunity there. See *U.S. Women's Chamber of Commerce v. U.S. Small Business Admin*, Civil Action No. 1:04-CV-01889 (RBW) 28-29, 36 (D.D.C. Nov. 30, 2005) where ("the issuance of injunctive relief against the defendants is not barred by the "no-injunction" provision of 15 U.S.C. § 634(b)(1), if the Administrator acted outside the

scope of his authority ... [moreover] this [c]ourt is compelled to conclude that the delay in this case is unreasonable. Thus, the defendants have acted outside the scope of their authority by enabling the delay, and this action is therefore not barred by the no-injunction provision of 15 U.S.C. § 634(b)(1)."); See also *Oklahoma Aerotronics, Inc. v. United States*, 661 F. 2d 976, 977 (D.C. Cir. 1981) ("arguments about sovereign immunity [specifically in § 634(b)(1)] and injunctive relief are irrelevant. This court may hold unlawful and set aside [SBA] agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). That is what we do here."); and see *Ulstein Maritime, Ltd. v. US*, 833 F. 2d 1052, 1058 (1st Cir. 1987) ("[i]f the analysis of § 634(b)(1) in *Related Industries* and *Cavalier Clothes* is correct, and we believe that it is, then the district courts as well as the Claims Court have the power to review actions of the SBA and issue injunctive relief as required.")

ii. There is No Discretion Here

As to the non-discretionary nature of judicial review here, as the *LIT Ventures* court regards, "[t]he CARES Act is an extension of powers that Congress has already granted to the SBA and its Administrator."[33] The discretionary authority granted the Administrator in §636(b)(2) is seen here below:

> "(2) to make such loans (either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred (guaranteed) basis) as the Administration may determine to be necessary or appropriate to any small business concern, private nonprofit organization, or small agricultural cooperative located in an area affected by a disaster,[] (including

33 Cited by the district court in *Powell v. SBA* (No. 24-cv-207). ECF. No. 4 at 6.

drought), with respect to both farm-related and nonfarm-related small business concerns, if the Administration determines that the concern, the organization, or the cooperative has suffered a substantial economic injury as a result of such disaster and if such disaster constitutes—[one or more of (A)-(E).]"

There are two important points the plaintiff in *LIT Ventures* may have made to explain why the court should not dismiss the permanent injunction and declaratory relief sought when asked to do so. First, Congress conditioned SBA's existing discretionary powers with new mandatory ones. One amendment to §636(b)(2) was a *proviso*[34] that turned SBA's disaster determinations from discretionary to compulsory when the President declares an emergency under 42 U.S.C. §5191(b) as follows:

> "*Provided further*, that for the purposes of subparagraph (D) [("an emergency involving Federal primary responsibility determined to exist by the President under the section 5191(b) of title 42")], the Administrator shall deem that such an emergency affects each State or subdivision thereof (including counties), and that each State or subdivision has sufficient economic damage to small business concerns to qualify for assistance under this paragraph and the Administrator shall accept applications for such assistance immediately."

As you can see, the discretion as to what is "necessary and appropriate" refers to determinations of "economic injury" to "small business concern[(s)]" "affected" by "disaster." However, when the President declares an "emergency" according to subparagraph (D) the permissive word "may" connoting discretion in (b)(2) becomes "shall"—now mandating those determinations because "economic damage" is "determined" and "deemed" "sufficient" and those injured do "qualify" for "assistance immediately." Accordingly, the President's disaster declaration[35] modified §636(b)(2)'s

34 Hirsch, Donald, DRAFTING FEDERAL LAW, Second Edition, Printed for the Use of the Office of the Legislative Counsel, United States House of Representatives, §5.18. Provisos, at 49 (particularly used "in appropriations bills").

35 Stafford Act Declarations for COVID—19 FAQ, Congressional Research Service (April 22, 2020), at 1,

discretionary provision into a compulsory one through this *proviso*.

