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Crisis Legislation: Analyzing the Noble Quest of the Paycheck Protection Program to Save Small Businesses

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ABSTRACT

In early 2020, the rapid global spread of the novel COVID-19 virus launched the United States, along with the rest of the world, into simultaneous health and financial crises. Emergency measures implemented to slow the spread of the virus also brought many sectors of the economy to a screeching halt. The U.S. Congress passed the CARES Act, a $2.2 trillion economic stimulus bill. As part of the bill, Congress established the Paycheck Protection Program (PPP), a forgivable, low-interest private loan program to specifically assist small businesses.

This Article is the first legal analysis of its kind to examine the successes and failures of the PPP in saving small businesses. It includes a narrative of how the PPP unfolded and a discussion of its more noteworthy criticisms, primarily concerning its less-than-praiseworthy rollout, accusations of favoring undeserving recipients, racial bias in execution, and a high level of fraud. The Article uses a novel five-part evaluation rubric to demonstrate the PPP's success, despite its many setbacks. In fact, the program is awarded a "high-pass" grade for its ability to effectively (while maybe not efficiently) deliver aid to small businesses in need.

This Article concludes that Congress should create a permanent PPP-style framework for future crises. With climate change, natural disasters and emergencies playing out similar to COVID-19 are likely

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to increase in frequency and severity. To avoid the missteps of the PPP next time, Congress should act now and use the lessons learned from the PPP to implement an effective strategy for the future deployment of a rapid-response emergency plan that can be implemented quickly and nimbly in the future.

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I. INTRODUCTION

In early 2020, the world faced the worst pandemic in a century.[1] The introduction of the COVID-19 virus presented government officials with the dual threat of a health crisis and a subsequent economic crisis.[2] Indeed, a combination of public fear and quarantining directives soon brought the United States economy to a screeching halt. [3] Service industries were among those hit the hardest. In March 2020, the airline industry predicted that, without government intervention, most airlines would go bankrupt.[4] On March 18, the National Restaurant Association estimated that "the industry's sales [would] decline by $225 billion during the next three months, which [would] prompt the loss of between five and seven million jobs."[5] The pandemic severely impacted businesses of all sizes and across industries.

Small firms bore the brunt of the crisis. [6] Over forty percent of small businesses in the United States reportedly closed their doors—either temporarily or permanently—in response to the pandemic.[7] Disruption of regular operations is a concern for businesses of all sizes. But small businesses are often financially fragile and more vulnerable to unforeseen revenue losses than their larger counter-

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1. *See* Vassilios Zoumpourlis et al., *The COVID-19 Pandemic as a Scientific and Social Challenge in the 21st Century,* 22(4) MOLECULAR MED. REPS. 3035 (2020).
2. *See generally* UNITED NATIONS OFF. ON DRUGS AND CRIME, CORRUPTION AND COVID-19: CHALLENGES IN CRISIS RESPONSE AND RECOVERY (2021) (analyzing the challenge of addressing the international health crisis and the ensuing economic fallout).
3. *See generally* LIDA R. WEINSTOCK, CONG. RSCH. SERV., R46606, COVID-19 AND THE U.S. ECONOMY (2022) (discussing the impact of the COVID-19 pandemic on the U.S. Economy due to public health orders and general fears).
4. *COVID-19. By the End of May, Most World Airlines Will Be Bankrupt,* CAPA (Mar. 17, 2020, 6:54 AM), https://centreforaviation.com/analysis/reports/covid-19-by-the-end-of-may-most-world-airlines-will-be-bankrupt-517512 [https://perma.cc/Q72X-EV38] .
5. Letter from Sean Kennedy, Exec. Vice President, Pub. Affs., Nat'l. Rest. Ass'n., to Donald J. Trump, President of the U.S. et al. (Mar. 18, 2020), https://restaurantsact.com/wp-content/uploads/2020/05/3.18.19-Natl-Rest.-Association-COVID-Response-Ltr.pdf [https://perma.cc/8FUS-ZN5G] (A letter from the National Restaurant Association asking the government for help in facing COVID-19 related economic challenges).
6. *See generally* Alexander W. Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PROCEEDINGS OF THE NAT'L. ACAD. OF SCI. 17656 (2020) (examining the severe impact of the COVID-19 pandemic on small businesses in the United States).
7. *Id.* at 17661; *see also* Andrew Bender, *COVID-19 Claims Nearly 73,000 US Businesses, With No End in Sight*, FORBES (Jul. 29, 2020, 11:52 AM), https://www.forbes.com/sites/andrewbender/2020/07/29/covid-19-claims-nearly-73000-us-businesses-with-no-end-in-sight/ [https://perma.cc/JV67-PDS8] (discussing research showing that almost 73,000 businesses had closed in the United States within just a few months of the initial pandemic surge).

parts.[8] Small businesses usually have only minimal emergency reserves at their disposal.[9] For most small businesses (especially early-stage companies), profit margins are slim, with reinvestment in growth prioritized over long-term stability.[10] Economic realities often necessitate business models with a minimal financial runway in the best circumstances; setting emergency funds aside is frequently unrealistic.[11] Dire predictions estimated that as many as half of small businesses could permanently close due to COVID-19 shutdowns.[12] Because small firms comprise 99.9% of all U.S. businesses,[13] account for roughly twice the annual new job growth rate as large firms,[14] and employ nearly sixty million workers,[15] any major disruption to this sector could have catastrophic consequences.

To support small businesses through this difficult period, the U.S. Government established a first-of-its-kind program, the Paycheck Protection Program (PPP). Congress passed the PPP as part of the bipartisan Coronavirus Aid, Relief, and Economic Securities Act (CARES Act), a $2.2 trillion stimulus bill aimed at providing robust and immediate financial aid to individuals, businesses, and both state and local governments.[16] The CARES Act allocated $349 billion to the PPP to provide forgivable loans to small businesses negatively impacted by the COVID-19 pandemic to cover payroll and related expenses for up to eight weeks.[17]

This Article is among the first works of legal scholarship to examine and analyze the PPP, the primary program used by the U.S. Government to support small businesses through the COVID-19 pandemic. It examines the passage and implementation of the PPP, focus-

8. Bartik, *supra* note 6, at 17656, 17662–63.
9. *Id.*
10. *See generally* John A. Welsh & Jerry F. White, *A Small Business Is Not a Little Big Business*, HARV. BUS. REV. (July 1981), https://hbr.org/1981/07/a-small-business-is-not-a-little-big-business [https://perma.cc/6DM7-JFPQ] (detailing cash flow differences between small and large businesses and how those differences affect decision making).
11. *Id*.
12. *See* Bender, *supra* note 7; *see also* METLIFE & U.S. CHAMBER OF COM., SPECIAL REPORT ON CORONAVIRUS AND SMALL BUSINESS (2020) (survey results of small businesses showing widespread temporary and permanent closures).
13. U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, FREQUENTLY ASKED QUESTIONS 1 (2020).
14. *Id.*
15. U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, UNITED STATES SMALL BUSINESS PROFILE 1 (2019).
16. *See* CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).
17. Press Release, U.S. Small Bus. Admin., SBA's Paycheck Protection Program for Small Businesses Affected by the Coronavirus Pandemic Launches (Apr. 3, 2020), https://www.sba.gov/article/2020/apr/03/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches [https://perma.cc/8SFX-JZ7X] [hereinafter *Launch of PPP*].

ing on the climate in which the PPP passed and its practical impact on small businesses. Additionally, this Article analyzes whether the PPP was a success, concluding that it succeeded. Most importantly, this Article begins to draw out practical lessons from this program and discusses how to apply those lessons in future emergencies.

The remainder of this Article is divided into five parts. Parts II and III outline the chaotic implementation of the PPP, detail many of the most salient criticisms of the program, and highlight some of its bright spots. Part IV considers the preceding analysis, assesses the PPP in a historical and practical context, proposes a five-part test for evaluating crisis legislation, and ultimately awards the program with a high passing grade. Part V asserts that climate change increases the need for programs such as the PPP to support small businesses through future disasters. Accordingly, the Article outlines a starting point for a legislative framework to create future emergency programs. Part VI concludes.

There are various frameworks for analyzing the government's response to the pandemic and broader economic and policy questions to consider in any holistic assessment of the PPP. While this Article occasionally touches on those points, a more robust analysis of such considerations falls outside the immediate scope of this Article's small business focus.[18]

II. THE PAYCHECK PROTECTION PROGRAM IN REVIEW

In the early stages of the pandemic, threats to the U.S. economy primarily came from its heavy dependence upon international supply chains.[19] Both the import economy and the domestic economy began to slow. As fears of contagion increased, public and private safety measures significantly reduced public interactions. The world was introduced to such phrases as "social distancing," "shelter in place," and "essential workers," while quarantine orders essentially stopped all discretionary in-person economic activity.[20] By March 2020, it was clear that the government needed to act quickly. The following section outlines the timeline and problematic implementation of the U.S. government's initial attempts to aid small businesses. Hindsight allows

18. The author relies on his experience as a startup and small business attorney who represented dozens of clients throughout the PPP process to inform this analysis.

19. *See* MARC LABONTE & LIDA R. WEINSTOCK, CONG. RSCH. SERV., IN11926, SUPPLY DISRUPTIONS AND THE U.S. ECONOMY (2022); *see also* Ilya Beylin, *The Ignominious Life of the Paycheck Protection Program*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 587, 596–97 (2021) ("In the pandemic's initial phase, COVID-19 threatened supply chains and exports to the extent the U.S. economy interacted with China and other affected regions.").

20. *See* Beylin, *supra* note 19, at 596–97.

us to analyze the program's flaws and shortcomings more easily than amid the crisis.

A. Passage of the Paycheck Protection Program

In response to the growing economic crisis, on March 27, 2020, the U.S. Congress passed the CARES Act.[21] This $2.2 trillion stimulus bill sought to provide robust and immediate financial aid to individuals, businesses, and state and local governments.[22] For small businesses specifically, the CARES Act allocated $349 billion for the PPP (which, through later amendments, eventually ballooned to $953 billion),[23] a forgivable loan program that incentivized employers to maintain pre-pandemic employment levels.[24]

The primary objectives of the PPP were twofold: first, to prevent mass layoffs which would even further burden the unemployment system, and second, to give small businesses facing financial hardship due to COVID-19 the support necessary to avoid closure.[25] The PPP allowed qualifying entities to apply for low-interest loans intended primarily to cover payroll expenses, among other costs.[26] PPP loan recipients were entitled to approximately 2.5 times the business's average monthly payroll costs.[27] Private lenders, such as federally insured banks, credit unions, and other Small Business Administration (SBA)-approved lending institutions made the loans.[28] Applicants were required to assert that "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."[29]

The potential for forgiving most or all of the loan balance was one of the main incentives for eligible entities to apply for PPP loans. The PPP required lenders to make loan applications free for applicants and fixed a one percent interest rate for any non-forgiven portions of the loan.[30] If applicants used their loan proceeds for approved pur-

21. *See* CARES Act, *supra* note 16.
22. *Id.*
23. Anita Dennis, *The legacy of the paycheck protection program*, J. OF ACCT. (Mar. 1, 2022), https://www.journalofaccountancy.com/issues/2022/mar/legacy-paycheck-protection-program.html [https://perma.cc/8G63-SV52].
24. *Launch of PPP*, *supra* note 17.
25. AMANDA FISCHER, DID THE PAYCHECK PROTECTION PROGRAM WORK FOR SMALL BUSINESSES ACROSS THE UNITED STATES? 3 (Washington Center for Equitable Growth 2020).
26. CARES Act, *supra* note 16, at sec. 1102(a)(2), § 7(a)(36)(D)(ii)(II), 134 Stat. 281, 288 (2020).
27. *Id.* at sec. 1102(a)(2), § 7(a)(36)(E), 134 Stat. 281, 289 (2020).
28. *Id*. at sec. 1102(a)(2), § 7(a)(36)(F)(iii), 134 Stat. 281, 290 (2020).
29. *Id*. at sec. 1102(a)(2), § 7(a)(36)(G)(i)(I), 134 Stat. 281, 291 (2020).
30. *Launch of PPP*, *supra* note 17.

poses and provided proof of doing so, they were assured that the loan would be forgiven and treated as a grant instead.[31]

A glance at the CARES Act table of contents provides the first indicator of the PPP's shortcomings. The CARES Act is well over three hundred pages long, but the sections directly relevant to the PPP—Sections 1102 and 1106—only cover about thirteen pages.[32] At times, brevity in drafting legislation can be advantageous. However, as will be outlined in later sections of this Article, the drafters of the CARES Act neglected to address several critical components of the PPP, which reduced its effectiveness.[33] The original legislation essentially consisted of general instructions for operating programs without extending far into specific, necessary details.

The statute briefly outlined loan eligibility, permissible uses for the loan funds, and how recipients should spend those funds to qualify for loan forgiveness.[34] Additionally, much of the text relevant to the PPP established protections for lenders who participated in the PPP, including guarantees afforded to those lenders regarding the timing of their claim payouts.[35] A cynical reading of the legislation could suggest that the drafters were more concerned about how the program would appear to the banks than the ultimate program recipients themselves. As will be discussed in a later section, a greater emphasis on protections for loan recipients, and not only the lending institutions, could have helped avoid many of the later criticisms of the program.[36]

The legislation contained virtually no substantive discussion of distributing the funds in practice. Instead, these details were essentially left to the SBA and the individual lending institutions. Given the severity of the looming economic crisis, there was a concerted policy focus on pushing money into the hands of eligible small business owners as quickly as possible. Speed was prioritized over developing cohesive and robust guidance on distributing the funds or who should be eligible to receive them. Upon the passage and enactment of the PPP, chaos quickly ensued.

B. A Difficult Rollout

The initial challenges to rolling out the PPP were primarily administrative. In 2019, the SBA issued over 63,500 loans totaling $28.2 billion.[37] Essentially overnight, Congress directed the SBA to turn the

31. CARES Act, *supra* note 16, at sec. 1106, 134 Stat. 281, 297–301.
32. *Id*. at sec. 1102–1106
33. *See infra* Part III.
34. *See infra* Part III.
35. *See infra* Part III.
36. *See infra* Part III.
37. U.S. SMALL BUS. ADMIN., AGENCY FINANCIAL REPORT 7 (2019).

framework created by the PPP into a lending program with millions of anticipated recipients and $349 billion in initial funds.[38] At that time, SBA employees were transitioning and adjusting to working from home.[39] To say that the SBA was unprepared for this challenge would be a massive understatement. What followed was essentially an administrative nightmare. No one involved had a clear picture of the rollout's progress at any given moment. Unfortunately, the result was that those small businesses most in need of immediate assistance were the least likely to receive it.

The PPP had admirable objectives and an apparently straightforward loan process. But, as often happens with such seemingly simple legislation, its execution was far from straightforward. Lending institutions were instructed to start issuing PPP loans on April 3, a mere seven days after the CARES Act passed.[40] Unsurprisingly, the demand for loan applications was extremely high.[41] Banks were left scrambling to determine their application processes without clear administrative guidance as customers demanded immediate loan access.[42] The initial federal guidelines for PPP loan issuance were not released to lending institutions until the night before banks began funding.[43] Business owners and banks alike were often confused about the program's basic facts. It was not immediately clear who qualified for the PPP, how qualifying businesses should apply, how long the loan funding process would take upon acceptance, and (perhaps most critically) what the loan recipients would require to qualify for forgiveness.[44] The SBA phone helpline was utterly unequipped to

38. Steve Dubb, *Anatomy of a Rollout Disaster: The Paycheck Protection Program*, NPQ (Apr. 10, 2020), https://nonprofitquarterly.org/anatomy-of-a-rollout-disaster-the-paycheck-protection-program/ [https://perma.cc/QH29-RPTJ].
39. *See* Jory Heckman, *SBA Executives 'Beyond Doubt' That Teleworking Employees are More Productive*, FEDERAL NEWS NETWORK (Apr. 15, 2021, 2:05 PM), https://federalnewsnetwork.com/workforce/2021/04/sba-executives-beyond-doubt-that-teleworking-employees-are-more-productive/ [https://perma.cc/F4YY-47KX] ("SBA's cloud-based networks scaled quickly to support mandatory telework during the COVID-19 pandemic. Agency executives said employee productivity is up under full-time telework . . . .").
40. *Launch of PPP*, *supra* note 17.
41. Emily Flitter, *Small Business Aid Program Stretches Agency to Its Limits*, N.Y. TIMES (April 7, 2020), https://www.nytimes.com/2020/04/07/business/coronavirus-ppp-small-business-aid.html [https://perma.cc/BC6Z-Q5ZR].
42. *Id.*; Dubb, *supra* note 38; Brian Thompson, *No Small-Business Relief Yet: False Start on Paycheck Protection Program Loans*, FORBES (Apr. 3, 2021, 8:20 AM), https://www.forbes.com/sites/brianthompson1/2020/04/03/no-small-business-relief-yet-false-start-on-paycheck-protection-program-loans/ [https://perma.cc/KFD3-EGTF].
43. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, UNDERSERVED AND UNPROTECTED, HOW THE TRUMP ADMINISTRATION NEGLECTED THE NEEDIEST SMALL BUSINESSES IN THE PPP 4–5 (2020) [hereinafter UNDERSERVED AND UNPROTECTED].
44. *See generally id*. ("One bank explained that the 'abstractly articulated' guidance from SBA and Treasury created confusion for lenders and prevented them from

manage the flood of incoming calls from lenders.[45] Callers waited hours to speak with operators who often could not even answer basic questions about the program.[46]

Rumors swirled that the program would quickly run out of funds.[47] Initially, there were more applicants than SBA could handle.[48] Therefore, small firms without pre-existing banking relationships often struggled to find lending institutions willing to process their applications.[49] On April 16, less than two weeks after the first loan was issued, the first appropriation of $349 billion was completely subscribed, with no guarantees that additional funds would be incoming.[50]

Arguably, while the PPP's implementation process was bumpy, it reached a desirable outcome since all of the PPP's initially allocated funds were fully lent out in such a short time. Any blame or consequence should rest with Congress for grossly underestimating the funds necessary by "only" allocating $349 billion to the program. Small businesses could receive emergency funds, and while not every business in need initially received funding, a large number reaped the PPP's intended benefits.

The preceding argument fails to recognize that the initial loan recipients, by and large, were likely not the firms with the most immediate need of emergency funds. During the initial funding period, many businesses struggled to find banks willing to issue them loans.[51] The

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implementing the program as Congress intended."); *see also* Flitter, *supra* note 41 ("The delays are causing confusion and panic among borrowers, especially those who see Trump administration officials playing up the program's success.").

