IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
(Southern Division)

DV DIAMOND CLUB OF FLINT, LLC, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 4:20-cv-10899-MFL-DRG
U.S. SMALL BUSINESS ADMINISTRATION, *et al.*,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' RENEWED EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Dated: April 24, 2020

JOSEPH H. HUNT
Assistant Attorney General

DAVID M. MORRELL
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director

ERIC WOMACK
Assistant Director

JAMES J. GILLIGAN
Special Litigation Counsel

INDRANEEL SUR
Trial Attorney

Federal Programs Branch,
Civil Division
United States Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-3358
E-mail: james.gilligan@usdoj.gov

Counsel for Defendants

COUNTERSTATEMENT OF ISSUES PRESENTED

After the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), appropriated to the United States Small Business Administration ("SBA") funds to provide guarantees through the Payroll Protection Program ("PPP") on private loans to small businesses harmed by the COVID-19 crisis, the SBA has adhered to its pre-existing regulation on the ineligibility of certain business types for business loans under 13 C.F.R. § 120.110(p), which makes businesses engaged in selling products or services, or presenting depictions or live performances, of a "prurient sexual nature" ineligible for agency-backed loans. Plaintiffs allege they were denied loans because of SBA's application of Section 120.110(p), and moved for a temporary restraining order and a preliminary injunction. The issues presented are:

(1) Whether Plaintiffs lack probability of success on the merits on their claims that application of Section 120.110(p) is unlawful (a) as a content-based restriction on speech; (b) as a departure from the obscenity test; (c) as an imposition of an unconstitutional condition; (d) as an imposition of a prior restraint; (e) as impermissibly vague; (f) under the Equal Protection and Due Process Clauses; and (g) because it is not authorized by the CARES Act; and (h) where, in any event, a preliminary injunction is unavailable under the Small Business Act, 15 U.S.C. § 634(b)(1);

(2) Whether Plaintiffs lack evidence of their alleged irreparable harm;

(3) Whether a preliminary injunction against SBA would be contrary to the public interest; and

(4) Whether, if a preliminary injunction issues, Plaintiffs should be required to post a bond sufficient to compensate SBA for losses in its administration of PPP loans if the injunction is held on appeal to have been improvidently granted.

MOST APPROPRIATE AUTHORITY

Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983)

Rust v. Sullivan, 500 U.S. 173 (1991)

Nat'l Endowment for the Arts v. Finley, 524 U.S.569 (1998)

United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (plurality)

TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

PAGE(S)

PAGE(S)

PAGE(S)

PAGE(S)

STATUTES

ADMINISTRATIVE AND EXECUTIVE MATERIALS

PAGE(S)

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' case rests entirely on the notion that the Government is constitutionally obligated to subsidize their speech. They couldn't be more wrong. As the Supreme Court held in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), and has repeatedly reaffirmed ever since, the Government is not required to remove obstacles in the path of a person's exercise of free speech that are not of the Government's own creation. Therefore, as also held in *Regan*, the First Amendment does not compel the Government to subsidize speech of any kind, on any topic, that the Government does not wish to promote. These are the principles that control this case, and they require that Plaintiffs' motion for a preliminary injunction be denied, just as the District Court for the District of Columbia denied a similar motion, by political consultants and lobbyists, only days ago. *See Am. Ass'n of Political Consultants v. SBA* ("*AAPC*"), 2020 WL 1935525 (D.D.C. Apr. 21, 2020) (denying motion for TRO and preliminary injunction).

Plaintiffs are establishments engaged in the business of presenting "female performance dance entertainment" that at times is "topless." They challenge the constitutionality of a regulation, issued by the Small Business Administration ("SBA") almost 25 years ago, 13 C.F.R. § 120.110(p), providing that businesses engaged in selling products or services, or presenting depictions or live performances, of a "prurient sexual nature" (as well as 17 other types of businesses

designated under the rule) are ineligible for SBA general business loans. The SBA adopted this rule in furtherance of its statutory mandate to consider the public interest when directing its limited resources, without abridging the freedom of such establishments to use their own funds to operate their businesses and express their views. Plaintiffs nevertheless contend that application of this longstanding rule to deny businesses of a prurient sexual nature access to economic relief under the Paycheck Protection Program ("PPP") of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act infringes upon their First and Fifth Amendment rights. Plaintiffs seek preliminary injunctive relief prohibiting the SBA from applying section 120.110(p) to deny them PPP loans.