Second, the Administrator is compelled to enter "direct loan" agreements and "other types of financial assistance" with "qualified" applicants "in the full amounts provided by law" and nothing "authorizes the Administration to reduce" this requirement. See the full text of §631 note (a)(2) below:

> "(2) Notwithstanding any other provision of law, the Administration shall enter into commitments for direct loans and to guarantee loans, debentures, payment of rentals, or other amounts due under qualified contracts and other types of financial assistance and enter into commitments to purchase debentures and preferred securities and to guarantee sureties against loss pursuant to programs under this Act [this chapter] and the Small Business Investment Act of 1958 [chapter 14B of this title], in the full amounts provided by law subject only to (A) the availability of qualified applications, and (B) limitations contained in appropriations Acts. Nothing in this paragraph authorizes the Administration to reduce or limit its authority to enter into such commitments."

This §631 note of paramount importance here is well regarded by precedent of the D.C. Circuit where "[i]n the performance of, and with respect to, the functions, powers, and duties vested in him by this Act [§§ 631 and notes-637, 638, 639, 640-647 of this title] the Administrator may—(1) sue and be sued ... in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies … 15 U.S.C. § 634(b)(1)." *Valley Forge Flag Company, Inc. v. Kleppe*, 506 F. 2d 243, 245 (D.C. Cir. 1974) (*enumerated duties insert here is in the original opinion*).

C. Disfavored Retroactivity Does Not Apply Here

("On March 13, 2020, President Donald J. Trump declared an emergency under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act; 42 U.S.C. §5191(b))").

Retroactivity does not apply here because it "would have a retroactive effect in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment[.]""" See *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006) (*internal citations omitted*). Moreover, the law is not retroactive unless there is a "clear statement" that it is. "[T]he statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times." *Landgraf v. USI Film Products*, 511 U.S. 244, 287 (1994).

The Consolidated Appropriations Act (*CAA)* Sec. 348 provides "[e]xcept as otherwise provided in this Act, this Act and the amendments made by this Act shall take effect on the date of enactment of this Act and apply to loans and grants made on or after the date of enactment of this Act." Here, the loan deemed qualified and eligible was already made. Moreover, the loan increase was sought four months prior to enactment. Furthermore, retroactive application regarding the EIDL loan would not apply to any changes in law and associated regulations under the new statutory scope because an intention to deprive Applicant and Company of "substantive rights" and "duties [on the basis of] conduct arising before [its] enactment" was not made "clear" in the *CAA*. See *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006); see also *Landgraf v. USI Film Products*, 511 U.S. 244, 287 (1994).

In the *Consolidated Appropriations Act of 2021* (CAA), only the EIDL Grant

language is retroactive, and regards ensuring parties like those in *LIT Ventures* the full amount of their EIDL Grant Advance requests. See *CAA* Sec. 333, 348 "[i]t is the sense of Congress that borrowers of loans made under section 7(b)(2) of the Small Business Act (15 U.S.C. 636(b)(2)) in response to COVID-19 during the covered period should be made whole. .... Section 1110(e)(6) of the CARES Act (15 U.S.C. 9009(e)(6)) [grants] is repealed .... The amendment ... shall be effective as if included in the CARES Act (Public Law 116-136; 134 Stat. 281)." Notably, this section specifies funding usages to include rent payments and Appellant's company never received an EIDL grant advance.

Meanwhile, although the §631 note arguably covered "full amounts" for EIDL grants in the context of "other amounts due under qualified contracts and other types of financial assistance," Congress sought to make it clear that everyone qualified was meant to receive full amounts of these funds where there may have been some ambiguity. This decision makes an important point because retroactivity does not apply to even the government for monetary obligations unless that intent is made clear by statute. For instance, "[w]hile the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government. See *United States v. Magnolia Petroleum Co.*, 276 U. S. 160 (1928); *White v. United States*, 191 U. S. 545 (1903)." *Landgraf v. USI Film Products*, 511 U.S. 244, 271 n. 25 (1994). The clear statement on this favored

applicable retroactivity ensures the obligation as intended.