45. *See* Flitter, *supra* note 41.

46. *Id*.

47. *See,* Marco Rubio (@marcorubio), TWITTER (Apr. 4, 2020, 7:16 AM), https://twitter.com/marcorubio/status/1246396191623057409 ("Our rough estimate is that if 2/3 of the lenders that will participate in #PPPloans aren't up & running yet, the $349 billion will run out around 6 June. . . .").

48. *See* Mark Anderson, *Unprecedented Demand Pushes An Industry To Its Limits*, SACRAMENTO BUS. J. (Apr. 16, 2020), https://www.bizjournals.com/sacramento/news/2020/04/16/emergency-loan-demand-outpaces-lenders-abilities.html [https://perma.cc/VEW5-MV2L]; *see also* TETYANA BALYUK ET. AL., FED. DEPOSIT INS. CORP. CTR. FOR FIN. RSCH., SMALL BANK FINANCING AND FUNDING HESITANCY IN A CRISIS: EVIDENCE FROM THE PAYCHECK PROTECTION PROGRAM 1 (Sept. 2021, FDIC CFR WP No. 2021-01) ("[O]bserve that banks were overwhelmed in the initial PPP stages, both due to the aggregate shortage of PPP funds and the surge in applications for this inexpensive funding.").

49. Anderson, *supra* note 48; UNDERSERVED AND UNPROTECTED, *supra* note 43, at 4–8; *see also* Balyuk, *supra* note 48, at 14–15 ("The sharp contrast between the no-relationship and relationship samples indicate that prior relationships help mitigate early access for large borrowers . . . [and] a small bank relationship helps small firms gain early PPP access.").

50. *See* Anderson, *supra* note 48.

51. *See* Thompson, *supra* note 42; *see also* Flitter, *supra* note 41 (highlighting challenges endured by prospective borrowers seeking loans).

reasons for this are twofold. First, as discussed, banks were still trying to figure out their internal PPP lending processes. In a truncated period, they needed to establish a lending cap, set up all internal procedures necessary to effect the new loans, develop loan application documents, create internal computer systems, and educate their loan officers and employees on the specifics of the PPP and the novel lending process.[52] In effect, Congress asked banks to become experts on a new type of loan overnight. Inevitably, banks were slow to roll out PPP applications.[53]

Additionally, the second and more dire reason why many businesses could not secure loans during the initial PPP tranche is that banks were playing favorites. With only a limited amount of funds available (both on a federal and an institutional level), banks first serviced their more valuable customers.[54] Bank of America, for instance, initially only processed loans for small businesses that: opened a Bank of America Small Business bank account before February 15, 2020; established a small business lending relationship before February 15, 2020; and possessed an online banking username and password.[55] Many other banks, including industry giants like Merrill Lynch, did not consider personal banking relationships sufficient to justify the issuance of commercial loans; they specifically required a preexisting commercial banking relationship as a prerequisite to receipt of PPP

52. *See* Dubb, *supra* note (“On the evening of April 2nd, banks faced a series of questions impossible to resolve overnight . . . ‘How would they process it? What would be their system? Every individual bank from the giant megabanks to the community banks, every bank had to figure out how you are going to do it.’”); *see also* Anderson, *supra* note 48 (“This would have been difficult if we had 30 days to plan for it. We started from day 1.”).

53. *See* Dubb, *supra* note 38; *see also* Anderson, *supra* note 48 (describing the chaos and confusion that slowed banks’ ability to process PPP loan applications).

54. *See* Will Jeakle, *The Paycheck Protection Program Rollout Has Been Utter Chaos,* FORBES (Apr. 6, 2020, 2:16 PM), https://www.forbes.com/sites/williamjeakle/2020/04/ 06/ppp/ [https://perma.cc/KA7D-4N3F]; *see also* Balyuk, supra note 45, at 59 (a survey of publicly held and privately held PPP borrower firms shows that larger firms were more likely to successfully receive PPP funds; more so with larger banks); *see generally* Daniel Rabetti, Non-Information Asymmetry Benefits of Relationship Lending 1 (Mar. 30, 2020) (unpublished paper) (available online at https://ssrn.com/abstract=3701587) [https://perma.cc/6J7U-PQZ9] (finding that pre-existing banking relationships correlated with successfully applying for PPP funds).

55. *See* Hugh Son & Dawn Giel, Bank of America Says 85,000 Small Businesses Have Asked for $22.2 Billion in Loans Since 9 A.M., CNBC (Apr. 3. 2020, 9:15 AM), https://www.cnbc.com/2020/04/03/bank-of-americas-small-business-loan-portal-is-up-making-it-the-first-bank-to-accept-applications.html [https://perma.cc/9ZJX-LDHD]; *see also* Jeakle, *supra* note 54 (“When Bank of America announced support for the PPP program, it declared its intention to only offer assistance to those customers that already had a commercial loan product . . . The account had to be active by February 15, 2020. Many of the other large commercial banks announced a similar program with the same cutoff date.”).

loan funding.[56] Thus, those businesses with close banking relationships could push through their PPP loan applications. By contrast, firms without such relationships were left waiting in line or were shut out altogether from the program's benefits.

As the most vulnerable businesses struggled to obtain funding, commercial lending infrastructure buckled under the new demands of the PPP. Websites crashed, even the largest lending institutions (such as Wells Fargo) claimed to have run out of funds within a few days, and small businesses everywhere were frustrated, confused, and scared. [57] Wait times for the SBA assistance hotlines were hours long.[58] Once business owners reached a bedraggled and exhausted representative, they received answers consisting of some version of "I don't know."[59]

The biggest downside of this chaos was that, at the end of the initial funding period, the PPP mostly failed to meet the needs of small businesses. As stated above, companies with preexisting commercial banking relationships were much more likely to receive funds from the banks selected to issue PPP loans. Such banks were initially included as PPP lenders because Congress believed that having a vast, pre-existing lending system would expedite the process better than if the SBA attempted to issue the loans itself.[60] While it is impossible to say what the rollout would have looked like had banks been excluded (it undoubtedly would still have faced many delays and obstacles), the inclusion of banks was not the silver bullet that policymakers had hoped for. In many cases, the PPP became a loyal customer rewards program rather than a targeted effort to reach the companies that needed it most.

This process of favoritism in PPP lending had dire consequences. It unintentionally siphoned funds away from small businesses, which were struggling to remain afloat, and back toward big businesses more likely to stay solvent through the economic crisis even without PPP assistance. Generally, the larger the company, the more valuable

56. *See* Jeakle, *supra* note 54.
57. *See* Dubb, *supra* note *38*.
58. *See* Andy Medici, *The SBA is overwhelmed with demand. Is it up to the task of responding to the coronavirus?*, WASH. BUS. J. (Apr. 8, 2020), https://www.bizjournals.com/washington/news/2020/04/08/coronavirus-has-overwhelmed-the-sba-is-overwhelmed.html [https://perma.cc/P6K6-RWQX].
59. *See* Flitter, *supra* note 41.
60. *See* H.R. REP NO. 117-328, at 2 (2022) ("In creating the PPP, Congress emphasized the rapid delivery of funds, and SBA recruited thousands of new lenders, including non-bank Fintech companies, to help distribute loan funds swiftly."); *see also* Todd Baker & Kathryn Judge, *How to Help Small Businesses Survive COVID-19* (Colum. L. & Econ., Working Paper No. 620, 2020), https://papers.ssrn.com/sol3/papers.cfmabstract_id=3571460 [https://perma.cc/J8BB-FBNF] (asserting that the PPP would operate most effectively through existing financial institutions).

it is as a customer to banks. As will be explored in more detail later in this Article, while having the necessary funds on hand to meet operational needs is essential for all businesses, appropriate timing of funds is especially critical for small businesses. The initial unavailability of PPP funds to smaller companies left these firms frustrated and struggling to survive, undoubtedly forcing many into avoidable closures or to the brink thereof.

C. Transparency Concerns and Controversial Borrowers

While Congress eventually issued additional funding ($953 billion in total), the program's initial struggles foreshadowed many future problems.[61] One of the primary issues with the administration of the PPP was a lack of effective oversight. At least seven different oversight bodies were responsible for ensuring that the program complied with its congressional mandate, but the oversight bodies themselves were fraught with complications.[62] For starters, government watchdog groups warned Congress that the Trump administration was actively attempting to block their ability to oversee the program.[63] The SBA was accused of being slow to share loan information with those groups responsible for oversight.[64] This lack of transparency naturally prompted questions in the public's mind about corruption, wasted taxpayer funds, and institutional incompetence.

61. *See generally* UNDERSERVED AND UNPROTECTED, *supra* note 43, at 4–15 (outlining issues including preferential treatment by banks of their existing commercial customers and the government's failure to prioritize underserved markets); Dennis, *supra* note 23.

62. *See* Corey Runkel & Rosalind Z. Wiggins, *Paycheck Protection Program Highlights Numerous Oversight Concerns Even as the SBA Makes First Disclosures,* YALE SCH. OF MGMT. (July 13, 2020), https://som.yale.edu/blog/paycheck-protection-program-highlights-numerous-oversight-concerns-even-as-the-sba-makes-first-disclosures [https://perma.cc/ZYA6-QEXP].

63. Chris Prentice & Koh Gui Qing, *Trump Administration is Blocking COVID Stimulus Oversight: Government Watchdog Letter,* REUTERS (June 15, 2020, 4:42 PM), https://www.reuters.com/article/us-health-coronavirus-usa-stimulus/trump-administration-is-blocking-covid-stimulus-oversight-government-watchdog-letter-idUSKBN23M2XD [https://perma.cc/9DAN-2QJC].

64. *See generally id*. (discussing Trump administration resistance to sharing information with oversight bodies); *see also* Letter from Michael Horowitz, Acting Chair, Pandemic Response Accountability Comm., to Carolyn B. Maloney, Chairwoman, House Comm. on Oversight and Reform et al. (June 11, 2020), (available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Letter%20from%20CIGIE%20PRAC%20-%206-11-20.pdf) [https://perma.cc/USQ7-X2MZ] (letter from Trump administration officials to the Congressional Pandemic Response Accountability Committee questioning its ability to conduct oversight of certain CARES Act funds).

Initially, Steven Mnuchin and the Trump administration pushed back against requests that recipient information be made public.[65] By June 2020, four and a half million businesses had received over $500 billion in loans.[66] Still, Mnuchin told the Senate Committee on Small Businesses and Entrepreneurship that PPP loan recipients' names and loan amounts would not be publicly released.[67] He claimed that such information was "proprietary" and "confidential."[68] Only eight days later, the SBA and the Department of the Treasury reversed course and stated that they would release the names, addresses, and other information about loan recipients who received more than $150,000 each.[69] On July 6, the Department of Treasury finally released such information.[70]

1. Politicians

Perhaps unsurprisingly, many eyebrow-raising names were associated with several larger loans when PPP loan information first became publicly available. Among them were several loans made to politicians on both sides of the political aisle and their family members. [71] Notably, three weeks before disclosure, multiple members of Congress who voted against public disclosure of PPP loan recipients fell into this category.[72] At least twenty-five PPP loans totaling over $3.65 million were paid out to businesses with addresses at properties owned by then-President Trump and his son-in-law and advisor Jared Kushner.[73] Most notably, the Triomphe Restaurant Corp. at the

65. Charlie Savage, *Trump Suggests He Can Gag Inspector General for Stimulus Bailout Program*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/trump-signing-statement-coronavirus.html [https://perma.cc/PHH9-88ME].
66. Aaron Gregg, *Trump administration won't say who got $511 billion in taxpayer-backed coronavirus loans*, WASH. POST (Jun. 11, 2020, 10:15 AM), https://www.washingtonpost.com/business/2020/06/11/trump-administration-wont-say-who-got-511-billion-taxpayer-backed-coronavirus-loans/ [https://perma.cc/4GHP-RZZ6].
67. *Id.*
68. *Id.*
69. *SBA and Treasury Announce Release of Paycheck Protection Program Loan Dat*a, U.S. DEPT. TREAS. (Jul. 6, 2020), https://home.treasury.gov/news/press-releases/sm1052 [https://perma.cc/77X4-T5SV].
70. *Id.*
71. Matthew Daly & Brian Slodysko, *Congress Created Virus Aid, Then Reaped The Benefits,* AP NEWS (Jul. 7, 2020), https://apnews.com/article/virus-outbreak-nv-state-wire-wv-state-wire-mo-state-wire-government-programs-7a5386e4cbca3a872561ef39378aa109 [https://perma.cc/25ZM-8JVS].
72. Sarah Ferris et al., *Members of Congress Took Small-Business Loans - and the Full Extent is Unknown,* POLITICO (June 16, 2020, 11:34 AM), https://www.politico.com/news/2020/06/16/congress-small-business-loan-320625 [https://perma.cc/T6WQ-URQY].
73. Ben Popken & Andrew Lehren, *Release of PPP Loan Recipients Reveals Troubling Patterns,* NBC NEWS (Dec. 2, 2020, 12:48 AM), https://www.nbcnews.com/

Trump International Hotel and Tower in New York, which claimed to have zero employees, received a loan exceeding $2 million.[74] (Recall that PPP loans were primarily intended to cover payroll costs.)

2. *Public Companies*

Between April 3 and April 14 in 2020, at least ninety-four loans were made to publicly traded companies and their subsidiaries, totaling $365 million.[75] Later that month, the SBA released guidance stating that it was unlikely that a publicly traded business would be eligible for a PPP loan.[76] As part of the application process, companies needed to certify in good faith that receipt of a PPP loan was necessary to support their ongoing operations during the pandemic.[77] It is unlikely that publicly traded companies would be able to accurately certify as such. Once the identities of these publicly traded firms were released, many of them voluntarily decided to immediately repay the loan proceeds that they had received, including Potbelly, Shake Shack, Nathan's Famous, and the Los Angeles Lakers.[78]

These publicly traded companies could apply for PPP loans because of the broad nature of the statutory language.[79] For the PPP, Con-

business/business-news/release-ppp-loan-recipients-data-reveals-troubling-patterns-n1249629 [https://perma.cc/AT6N-FAG7].

74. *Id.*
75. Reese Dunklin et al., *Publicly Traded Firms Get $365M in Small-Business Loans,* AP NEWS (Apr. 21, 2020), https://apnews.com/article/ap-top-news-ca-state-wire-politics-pa-state-wire-virus-outbreak-6c5942eec36cc43b25ad5df5afebcfbd [https://perma.cc/M98E-LJEU]; *see also* Joshua Franklin & Lawrence Delevingne, *Most Publicly Listed Companies Keep U.S. Small-Business Aid Loans,* REUTERS (May 24, 2020, 10:54 AM), https://www.reuters.com/article/us-health-coronavirus-ppp-companies-idCAKBN2300JT [https://perma.cc/V4VZ-QYT5] (corporate filings later showed that, in total, at least 424 public companies received loans totaling $1.35 billion).
76. U.S. Dep't. of Treasury, PAYCHECK PROTECTION PROGRAM LOANS FREQUENTLY ASKED QUESTIONS (FAQS) 15 (2021).
77. *See* CARES Act, *supra* note 16, at sec. 1102(a)(2), § 7(a)(36)(G)(i)(I), 134 Stat. 281, 291 (2020).
78. Sarah Hansen, *Potbelly, Shake Shack, Axios: Here Are All the Companies Returning PPP Money After Public Backlash,* FORBES (Apr. 29, 2020, 11:15 AM), https://www.forbes.com/sites/sarahhansen/2020/04/29/potbelly-shake-shack-axios-here-are-all-the-companies-returning-ppp-money-after-public-backlash/ [https://perma.cc/8LYQ-U6XR].
79. Susan C. Morse, *Emergency Money: Lessons from the Paycheck Protection Program*, 55 U. MICH. J.L. REFORM 175, 194 (2021) ("When restaurant companies like Shake Shack and Potbelly and large hospitality firms like the Ashford Hospitality Trust applied for PPP grants, they presumably developed a position that placed them within the lines drawn by the law. They could take advantage of the leeway provided by the statute, rather than focusing on the placement of the law under the auspices of the SBA or on the sense of the Senate provision that encouraged preference for smaller applicants. Contrary to the strand of public opinion that resisted the eligibility of larger firms for PPP grants, one paper

gress expanded the standard SBA definition of "small businesses" to include most companies closely affiliated with larger firms.[80] Additionally, it not only specifically included any company with more than 500 employees but also stated that any company that did not have more than 500 employees *per location* was eligible to apply.[81] It is easy enough to see how this language allowed for publicly traded companies, which certainly would not qualify under any conventional definition of a "small business," to nonetheless be able to apply for PPP funds.

3. *Churches and Anti-vaccination Companies*

Among other controversial organizations receiving loans, thousands of churches also applied for relief. According to a survey of Protestant pastors conducted by LifeWay Christian Resources, forty percent of churches reportedly applied for government assistance through the CARES Act or the SBA, and fifty-nine percent of those applicants reported being approved.[82] The Diocesan Fiscal Management Conference estimated that 9,000 Catholic parishes had received PPP loans, totaling roughly half of the parishes in the United States.[83] Many anti-vaccination organizations also received grants which totaled $850,000 while simultaneously working against government efforts to end the pandemic.[84]

From a public policy perspective, organizations actively working against resolving the current crisis, such as anti-vaccination organizations, certainly seem excludable from receiving pandemic relief funds. Churches, on the other hand, are a more complicated matter. The intent is not to argue, per se, that it was a mistake to allow churches to apply for PPP loans. Many churches effectively operate as businesses

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estimates that under the technical terms of the statute, about half of public firms were eligible to apply for PPP funding.").

80. U.S. Small Bus. Admin., PAYCHECK PROTECTION PROGRAM LOANS FREQUENTLY ASKED QUESTIONS (FAQS) 1–2 (2020); Michela Moscufo, *Who Decides What is a Small Business for PPP Loans?*, FORBES (Apr. 30, 2021, 6:34 PM), https://www.forbes.com/sites/michelamoscufo/2020/04/30/who-decides-what-is-a-small-business-for-ppp-loans/ [https://perma.cc/M6UZ-HWBB].

81. *See* Moscufo, *supra* note 80.

82. Aaron Earls, *Few Protestant Churches Met in Person for Worship Services in April,* LIFEWAY RSCH. (May 1, 2021), https://research.lifeway.com/2020/05/01/few-protestant-churches-met-in-person-for-worship-services-in-april/ [https://perma.cc/4482-RGPH].