Plaintiffs' motion should be denied. First, none of their constitutional claims is likely to succeed on the merits. Section 120.110(p) is not, as Plaintiffs maintain, a content-based prohibition of speech. As the Supreme Court has explained, government does not ban, penalize or otherwise infringe on speech simply by deciding not to fund it, and is entitled to make content-based judgments about the speech it will and will not fund so long (as is the case here) it does not engage in invidious viewpoint discrimination, or attempt to suppress the expression of particular ideas. Nor does section 120.110(p) violate the doctrine of unconstitutional conditions, constitutional standards concerning obscenity, the rule against prior restraints, or the vagueness doctrine, because it merely prohibits the use of SBA

loans to fund private speech that the Government does not wish to subsidize, while leaving businesses of a prurient sexual nature entirely free to use their own financial resources to engage in any speech they wish. Section 120.110(p) is also consistent with principles of Equal Protection, and Plaintiffs' asserted right to "occupational liberty." Just as the Government rationally may decide that it is not the best use of limited public funds to subsidize lobbying, as held in *Regan*, and *AAPC*, so too it may decide it is not in the public interest to subsidize businesses of a prurient sexual nature. Plaintiffs' claim that the CARES Act prohibits application of section 120.110(p) under the PPP also fails. When Congress designed the PPP, it modified a number of SBA regulations for purposes of the program, but did not see fit to waive or modify SBA's policy concerning businesses of a prurient sexual nature.

Although the legal deficiency of Plaintiffs' claims alone requires that their request for preliminary relief be denied, as discussed below their conclusory and unsubstantiated claims of "ruination" are insufficient to make the requisite showing of irreparable harm attributable to the SBA's rule. Moreover, they have not shown that awarding the relief they seek would be in the public interest. Congress did not deem it in the public interest to compel SBA to make PPP loans available to businesses of a prurient sexual nature. Plaintiffs offer no justification for disregarding that legislative judgment, when the effect would be to deny finite funds

to other businesses and individuals whose need for economic assistance in this time of crisis is just as great, if not more so, than Plaintiffs'.

BACKGROUND

The Small Business Administration

The declared policy of the Small Business Act, 15 U.S.C. § 631 *et seq.*, is to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns," in order to preserve the system of free competitive enterprise that is "essential" to the economic well-being and security of the Nation. 15 U.S.C. § 631(a). To promote that important national objective, Congress created the Small Business Administration ("SBA"), under the management of a single Administrator, *id*. § 633(a), (b)(1), who is given "extraordinarily broad powers" under section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety of technical, managerial, and financial assistance to small-business concerns. *See SBA v. McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing numerous varieties of general small-business loans the Administrator is "authorized" and "empowered" to make); 13 C.F.R. § 120.1. In the performance of these authorized functions the Administrator is further empowered to "make such rules and regulations as [she] deems necessary to carry out the authority vested in [her]," and in addition to "take any and all actions … [that] [she] determines … are necessary or desirable in making … loans." 15 U.S.C. § 634(b)(6), (7).

SBA financial assistance to a small business under section 7(a) of the Act may take the form of a direct loan, an immediate participation (joint) loan with a lender, or a deferred participation (guaranteed) loan initiated by a lender but a portion of which the SBA will purchase from the lender in the event of a borrower default. 13 C.F.R. § 120.2(a); *see Valley Nat'l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *California Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, however, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979), thus "reduc[ing] risk for lenders … mak[ing] it easier for them to access capital," and thereby "mak[ing] it easier for small business to get loans." *See https://www.sba.gov/funding-programs/loans*.