However, there is no clear statement on applicable retroactivity in the EDIL loan context because the §631 note speaks clearly to "full amounts" for "loans" unambiguously and therefore no retroactive amendment was necessary to clarify the respective "substantive rights" and "duties" in respect of statute regarding EIDL loans.

D. The Claim is More Than Plausible

Briefly, to put the district court's decision in context, it is understood that because a fee waiver cases "lacks an economic incentive" in the form of fees or sanctions to ensure meritorious lawsuits, district courts can spare "prospective defendants the inconvenience and expense of answering such complaints" when they make "inarguable claims." *Neitzke v. Williams*, 490 U.S. 319, 324-328 (1989). However, "[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." *Id.*

Now as to the more than plausible nature here in light of what *Neitzke* seems to establish as a higher pleading standard for fee waiver cases. In *United States v. Texas*, 143 S. Ct. 1964 (2023) the Supreme Court cites "Cf. S. Bray & P. Miller, Getting Into Equity, 97 N. D. L. Rev. 1763, 1797 (2022) [to say] ("[i]n equity it all connects—the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be."). The true story here is in fact stronger than the relief the Plaintiff seeks. Strong

enough to warrant a preliminary injunction thereby ensuring the complaint was above and beyond plausible for the purposes of vaulting over the fee waiver pleading bar, and suitable here for a stay of the district court's remand order being sought here.

Accordingly, in each complaint Appellant incorporated by reference the Petition to the Supreme Court and its Appendix with 98 exhibits tabulated in rows numerically, with columns including dates, descriptions, and pagination references to the 1,009 pages of contents. This Appendix provides evidence, alongside logical or reasonable analysis, determining the facts as stated or as predicate for every sentence of the entire Petition that is not otherwise supported by links to verifiable information in which factual statements are alternatively conditioned with words such as "Reuters reported," "CNN reported," CNBC Reported," "Bloomberg reported," and so forth.

Here, Appellant is very likely to succeed on the merits of seeking the "full loan amount" for his agricultural enterprise according to statute and regulation (as an "agriculture-related" company based on the Company's raw produce supply chain element) at the time of application because retroactivity here is impermissible, seen above. For instance, six months of "total expenses"[36] as the calculation basis for agriculture related loan amounts to six months of "operating expenses"[37] had not yet

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36 *In Re Jordan Powell*, U.S. 22-7044, Appendix (Exhibit 2) at 4 (SBA Correspondence: where loan amount was determined by six months of total expenses: "[P]lease verify for me the total expenses for your Agricultural Enterprise the 12 months prior to the disaster.") Linda C. Morris, SBA Loan Officer, June 6, 2020 at 1:13pm.

37 GAO-21-589: Economic Injury Disaster Loan Program, United States Government Accountability Office, Report to Congressional Addressees, Additional Actions Needed to Improve Communication with Applicants and Address Fraud Risks (July 2021), at 7 (July 2021) ("SBA used different information to determine economic injury for agricultural enterprises and nonprofits. SBA asked these applicants to provide operating expenses for the 12 months prior to the disaster. To calculate 6 months of economic injury, SBA divided the 12-month

become law.[38]

Meanwhile, the district court makes light of Plaintiff's efforts to find relief from the branches of government, dubbing them "unsuccessful[.]" D.C.D, 24-cv-207, ECF. 4 at 3. For instance regarding a cordial letter to President Biden March 12, 2021, the same date Appellant has since learned that the Ant Group CEO "unexpectedly" resigned.

Ten months later, President Biden replied to Appellant "Dear Mr. Powell" on December 15, 2021, forecasting "tough times" as "one of the most difficult in our history" writ large, while, "optimistic for the future of America." In the next paragraph given some deductive reasoning, he specifically says "we may not" "agree on how to solve" this "issue" but "I am sure we can work together." In the final paragraph he concludes by saying "I encourage you to remain an active participant" and "[w]e need your courage and dedication at this critical time." This is followed by the complimentary-close "sincerely" and signed "Joe Biden" with all the characteristics of an original signature, as in nonidentical to any other publicly available. PT. App. at 333.