83. Christina Capatides, *More Than 12,000 Catholic Churches in the U.S. Applied for PPP Loans – and 9,000 Got Them,* CBS NEWS (May 8, 2020, 12:17 PM), https://www.cbsnews.com/news/catholic-churches-paycheck-protection-program-12000-applied-9000-got/ [https://perma.cc/EZ88-U86L].

84. Joe Walsh, *Report: Anti-Vaccine Groups Collected Federal Covid Relief Funds,* FORBES (Jan 18, 2021, 1:24 PM), https://www.forbes.com/sites/joewalsh/2021/01/18/report-anti-vaccine-groups-collected-federal-covid-relief-funds/ [https://perma.cc/W64G-L869].

with full-time employees. Rather, it is appropriate to question whether their tax exemption or other special accommodations accompanying their status as a religious organization should prohibit receipt of government-backed (i.e., tax dollar funded) relief funds.

Under the language of the CARES Act, churches were eligible for loans as the program was open to non-profit organizations.[85] Churches were certainly within their right to apply for the loans, and the purpose of including them in this discussion is not to criticize any individual congregations for applying. However, this does raise the question of whether churches were (or should have been) intended recipients of PPP loans. While, legally, churches are recognized as 501(c)(3) charitable organizations, in practical terms, churches are not generally considered businesses. While there are many reasons churches may have faced additional financial strain due to COVID-19, are these the types of organizations that the government should be using tax-payer dollars to bail out? Does it make sense to have money set aside to aid small businesses sent to assist religious organizations? The de facto inclusion of such organizations among the eligible recipients of PPP loans further highlights an area of the program that was not initially well thought through and eventually contributed to later criticism.[86]

D. Hindsight is Twenty-twenty

In retrospect, it is easy to point out that many businesses likely fell outside the spirit, if not the letter, of the PPP. It was well understood (and documented within the legislation itself) that the PPP's purpose was to support small businesses during this economic crisis. The purpose of highlighting these entities is not to attach further shame to purported bad actors for attempting to divert funds away from those the program was set up to benefit. Instead, the purpose is only to further highlight the confusion brought about by the lack of clarity in and around the statute.

Indeed, the facts paint a more complicated picture than wrongdoers taking advantage of quick money during a crisis. There was genuine confusion as to who qualified for these loans. The statute's language was intentionally drafted extremely broadly to extend aid to as many businesses as needed. Even though the SBA did attempt to release guidance as to eligible recipients (including scaling back on

85. U.S. Small Bus. Admin., Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL) 1 (2020).

86. *See, e.g.,* Reese Dunklin & Michael Rezendes, *Sitting on Billions, Catholic Dioceses Amassed Taxpayer Aid,* AP News (Feb 4, 2021), https://apnews.com/article/catholic-church-get-aid-investigation-39a404f55c82fea84902cd16f04e37b2 [https://perma.cc/YT3A-YU4Z].

the broad nature of the language),[87] businesses were essentially operating under an "apply now, ask questions later" philosophy.

With uncertainty about how long quarantine guidelines would be in place, whether Congress would provide additional aid, and what the economy would look like in both the short- and long-term, a "shoot first, ask questions later" mentality ruled the day. Company financial and legal advisors were essentially flying blind. With funds rumored to run out quickly, the safer option for businesses seemed to be to apply for all possible loans and then let banks and administrators be the gatekeepers. The worst-case result of this course of action would likely be either getting rejected for the loan outright or receiving the loan and not qualifying for loan forgiveness. In instances where the loans were not forgiven, businesses would only be responsible for repayment on a long-term schedule with a measly one percent interest rate.

Influential figures in the financial world, like Mark Cuban, were publicly giving such dubious advice to small businesses to apply for PPP loans at multiple banks to increase their odds of receiving funds.[88] Businesses with existing banking relationships (which often signifies having reached some level of stability) were much more likely to successfully obtain funds than businesses without such relationships. There was no clear guidance regarding whether businesses would be eligible for PPP loans and Economic Injury Disaster Loans (EIDL), or if receiving one would preclude receiving the other.[89] This lack of guidance was particularly important, as the CARES Act also effectively promised recipients of EIDL a $10,000 upfront grant simply for applying.[90] The initial few weeks after the CARES Act passed

87. *See* First PPP Interim Final Rule, 85 Fed. Reg. 21747 (Apr. 2, 2020) (to be codified at 13 C.F.R. pt. 120).

88. Kevin Stankiewicz, *Mark Cuban Says a Lottery System is the Only Fair Way to Grant Small Business Coronavirus Loans*, CNBC (May 1, 2020, 10:28 AM), https://www.cnbc.com/2020/05/01/mark-cuban-advises-small-businesses-to-apply-to-multiple-banks-for-loan.html [https://perma.cc/T2S6-PJ72].

89. *See* Jesse Noyes, *Confused and Waiting for Promised Financial Relief, Small Business Owners Turn to Each Other for Answers,* WORKSET (Apr. 11, 2020), https://www.zenefits.com/workest/confused-and-waiting-for-promised-financial-relief-small-business-owners-turn-to-each-other-for-answers/ [https://perma.cc/NHA4-6T9U]; *see also* Kate Rogers & Betsy Spring, *Frustration Mounts on Main Street as Entrepreneurs Wait on Banks and SBA for Much-Needed Funding,* CNBC (Apr. 9, 2020, 9:59 PM), https://www.cnbc.com/2020/04/09/frustration-mounts-on-main-street-as-entrepreneurs-wait-on-banks-and-sba-for-much-needed-funding.html [https://perma.cc/92XT-JFD6] (noting that businesses can qualify for both an EIDL and PPP loan as long as they are not used for the same thing).

90. *See* CARES Act, *supra* note 16, at sec. 1110, 134 Stat. 281, 306–08; *see also About Targeted EIDL Advance and Supplemental Targeted Advance*, SBA, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/covid-19-economic-injury-disaster-loan/about-targeted-eidl-advance-supplemental-targeted-advance [https://perma.cc/XSG5-L32M] ("The Targeted EIDL Advance provided funds of

were truly chaotic for everyone involved with the PPP loan process, from the top down.

III. AN ASSESSMENT OF THE PAYCHECK PROTECTION PROGRAM

While the administrative struggles of the PPP rollout accounted for a large portion of its initial criticism, more structural flaws soon became apparent. Despite its goal of aiding small businesses, the PPP failed to reach the neediest small firms promptly. It demonstrated a lack of understanding of small businesses' financial calculus and failed to safeguard against the well-documented problem of racial bias in commercial lending. Nonetheless, the PPP functioned largely as its bipartisan team of creators intended. This section delves into the PPP's flaws and successes as a program to assist small businesses.

A. Misplaced Incentives

As anyone who works closely with small businesses will attest, they are not merely large businesses of smaller size. Running a small business is much different from running a large business, leading to different company objectives, challenges, and management styles. Even within the SBA's confined definition of small businesses, a business of 100+ employees is vastly different from that of 10 to 20 employees. The smallest small businesses were most uniquely vulnerable to the challenges posed by COVID-19.[91] Instead of considering these differences, the PPP's one-size-fits-all approach to the application and distribution of funds led some of the more vulnerable subsets of applicants to either shy away from the program or get shut out altogether.

Despite the many companies that rushed to apply for all financial assistance available in the wake of the pandemic, not everyone was so eager. Among the greatest uncertainties upon the PPP's initial rollout were the all-important questions of how and when loan recipients would qualify for loan forgiveness. Companies were naturally interested in receiving aid to help them weather this unexpected economic disaster, but they were not necessarily willing to take on large sums of debt regardless of the low-interest rate.

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up to $10,000 to applicants who were in a low-income community, could demonstrate more than 30% reduction in revenue during an eight-week period beginning on March 2, 2020, or later, and had 300 employees or fewer").

91. Andre Dua et al., *US Small-Business Recovery After the COVID-19 Crisis*, McKinsey & Co. (Jul. 7, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/us-small-business-recovery-after-the-covid-19-crisis [https://perma.cc/S774-8CLD] ("many small businesses across sectors came into the COVID-19 crisis with low financial resilience").

Many firms wanted stronger assurance that their loans would indeed be forgiven.[92] At first, businesses only received the less-than-reassuring promise that the loans "may be forgiven."[93] Also, each eligible employer's degree of loan forgiveness depended upon their number of qualified employees at the time of applying for forgiveness, as opposed to at the time of application for the loan itself.[94] If that number had dropped, the PPP would reduce the amount of eligible loan forgiveness for a company. Especially given the circumstances, many firms were uncertain if they could retain constant employment numbers even with the PPP loans.

This uncertainty in the PPP's initial rollout led to misaligned incentives among prospective loan applicants. As described in the previous section, larger and more stable companies without as dire a need for immediate financial assistance had strong incentives to apply for the PPP. For comparison, smaller and less stable companies with a greater need were disincentivized to do so. Larger and more well-established companies tend to have greater emergency reserves than smaller companies. They also often have well-established banking relationships, commonly with open lines of credit with financial institutions. While emergencies, by their very nature, are not the desired outcome for anyone, larger companies typically are in a better position to withstand initial financial shortfalls than their smaller counterparts.

For these larger and more stable organizations, deciding to apply for PPP loans was easy. They could access the application process more easily through their pre-existing banking relationships. Even if their PPP loans were not forgiven, their long-term low-interest rate was still a valuable asset and cost-saver. Even if these businesses eventually did not need the extra funds to survive the COVID crisis, they could use the loan in other ways to support and grow their companies. There was essentially no downside in applying, even where a firm did not necessarily "need" the loan.

Smaller businesses, on the other hand, faced a very different calculus. As discussed, most small businesses run on extremely narrow financial margins, and any unexpected cash flow drop can have devastating consequences. Insufficient cash flow (as opposed to insufficient funds) is often cited as the number one reason small businesses fail.[95] The timing of the availability of funds is therefore crucial. With

92. *See, e.g.*, John Geraci, *The Not-so-Forgivable PPP Loans: Wrestling with SBA Guidance*, ACCT. TODAY (May 12, 2020, 12:21 PM), https://www.accountingtoday.com/opinion/the-not-so-forgivable-ppp-loans-wrestling-with-ambiguous-and-sometimes-nonsensical-sba-guidance [https://perma.cc/GFK5-MC4V].

93. U.S. Dep't. of Treasury, *supra* note 76.

94. *Id.*

95. *See, e.g.*, Welsh & White, *supra* note 10; *see also* Nick Chandi, *Council Post: How Cash Flow Forecasting Could Help Save Some Small Businesses From Failure,*

this particular vulnerability in mind, it is clear that these sorts of truly small businesses would have benefitted the most from the PPP. Not only that, since these businesses were in dire need of funds, any delay could cause irreparable damage.

Given this level of vulnerability, one would think that applying for PPP loans must also have been an easy decision for these smaller businesses. However, many small business owners were hesitant to apply. This hesitancy was simply because there was no guarantee that the loans would be forgiven. While debt can be an advantageous financial instrument for businesses in general, most small businesses try to avoid it whenever possible.[96] Often working with narrow revenue margins, cash-flow-conscientious small businesses are extremely wary of increasing monthly expenses.[97] There was real concern that, if the loans were not forgiven, it would only result in small businesses eventually shutting down because they could not meet their repayment obligations.[98]

Accordingly, especially in the initial rollout of the PPP, larger and more financially secure businesses were incentivized to apply for as much aid as possible as quickly as possible. Smaller businesses, which were in greater need of immediate assistance, were incentivized away from applying for loans until the loan forgiveness process and criteria were clarified. These inverse incentives, coupled with the relative ease of access for larger companies in applying for the PPP loans, meant that the needier group of companies was largely pushed out from initial loan consideration.

FORBES (June 28, 2022, 7:45AM), https://www.forbes.com/sites/forbesfinancecouncil/2022/06/28/how-cash-flow-forecasting-could-help-save-some-small-businesses-from-failure/?sh=217f2ec860eb [https://perma.cc/3PE9-CM5N] (noting that small businesses that are able to implement strategies to help stabilize cash, as well as budget for cash flow gaps are more likely to succeed); Melissa Houston, *How This Cash Collector Turns Outdated Accounts Into Cash Quickly*, FORBES (Dec. 22, 2020, 5:00 AM), https://www.forbes.com/sites/melissahouston/2020/12/22/how-this-cash-collector-turns-outdated-accounts-into-cash-quickly/ [https://perma.cc/D4A8-3AD8] (noting that according to a study, eighty-two percent of businesses fail because of poor management of cash flow).

96. *See generally* Mikael Paaso et al., *Entrepreneur Debt Aversion and the Effectiveness of SME Support Programs: Evidence from the COVID-19 Pandemic*, PROC. PARIS DEC. 2021 FIN MEETING EUROFIDAI – ESSEC (2021).

97. *Id.* at 15–16.

98. Amber N. Morris, *Small Business Debt in the Age of COVID-19*, 29 AM. BANKR. INST. L. REV. 131, 159 (2021) (noting that failure to obtain PPP loan forgiveness could be fatal to small businesses); Timothy C. Dunne & Garrett A. McBrayer, *In the interest of small business' cost of debt: A matter of CSR disclosure*, 29 J. SMALL BUS. STRATEGY 58 (2019) (noting that "the relatively high cost of debt for small businesses, as compared to large ones, can make for a fragile economic situation for a small firm").

B. Racial Bias

Beyond its failure to account for the unique challenges small businesses experienced, the PPP failed to recognize racial bias's role in commercial banking and other lending institutions.[99] Multiple studies have conclusively shown an extreme disparate racial impact among the companies approved for PPP loans.[100] One study by a coalition of Federal Reserve banks concluded that only forty-three percent of Black-owned businesses received all the PPP funds they had applied for, whereas seventy-nine percent of white-owned businesses received the full allotment of the requested funds.[101] Another study in Florida determined that Black-owned restaurants were twenty-five percent less likely to receive PPP funds that they applied for than white-owned restaurants, while Latinx-owned restaurants were nine percent less likely.[102]

Unsurprisingly, this racial discrepancy can be mostly explained by human behaviors. In small and mid-sized banks, where subjectivity is more likely to impact lending decisions, Black-owned businesses were much less likely to receive funding.[103] Only 3.3% of funds lent out by small banks were given to Black-owned businesses.[104] By contrast, most Black-owned businesses who received PPP funds did so through

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99. "The first wave . . . revealed racial disparities in the experience of small businesses following the onset of the pandemic. Businesses owned by people of color experienced more acute cash shortages and lower rates of banking relationships. They closed at a higher rate–almost double–compared to businesses owned by white persons." Morse, *supra* note 79, at 192.

100. *Id.*; Silvia Foster-Frau, *Racial Bias Affected Black-Owned Small Businesses Seeking Pandemic Relief Loans, Study Finds,* WASH. POST (Oct. 15, 2021), https://www.washingtonpost.com/national/ppp-bias-black-businesses/2021/10/15/ [https://perma.cc/EWV5-HRQ5]; *Anneliese Lederer et al., Lending Discrimination During COVID-19: Black and Hispanic Women-Owned Businesses*, NAT'L CMTY. REINVESTMENT COAL., https://ncrc.org/lending-discrimination-during-covid-19-black-and-hispanic-women-owned-businesses/ [https://perma.cc/UWB5-LW47] (discussing disparate treatment by race among PPP loan applicants); Federal Reserve Banks, SMALL BUSINESS CREDIT SURVEY: 2021 REPORT ON FIRMS OWNED BY PEOPLE OF COLOR (2021) ("While 79% of white-owned firms received all of the PPP funding they sought, that share dropped to 43% for Black-owned firms. Black-owned applicant firms were five times as likely as white-owned firms to receive none of the PPP funding for which they applied."); *see also* Sergey Chernenko & David S. Scharfstein, *Racial Disparities in the Paycheck Protection Program* (Feb. 2022, NBER Working Paper No. 29748), http://www.nber.org/papers/w29748 [https://perma.cc/MGY6-SV54] (documenting the racial disparities in borrowing through the PPP using a large sample of Florida restaurants).

101. Federal Reserve Banks, *supra* note 100.

102. Chernenko & Scharfstein, *supra* note 100.

103. Sabrina Howell et al., *Automation and Racial Disparities in Small Business Lending: Evidence from the Paycheck Protection Program* (May 2022, NBER Working Paper No. 29364), https://www.nber.org/papers/w29364 [https://perma.cc/E9TH-J65M].

104. *Id.*

financial technology companies (commonly referred to as "FinTech").[105] Loans to Black-owned businesses accounted for 26.5% of funds distributed by FinTech lenders, more than twice the percentage of the next closest group of lenders, credit unions, which came in at 9.7%.[106]

Research further revealed that the main reason Black-owned businesses were so much more successful in applying for loans through FinTech was the impartial nature of the FinTech application process.[107] Automating the process greatly reduced the chance for human biases to come into play in the approval process. Changes the Biden administration made to the PPP's execution process in later phases of the program also helped reduce applicant bias.[108]

Racial bias in the financial sector is certainly not unique to the PPP,[109] and it is improbable that there were any reasonable or straightforward means of eliminating bias from the program, particularly given its lightning-fast turnaround. At the same time, racism within the financial sector is an extremely well-documented problem.[110] The failure here of the PPP is not that it did not eliminate bias in its loan process, but that it neglected to affirmatively prepare any safeguards against such biases. By initially not attempting to address

105. Stacy Cowley, *Racial Bias Skewed Small-Business Relief Lending*, *Study Says,* N.Y. TIMES (2021), https://www.nytimes.com/2021/10/11/business/ppp-loans-covid-racial-bias.html [https://perma.cc/WSH4-889R] (last visited Aug 17, 2022).

106. John M. Griffin, Samuel Kruger, & Prateek Mahajan, *Did FinTech Lenders Facilitate PPP Fraud?*, J. FIN., (forthcoming) (available at SSRN: https://ssrn.com/abstract=3906395) [https://perma.cc/2GUB-RTC5]. (The study identified flagged loans as potentially fraudulently awarded for applicants which claiming they paid workers significantly more than industry standards, businesses which lacked a state business registration, and in comparing SBA records with data from other sources, such as registration records and wage data to find loans with anomalies); *see* Cowley, *supra* note 105.

107. *See* Howell, *supra* note 103.