Ordinarily, to qualify for an SBA general business loan an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c); meet the size standards for a "small" business set forth under the statute and SBA rules (usually stated in terms of number of employees, or average annual receipts), *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101. In addition, an applicant must meet SBA standards of creditworthiness, *see* 13 C.F.R. § 120.150; for loans over $25,000, meet the lender's collateral requirements for

similar non-SBA guaranteed loans, SBA Standard Operating Procedure ("SOP") 50-10-5(K), *Lender & Dev. Co. Loan Programs*, Subp. B, Chap. V, § II(B)(3)(b), at 193 (Exh. 1, hereto); and pay an annual "guaranteed [loan] fee" to the SBA equal to 0.55 percent of the outstanding balance of the SBA's share of the loan, 15 U.S.C. § 636(a)(23). Holders of 20 percent or more ownership shares in the applicant must personally guarantee the loan. 13 C.F.R. § 120.160(a).

Ineligible Business Types Under 13 C.F.R. § 120.110

Pursuant to the broad powers conferred on the Administrator by the Small Business Act to make rules and regulations and take other actions deemed necessary or desirable in making SBA loans to small-business concerns, 15 U.S.C. § 634(b)(6), (7); *see supra* at 6, the SBA over time has determined as a matter of policy that SBA business loans should not be made available to certain types of businesses, such as, for example, non-profit businesses, other lenders, businesses in which the lender owns an equity interest, and businesses that have previously defaulted on federal or federally assisted loans resulting in a loss to the Government. The types of business concerns deemed ineligible for SBA section 7(a) loans (18 in all) are listed at 13 C.F.R. § 120.110, and include, as relevant here, "[b]usinesses which (1) [p]resent live performances of a prurient sexual nature; or (2) [d]erive . . . more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature." *Id.* § 120.110(p).

Businesses covered by paragraph (2) of this provision are those that derive more than five percent of their gross revenue from such sales, depictions, or displays. SOP 50-10-5(K), Subp. B, Chap. II, § III(A)(15)(a)(ii) at 114.

The SBA first decided that businesses of a prurient sexual nature should be deemed ineligible for SBA general business loans almost a quarter century ago, in January 1996, *see* 61 Fed. Reg. 3226-02, 3229-40 (Jan. 31, 1996) (final rule); 60 Fed. Reg. 64356, 64359 (Dec. 15, 1995) (proposed rule). It did so in accordance with its mandate under the Small Business Act to establish general policies that direct its limited financial resources in ways that will best serve the public interest. 60 Fed. Reg. at 64360 (citing 5 U.S.C. § 633(d)). So far as Defendants are aware, the validity of the SBA's policy concerning businesses of a prurient sexual nature, as codified in section 120.110(p), has never before been questioned in federal court.

The Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Stimulus ("CARES") Act, Pub. L. No. 116-136, 134 Stat. 281, passed by Congress to provide an unprecedented package of emergency economic assistance and other support to help individuals, families, businesses, and health-care providers cope with the enormous economic and public health crises—unlike any experienced in the lifetime of the Nation—triggered by the worldwide coronavirus (COVID-19) pandemic. *See* SBA, Interim Final Rule, *Business Loan*

Program Temporary Changes; Paycheck Protection Program, 80 Fed. Reg. 20811-01, 20811-12 (Apr. 15, 2020) ("PPP Interim Final Rule") (Exh. 2, hereto); *see also, e.g.*, 166 Cong. Rec. H1732-01, 1820-24 (Mar. 27, 2020) (statements of Reps. Neal, Davis, and Mitchell); 166 Cong. Rec. S2059-01 (Mar. 25, 2020) (statement of Sen. Schumer); 166 Cong. Rec. S1862-02 (Mar. 20, 2020) (statement of Sen. McConnell). Among the numerous measures taken by the CARES Act to address the COVID-19 crisis, of principal concern here is the Paycheck Protection Program ("PPP"), CARES Act. § 1102, enacted to extend relief to small businesses experiencing economic hardship as a result of the public-health measures being taken to minimize the public's exposure to the COVID-19 virus. *See* PPP Interim Final Rule, 85 Fed. Reg. at 20811.