The President's letter acted as an inducement where Appellant sought compromise by "seeking a two-million dollar loan" in total as the full amount required by statute by emailing a letter addressed by attention to the Director of SBA Disaster Assistance on December 30, 2021, as an alternative to seeking "economic indicators" consideration

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operating expenses by two.")

38 *Small Business Administration (SBA) Transition Briefing for the Incoming Biden Administration 2020*, FOIA Request, Chief, Freedom of Information/Privacy Acts Office, U.S. Small Business Administration ("AH26 Small Business Size Standards: Calculation of Average Annual Receipts in Business Loan, Disaster Loan, and Small Business Investment Company Programs, Proposed Rule Under development").

from the Administrator based on her discretionary authority by statute concerning amounts above the $2 million cap. *Id.* at 850. After all, when "the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable." *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

For instance, the only person by name and title that Appellant has been contacted by in writing from SBA since May 21, 2021 is their supervisor, President Biden. Before then, several people from SBA working with me to resolve my concerns included their names and titles. Like Marbury commissioned by Adams and entitled to receive it from Jefferson through Madison by statute, Powell is also entitled to the benefit of his Company deemed qualified by Trump to receive the full amount from Biden through Guzman by statute. Essentially, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, … the individual who considers himself injured has a right to ... a remedy....[because] the right claimed is given by a law of the United States." *Id.* at 166, 174.

Appellant also wrote to Congress and filed a petition for writ of mandamus in the Supreme Court after being denied what is required by statute. The response to those efforts are regarded by Appellant as support from Congress and the Court as seen below, and also thankfully concerning the Executive, useful now as evidence of scienter in his capacity as supervisor of the SBA after being served with process to his authorized recipient. In fact, these are not failed efforts as indicated by the district court but rather

provide the groundwork for me to succeed on the merits with a completed checklist of confirmations that have been filled over the course of this three year period.

A draft was sent to both Houses of Congress on December 17, 2022 which proved Ant Group violated the Patent Cooperation Treaty. PT. App. at 998. Then a bill that sat with no activity for twenty months suddenly reached bicameralism (passed Senate 12/20/22, passed House 12/22/22) and presentment (12/28/22). The *Protecting American Intellectual Property Act of 2022* (PAIP) was signed into law by the President on January 5, 2023 and required a report of the theft of any American IP found anywhere on Earth in 180 days (July 4, 2023) also empowering POTUS with sanctions discretion. Ant Group founder Jack Ma gave up entity control January 7, 2023.

The Petition was originally filed in the Supreme Court on March 7, 2023. On July 6, 2023 Appellant refiled the provisional patent application with the USPTO. On July 7, 2023 the China Securities Regulatory Commission (CSRC) fined Ant Group and associates approximately $1 billion dollars (Comp. Exhibit 5) thereby satisfying the requirements of the Patent Cooperation Treaty (PCT) (*it basically requires the home country of an anticompetitive actor to discourage that activity*). On July 9, 2023 Ant Group made its first share repurchase offer since its planned IPO in 2020—at a $237 billion drop in valuation. Comp. Exhibit 6. This is a strong indication that Ant Group released the IP from their books on an internal accounting basis immediately following the CSRC fine, perhaps as a result of the reporting required and prospective sanctions

imposable by PAIP.

Altogether, Appellant's Petitions to the Supreme Court, process to the President and SBA, and notice to Congress allowed Plaintiff to confirm the full awareness of the Biden Administration, observe their policy adjustments afterward for instance Data Act compliance under OMB policy on USASpending.Gov, GAO reports[39], and indications of conformity with executive obligations and discretion under PAIP. PT. App. 24.