108. Stacy Cowley & Jim Tankersley, *Biden changes P.P.P. rules to help the self-employed,* N.Y. TIMES (Mar. 16, 2021), https://www.nytimes.com/2021/02/22/business/smallbusiness/paycheck-protection-program-small-business-biden.html [https://perma.cc/VC4K-XEKW].

109. *See, e.g.*, Justin P. Steil et al., The Social Structure of Mortgage Discrimination, 33 HOUS. STUD. 759 (2018) (Illustrating a pattern of racial discrimination in mortgage approval).

110. While it is outside the scope of this Article to delve into the history and complexity of the issue, for some background reading on this topic, *see* Babolall et al., *Building supportive ecosystems for Black-owned US businesses*, MCKINSEY & CO. (Oct. 29, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/building-supportive-ecosystems-for-black-owned-us-businesses [https://perma.cc/Y7ML-P5R8]; *see also* Ashley Evans, *The Mistreatment of Black-Owned Businesses During the First and Second Rounds of the Paycheck Protection Program*, 17 RUTGERS BUS. L. REV. 107 (2022) (noting that, amid the COVID-19 pandemic, the PPP severely discriminated against Black-owned businesses).

this predictable outcome proactively, Congress and the SBA were complicit in yet another financial program that benefitted white business owners over Black and Latinx business owners.

C. Fraudulent Recipients

Another area where the PPP greatly stumbled is in not sufficiently guarding against fraudulent recipients. As discussed, many businesses received funds despite not being the type of entity contemplated under this program. While the decisions of those companies to apply for funds (or the decision of the banks to grant them) may raise some eyebrows, the applications were legally submitted.

Besides these firms, the aftermath of the PPP got bogged down with news of billions of dollars in loans and grants rewarded fraudulently. A recent analysis from the University of Texas identified PPP recipients with irregularities between the data provided in their SBA applications compared with other available records and data sources and concluded that as much as fifteen percent of the funds, totaling $76 billion, may have been illegitimately rewarded.[111] While not all of these 1.8 million identified companies with irregularities fraudulently received loans, even if half of those identified were illegally received, the program would still have distributed more than $30 billion in funds that it should not have.

Concerns of fraud in the aftermath of the PPP were so high that Congress passed legislation specifically designed to find and hold fraudulent recipients responsible.[112] As of this writing, hundreds of individuals have been convicted of criminal charges relating to fraudulently applying for and receiving PPP funds.[113] Those convicted received loans as small as $14,000 to as high as $9.5 million for single-company borrowers.[114] One recently convicted California man submitted twenty-seven separate fraudulent PPP loan applications requesting funds totaling $27 million.[115]

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111. *See* Griffin, *supra* note 106.

112. Samson Haileyesus, US House *Passes 7 Small Business Bills - 2 For PPP and EIDL Loan Fraud,* SMALL BUS. TRENDS (June 12, 2022), https://smallbiztrends.com/2022/06/us-house-passes-7-small-business-bills.html [https://perma.cc/ZG75-XXKD].

113. Ken Dilanian & Laura Strickler, *'Biggest Fraud In A Generation': The Looting Of The Covid Relief Plan Known As PPP,* NBC NEWS (Mar. 28, 2022), https://www.nbcnews.com/politics/justice-department/biggest-fraud-generation-looting-covid-relief-program-known-ppp-n1279664 [https://perma.cc/ENT5-N2FP].

114. *See Cares Act Fraud Tracker*, ARNOLD & PORTER (Sept. 20, 2022), https://www.arnoldporter.com/en/general/cares-act-fraud-tracker [https://perma.cc/XET9-XXBZ] (listing out those convicted of PPP related fraud).

115. *Man Convicted for $27 Million PPP Fraud Scheme*, THE U.S. DEPT. OF JUST. (Mar. 29, 2022), https://www.justice.gov/opa/pr/man-convicted-27-million-ppp-fraud-scheme [https://perma.cc/2L4R-C4DB].

Interestingly enough, the same factor that enabled many Black-owned businesses to receive PPP funds they may not otherwise have been able to acquire is the same factor that enabled the high level of fraud. Fintech companies were more susceptible to fraudulent applicants than their brick-and-mortar counterparts. Nine of the ten lending institutions with the highest rates of fraudulent loans were FinTech companies.[116] This fraud rate can likely be attributed to the impersonal nature of FinTech. On the one hand, the relative anonymity of applying for loans through FinTech helped to ward against racial bias on the part of lenders; on the other hand, the lack of a more personal touch to the application process essentially invited fraudulent applications.[117]

It is important to note that while larger institutions focused their lending efforts on those small businesses with whom they had existing relationships, a large portion of those applying for loans through FinTech lenders did not have such prior banking relationships. Businesses without a pre-existing banking relationship are often smaller and less sophisticated than those with banking relationships. Additionally, applying for a loan through FinTech is less user-friendly than applying in-person with a loan officer. Without professional oversight, firms are more likely to make mistakes. Also, firms so small as to lack standing banking relationships likely do not have in-house accountants or lawyers to help with the application process. All of this (especially considering the sheer volume of loans being processed) created an attractive ecosystem for fraudulent applicants, especially since no proof was required to claim oneself as a sole proprietorship. However, it also created a scenario where many companies validly applying for loans would raise some of the red flags identified in the University of Texas research.

While at this point, more research is needed to conclusively identify the severity of fraud perpetuated through the PPP, it is clear that likely billions of dollars of taxpayer funds were stolen due to poor oversight by SBA-approved lending institutions. Some level of fraud is expected for programs of this size distributing funds to as many recipients as the PPP. However, if the SBA had put in place appropriate procedural safeguards and oversights during the PPP's initial rollout, the level of fraud likely would have been considerably lower. Instead, this failure left banks and the government struggling to claw back fraudulently received funds.

116. Stacy Cowley, *15% of paycheck protection program loans could be fraudulent, study shows* N.Y. TIMES (Oct. 11, 2021), https://www.nytimes.com/2021/08/17/business/ppp-fraud-covid.html [https://perma.cc/H43J-F8GU]; Griffin, *supra* note 106.

117. Cowley, *supra* note 116.

D. Some Bright Spots

While the PPP had many flaws, there were also many positive aspects to its enactment. During its time, the nation faced potentially the greatest economic disaster since the Great Depression—at the very least, since the Great Recession. The crisis placed Congress in the difficult position of needing to act quickly to shore up the economy and assist individuals and businesses. The PPP functioned as an effective means of distributing an enormous amount of financial aid during a crisis. Despite all its setbacks and bad press, the PPP eventually provided much-needed assistance.

1. Companies Received Assistance

Without a doubt, the PPP's initial rollout was nothing short of a trainwreck. However, its initial failures should not define the entirety of the program. Despite its shortcomings, the PPP did one thing very well: it put money in the bank accounts of small businesses. By the time the SBA stopped accepting new PPP loan applications on March 31, 2021, the program had approved over eleven million loans at an average of $67,647 per loan.[118] Businesses, from sole proprietorships to companies with hundreds of employees, could receive funds that helped keep the doors open during uncertain economic times.

Perhaps more important than the number of businesses that received aid is the number of individuals who could stay employed and receive a steady paycheck during the pandemic. Initially, with shelter-in-place orders and the active workforce limited to essential workers, many employees could not work during the pandemic's early months.[119] There was a real fear that mass layoffs would ensue as many companies essentially shut down for an extended period.[120] It is impossible to calculate how many jobs were saved directly by the PPP. But millions of businesses could pay their employees and meet other expenses for at least eight weeks when they likely otherwise would not have been able to do so.[121]

118. Anna Serio, *PPP Loan Statistics: Top Lenders, Who Received Loans,* FINDER (June 15, 2021), https://www.finder.com/ppp-loan-stats [https://perma.cc/EQ6A-49DD].

119. *See* Marissa G. Baker, *Nonrelocatable Occupations at Increased Risk During Pandemics: United States, 2018*, 110 AM. J. PUB. HEALTH 1123, 1126–32 (2020) (noting that seventy-five percent of workers are unable to work so solely from home and face increased health risks and job insecurities as a result of the pandemic).

120. Abha Bhattarai, Heather Long & Rachel Siegel, *The First U.S. Layoffs from The Coronavirus Are Here,* WASH. POST (Mar. 11, 2020, 7:06 PM), https://www.washingtonpost.com/business/2020/03/11/layoffs-coronavirus/ [https://perma.cc/TQM5-44BY].

121. *See*, Chris Wheat & Chi Mac, *Did the Paycheck Protection Program Support Small Business Activity?,* JP MORGAN CHASE & CO. INST. (Dec. 2021), https://

Critics point to the lack of quantifiable success as one of the program's failings. But no studies have conclusively shown to what extent the PPP did or did not financially benefit the economy or stem the tide of unemployment. It is doubtful any such measurement will ever be possible.[122] As lovely as it would be to point to a data set and determine the exact number of closed businesses or employee layoffs prevented but-for the PPP, the reality is much more messy and nuanced. The businesses themselves worked hard to stay afloat, driving amazing innovations in online sales, virtual services, and structural modifications to allow employees to work from home.[123] Restaurants added curbside pickup and robust delivery options that previously were unavailable.[124] Retailers leaned into e-commerce options, and service providers quickly adopted virtual models.[125] State and local governments and communities adopted other programs to try and help boost businesses and retain employees.[126] The PPP was one effort among many to try and keep the economy afloat.

While we cannot quantify the extent to which the PPP helped stave off a tidal wave of unemployment and business closures, we know that close to $1 trillion of assistance rapidly flowed into struggling compa-

www.jpmorganchase.com/institute/research/small-business/did-ppp-support-small-business-activity [https://perma.cc/UV6L-LV22] (In the eight week period following receipt of PPP funds, small businesses spent on average forty-percent more on expenses such as payroll than businesses that did not receive PPP funds suggesting that the PPP recipients were more able to meet their regular expenses than were non-PPP recipients.).

122. *See* William A. Birdthistle & Joshua Silver, *Funding Crises: An Empirical Study of the Paycheck Protection Program*, 69 BUFF. L. REV. 1541, 1579–83 (2021), (which notes the difficulties in determining the PPP's ultimate impact on the economy); however, *see also,* Robery Fairlie, *The Impact of Covid-19 on small business owners: Evidence from the first three?months after widespread social-distancing restrictions*, J. ECON. MGMT. STRATEGY, 29(4) 727, 727–40 (2020) (noting that small business improvement coincided with relief efforts, although the study focuses mostly on public health measures as opposed to strictly economic efforts).

123. *See, e.g.*, Joshua Felder, *The Rise of the Video Call: How Covid-19 Has Changed The Way We Collaborate,* UC TODAY (Nov. 6, 2022), https://www.uctoday.com/collaboration/the-rise-of-the-video-call-how-covid-19-has-changed-the-way-we-collaborate/ [https://perma.cc/WVK4-G6NV].

124. *How 10 Businesses Are Adapting And Evolving In The Age Of Covid-19,* RINGCENTRAL BLOG (Apr. 29, 2020), https://www.ringcentral.com/us/en/blog/small-business-adapting-covid-19/ [https://perma.cc/L649-NC9D] (which lists several specific examples of business pivots as a result of the COVID-19 pandemic).

125. *Id.*

126. Most cities studied had adapted their regulations, permitting processes, and other measures to make it easier to do business in light of COVID-19 related public health restrictions. *See*, Elinor Haider, *How Covid Changed the Way City Governments Support Local Businesses*, THE PEW CHARITABLE TRUSTS, (Mar. 29, 2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/03/how-covid-changed-the-way-city-governments-support-local-businesses [https://perma.cc/C9UT-9UN5].

nies.[127] Far from every business was "saved," and many businesses, which would have likely failed regardless, were artificially propped up. Studies have confirmed that many small businesses shut down operations, although not all did so permanently.[128] However, the actual recorded number of business failures in the wake of COVID-19 was much smaller than previously predicted.[129]

In response to this observation, critics have pointed out that there may have been more efficient ways to distribute aid to small businesses.[130] Others have declared because of its many missteps, the PPP was an utter failure of a program.[131] These criticisms miss the importance of speed in response to the crisis. It is certainly not the claim of this Article that the PPP (or other programs of its ilk) is the best way to prop up small businesses and the economy during a crisis. However, rather than sitting around, endlessly debating competing theories of economic policy, Congress picked *a* course of action, which *did* lead to businesses quickly receiving assistance.[132]

2. *A Unified Congress*

It is admirable that Congress acted with such speed. Another, perhaps less obvious, but positive takeaway from the PPP experience was the strong, concerted effort by politicians and career bureaucrats alike to pass the CARES Act and make the PPP work. In an era of an extreme partisan divide, in the face of a dire emergency, Democrats and

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127. U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT (2021) (accessible at https://www.sba.gov/sites/default/files/2021-06/PPP) (indicating that in just over a year the SBA oversaw the funding roughly $800 billion in PPP loans).

128. Total business exits during 2020 were around 200,000 or roughly one-quarter to one-third above normal. While this is certainly high, it is lower than the dire projections from early on in the pandemic. Leland D. Crane et al., *Business Exit During the Covid-19 Pandemic: Non-Traditional Measures In Historical Context*, 2021 FIN. & ECON. DISCUSSION SERIES 1, 2–4 (2021).

129. *Id.*

130. Veronique de Rugy & Arnold Kling, *A Government-Backed Line Of Credit Would Help Small Businesses More Than Current Relief Efforts*, SSRN ELECTRONIC JOURNAL 1, 1–5 (2020); *see also* Emily Stewart, *The PPP Worked How It Was Supposed To. That's The Problem*, VOX (July 13, 2020, 8:00 AM), https://www.vox.com/recode/2020/7/13/21320179/ppp-loans-sba-paycheck-protection-program-polling-kanye-west [https://perma.cc/6DMY-6NR8] (which criticizes the one size fits all approach of the PPP).

131. Jordan Weissmann, *The Paycheck Protection Program Was a Flop*, SLATE (July 24, 2020, 4:08 PM), https://slate.com/business/2020/07/paycheck-protection-program-was-a-flop.html [https://perma.cc/44FK-PTAD].

132. *See generally,* Marco Rubio, *The historic success of the Paycheck Protection Program*, MEDIUM, (Dec. 9, 2020), https://senatormarcorubio.medium.com/the-historic-success-of-the-paycheck-protection-program-5b53d820f3a2 [https://perma.cc/N4CF-Y7EF].

Republicans could put aside deep ideological rifts to help the American people.

In an era where having a "do nothing" Congress is much more common than a "do something" Congress, it often seems that partisan politics has destroyed the usual mechanisms of government.[133] Bipartisan bills are scarce, and the filibuster is deployed at close to all-time high frequency.[134] Presidents are frequently bypassing Congress altogether by expanding the power of executive orders. Congressional approval ratings tend to hover in the high teens.[135]

Despite a political climate that typically does not allow for it, the CARES Act represented a unified light in a divided world. Especially during the early stages of the pandemic, there was a sense of togetherness and national community that this country likely has not experienced since 9/11. Even when Congress seems able to collectively agree on very little, it is heartening to know that, during an extremely dark period, it was able to set differences aside and work quickly and adeptly to greatly benefit the American people.[136]

Beyond Congress working together to initially pass the CARES Act (and then supplement the PPP as needed with additional funds), the government bureaucrats responsible for enacting the program also worked diligently to do their part. While the SBA received much criticism for handling the PPP,[137] it is surprising that this oft-forgotten relatively small government agency essentially transformed into an economic crisis center for small businesses. Especially in the early stages of the process, new guidance was being handed down from the SBA constantly, often daily, if not multiple times a day. Administra-

133. *See, e.g.*, Susan Milligan, *How Partisan Politics Threatened Even Must-Pass Legislation in Congress,* U.S. NEWS & WORLD REPORT (Oct. 21, 2021), https://www.usnews.com/news/the-report/articles/2021-10-01/how-partisan-politics-threatened-even-must-pass-legislation-in-congress [https://perma.cc/8X79-MVHX].

134. Molly E. Reynolds, *What is the Senate filibuster, and what would it take to eliminate it?*, BROOKINGS INST. (2021), https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/ [https://perma.cc/G6C4-KZZC].

135. At the time of this Comment, Congress had an approval rating of 17%. *Congress and the Public,* GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx (last visited Aug. 17, 2022).

136. *See, e.g.*, Leon LaBrecque, *The CARES Act Has Passed: Here Are The Highlights*, FORBES, (Mar. 29, 2020, 7:00 AM), https://www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/ [https://perma.cc/2CRR-ME9W] (in response to congress passing the CARES Act, "Today, we can look to our elected representatives with admiration. The two parties came together, and after only a smidgen of negotiating, passed the $2 trillion coronavirus economic stimulus bill.").

137. *See, e.g.*, Aaron Gregg, *Watchdog faults SBA on minority-owned and rural small-business relief lending,* WASH. POST (May 8, 2020), https://www.washingtonpost.com/business/2020/05/08/sba-ppp-ig-report/ [https://perma.cc/4LD2-6F72].

tors were scrambling to adjust their operations on the fly.[138] Throughout this time, there was a concerted effort to get aid to the individuals who needed it most.[139] At the end of the day, this is a clear instance of the government doing what it should do: working tirelessly to help the American people in their time of need.

IV. GRADING THE PAYCHECK PROTECTION PROGRAM

The PPP had several embarrassingly negative aspects and some extremely bright spots. Perhaps the most important question, in retrospect, is simply: was the Paycheck Protection Program a success? If the PPP were given a pass/fail grade, it should receive a high pass.

This high praise may come as a shock, given its many well-documented problems. As has been noted, the program was rife with administrative failures. It benefited the well-connected and rich over the little guy and disproportionately discriminated against racial minorities.[140] In essence, it is a microcosm of the history of American economics. However, despite these setbacks, when grading the PPP, it is important not to view its failures in a vacuum but to consider the entire context—not for the PPP itself but also in comparison to other crisis legislation which has come before it. By this curved measure, the PPP was a novel solution to an ongoing emergency, which was no more flawed than should be expected (given the circumstances of its execution). It successfully delivered tangible aid to many of those who needed it most.

A. A Comparison to Past Programs

The PPP was certainly the first of its kind because no other congressional program had provided emergency assistance to small businesses in this way.[141] It is not the first time Congress has ever passed emergency financial assistance legislation when facing crises. Congress passed legislation granting emergency aid for businesses in response to the Great Depression, after September 11th, and during the

138. *See, e.g.*, Jeff Blumenthal, *SBA's last-minute paycheck protection program guidance leaves local banks scrambling,* PHILA. BUS. J. (Apr. 30, 2020), https://www.bizjournals.com/philadelphia/news/2020/04/03/sbas-last-minute-paycheck-protection-program.html [https://perma.cc/HR3X-2Y94].