To bring the Court up to full speed on more than plausibility here consider this, in the course of the Company's consideration for a $30 million dollar grant from CDC following an application in May/June 2020 concerning global health security involving supply chain blockchain technology where Pricecheck budgeted a corporate contribution of over $27 billion dollars to the project over the grant period. PT. App. at 734. In August of 2020 we received a call from and corresponded over email with an official from the Office of Grants Services (OGS) in the Office of Financial Resources (OFR) in the Office of the Chief Operating Officer (OCOO) at the Centers for Disease Control and Prevention (CDC) to complete our Grant Assurances paperwork (standard form overseen by GSA).[40] We also placed job postings for additional senior executive leadership team members. Among dozens of exceptionally qualified applicants from senior leadership roles in Fortune 500 companies and from senior roles in federal and state governments included an Advisor to the Acting United States Director of National

39 See GAO-21-589.

40 Note: this is the federal officer directive referred to as "from GSA" in the Rehearing Petition filed July 9, 2024.

Intelligence and former Advisor to the Vice President of the United States at the time. PT. App. at 803. The value of the IP here may have since been made out to seem incredulous, however, at the time an individual with top secret security clearance and advising the Director of National Intelligence and with access to more information than most people in the world saw working for the Company as a suitable next career step.

Since then, regarding my fee waiver applications (concerned with income and liquid assets), each viewed together show the amortization expense heavily reducing my illiquid assets over time where accounting only for U.S. market fair value (due to certain limitations on access to foreign market data thus using Pricecheck commissioned market research by YouGov Plc. for the U.S. Market) to determine losses to the tune of about $10 billion so far at a rate of approximately $2.4 billion annually considering expenses that reflect the relative loss in intangible assets of the Plaintiff over the years. PT. App. at 727-733, 741-750, 771. Notably, these determinations were made based on industry standard fair value determinations by forecasting with market research and using net present value calculations.

Unfortunately, the son of the current President of the United States' joint venture BHR includes a portfolio company that committed over half a billion dollars to Ant Group in September of 2020 at a time when his father was the Democratic Nominee for President and privy by longstanding tradition to national security briefings in the months leading up to the Ant Group ban (i.e. "Alipay"). Again, the former President banned

Ant Group January 5, 2021 and the current President reversed that decision. PT. App. at 814; PT. at 20. We also never heard back about the grant. This information is all either available in the Complaint and the Petition and its Appendix which were incorporated by reference and are now part of the agency record following service of process in 2023, or ascertainable from publicly available information subject to judicial notice.

For instance, It has been over three years and we still have not seen a production of the agency record, which is required in this district at the time of a motion to dismiss by an federal agency defendant. This should have been over with a motion for summary judgement by Plaintiff this past March, and we even contacted counsel for Defendant that Plaintiff would file for Rule 11 sanctions if this case were intentionally delayed, still somehow it has been.[41]

Plaintiff presented new evidence in a motion for relief[42] where, the now presumed owner of Hunter Biden's relative share of Ant Group equity, Kevin Morris, stated in a Congressional hearing in response to a question as to why he made the purchase from Mr. Biden: "That's privileged. I am not going to answer that because of attorney-client privilege." Morris Transcript[43] at 149, lines 22-23. Later in reply to the following question concerning the asset: "Does that contract allow for Hunter Biden to purchase back BHR at a certain time point?" Morris replies: "That I don't – I can't tell you,

41 *Powell v. SBA*, 1:24-cv-207 (D.D.C.) (ECF No. 5, at 23)
42 *Id.*
43 COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY, joint with the COMMITTEE ON THE JUDICIARY and the COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, WASHINGTON, D.C., INTERVIEW OF: KEVIN MORRIS, Redacted Transcript, Thursday, January 18, 2024, Washington, D.C., available at: https://oversight.house.gov/wp-content/uploads/2024/01/Morris_Redacted.pdf.