139. *See generally,* Michele Simmons*, State and Local Government Assistance from The Cares Act*, JD SUPRA, (Apr. 7, 2020), https://www.jdsupra.com/legalnews/state-and-local-government-assistance-87216/ [https://perma.cc/62TF-RPJF].

140. *See* Howell, *supra* note 103.

141. To clarify, this is referring to specific crisis-time legislation targeted at providing direct aid to small businesses. There are certainly other programs available to assist small businesses, but nothing of this magnitude or specifically implemented while in the midst of a national economic crisis.

Great Recession, to name a few.[142] The Panic of 1792 is considered the first instance of the United States government providing a private-sector bailout to avoid a widespread economic downturn.[143] Any assessment of the PPP should be done with the development, execution, and performance of past legislation in mind.

Historically, legislation passed to address a looming or active financial crisis has had three unifying features: the legislation tends to (1) be passed quickly to (2) try and prevent/mitigate an economic crisis, and (3) is targeted at a specific type of business or industry.[144] The economic crisis need not be widespread but can be limited to a certain business sector. The most well-known types of crisis legislation come in the form of bailouts (although not all bailouts are a result of crisis legislation, nor are all forms of crisis legislation necessarily bailouts).[145] This government aid is, generally speaking, intended to help prevent companies from going bankrupt.[146]

For example, on September 23, 2001, then-President George W. Bush signed the Air Transportation Safety and System Stabilization Act (ATSSSA).[147] Shortly after the 9/11 terrorist attacks, many feared the airline industry might collapse, potentially sparking a domestic and international economic crisis.[148] Delta Airlines CEO Leo Mullin stated, "almost no airline is strong enough to survive for long, facing the upcoming challenges."[149] In response, Congress, in two days, introduced and passed a $15 billion bailout package.[150]

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142. *See* Paul Nylen, Brian Huels, & Shane Wheeler, *With Coronavirus Ravaging the Economy, Congress Shows Highest Tax Priorities: An Exploration of the Provisions in the Cares Act and Beyond*, 30 U. MIAMI BUS. L. REV. 103, 113–19 (2021).

143. *See* Richard Sylla, Robert E. Wright, & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61, 61 (2009).

144. *See generally*, Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 IND. L. J. 951, 955–80 (1992).

145. *See id.*; Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 NOTRE DAME L. REV. 479, 479–81 (2015).

146. *What is a bailout? Reasons Why Companies Are Bailed Out*, MKT. BUS. NEWS, (Jan. 12, 2017), https://marketbusinessnews.com/financial-glossary/bailout/ [https://perma.cc/D2HT-4WQN].

147. Margaret M. Blair, *The Economics of Post-September 11 Financial Aid To Airlines*, 36 IND. L. R. 367, 368 (2003).

148. Frank Swoboda & Martha McNeil Hamilton, *Congress Passes $15 Billion Airline Bailout*, WASH. POST (Sept. 22, 2001), https://www.washingtonpost.com/archive/politics/2001/09/22/congress-passes-15-billion-airline-bailout/ [https://perma.cc/C4F4-JSRU].

149. Jaime Holguin, *9/11 Airline Bailout: So, Who Got What?,* CBS NEWS (Dec. 9, 2002), https://www.cbsnews.com/news/9-11-airline-bailout-so-who-got-what/ [https://perma.cc/4T9E-YEHY].

150. *See* Blair, *supra* note 147, at 367 (consisting of $5 billion in immediate and direct payments to airlines and additional credit instruments, such as direct loans, totaling another $10 billion).

In slightly more recent memory, in response to the Great Recession of 2008, the Emergency Economic Stabilization Act of 2008 (EESA) was enacted on October 3, 2008.[151] The EESA was enacted only two weeks after Treasury Secretary Henry M. Paulson and Federal Reserve Chairman Ben S. Bernanke met with Congressional leaders and warned them, "if we don't do this, we may not have an economy on Monday."[152] Like the CARES Act, the EESA was a sweeping piece of legislation with specific programs targeted at specific, troubled economic sectors, such as banks and the auto industry.[153]

Crisis legislation also tends to have other important factors in common, specifically associated with its implementation during a crisis. Unsurprisingly, the high speed at which such programs are drafted and implemented often inevitably results in flaws that, with the benefit of hindsight, are greatly criticized.[154] While each program is flawed in unique ways, the heaviest criticisms of the PPP (administrative difficulties, money funneled to "unintended" recipients,[155] and difficulties in quantifying success) are similar to those leveled at previous crisis legislation.

To further clarify the point, essentially all of the major criticisms leveled at the PPP and crisis legislation, in general, can be summed up by saying that hastily put-together legislation will inevitably be greatly flawed. Therefore, since expediency tends to be a unifying hallmark of *all* crisis legislation, to say that the existence of major flaws automatically equates to a failed program is to say all crisis legislation should be presumed failures. This reasoning, however, is itself flawed and incomplete. While problems associated with crisis legislation should certainly be considered when judging the merits of such programs, they should only be considered a part of the larger equation. Any analysis of crisis legislation should begin with the perspective that these flaws are a built-in piece of the product. They should be a recognized factor, but not, as many critics seem to presume, proof of failure, standing alone.

151. Fein, Melanie L., *The Emergency Economic Stabilization Act of 2008: Was It Necessary?* 1–3 (Working Paper, 2008) (available at SSRN: https://ssrn.com/abstract=1647094 [https://perma.cc/99XP-7GPJ]).

152. *Id.*

153. Archit Shah, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569, 577–84 (2009).

154. *See, e.g.*, Kathryn Judge, *The Design Flaw At The Heart Of The CARES Act*, FORBES (Apr. 20, 2020), https://www.forbes.com/sites/kathrynjudge/2020/04/20/the-design-flaw-at-the-heart-of-the-cares-act/ [https://perma.cc/PAT6-UN8N].

155. *See generally*, Thomas W. Joo & Alex Wheeler, *The "Small Business" Myth of the Paycheck Protection Program,* 54 UC DAVIS L. REV. 21, 21–41 (2020).

B. A Rubric for Evaluation of Crisis Legislation

While not ignoring the aforementioned flaws, an assessment of success or failure of a program like the PPP should focus on whether the response was appropriate, given the nature of the crisis. In this vein, this Article proposes a five-part test that should be used to evaluate crisis legislation. The parts are as follows: (1) Were the objectives used in crafting the program appropriate for the crisis at the time of the drafting? (2) Was the nature and scope of the program appropriate to meet the objectives identified under part one? (3) Was the program enacted and executed promptly? (4) Was the program successful in doing what it intended to do? (5) Even if parts 1–4 are successfully met, were the negative aspects of the program so great as to completely outweigh any benefits from the program? When evaluated through this test, the PPP should be considered a success.

1. Were the Objectives Used Appropriate?

The first step under this crisis legislation evaluation rubric is to determine whether the objectives used in crafting the program were appropriate for the crisis and the program's identified goal. Essentially this evaluation requires making a judgment on whether lawmakers responding to an emergency could accurately assess the crisis itself. When working with limited time and resources, appropriately triaging the situation is vital. If lawmakers acted but did so in a way that did not address the problem, it would likely automatically make the response a failure.

In creating the PPP, Congress cleared this hurdle of appropriately identifying a major crisis and creating valid goals and objectives to attack the problem. When COVID-19 struck, Congress' actions indicated the correct understanding that (along with other aspects of the economy) small businesses were particularly in danger. They assessed that a mass failure of small businesses would likely be catastrophic to the economy. The stated objectives in creating the PPP, of preventing mass layoffs and giving small businesses support to avoid closure and bankruptcy,[156] facially made sense for attempting to prevent the mass closure of small businesses.[157] Essentially, with the information available to them at the time of crafting the PPP, lawmakers could appropriately determine an important area that could greatly benefit from government intervention.

156. Fischer, *supra* note 25.
157. *Id.*

2. *Was the Nature and Scope of the Response Appropriate?*

For this second step, after successfully identifying a problem at hand, did lawmakers respond in a way that made sense in addressing the identified problem? In response to the crisis, it is not enough to react, but it is necessary to react in a way that is likely to meet the identified goals and objectives. It is important to determine if both the nature of the response and the scope thereof were appropriate. Even if the response were appropriate, if the scope were disproportionate to the problem, it would be a mark against the program. Put another way, given the stated goals and objectives, is it reasonable to believe that the response would work directly to achieve them?

Similar to step number one, the PPP certainly meets the criteria of this second step. The PPP was intended to assist small businesses in meeting their payroll needs during a crisis.[158] The program literally gave companies the funds they needed to do so.[159] It is difficult to imagine a program with a more direct linear connection between its stated objectives and actions taken. Congress was concerned that small business owners would be unable to meet their payroll expenses, so they created a program to ensure they could do so. As this Article has touched on, the program's simplicity led to its many problems.[160] At the same time, its simplicity is also its greatest asset. A legislative body known for drafting intentionally dense, convoluted, complicated, and often confusing laws and procedures went against its nature and created a simple, streamlined system to funnel hundreds of billions of dollars to companies in immediate need.[161]

The one potential pitfall for this second step is whether the program's scope was appropriate. With its initial hefty price tag of well over $300 billion, one might naturally conclude that, if anything, the scope was too large for only assisting small businesses. [162] However, the speed with which the first tranche was fully subscribed shows the initial scope was too small. To Congress' credit, after seeing the initial allocation of loans quickly evaporate, they worked to authorize additional funds quickly.[163] If Congress had not made this increase, then the scope would have indeed been disproportionately small to meet the program's needs. However, by responding relatively quickly to the

158. *Id.*
159. *Id.*
160. *Supra* Part III.
161. *See generally,* Richard K. Neumann Jr., *Why Congress Drafts Gibberish*, 16 LEGAL COMMC'N. & RHETORIC: JAWLD 111 (2019).
162. Carmen Reinicke, *Small business owners missed out on thousands of dollars in loans when PPP funding ran out early,* CNBC (May 17, 2021), https://www.cnbc.com/2021/05/16/small-business-owners-were-blindsided-when-ppp-funding-ran-out-.html [https://perma.cc/5NNF-XX6D].
163. Paycheck Protection Program Flexibility Act, H.R. 7010, 116th Cong. §§ 1–5 (2020).

demands of small businesses and eventually allocating enough money to meet the needs of all companies who applied for and qualified for aid, the scope ended up just about right.

3. Was the Response Timely?

It has been said the best ability is availability. In emergencies, speed is paramount. Relief that arrives too late is essentially no relief at all. Accordingly, step three in this analysis is determining whether the crisis legislation was timely in its drafting and enactment. Even if the relief program had admirable objectives and a well-crafted program to meet those objectives, if lawmakers and administrators are not swift in passing and implementing the assistance, it greatly diminishes the program's positive impact.

As noted earlier, many of the challenges associated with the PPP came from its speedy passage and implementation.[164] However, this rapidity was crucial for the program's effectiveness. With only a total of thirteen days between the passage of the program and the distribution of the first set of loans, it is hard to imagine how the program could have responded faster. Yes, this speed brought along with it many challenges, but with the crisis at the doorsteps of small businesses across the nation, it was the correct course of action. There is no doubt that the PPP passes this third aspect of its evaluation with flying colors.

4. Did the Program Do What it was Intended to Do?

Ultimately, results do matter. While the three previous steps in evaluating a program focus on the process of drafting and implementing a crisis relief program, this step requires assessing the actual effectiveness of the program itself. Essentially, did the program do what it set out to do in the first place? No matter how well-intentioned a program might be at its outset, it is extremely difficult to declare success if it never achieved the intended objectives.

In assessing this question, while it is extremely difficult to give a purely quantitative analysis of how much the PPP truly helped, attempts to do so have pointed toward positive results. One study concluded that PPP loans resulted in a nine–twenty-two percent increase in a small business' likelihood of surviving the pandemic.[165] The SBA reported as early as July 2020 that already eighty-five percent of all small business employees had received financial support through the

164. *See supra* notes 37–60 and accompanying text.

165. Alexander Bartik et al., *The Targeting And Impact Of Paycheck Protection Program Loans To Small Businesses*, NAT. BUREAU OF ECON. RSCH. 1, 4 (2021).

PPP, covering more than 51 million jobs.[166] Another study indicates that the PPP boosted employment at eligible small firms by 3.25%.[167] While much of the data cannot prove a causal relationship between these benefits and the PPP, at the very least suggestive relationships are emerging.[168]

Beyond the available program-specific research, broader data indicates that relief programs, such as the PPP, are generally successful in ameliorating worst-case scenarios. As previously mentioned, pre-CARES Act analyses predicted that, should Congress fail to intervene in the wake of COVID-19, unemployment could exceed thirty percent, reaching the range of during the Great Depression.[169] Some more dire predictions estimated that thirty-six percent of small businesses (up to 2.1 million) could potentially close down permanently.[170] One survey noted that ninety percent of respondents indicated the pandemic negatively impacted them in some way.[171] While it is impossible to know what would have happened absent Congressional intervention, what is certain is that these apocalyptic predictions never became a reality. Even at their peak, measured unemployment levels during the height of the COVID-19 crisis never exceeded 14.4%, which it recorded in April 2020.[172] This number is certainly much higher than is typically desirable but also much lower than initially feared.

166. U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT (2020) (available at https://www.sba.gov/sites/default/files/2020-07/PPP_Report_Public%20-%202020-07-25-508.pdf [https://perma.cc/TE6M-KBJT])

167. Santiago Barraza, Martin Rossi, & Timothy J. Yeager, *The Short-Term Effect of The Paycheck Protection Program on Unemployment*, 1, 2 (Working Paper 2020).

168. *Id.* at 1.

169. Andrew Soergel, *Fed Official Warns of 30% Unemployment,* U.S. NEWS & WORLD REPORT (Mar. 23, 2020), https://www.usnews.com/news/economy/articles/2020-03-23/fed-official-unemployment-could-hit-30-as-coronavirus-slams-economy [https://perma.cc/4HJY-CEF3]; Rebecca Rainey, *Unemployment claims top 26 million 5 weeks into pandemic*, POLITICO (Apr. 23, 2020), https://www.politico.com/news/2020/04/23/coronavirus-unemployment-claims-numbers-203455 [https://perma.cc/E4UC-Y9LF].

170. Andre Dua et al., *Which small businesses are most vulnerable to covid-19—and when,* MCKINSEY & COMPANY (June 18, 2022), https://www.mckinsey.com/featured-insights/americas/which-small-businesses-are-most-vulnerable-to-covid-19-and-when [https://perma.cc/7SYM-WLJV].

171. Joseph Parilla & Sifan Liu, *From relief to recovery: Using federal funds to spur a small business rebound*, BROOKINGS INST. (July 7, 2021) https://www.brookings.edu/essay/from-relief-to-recovery-stage-1-relief/ [https://perma.cc/4YG6-865L].

172. Rakesh Kochhar, *Unemployment rose higher in three months of covid-19 than it did in two years of the great recession*, PEW RSCH. CENT. (June 11, 2020), https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/ [https://perma.cc/8UUA-52Y6].

Additionally, reports estimate that 200,000 small businesses shut down in 2020 due to the COVID-19 economic crisis.[173] This number is well below the anticipated tsunami of small business closures.[174] It is impossible to parse out exactly to what degree the PPP contributed to these improved outcomes, but this does not diminish the PPP's clear role as part of a holistic approach in combating what appeared to be (and might have been) a looming economic disaster.

The above analysis suggests that the PPP appears to have been successful in helping to avoid a more cataclysmic economic disaster at a more macro level. While this bigger-picture view of the program is important, it is also important not to lose sight of the individual people to whom the program tangibly benefited.[175] Given the size of small businesses, government assistance likely has fewer internal layers to flow through to reach individuals than similar aid for larger businesses.[176] Beyond simply looking at the total number of businesses that may or may not have closed down without the help of the PPP, millions of people and families could continue receiving regular paychecks as a direct result of this program, even if the exact number is difficult to quantify.[177]

For its faults, the PPP put money in the hands of individuals who were going through an extremely stressful and trying time. The PPP gave hope and a lifeline to businesses and individuals during an extremely difficult time. Many business owners credit the PPP with helping them survive COVID-19.[178] While such anecdotes alone cannot prove the PPP was successful, they add color and impact to what is otherwise an impersonal economic analysis. In performing any review of the PPP, it is still important to recognize the value realized by those the program needs to benefit. As Chris Hurn, the founder and CEO of Fountainhead Commercial Capital, the sixth most active PPP lender,

173. *See* Crane, *supra* note 128.

174. *See* Dua *supra* note 170.

175. *See, e.g.*, *Boozman Shares Success Stories of Arkansas Businesses for PPP Anniversary* (Apr. 9, 2021), https://www.boozman.senate.gov/public/index.cfm/2021/4/boozman-shares-success-stories-of-arkansas-businesses-for-ppp-anniversary [https://perma.cc/5JM5-2AJ9].

176. Kathy Lockwood, *11 Advantages Small Businesses Have Over Large Corporations (And How to Use Them)*, FORBES (July 22, 2019), https://www.forbes.com/sites/forbescoachescouncil/2019/07/22/11-advantages-small-businesses-have-over-large-corporations-and-how-to-use-them/ [https://perma.cc/R6FS-PR7H] (indicating that one benefit small businesses have over large businesses is the flexibility that comes with less bureaucracy).

177. Michael Sasso, *U.S.'s $795 Billion Rescue Saved Jobs. No One's Sure How Many*, BLOOMBERG (May 28, 2021), https://www.bloomberg.com/news/articles/2021-05-28/u-s-s-795-billion-rescue-saved-jobs-no-one-s-sure-how-many [https://perma.cc/42HN-MWNY].

178. Kiah Treece, *Two Years Later, Was the PPP Worth It?*, FORBES (Apr. 4, 2022), https://www.forbes.com/advisor/business-loans/ppp-two-year-anniversary/ [https://perma.cc/HU6B-2K78].

stated, "it was the proverbial building the airplane after you jump off the cliff in many ways. I do think the program was successful. Unfortunately, so many headlines concern fraud and misuse."[179]

None of the above-stated benefits of the PPP alone delivers a definitive argument about its success. However, taken as a whole, they depict a program that, while flawed on its surface, actually contained many bright spots and greatly benefited the economy and many individuals. With this in mind, the PPP should also be given high marks for this fourth step of its evaluation.

5. *Did the Bad Outweigh the Good?*

At this point, it is finally time to recognize all of the missteps and failures of the PPP. It is not just enough for any crisis legislation to have positive aspects; it should ultimately be a net good for society. The adage goes that the cure should not be worse than the disease. In properly evaluating any relief programs, it is important to examine whether the bad ultimately outweighed the good.

This step in the evaluation is perhaps the most subjective as it is essentially an exercise in comparing all of the positive aspects of the program against all of its negative aspects and making a judgment call as to which ultimately carries the day. Additionally, it involves speculation of what would have been the consequences should the program not have passed. Perhaps the best question should be, "is the nation better off for the enacted crisis legislation?" As noted in the previous section, crisis legislation, by its very nature, produces programs ripe with problems.[180] This accident-proneness comes about because of the necessary speed used to create the legislation. The drawbacks are not conclusive proof of the failure of such a program.

Additionally, when making this final evaluation, it is important not to assign too much weight to compare the program to proposed alternatives. As Voltaire said, and as is often said in the startup world, "the perfect is the enemy of the good."[181] Given hindsight, it is certainly possible to develop ways to improve the PPP or propose alternative solutions altogether. However, as has been discussed, time is of the utmost importance when a crisis is unfolding. Accordingly, it is better to create and enact an imperfect program quickly than to deliberate too long and delay aid. If a readily proposed alternative were rejected at the time of enactment, then perhaps it would be worth making an after-the-fact comparison of the two proposals. In the ab-

179. *Id.*
180. *Infra* notes 141–146 and accompanying text.
181. Leslie Wolf, *The Perfect is the Enemy of the Good*, CAL. DIGIT. LIBR., (June 2, 2010), https://cdlib.org/cdlinfo/2010/06/02/the-perfect-is-the-enemy-of-the-good/ [https://perma.cc/4MVD-93ML] (dissecting the quote and its impact on perfectionism).

sence of such, the most apt analysis involves juxtaposing the aid rendered against the possibility of no aid at all.

In the PPP's case, the nation is better off for its existence than it would have been otherwise. As noted in step four above, assistance was delivered to needy businesses.[182] The assistance avoided the worst-case economic scenarios, and while many businesses still closed, many more were saved. Small businesses, their employees, families, and likely the whole economy were better off at the end of the worst stages of the pandemic than if Congress had never passed the program.

On the other side of the equation, the program was not the most equitably constructed and administered, it did funnel money to undeserving recipients, it was riddled with fraudulent recipients, and it did come with an extremely hefty price tag. While important to discuss, all of these drawbacks should not greatly diminish the ultimate successes of the program. The fraud and undeserving recipients are an unfortunate byproduct, but companies in need should not be ignored because some companies might unjustly benefit simultaneously.[183] The price tag, while certainly high, is still justifiable in light of the potential economic damage that could have occurred had it not been spent. Ultimately, while the PPP did come with many drawbacks, these drawbacks do not supersede the positive aspects discussed in the first four steps of this crisis legislation analysis.

As shown above, the PPP meets the requirements necessary to be deemed a success under this evaluation rubric. The goals and objectives used in its creation did make sense in light of the then-current crisis. The nature and scope of the program are directly related to its stated goals and objectives. The PPP was both drafted and enacted in an extremely timely manner and then was modified appropriately as the program itself unfolded. Upon execution, the program worked to help the intended group of recipients. And ultimately, while far from a perfect program, none of the drawbacks from the PPP can conclusively make the case that, as a whole, the program was a failure. With all this in mind, the PPP should be viewed as a successful example of a crisis-time legislative program.

It should also be noted that the PPP was essentially the first time widespread financial relief of this type was provided to small businesses. Before the CARES Act, emergency business aid focused almost exclusively on bailing out large institutions deemed "too big to fail" or

182. *Infra* notes 165–174 and accompanying text.

183. Ultimately the funds awarded to undeserving (and to a lesser extent even fraudulent recipients) can be seen as money injected into the economy, which was one of the key goals of the CARES overall. While it does not directly support the goals of the PPP, such funding should still not be viewed as a complete economic waste.

propping up individual industries facing specific challenges.[184] Even the EIDL program, traditionally geared toward small businesses in a state of emergency, was *only* a loan program until the CARES Act.[185] While severely flawed in its execution, in many ways, the PPP can, and should, be viewed as an initial (although quite expensive) experiment in providing this specific type of aid. Congress should receive high marks for the novelty and ingenuity of the program, and especially for expanding beyond its typical pattern of providing emergency economic funds primarily to large firms and industries.

Additionally, all of this occurred on an extremely truncated timeline, with the entire world essentially in chaos. While the program has been greatly and widely criticized, there is yet to be any real consensus on alternatives given the abovementioned constraints. Perhaps any conclusions regarding the PPP are best summed up by Ilya Beylin's comment that "hindsight does not provide substantially better alternatives [to the PPP]. And that may be the greatest endorsement the program receives and the lesson to be drawn from this traumatic experience."[186]

Rather than remembering the PPP as a readily criticizable failure, it should be celebrated as a success under its constraints. It then should be studied to see how it can be improved. The good that came out of the program should be recognized and collectively built upon to guide future programs. The remainder of this Article delineates the most crucial lessons from this experience and how to utilize the successes and failures of the PPP moving forward.

V. DEVELOPING PLANS FOR FUTURE EMERGENCIES

In the future, it is important to note that, while COVID-19 was the first pandemic of its kind in a century, it will almost certainly not be the last. In fact, without diminishing the significance of the COVID-19 death toll (which, at the time of this writing, exceeded one million lives in the United States alone), it could have been much worse.[187] Top epidemiologists warn that the next pandemic could very likely

184. Jesse Nankin & Krista Kjellman Schmidt, *History of U.S. Gov't Bailout*, PROPUBLICA (Sept. 18, 2008), https://www.propublica.org/article/government-bailouts [https://perma.cc/Z35U-TZUL].

185. Kirsta Swanson et. al., *Pandemic Relief Update: Economic Injury Disaster Loan Program,* FARMDOC DAILY 1, 1–2 (2020).

186. Beylin, *supra* note 19.

187. *Launch of PPP*, *supra* note 17.

Adeel Hassan, *The U.S. surpasses 1 million Covid deaths, the world's highest known total*, N.Y. TIMES (May 19, 2022), https://www.nytimes.com/2022/05/19/us/us-covid-deaths.html [https://perma.cc/68CY-EZV3].

cause an even greater health crisis which, in turn, would prompt an even greater economic crisis.[188]

Additionally, climate change scientists anticipate that the frequency and severity of pandemics will increase.[189] Other climate change-related natural disasters, such as hurricanes, droughts, wildfires, etc., are also on the rise and will likely only continue to be so in frequency and intensity.[190] While pandemics are unique as far as natural disasters go in their scope, regional disasters also significantly impact the national economy. COVID-19 should be seen as a warning of what is and may be to come rather than a singular occurrence. The remainder of this Article outlines how to utilize lessons from the PPP to prepare for future disasters.

A. Preparation for Future Disasters

Just as the survival of small businesses was a critical component of Congress' response to the COVID-19 pandemic, future economic emergencies should also consider the needs of small businesses. Small businesses and solopreneurs make up an increasingly large portion of the workforce. More than ninety-nine percent of all businesses in the United States are classified as "small businesses," and these employ a combined sixty-one million individuals.[191] With the rise of gig worker industries and remote work options allowing more individuals than ever to become entrepreneurs, the necessity to protect small businesses is only likely to increase. A program like the PPP will likely become more, rather than less, necessary in the future. While the PPP represented a first-of-its-kind program for assisting small businesses through an economic crisis, it will certainly not be the last.

With the above in mind, this Article proposes that, before the next economic crisis (whether caused by a pandemic or other event), Congress should prepare a framework that it can readily implement when needed. As outlined above, most of the PPP's major problems were direct results of administrative and structural problems attributable to its truncated passage and implementation process. While the COVID-19 pandemic and its associated economic crisis caught the entire globe unprepared, this need not be the case the next time. If Congress lays

188. Guy Faulconbridge & Stephanie Nebehay, *Next pandemic could be more lethal than COVID, vaccine creator says,* REUTERS (Dec. 6, 2021), https://www.reuters.com/business/healthcare-pharmaceuticals/next-pandemic-could-be-more-lethal-than-covid-oxford-vaccine-creator-says-2021-12-06/ [https://perma.cc/5P8C-6KJU].

189. Colin J. Carlson et al., *Climate change increases cross-species viral transmission risk*, 607 NATURE 555, 555–62 (2022).

190. Vinod Thomas & Ramon Lopez, *Global increase in climate-related disasters*, (]ADB Econ. Working Paper Series No. 466, 2015).

191. *Supra* note 13.

preparatory groundwork now, it will not be left scrambling for solutions the next time the nation faces a similar situation.

While it is impossible to know exactly what the next crisis will entail, it is possible to anticipate general policy provisions which will likely be necessary for an effective response. Unpredictable crisis-specific details aside (such as geographic and industry areas of impact, quantity of aid, timing, etc.), there is still ample room for generic emergency preparedness. The PPP gave us a template to aid small businesses in crisis, but its execution demonstrated multiple flaws worthy of deliberation. Fortunately, many more administrative aspects that hampered the rollout of the PPP were eventually resolved to some extent. With sufficient foresight, its administrative structure can improve even further. Additionally, structural and substantive flaws unearthed by the PPP's execution can also be addressed and remedied. Wholesale changes to the goal and objectives behind such a program are also better considered when not facing an impending crisis.

Although it is not within the scope of this Article to precisely set forth all details of such an economic emergency response program, this Article will begin the process of identifying problems from the original PPP to be remedied moving forward. While certainly not exhaustive, the following section lists key obstacles and how they should be considered and addressed. For simplicity's sake, the future framework described below will be referred to as the Future Response Act for Market Emergencies, or the FRAME. Specifically, this Article lays out the proposed program's goal and objectives, the metric used to determine aid, the criterion for determining eligible recipients, an administrative and procedural framework, and concludes by proposing ways to try and mitigate the racial bias problems associated with the PPP.

B. Clarification of the Program's Primary Goal

First, the FRAME must have clearly stated goals and objectives. While it is easy to broadly state that supporting small businesses is important, such a simplistic view alone does not lend well to good policymaking. As discussed earlier, the PPP had the dual objectives of preventing mass unemployment and mass small business closure and bankruptcy. In our autopsy of the PPP, it is crucial to examine these objectives and their overarching goal and then determine whether they or others should be used in the future.

Even before delving into which goal should be used, it is important to take one step further back and classify the difference between a goal and an objective (and the relationship between the two), as the two terms are commonly interchanged. To borrow from the world of business management, "a goal is an achievable outcome that is generally broad and longer-term while an objective is shorter term and defines measurable actions to achieve an overall goal."[192] In short, FRAME's goals would be the program's overall purpose, while its objectives would be more measurable methods that will work toward achieving the goal.[193]

On its surface, the goal of the PPP seemed to be clear; in reality, things were not nearly so straightforward. One of the major flaws in executing the PPP was its apparent identity crisis. Although the program's overarching goal was to help small businesses, its philosophy for achieving this goal was a bit nebulous. Was the primary purpose to prevent a critical mass of small businesses from being forced into bankruptcy or permanent closure? Was it to try and ease the burden of unemployment? Was it seen as another avenue to inject cash into the economy and was agnostic to the fate of the businesses themselves? If any ten lawmakers who voted in favor of the CARES Act were asked about the primary purpose beyond the stated goal of the PPP, they would very likely respond with ten different answers.

When the PPP was included as part of the CARES Act, lawmakers agreed that getting funds into the bank accounts of small businesses was important. The question of *why* this was important was never entirely clarified. The consensus was that the program would help the economy, but the *how* and the *why* were never fully agreed upon. It is easy enough to brainstorm a long list of reasons why the PPP would be an important and beneficial program. Still, goal setting, in hindsight, typically is certainly not a best practice for lawmaking. There should be a more robust development process than simply saying that an idea "should probably work" and throwing it out there. As the PPP was originally crafted in a chaotic crisis where speed was the utmost priority, its drafters can be excused for not being entirely clear in its goal. Moving forward, Congress should take this time outside crisis mode to establish a well-thought-out goal for the PPP's next iteration.

One important aspect of having a clear goal (and clarity of purpose behind said goal) is that the goal represents the "why" of the program. The objectives should then be a natural extension of the goal. In examining the relationship between the goal and objectives of the PPP, some disconnects within the program become clear.

As stated earlier, the PPP's objectives were twofold: to prevent mass layoffs, ease the burden on unemployment, and help small businesses avoid closure and bankruptcy. As straightforward as these objectives may seem on the surface, upon further analysis, it is not

192. *Goals vs. objectives: A project manager's Breakdown,* ASANA (2021), https://asana.com/resources/goal-vs-objective [https://perma.cc/X4T5-PFMV].

193. To some, this statement of goals and objectives may feel like a pedantic exercise, but given the extent to which this differentiation is ignored in both business planning and lawmaking, its discussion felt necessary.

necessarily clear that they relate directly to the goal of helping small businesses. Without a clear relationship between the goal and the objectives, it becomes difficult to have an effective program.

To illustrate the above, take the objective of preventing mass layoffs. What was the primary purpose behind this objective? Was the underlying concern reducing the burden on the unemployment system? If so, the focus seems to be on unemployment, with any benefit to small businesses only a happy externality. Was it to ensure that individuals and families had an uninterrupted revenue stream during an emergency? If so, the focus again would not be on small businesses, even though small businesses would inevitably benefit from such an objective. Both unburdening unemployment and helping families are admirable aims, to be sure. Still, it seems that either of these focuses could be better achieved through direct assistance to individuals and families rather than using small businesses as intermediaries.[194] Perhaps the most small business-centric reading one can give to this objective is employee turnover is a great burden on all companies. This reading helps small firms avoid the administrative cost and hassle of firing and then hiring a large portion of their workforce in such a short time. Somehow it seems unlikely that this was the thought process behind this objective.

The second objective of helping small businesses to avoid bankruptcy and closure tracks much more closely to help small businesses. If you were to poll small business owners during the pandemic, it seems certain that "not going out of business" would have been at the very top of their business objectives for that time.[195] However, this raises a question about whether simply preventing small businesses from failing during the pandemic is enough. Is simply keeping businesses from closing, irrespective of the firm's health, a valuable objective? To analogize to providing medical care, is the focus simply on the patient not dying, or is it on them returning to and maintaining health? Of course, medical care *should* work to keep patients alive, but if that is the primary focus (rather than achieving good health), then the treatment plan likely will not be as beneficial to the patient as it otherwise could be. If one were to choose between a doctor who said their primary objective was for their patients not to die, and one who said their focus was on healing their patients and returning them to full health, one would likely choose the latter.

194. It is, of course, not to say that a program cannot have intended benefits beyond the primary focus. However, it is important to be clear which benefits are the priority and which are secondary.

195. *See* Madeleine Ngo, *Small Businesses Are Dying by The Thousands - And No One Is Tracking The Carnage*, WASH. POST (2020), https://www.bloomberg.com/news/articles/2020-08-11/small-firms-die-quietly-leaving-thousands-of-failures-uncounted [https://perma.cc/98BB-QW7W] (fifty-eight percent of small business owners are worried that COVID-19 will force them out of business).

Using this comparison, it is not clear that keeping businesses from failing is even a worthy objective. Statistically speaking, according to the U.S. Bureau of Labor, only roughly half of small businesses survive more than five years.[196] More strikingly, twenty percent of small businesses, or one in every five new ventures, close their doors within the first year after incorporation.[197] Especially in their beginning stages, as noted earlier, small businesses are extremely vulnerable to unforeseen economic disturbances. Thus, many of the small businesses the PPP attempted to save were likely not economically viable long-term, and assistance may have been delayed inevitably. This delay is not to say that a goal of helping small businesses is not appropriate, but that simply trying to prevent these businesses from failing during the pandemic (or for one limited stretch during the pandemic) only to have them fail shortly thereafter would not seem to justify the high cost of the PPP.[198] Accordingly, if the government truly has the goal of helping small businesses through a crisis, then its objectives should be focused on the business's overall health and not just failure prevention.

One of the criticisms of the PPP is that it was designed essentially to be just a "shot in the arm" for troubled companies.[199] As the program focused primarily on replacing short-term payroll expenses rather than addressing the long-term needs of the businesses, critics complained that companies were being positioned only to survive for a short period before having to close down despite the aid. The program's focus on short-term payroll expenses fits nicely with the objectives of not overburdening unemployment and preventing businesses from closing but did not necessarily set the companies up for longer-term success. If instead, the focus was placed on boosting the long-term health of small companies, it would be much more like to produce a program built around benefiting small businesses. Accordingly, this Article proposes that the FRAME should expressly adopt a goal of helping small businesses stay financially healthy through an economic crisis. All objectives should then be focused on metrics supporting this goal. As discussed above, simply trying to prevent small businesses from closing is insufficient if the goal is to help the firms. As will be

196. Katherine Gustafson, *The Percentage of Businesses That Fail and How to Boost Your Chances of Success*, LENDINGTREE (2022), https://www.lendingtree.com/business/small/failure-rate/ [https://perma.cc/PQZ8-LQXM].

197. *Id.*

198. One may argue that the purpose was to flatten the curve of business closures, similar to flattening the curve of COVID-19 hospitalizations, but there is little evidence that this was intended purpose.

199. *See, e.g.*, Jacob Owens, *As Pandemic Lingers, PPP Loans Slow To A Trickle,* DEL. BUS. TIMES (2020), https://delawarebusinesstimes.com/news/ppp-trickles-in/ [https://perma.cc/76JT-9SPL] (For many small business owners the PPP was merely a "drop in the bucket").

discussed later, using an assistance metric fully reliant on payroll is not nuanced enough to address the needs of small businesses as a whole.[200]

Economic and societal value is in supporting the overall health and success of small businesses. Small businesses are the lifeblood of the U.S. economy, accounting for forty-four percent of the country's economic activity.[201] Additionally, they are strong drivers of innovation and competitiveness. Small businesses produce more than fourteen times the number of new patents than large businesses and universities combined.[202] Allowing the pandemic to wipe out many small businesses unceremoniously would have significantly interrupted the economy, even if new businesses eventually sprung up to replace those that closed.[203] Innovation and invention undoubtedly would have faced a severe setback as intellectual property development would need to be transferred to a new entity or potentially halted altogether.