Counsel." *Id.* at 152, lines 18-20. The firm that represents Mr. Morris followed up the hearing with a statement that Mr. Morris and Mr. Biden's agreement does not contain a BHR repurchase agreement. However, the statement by Mr. Morris' counsel does not necessarily include privileged information between Mr. Biden and Mr. Morris.

Also while the letter says "Mr. Biden does not have any right to re-purchase the membership interests of Skaneateles, LLC" it is also worth noting that the letter does not say whether Mr. Biden has a right to re-purchase Skaneateles, LLC itself. This question was presented more generally and in common parlance by Congress as to the existence or not of a repurchase agreement which led Mr. Morris to respond with an assertion of privilege presumably because Mr. Morris understood the full scope of what was being asked. However, that question was presented without the particularity of the language used in the follow up letter by counsel representing Mr. Morris which as written was isolated to the "membership interests of Skaneateles, LLC" and "subparts thereof" but not Skaneateles itself, which means in this context the part or parts of its sole asset BHR (membership in a join-venture). See Mr. Morris' counsel's statement below.

> "While it has been reported that Mr. Biden paid approximately $420,000 for the investment, Mr. Morris's purchase price was only the assumption of the remaining debt of $157,729.69 that Skaneateles and Mr. Biden owed from their acquisition of Skaneateles' sole asset. Furthermore, Mr. Biden does not have any right to re-purchase the membership interests of Skaneateles, LLC, or any portion thereof, from Mr. Morris."[44]

44 *Powell,* 24-cv-207 (D.D.C.) (ECF No. 5, at 23-24) ("firm … represents …agreement does [not] contain a BHR repurchase agreement"); See also Letter Detailing Kevin Morris's Loans to Hunter Biden (Jan. 25, 2024), Contributed by Kenneth Vogel (The New York Times), available at: https://www.documentcloud.org/documents/24425116-letter-detailing-kevin-morriss-loans-to-hunter-biden-jan-25-2024.

Essentially, the affirmation made in this follow up letter alone leaves open the door for Mr. Biden to repurchase Skaneateles, LLC entirely, including its sole asset BHR, because the right to repurchase negation declaration there speaks only to Skaneateles' sole asset (BHR) made clear through context, thereby only negating repurchase of BHR separate and apart from its entity owner (Skaneateles, LLC) or any sub-divisible portion of BHR. To better clarify, this isolated negation regarding a right to repurchase is determinable as limited accordingly by the use of the preposition "of" (Def. *expressing the relationship between a part and a whole*) referring to the part ("sole asset" i.e. BHR) and the use of "any portion thereof " (Def. "*relating to the thing just mentioned*") thus speaking only to the part (BHR) and any portion of the part (BHR) but never speaking to the whole (Skaneateles, LLC) thereby leaving open the possibility for Mr. Biden to repurchase Skaneateles, LLC in its entirety from Mr. Morris.

Had the letter said there is no right to repurchase "membership interests in Skaneateles" the use of the preposition "in" (Def. "*expressing the situation of something that is or appears to be enclosed or surrounded by something else*") would make clear that he has no right to repurchase Skaneateles itself. It does not say that, so we know and may have concern that Mr. Biden may have an option that remains of interest to President Biden based on this understanding. Accordingly, this remains a concern for plaintiff due to BHR's portfolio company's investment in Ant Group (Comp. Exhibit 7) presenting a potentially remaining conflict between the financial interests of the

President and the non-discretionary statutory duty owed to Plaintiff and Company.

2. Irreparable Harm Absent a Stay is Certain

First, just quickly as to the antitrust claim against Ant Group outlined in the mandamus petition, not only has that discovery initiated countdown to the four year limitations period; the look back period, for certain kinds of damages, is four years regardless of the point of discovery making this bulwark to statutory appropriations result in an even greater irreparable harm from unrecoverable losses and rapidly approaching everything. Moreover, to allow the superior court hearing to take place without SBA joinder would result in not only removing Appellant form his home but also where the Company maintains its principal place of business. Accordingly, "[t]he harm to [the Company via the harm to Appellant] in the absence of a stay would be its destruction in its current form." *Washington Metropolitan Area, etc. v. Holiday Tours*, 559 F. 2d 841, 843 (D.C. Cir. 1977).

As to *res judicata*, this strong showing of likelihood to succeed on the merits may be of little to no regard in superior court when applying the district court decision in 24-cv-207 despite default by SBA being forewarned in the hearing notice. Furthermore, this is presumed to become irreparable harm because Supreme Court precedent suggests their "authority to issue a stay of a state court order that violates the Constitution [may be] limited to situations in which a final order has been entered below." *Yeshiva University v. YU Pride Alliance*, 143 S. Ct. 1 (2022). The first order of the superior

court at the status hearing will thereby foreclose the opportunity for a stay until the order is final. Uniquely, a final order in superior court here instantly becomes an enforcement proceeding then barred by *Younger* abstention.

3. A Stay will Not Substantially Injure the Other Parties

JBG will not be substantially harmed because their relief is only available in federal court. See *infra.* Moreover, JBG and Appellant have a stipulation for a month to month lease arrangement where an agreement was made for Appellant to pay an additional $500 per month. Appellant also resides in the most expensive residential zip code in the District of Columbia where JBG accrues accounts receivable here substantially above top area market price. Furthermore, their residential and commercial operations span the northeast as one of the largest real estate enterprises in the nation. A stay here is very unlikely to present substantial harm and rather positions them for a complete recovery. A stay here also presents no substantial harm to SBA.

4. The Public Interest Lies Strongly in Favor of a Stay

Through the Court Reform Act of 1970 Congress expressed its unambiguous intent to provide citizens of the District of Columbia with the same rights and privileges as citizens of the fifty sovereign states. Allowing the irreparable harm of improvident remand here would deprive Appellant of those rights and further, set a precedent of deprivation for similarly situated persons. Moreover, there are key separation of powers issues here the Court may wish to consider at its September 30, 2024 conference

considering certiorari here as perhaps a matter of national importance.

This deeper issue of public interest, although in its infancy of analysis here, is as follows: The superior court is a local legislative court instituted through Congress' Article I police power by the seat of the nation clause of the U.S. Constitution. The equally powerful commerce clause that limits the power of Congress to regulation of commerce between the states would mean local common law rulings over a Title 15 (Commerce and Trade) agency are either powerless or, super-powered. As to the latter, to apply here they must also apply nationwide, effectively as an Article I regulation of interstate commerce. If so, superior court statutory interpretation for instance would have the effect of hybrid legislative-rule-making with no bicameralism and presentment, presidential enactment, notice nor comment, and furthermore this Court may only be allowed judicial review if the District of Columbia Court of Appeals hears the case first. This would give the superior court Article III quality power comparable only to the Supreme Court of the United States with one caveat—either private litigants would hold the keys to interstate commerce rule-making in their decision to appeal twice or not, or the Attorney General would do so—purely at the pleasure of the President before judges without the safeguards of lifetime appointments. While this concern is merely budding analytically at this stage, the roots of the issue are available as argument, in Brief of Appellant Argument I, that congress gave the superior court no such power. See *JBG*, No. 24-5023 (C.A. Doc. 2046395 at 1-4, 11-35).

ANY OTHER RELIEF

May it please the Court Appellant respectfully requests the Court's discretion here, as the Court may wish to treat this application as a petition for certiorari or certiorari before judgement pursuant to 28 U.S.C. §1254(1) for consolidation of C.A. Nos. 24-5023 and 24-5167. The Court may also wish to treat this application as a mandamus petition pursuant to §1651 perhaps vided as *In Re Jordan Powell* pursuant to Rule 20 because review of the district court's remand order by mandamus is permissible by this Court's precedent if the Court determines relief would not be available in any other form. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); see also *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009).