Given the well-documented fact that small businesses close at an extremely high rate, critics will point to this as proof of capitalism at work and claim that these businesses were simply unviable.[204] However, as noted earlier, cash flow issues (rather than lack of business viability) cause most small business failures.[205] With the high likelihood that an emergency will artificially result in cash flow issues, it is easy to understand how small businesses are especially vulnerable to such events. Without emergency assistance, many businesses that could otherwise eventually find successful financial footing will, unfortunately, face an early demise. At the very worst, a program that focuses on the health of small businesses will do exactly what the PPP did; reduce the number of business closures during a pandemic, helping to relieve pressure on unemployment and saving some companies from failure. At best, such a program could help a wide swath of small businesses potentially come out on the other side of a crisis even

200. *See infra* section V.C.
201. No. 19-1 ADV, *Small Businesses Generate 44 Percent Of U.S. Economic Activity*, SBA (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/ [https://perma.cc/8E6C-YK9C].
202. U.S. Committee on Small Business & Entrepreneurship, *Innovation and Research* (2022), https://www.sbc.senate.gov/public/index.cfm/innovationresearch [https://perma.cc/4E7D-USMY].
203. Parilla & Liu, *supra* note 171 ("Simply letting businesses fail through no fault of their own would not only cost jobs, but would destroy all the intangible learning and expertise that small business owners have developed in tandem with their employees. This 'firm-specific capital' can be lost very quickly and is very difficult to transfer to another business or rebuild through an additional business. As a result, widespread small business failures could drastically lengthen the time it takes for the labor market to recover.").
204. *Contra*, *see id.* (noting that "COVID-19's small business shock is not creative destruction, but destructive destruction.").
205. *See* Welsh & White, *supra* note 10.

stronger than when they entered it and in a greater position for long-term growth.

An argument against saving small businesses is that even if one small business fails, it is relatively easy for another (often led by the same founders as the company that initially failed) to step in and take its place. However, this argument fails to address the transactional costs associated with the transitional period. Many businesses fail in their early stages because much of their initial capital and labor resources are poured into simply getting the company off the ground.[206] The person-hours initially put into building a business and customer base are duplicated efforts each time a business is replaced. [207] These duplicated efforts are in addition to the real economic costs of laying off and onboarding new employees. Also, two of the greatest indicators of a company's success are its founders' experience and years in operation.[208] Thus, if these small businesses can bridge the temporary crisis caused by an emergency rather than shutting down entirely, it bodes well for their future success.

C. Is Payroll the Appropriate Measurement for Assistance?

After establishing the FRAME's goal of helping small businesses stay financially healthy through a crisis, the next step is to develop an objective that directly relates to this goal.[209] Going back to our definition of an objective, it should provide some measurable action. This Article proposes that the primary objective of the FRAME should be helping small businesses maintain their overall financial health

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206. Nellie Akalp, *Surviving Your First Year As A Small Business Owner*, FORBES (May 11, 2015), https://www.forbes.com/sites/allbusiness/2015/05/11/surviving-first-year-as-small-business-owner/ [https://perma.cc/B7JX-HPYS] (indicating a large portion of businesses do not become profitable until after the first year); Martha Rooks, *How long does it take to turn a profit in small businesses?*, ICSID, https://www.icsid.org/business/how-long-does-it-take-to-turn-a-profit-in-small-businesses/ [https://perma.cc/6SU8-NJ82] (last visited Aug. 23, 2022) ("[F]or the majority of new businesses, it takes 18 to 24 months for them to become profitable.").

207. See Parilla & Liu*,* s*upra* note 171.

208. Second-time founders are close to twice as successful as first-time founders, and third- and fourth-time founders are progressively more successful. *See* Benn Stancil, *Are Experienced Founders Better?*, MODE (Jan. 30, 2014), https://mode.com/blog/are-experienced-founders-better/ [https://perma.cc/J9CJ-F8YY]; *see also*, Georgia McIntyre, *What Percentage of Small Businesses Fail?,* FUNDERA (Nov. 20, 2020), https://www.fundera.com/blog/what-percentage-of-small-businesses-fail [https://perma.cc/U53D-GQTB] (data from the Bureau of Labor Statistics indicates that while twenty percent of businesses close within the first year of operation, and fifty percent close by year five, most business that survive to year five continue to survive past year ten).

209. It is certainly possible, and often advisable, to have multiple objectives, but in this Article, it makes sense to only focus on one.

through a crisis by assisting with operating cost expenses that a business cannot meet as a result of the crisis.

The first step in arriving at the above objective is identifying the appropriate metrics to attach to the amount of aid given to the businesses. One of the PPP's strengths was its straightforward measurement for calculating assistance based on a business' past reported payroll and the direct nature of aid (i.e., direct payments to a Company's bank account). Companies applying for PPP assistance needed only to declare their average monthly payroll expenses from the year 2019 and their total number of employees from the previous calendar year;[210] they then had the flexibility to use the funds to cover payroll expenses in the manner they saw fit.[211] However, one of the major criticisms of the PPP is that this one-size-fits-all approach to assistance did not take into account the vast differences among industries.[212]

For example, many restaurants were hesitant to apply for the PPP. Given the nature of their industry, they were uncertain if their business would be able to meet the program's criteria for loan forgiveness.[213] Under the typical restaurant business model, employees receive hourly pay. Servers often receive the majority of their salary in the form of tips.[214] Due to shelter-in-place restrictions, restaurants were hit particularly hard, especially in the early stages of the pandemic.[215] Even when restrictions lifted, they were often required only to fill their tables to a limited capacity.[216] Under the terms of the PPP, to qualify for loan forgiveness, businesses were required to spend the entirety of their loans within eight weeks of receipt (which later ex-

210. *See* SBA *supra* note 17.

211. *Id.*

212. *See, e.g.*, Megan Cerullo & Stephen Gandel, *Many Small Businesses Say Paycheck Protection Program Is Deeply Flawed*, CBS NEWS: MONEYWATCH (Apr. 15, 2020), https://www.cbsnews.com/news/paycheck-protection-program-small-businesses-flawed/ [https://perma.cc/H8SN-LDA3].

213. Jenny Splitter, *Restaurants Say Paycheck Protection Program Has Restrictions That Make The Funding Untouchable*, FORBES (Apr. 16, 2020), https://www.forbes.com/sites/jennysplitter/2020/04/16/restaurants-say-paycheck-protection-program-has-restrictions-that-make-the-funding-untouchable/ [https://perma.cc/W8HD-8FAH].

214. Lorri Mealey, *Who gets paid minimum wage in a restaurant?*, THE BALANCE SMALL BUS. (Sept. 2, 2019), https://www.thebalancesmb.com/who-gets-restaurant-minimum-wage-4134314 [https://perma.cc/FH8C-CFHC].

215. *See* Kennedy, *supra* note 5.

216. Colman Andrews, *Mask mandates, limited capacity: These are each state's reopening restaurant restrictions,* USA TODAY (Jan. 2, 2021), https://www.usatoday.com/story/money/2021/01/02/restaurant-reopening-restrictions-in-every-state/43303369/ [https://perma.cc/L7DD-R3KB] (As of January 1, 2021, more than half of states had restrictions in place restricting restaurants to only use fifty percent or lower of their capacity for indoor dining).

panded to twenty-four weeks).[217] The burdens of the restaurant model, combined with the spending requirements of the loan, made many restaurants fearful of applying for the loans in the first place, as they were not confident about their ability to meet the forgiveness requirements.[218] If they were not open for business, their employees would not be working the hours needed to earn a paycheck. If employees could not earn a paycheck, how could the restaurants appropriately spend the funds to qualify for loan forgiveness?

Additionally, with little to no foot traffic, restaurant employees who could work received only a fraction of their usual tips. As a reflection of the low wages typically paid in the industry, many workers opted not to return to work as they could receive a comparable, if not better, salary through boosted unemployment programs.[219] As businesses were required to maintain a certain number of employees to obtain PPP loan forgiveness, this further lowered the program's usefulness.

Additionally, restaurants that stayed open often reinvented their services to include home delivery and curbside pickup. These models often reduced the number of employees needed at any given time without a drop-off in non-payroll costs. These measures presented an awkward situation for restaurants attempting to meet forgiveness standards; they needed to spend a certain amount on payroll costs, but payroll was suddenly a comparatively smaller portion of their operating expenses. The inflexibility of the PPP's forgiveness requirements forced business owners to take measures to qualify for forgiveness that may not have been the best use of funds to maintain the business's health.

This counterintuitive behavior highlights one of the major problems with the design of the PPP: using payroll as the baseline measurement for business assistance is fine for some companies, but payroll is only one regular business expense among many. Evidence gathered after the initial stages of the pandemic suggests that firms which had a difficult time making payroll payments were equally una-

217. CARES Act, *supra* note 16, at sec. 1106, 134 Stat. 281, 297–301; Paycheck Protection Program Flexibility Act of 2020, Pub, L. 116-142, 134 Stat. 641.

218. Small Business Majority, *Small Business Owners Worried About PPP Loan Forgiveness,* SMALL BUS. MAJORITY (2020) https://smallbusinessmajority.org/sites/default/files/research-reports/Survey-Small-business-owners-worried-about-PPP-loan-forgiveness.pdf [https://perma.cc/6LE7-9DGJ] (Nearly one-third of businesses who did not apply for PPP did not do so out of forgiveness concerns); *see also* Splitter, *supra* note 213; David Autor et al., *An evaluation of the Paycheck Protection Program Using Administrative Payroll Microdata*, 211 J. PUB. ECON. 104664 (2022).

219. Ian Kullgren, *Restaurants' Bailout Problem: Unemployment Pays More,* POLITICO (Apr. 20, 2020), https://www.politico.com/news/2020/04/20/restaurant-bailout-unemployment-coronavirus-197326 [https://perma.cc/T6Y9-3PVS].

ble to make other monthly expenses, such as rent and loan payments.[220] These shortfalls indicate that if the program's goal was truly to bolster the health of small businesses, such a strong emphasis on payroll expenses was likely not the best course to take.[221] A program designed to aid small businesses through an economic crisis must be able to account, at least in part, for all of a business's expenses and not just payroll costs.

Furthermore, not all companies and industries are created equal. By its very design, companies with more labor-intensive business models could apply for a comparatively higher amount of aid than firms with fewer employees.[222] This differentiation might make sense if revenue loss due to the pandemic directly resulted from the number of individuals employed. Realistically, however, there is no reason to believe such a direct correlation exists. As a result, the focus on payroll disproportionately assisted one group of companies over others. This focus would make sense if the program's primary goal was assisting employees. But if the primary goal was boosting the health of small businesses generally, then such differentiation does not make sense.

If, as suggested, the FRAME focuses on the long-term health of small companies rather than just on payroll, then a metric needs to be identified to more accurately target individual businesses' needs. Instead of focusing solely on payroll expenses, the FRAME should use a calculation based on total business operating costs. Operating costs are "the ongoing expenses incurred from the normal day-to-day of running a business."[223] These costs include, in addition to payroll, such expenses as costs of goods sold, rent, equipment, inventory costs, marketing, insurance, and funds allocated for research and development. An emergency interruption of normal business procedures can impact the ability of a company to pay any of these above expenses.

As previously discussed, small businesses often operate on a slim revenue margin. This tight margin for error, coupled with the aforementioned factors that make up a company's operating costs, helps explain why uninterrupted cash flow is crucial for healthy small business operations. Any unexpected event can lead to operating shortfalls, resulting in the small company constantly playing catch-up. If such an issue goes unaddressed, it can quickly lead to defaulting on accounts required for uninterrupted business performance. Once

220. Hubbard, Glenn and Michael R. Strain, *Has the Paycheck Protection Program Succeeded?*, BROOKINGS PAPERS ON ECON. ACTIVITY, 335 (2020).
221. *Id.*
222. *See generally*, David Autor et al., *The $800 billion paycheck protection program: Where did the money go and why did it go there?*, 36 J. ECON. PERSPS., 55 (2022).
223. Chris B. Murphy, *What Are Operating Costs?*, INVESTOPEDIA (Mar. 17, 2022), https://www.investopedia.com/terms/o/operating-cost.asp [https://perma.cc/6RQ8-9XUX].

the scales start to tip in this direction, the financial distress suffered by a small business can compound itself, leading to eventual failure.

By focusing on total business revenue rather than simply on payroll expenses, the FRAME can better help businesses to maintain an uninterrupted, healthy balance sheet in addition to uninterrupted payment of employees. In the long run, this will also be more beneficial to the employees, reducing the chance that they must take a pay cut or lose their job after the assistance ends. Accordingly, this Article proposes that, in developing the FRAME, Congress specify that assistance distribution follows a multiplier appropriate to the emergency at hand to assist with total operating costs rather than simply one small portion, such as payroll, whose importance varies from firm to firm.

A natural criticism of this approach is that it will result in a heftier price tag than the just-shy-of-$1 trillion that congress ended up appropriating for the PPP. If the government is already willing to allocate such an astronomical amount of aid to assist small businesses, it should be willing to implement a program that works and works well. Certainly, cost should be a consideration, but the focus, first and foremost, should be on effectiveness. If an operating costs approach is more appropriate for promoting long-term business health than a payroll approach, this is the measurement that should be used.

Additionally, the very nature of the COVID-19 pandemic led to the universality of aid distribution. The pandemic simultaneously struck every single business in the United States at the same time, with an indeterminate end date. Some predictions had the economy opening up after a brief hiatus to "flatten the curve," while others provided doomsday scenarios of long-term shuttered businesses.[224] As is often the case, the truth ended up somewhere in the middle. Congress regularly renewed funds for the PPP for nearly a year, resulting in its final price tag of nearly three times its initial cost. While it is certainly possible that future crises will need this same sort of long-term, universal approach, it is more likely that emergencies will be more like more traditional natural disasters: regionalized and of a shorter duration.

224. Aria Bendix, *Trump's 15-Day plan to slow the coronavirus' spread is too short, experts say. Flattening the curve could take at least several more weeks*, BUS. INSIDER (Mar. 24, 2020), https://www.businessinsider.com/coronavirus-white-house-15-day-plan-too-short-2020-3 [https://perma.cc/K8P3-7WTT]; Kara Gavin, *Flattening the Curve for COVID-19: What Does It Mean and How Can You Help?*, MICH. HEALTH (Mar. 11, 2020), https://healthblog.uofmhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help [https://perma.cc/JF22-UMZD]; Harry Stevens, *These Simulations Show How To Flatten The Coronavirus Growth Curve*, WASH. POST (Mar. 14, 2020), https://www.washingtonpost.com/graphics/2020/world/corona-simulator/ [https://perma.cc/P78K-GKC3]; Patricia Cohen & Jim Tankersley, *America's Economy Begins to Shut Down as Pandemic Measures Take Hold,* N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/business/economy/coronavirus-us-economy-shutdown.html [https://perma.cc/2YHJ-KRXP].

In such cases, the eventual price tag will likely be large but much more palatable than the PPP.

D. Aid Recipients Need to Be Clarified

After establishing the appropriate goal and objective(s) for the FRAME, the third factor for consideration is the intended eligible recipients. As noted, for a time, every business in the United States qualified for PPP loans. While many of these businesses genuinely needed the funds, a large portion almost certainly did not or could have received assistance through a different channel. Accordingly, the FRAME must clarify the scope of future program eligibility. This section examines the failings of the PPP and advocates for a narrower, need-driven approach moving forward.

The success or failure of a government program is often determined not by statistical measurements but by how it fares in the court of public opinion. This popularity contest has most definitely been the case with the PPP. Regardless of how much the program may have assisted people and businesses, the overarching public perception of the program is still negative. Perhaps nothing led more to the PPP's negative perception than the aforementioned (and extremely well publicized) instances of undeserving entities' receipt of funds.[225] As discussed above, publicly traded companies and companies with close ties to politicians, churches, anti-vax organizations, etc., all received PPP funds. Without arguing here the specific merits of these loans, the general reactions to their reception of funds were extremely negative.[226] Many felt that these types of organizations were not the intended recipients of these loans and were, in essence, diverting funds away from intended benefactors.[227]

To create a better program moving forward, it is important to understand what gave rise to this misstep in the first place. As stated above, time was of the essence when the CARES Act was passed. Rather than craft perfect language that balanced the need for easy access to funds for small businesses in need against excluding those who did not need it, Congress cast as broad a net as possible in defin-

225. This is specifically referring to those who were qualified to receive funds, but whose receipt was seen as against the spirit of the program. This does not refer here to fraudulent recipients, although certainly they were even more undeserving of receiving assistance, and have also been extremely widely reported on.

226. *See, e.g.*, Jeanna Smialek, Jim Tankersley & Luke Broadwater, *Lobbyists, Law Firms and Trade Groups Took Small-Business Loans*, N.Y. TIMES (July 7, 2020), https://www.nytimes.com/2020/07/06/us/ppp-small-business-loans.html [https://perma.cc/76DC-N38N].

227. *See, e.g.*, Emma Coleman Jordan & Jamillah Bowman Williams, *Op-Ed: Surprise, surprise. Big bank racism is corrupting PPP loans*, L.A. TIMES (July 17, 2020), https://www.latimes.com/opinion/story/2020-07-17/banks-pandemic-small-business-racism [https://perma.cc/F38S-YYAF].

ing qualified recipients. Hence, the language of the legislation broadly made the funding available for all businesses which could claim they were negatively impacted by COVID-19.[228]

With time now for reflection, it is possible to draft a better bar for receiving aid than was used by the PPP. In analyzing alternative benchmarks for loan eligibility, it is important to first examine what qualifies as a small business. The SBA has industry-specific definitions for small businesses based on the number of employees or average annual receipts.[229] The qualifying number of employees can range from 100 to over 1500; the average annual receipt limits for qualification can range from under $1 million to $40 million.[230] The SBA has hundreds of categories and subcategories of business industries, each with its threshold for classification.[231]

As discussed, the CARES Act used the SBA definition of a small business as its baseline for PPP eligibility, but it broadened the scope even further. For the PPP, Congress expanded eligibility beyond the traditional SBA definition of small businesses to include any firm with 500 or fewer employees.[232] Thus, businesses that would otherwise not have been eligible to apply for PPP loans qualified under this expanded definition. Additionally, independent contractors and sole proprietors were also all eligible to apply.[233]

The legislative language waived other typically disqualifying factors for small business status. Specifically, the statute stated that "any business concern that employs not more than 500 employees per physical location . . . shall be eligible to receive a covered loan."[234] Such businesses could qualify for aid and employ well over 500 employees in total, so long as no more than 500 worked in any single place of employment. Additionally, Congress waived its affiliation rules, meaning that many subsidiaries, franchisees, and other companies receiving financial assistance from larger firms would also be potentially considered eligible recipients for PPP loans.[235] As mentioned earlier, while the SBA did make an initial attempt to claw back at

228. *The Huge and Hasty PPP Was Destined to Make Dubious Loans. Now Congress Must Fix It*, WASH. POST (July 8, 2020), https://www.washingtonpost.com/opinions/the-huge-and-hasty-ppp-was-destined-to-make-dubious-loans-now-congress-must-fix-it/2020/07/08/25a154e6-c07e-11ea-b4f6-cb39cd8940fb_story.html [https://perma.cc/P4Z5-N9TC].
229. 13 C.F.R. § 121.102.
230. 13 C.F.R. § 121.201.
231. *Id*.
232. 13 C.F.R. § 121.301; Express Loan Programs; Affiliation Standards-Rescission, 85 FR 80581 (Dec. 14, 2020) (codified at 13 C.F.R. pt.121) (describing the recission of the SBA's rule following its supersession by the CARES Act).
233. Note that there were additional problems with how independent contractors were treated, but that falls outside of the scope of this Article.
234. CARES Act, *supra* note 16, at sec. 1102, 134 Stat. 281, 286–94.
235. *Id*.

Congress' seeming generosity a bit, it was too little too late to stem the massive tide of applicants.[236]

The addition of the locational qualifier and the waiver of the typical affiliate rules opened the proverbial floodgates to eligible recipients. Suddenly, each hotel location, restaurant, box store, etc. (so long as they employed 500 or fewer employees on site) was potentially eligible for assistance. With thousands of McDonald's, Subway, and Dunkin' Donut locations applying for aid and thousands of Ford and General Motors dealerships, it is easy to see how the number of "small businesses" quickly apply for relief bled dry the initial fund allotments.[237] More than 75,000 franchises collectively applied for and received an excess of $15 billion of the initial fund package.[238]

In short, the PPP took the SBA's standard definition of what qualifies as a small business and expanded upon it. Even under the SBA's standard definition, over ninety-nine percent of all businesses are considered small. The PPP's expanded definition only increased the number of qualifying businesses.[239] The result was that essentially all businesses were eligible to apply for PPP loans. The only limiting factor for most companies applying for these loans was whether they could claim, in good faith, that the "current economic uncertainty makes this loan request necessary to support the ongoing operations of the [company]."[240]

This approach made sense in the early days of the pandemic. Given the Armageddon-like economic predictions that were common when the CARES Act was drafted, Congress attempted to build aid opportunities for everyone who might need it. There was a brief window at the beginning of the pandemic when the national attitude unified around a desire to do whatever it took to keep individuals and businesses afloat through whatever challenges were ahead.[241] Additionally, in the memory of governmental failures to provide appropriate assistance in such relatively recent emergencies as Hurricane Katrina and the looming presidential election, all sides of the political aisle were motivated to err on the side of being overly generous than being ac-

236. First PPP Interim Final Rule, *supra* note 87.

237. Jonathan O'Connell & Andrew Van Dam, *McDonald's, Subway and Other Franchises Got $15.6 Billion In Small-Business Funds*, WASH. POST (Jan. 28, 2021), https://www.washingtonpost.com/business/2021/01/28/ppp-loans-mcdonalds-subway-franchises/ [https://perma.cc/4RBW-SAR4].

238. *Id.*

239. Murphy, *supra* note 223.

240. CARES Act, *supra* note 16, at sec. 1102(a)(2), § 7(a)(36)(G)(i)(I), 134 Stat. 281, 291 (2020).

241. *See, e.g.*, Cary Funk, *Polling Shows Signs of Public Trust in Institutions amid the Pandemic*, SCI. AM. BLOG NETWORK (Apr. 2, 2020), https://blogs.scientificamerican.com/observations/polling-shows-signs-of-public-trust-in-institutions-amid-the-pandemic/ [https://perma.cc/6LLN-X6XG].

cused of inaction. This caution and the need for speed in passing the legislation led to the CARES Act's broad strokes approach.

While this generous approach to fund eligibility might have made sense at the outset, it also led to some of the greatest criticisms of the CARES Act later on. With the benefit of hindsight, it is relatively easy to identify which types of institutions should not have been eligible for PPP loans. Media articles have certainly vilified both the PPP and perceived undeserving loan recipients (and, in many cases, rightly so) for receiving funds.[242] However, under the statute's language, these businesses did qualify for the loans except in genuine fraud cases.

Especially during a crisis, it is difficult to assign too much blame to institutions that were doing what everyone else was doing at the time by applying for the assistance available to them.[243] Company legal and financial advisors directed firms to apply for all available aid programs and let the lending institutions be the gatekeepers. What seems clear in hindsight is not that the companies were necessarily at fault for applying for PPP loans but that the program itself was overly inclusive in its language and the attempts at correction by the SBA were too little too late. For the FRAME, Congress must be much more thoughtful and selective about designating eligible recipients.

In developing criteria for eligible FRAME recipients, the greatest challenge will be finding the correct Goldilocks approach of keeping the requirements broad enough to encompass all intended recipient companies needing assistance while narrowing the qualifications sufficiently to exclude unintended recipients. Additionally, there needs to be some way to at least try and distinguish those companies with genuine need instead of those simply being opportunistic.

In trying to find the right approach, this Article first proposes excluding companies that would likely qualify for emergency assistance through other avenues. Many companies have long-standing relationships with deep-pocketed affiliates or through existing relationships with lenders. These existing relationships should be the initial source of emergency assistance rather than through an emergency governmental assistance program specifically set up for more needy firms.

Along these lines, as mentioned above, the PPP waived its affiliate relationship rule for loan qualification purposes. Typically, a company with strong affiliate ties with large companies would not be eligible for SBA assistance aimed at small companies. In the FRAME, the stan-

242. *See, e.g.*, Brandon Ballenger, *Rich and Famous People Who Had PPP Loans Forgiven*, MSN (Aug. 22, 2022), https://www.msn.com/en-us/money/smallbusiness/rich-and-famous-people-who-had-ppp-loans-forgiven/ss-AA10VC3B?li=BBnb7Kz [https://perma.cc/75BP-TLMM].

243. Joo & Wheeler, *supra* note 155 (arguing that large corporations which took PPP loans and were later criticized for doing so were not at fault, but that the blame lies with Congress for a carelessly designed program).

dard affiliate relationship rules should apply. Additionally, the FRAME should count each geographic location of a business as part of the singular entity for aid purposes, per the SBA's standard practice. These two adjustments from the PPP alone will disqualify a large portion of the businesses under public scrutiny.

This change would exclude thousands of franchises that received PPP funds and the subsidiaries of larger companies, including publicly traded companies. This is not to say that such institutions do not deserve assistance, but rather that such aid would best come from avenues other than a program designed to assist small businesses. Franchisors have a vested interest in the health of their franchisees. Larger companies which, but for being spread over multiple locations, would never even remotely be considered small businesses, should not be treated as small businesses for a program such as this.[244]

Limiting the program to traditional small businesses will greatly reduce its price tag, narrow it to its targeted recipients, and prevent companies from jumping the line. As has been thoroughly discussed herein, one of the major initial flaws of the PPP is that less-deserving institutions were able to receive loans ahead of needier companies. By applying the above changes to the PPP's procedure, the FRAME would automatically exclude a large portion of firms who received loans in the initial traunch of funds instead of directing the funds to genuine small companies. This reduction of the breadth of the program should allow for greater depth in providing assistance that is more targeted at the long-term needs of the businesses.

Beyond simply pulling back the expanded definition of small businesses, the FRAME should take an additional step to further limit the eligible pool of recipients. The simplest way would be to add geographic and industry-specific qualifiers that Congress can appropriately insert per the specific crisis. While it is certainly possible that future emergencies will require as universal a response as did COVID-19, it is much more likely that a more targeted approach will be effective. Not all industries were impacted equally by COVID- 19. While businesses that relied heavily on in-person patronage and heavy foot traffic suffered, other industries, such as e-commerce and software development, were much less likely to be as adversely impacted. With the lessons learned from this pandemic, the SBA should create guidelines for the most likely impacted industries during future crises. When a crisis does hit, these administrative guidelines, coupled with real-time assessments of the actual situation, can aid in creating more targeted assistance programs rather than the blanket free-for-all that the PPP presented.

244. It may be possible for these disqualified businesses to plead for aid on a case-by-case basis, but the default should be their exclusion as to more effectively funnel aid elsewhere.

E. Administrative and Procedural Clarity

Additionally, and perhaps the most obvious of recommendations, the FRAME must resolve the many administrative and procedural shortfalls of the PPP. As has been noted, the administrative struggles of the PPP were largely due to a relatively small government agency attempting to administer a brand-new, massive loan program in a matter of weeks. The world had essentially turned upside down. As abbreviated implementation timeframes often lead to similar administrative fumbling in crisis legislation, this is perhaps the area where some forethought can benefit the FRAME over the PPP the most. Congress and the SBA must ensure that the rollout of such an assistance program in the next emergency is much smoother.

Unsurprisingly, of the many problems that plagued the original PPP, arguably none was more troublesome than the lack of clarity around key procedural details. As discussed above, the framework for the PPP in the CARES Act was more akin to a general outline, such as that which one might see in a term sheet, rather than a fully formed and operable law. Even recognizing that congressionally appointed programs such as the PPP are frequently delegated to administrative bodies, the original PPP legislation was not nearly robust enough for smooth implementation. Especially in the program's early days, without the luxury of ample preparatory time, the SBA (along with participating lending institutions and companies) was continually playing catch-up.

As the administrative struggles in rolling out the PPP have been well documented elsewhere in this Article, it is not worth repeating them here. In short, it is not hyperbole to say that the initial rollout of the PPP was a disaster. Commentators and journalists at the time referred to the program as "[a] disaster. Fiasco. Debacle," "just a mess," and declared that the rollout of the program was "utter chaos."[245] The SBA could not create a cohesive administrative plan in time to ensure an organized process. Banks could not implement the guidance that the SBA did provide fast enough to meet customer demand. Businesses were often left unable to find a lending institution that would even agree to process their applications. Lawyers and financial advisors scrambled to provide timely and adequate advice to their clients. Given the tight timeframe, everyone was working under. The "utter chaos" simply may not have been avoidable. However, there is no reason why such a nightmare of disorganization bears repeating in the future.

245. Rhonda Abrams, *PPP Loan Plan a Mess so Far for Small Businesses Riding Out Coronavirus Crisis*, USA TODAY (Apr. 7, 2020), https://www.usatoday.com/story/money/usaandmain/2020/04/07/ppp-loan-plan-rollout-disaster-small-businesses/2963901001/ [https://perma.cc/63YZ-NTS7]; Jeakle, *supra* note 54; Dubb, *supra* note 38.

One of the key benefits of establishing a legislative framework ahead of the next widespread economic disaster is that many primary administrative hiccups and logjams can be addressed and prepared for ahead of time. To its credit, the SBA was able to eventually iron out many of the details that could have made the program much more effective from the beginning. However, in the time it took to do so, the PPP suffered extremely severe reputational damage. More importantly, this confusion delayed millions of small businesses from receiving much-needed funds. As outlined above, cash-flow-sensitive small businesses were pushed to the back of the line, while larger, well-connected, and better-funded companies took the first (and often largest) bites from the apple.

The FRAME can address many administrative headaches that bogged down the early stages of the PPP. This proposal will primarily entail nothing more complicated than tasking the SBA with putting administrative systems in place so they can be quickly activated when needed. The SBA's experience running the PPP and its long history of working with small businesses make it the most natural agency to administer the FRAME. Assigning an SBA task force to develop the details of this process now and developing standard guidelines, training, and handbooks that come into force at the appropriate time can ensure a much smoother process next time a PPP-like program is needed.

Of particular importance in developing an administrative framework is clarity surrounding the loan forgiveness process and requirements. It makes sense to follow in the footsteps of the PPP by providing aid in the form of an obligation-based forgivable loan, as the forgivable nature of the loans was the most attractive feature of the program. Companies were much more comfortable and willing to apply for PPP loans when they were confident they would likely qualify for forgiveness. By contrast, more traditional loan-based small business assistance programs, such as the EIDL, are typically not forgivable.

The administrative process for the FRAME should make all elements surrounding loan forgiveness as clear as possible. This procedure will help encourage loan applications from businesses that would otherwise be wary of taking on debt. To further incentivize applications from targeted companies, instead of framing the aid as a forgivable loan, there should be a revokable presumption of forgiveness with associated criteria. Debt-sensitive companies could greatly benefit from emergency assistance by creating a presumption rather than just the possibility of loan forgiveness. In addition, the FRAME needs to ensure upfront clarity as to what steps are required to ensure that forgiveness is not revoked.

Additionally, a clear administrative framework could help to reduce the fraud that plagued the PPP.[246] While it is likely impossible to eliminate fraud in a program such as this, relatively simple safeguards should be implemented to deter bad actors. Even such actions as clearly articulated punishments for fraudulent applicants, guidelines to lending institutions as to minimum levels of verification of identity needed before issuing loans, or a slightly more robust application process requiring more supporting documents could have deterred many of the fraudulent applicants. The downside to such safeguards is that every additional hoop will likely deter some legitimate applicants, but continuing to accept the level of fraud as was present in the PPP is simply untenable.

It is certainly not within the scope of this Article to enumerate all of the nuances that would need to be built into such a guideline to make future implementation both quick and effective. Any administrative framework will certainly need to address many more logistical and structural questions than those listed herein. Some additional points which will also need to be considered include the timing of the loans and what is required to demonstrate genuine economic need. Those items listed above are some of the most critical points which should be considered in preparing for future crises.

F. Racial Bias Needs to be Addressed

Finally, it is also extremely important that the FRAME address the racial inequality which sullied the PPP. Unfortunately, racial bias in the United States banking and financial systems is more than a feature of this singular program; it runs much deeper and is much longer-lasting. It is far beyond this Article's scope (and the author's abilities) to attempt to resolve this issue satisfactorily. However, the issues highlighted by the PPP inform several policy recommendations to mitigate the specific racial bias problems identified.

As outlined earlier, the PPP's most explicit instance of racial bias occurred during the loan approval process. To reiterate, PPP loans for white-owned businesses were approved much higher than those for Black-owned businesses.[247] Unsurprisingly, this phenomenon was particularly evident in counties where racial prejudice generally was greater.[248]

246. *See supra* notes 110–117 and accompanying text.
247. See *supra* notes 99–110 and accompanying text.
248. *See, e.g.*, Jeffrey Wang & David Hao Zhang, *The Cost of Banking Deserts: Racial Disparities in Access to PPP Lenders and Their Equilibrium Implications* (Harvard Univ., Working Paper, 2021) https://davidzhang.scholar.harvard.edu/files/dhz/files/geographyppp.pdf [https://perma.cc/N3BT-P2L5] (there is a 1.3% lower take-up rate of PPP loans in ZIP codes with a 10% higher Black population).

Breaking the problem down even further, smaller banks that required a more personal loan approval process were far more likely to reject applications for Black-owned businesses than larger banks and FinTech companies, which employ more automated and more racially neutral evaluation processes.[249] With this data in hand, it is possible to craft solutions to better ensure that eligible Black-owned businesses can receive appropriate aid.

For starters, the FRAME should develop a method for outing particularly egregious offenders. Banks participating in the FRAME should be required to report demographic data relating to applicant acceptance rates and, where available, a race and ethnicity breakdown of those companies.[250] Banks should be flagged for further review where the rejection rate of applications from Black and Latinx-owned businesses appears unduly high. If upon further review, these banks did (or likely did) participate in racial discrimination in the loan approval process, then the status of the offending banks as SBA-approved lenders should either be suspended or outright revoked.

Beyond punishing the offending institutions, the FRAME should also attempt to make non-discriminating loan opportunities available to Black-owned businesses. One possible solution would maintain a list on an SBA webpage with links to lending institutions that have proven to be Black and Latinx-friendly. Providing such a resource will certainly not come close to eliminating the problems, but it can at least work to provide access to institutions with a positive track record.[251]

VI. CONCLUSION

In startups, founding a company is often compared to jumping from an airplane and building another airplane in freefall. With the PPP, it most certainly felt like Congress shoved the program out of the proverbial airplane and let the administrators of the program attempt

249. *See* Howell, *supra* note 103, at 5 ("Black-owned businesses were much more likely to obtain their PPP loan from a non-relationship FinTech lender, and much less likely to obtain it from a non-relationship small bank)".

250. Evans, *supra* note 110, at 121 ("Business owners were not required to provide data related to race and ethnicity, and 75 percent of applicants elected not to include this information").

251. The relationship between race and business funding is an extremely complex subject with an extremely long history. For further readings on this subject and suggestions on what needs to be done to improve suggested readings include: San Francisco Office of Financial Empowerment & California Reinvestment Commission, PRE-EXISTING CONDITIONS: ASSESSING THE FINANCIAL SERVICES RESPONSE TO RACISM, INEQUALITY, AND COVID-19 (Aug. 2020) (providing analysis of economic results of COVID-19 and policy suggestions through a BIPOC lens); Mynor Lopez, Washington Investment Trust: A Public Complement to Private Banking, 20 SEATTLE J. FOR SOC. JUST. 539 (2022) (discussing policy change to support minority-owned businesses in times of peace as well as crisis).

to put the pieces of the program together as they were falling. The results were predictably messy and error-prone. However, if an analysis of the PPP ends with acknowledging its flaws, then it misses understanding the greater context in which the program was passed and implemented.

Instead, the PPP is best viewed in light of the chaotic and scary time it was drafted. In a matter of weeks, a brand-new type of crisis legislation geared toward assisting small businesses was drafted, debated, ratified, and implemented. If Congress had more time to carefully debate and craft the language of the PPP, they could have come up with a better program. That better version could have avoided the headaches and drama that plagued the version in our reality. However, given that Congress does not have a stellar reputation for passing any legislation when they have sufficient time to debate, research, and draft, it is quite possible that the program only passed at all because of, and not despite, political expediency.

Moving forward, it is imperative not to ignore the problems associated with the PPP but to instead study the missteps and learn how future programs can learn from its mistakes. As small firms represent a large and often overlooked portion of the workforce and the economy, any preparations for the increase of natural disasters that climate change is likely to instigate should include assistance to this sector. Congress should take the lessons from the PPP and create a readily-used permanent framework to aid small businesses in the future.