The Court's discretionary powers applied to what the Court may consider here as exceptional circumstances may be warranted because adequate relief is not available in any other court because there is no mandamus jurisdiction in district court, *supra*, and D.C. Cir. Rule 21 requires the circuit court to request a pleading from the respondent in order to grant a mandamus petition, presenting certain practice and timing impediments. As to practice, two earlier petitions by Appellant for mandamus in this Court were not responded to either by waiver or answer as required by Rule 20(3)(b) of this Court and Solicitor General Policy where "the United States is obliged to respond in some way, either by filing a brief or (after review of the case) waiving the right to do so."[45] As to

45 U.S. Department of Justice, FY 2013 PERFORMANCE BUDGET, Congressional Submission, Office of the Solicitor General, February 8, 2012, at 11, available here: https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/29/fy13-osgjustification.pdf (Ret. May 24, 2024).

timing, awaiting response to the circuit request would not allow Appellant time to sustain *personal jurisdiction* there and circuit transfer as a third-party-plaintiff-defendant presents a certain underlying *specific* and *general* jurisdiction paradox. Accordingly, the Court may wish to treat this application as combined with a motion for an order of a copy of the agency record[46] (enforceable even upon the Administrator's supervisor under 18 U.S.C. §1826) considering Appellant has sought this for over three years for the mere confirmation necessary for a court order of rights and duties owed by statute. Finally, the Court may wish to consider this as a preliminary motion for summary judgement.

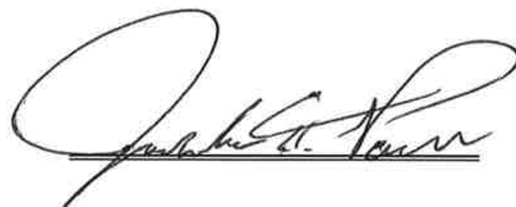
CONCLUSION

In any event, Appellant sincerely places these heavily weighted arguments on the balance of the factors for stay here showing the favor of every one by every measure and urgently requests a stay of the district court's remand order, in order for the Court to fully consider, if necessary, the forthcoming petition for writ of certiorari. Disposition by this Court is also necessary for certainty and assurance that Appellees may not use the very same argument set forth by Appellant (without this Court's review either granting or denying cert.) to say Appellant already removed the case pursuant to §1442 *and* §1443 and is thereby barred from any further removal and thereby also any further appellate review.. Meanwhile, this sequence of more—certain irreparable harm—is set to begin July 31, 2024 in the absence of a stay. Therefore, a decision on this emergency application for a stay is respectfully requested by **July 30, 2024** at 5pm EST.

46 See D.D.C. LcvR 7(n)(1).

Date: July 26, 2024

Respectfully submitted,



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No. 24A- ______

In the Supreme Court of the United States

JBG SMITH PROPERTIES, LP FIRST RESIDENCES,
Plaintiff-Respondent,

v.

JORDAN POWELL,
Defendant-Third-Party-Plaintiff-Applicant,

v.

THE UNITED STATES SMALL
BUSINESS ADMINISTRATION,
Third-Party-Defendant-Respondent.

PROOF OF SERVICE

I, Jordan Powell, do swear or declare that on this date, July 25, 2024, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and APPLICATION FOR STAY on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. Due to the emergency nature of the filing, service recipients were also notified by email with all documents above attached. The name or title, address, and email addess of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530–0001
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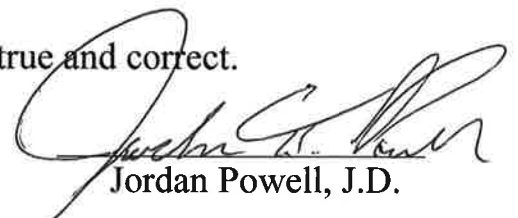
Melissa Polito
4200 Parliament Place
Suite 100 Lanham, MD 20706
mpolito@mmrlaw.com

I declare under penalty of perjury that the foregoing is true and correct.
Executed on July 26, 2024



Jordan Powell, J.D.