Specifically, section 1102(a)(2) of the CARES Act adds a new paragraph (36) to section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)(36), which provides that "*[e]xcept as otherwise provided in this paragraph*, the [SBA] may guarantee [PPP] covered loans"—not make loans directly, however—"under the same terms, conditions, and processes as a loan made under this subsection," i.e., section 7(a). 15 U.S.C. § 636(a)(36)(B) (emphasis added). The PPP then sets forth in extensive detail the precise ways in which PPP covered loans differ from other section 7(a) loans. *Id*. § 636(a)(36)(D)-(R). Among these differences, the PPP authorizes the SBA to make covered loans to various non-profit organizations, independent

contractors, and self-employed individuals, as well as to small business concerns, *id*. § 636(a)(36)(D)(i), (ii); relaxes size limitations to allow businesses with as many as 500 employees (or more, depending on the industry in which they operate) to receive assistance, *id*. § 636(a)(36)(D)(i)(I); and selectively waives certain of the SBA's affiliation rules used to make small business "size" determinations, *id*. § 636(a)(36)(D)(iv); *see* 13 C.F.R. Part 121. The PPP also expressly caps the chargeable rate of interest of a covered loan at four percent (SBA has further limited the rate to one percent), *id*. § 636(a)(36)(L); PPP Interim Final Rule, 85 Fed. Reg. at 20813; and waives the "no credit elsewhere," personal guarantee, collateral, and guaranteed loan fee requirements imposed under section (7a), SBA regulations, and SBA standard operating procedures. 15 U.S.C. § 636(a)(36)(h)-(J), (L); *see supra* at ___. The PPP also requires that the SBA pay an origination fee to the lender that makes a covered loan equal to a specified percentage of the loan balance at the time of disbursement. *Id*. § 636(a)(36)(P).

The maximum amount of a PPP covered loan is the lesser of $10,000,000 or an amount calculated as a multiple of the applicant's total monthly "payroll costs," to which the balance of any outstanding disaster loans under 15 U.S.C. § 636(b)(2) may be added. *Id*. § 636(a)(36)(E); § 636(a)(36)(A)(viii)(I); *see* PPP Interim Final Rule, 85 Fed. Reg. at 20812-13. Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount borrowed. CARES Act § 1106(b);

PPP Interim Final Rule, 85 Fed. Reg. at 20811, 20813. The actual amount forgiven will depend on a borrower's payroll costs and payments for rent, utilities, and mortgage interest. CARES Act § 1106(b) (1)-(4), (d); PPP Interim Final Rule, 85 Fed. Reg. at 20813. No later than 90 days after the date on which the amount of forgiveness is determined, the SBA must remit to the lender the amount forgiven plus interest. CARES Act § 1106(c)(3).

Congress initially authorized the SBA to guarantee up to $349 billion-worth of loans to small businesses under the PPP. CARES Act § 1102(b)(1). The Paycheck Protection and Health Care Enhancement Act, Pub. L. No. 116-139, --- Stat. ---, § 101(a)(1), added another $310 billion to the program on April 24, 2020.

Plaintiffs and Their Claims

Plaintiffs are 42 "alcohol-serving establishment[s]" located around the country that engage in the business of presenting "female performance dance entertainment which is fully clothed and, at times[,] topless." Verified First Am. Compl. for Decl. & Inj. Relief ("Am. Compl."), ECF No. 11, ¶¶ 10-51; *see, e.g.*, *id.* ¶¶ 75, 87, 98, 109, 121. According to Plaintiffs, none of their live performances is "unlawful or obscene." *E.g. id.* ¶¶ 76, 88, 99, 110, 122. Plaintiffs state that they are "currently shuttered as a result of . . . emergency 'shelter-in-place'" orders issued by the Governors of their respective States to prevent further spread of the COVID-19 virus. *E.g. id.* ¶¶ 78, 90, 101, 112, 124. In general, they allege that if they are unable

to obtain PPP covered loans they "may lack the staff and/or funds to reopen following the COVID-19 pandemic, resulting in the permanent ruination of [their] business[es] [and] the inability . . . to engage in protected First Amendment activity[.]" *E.g. id.* ¶¶ 97, 108, 120, 132.

They maintain that the SBA's rule against federally subsidized loans for businesses of a prurient sexual nature is a "content-based restriction[ ] on speech" that "fails to conform to the constitutional standards regarding obscenity," "violate[s] the doctrine of unconstitutional conditions," acts as a prior restraint, and is "unconstitutionally vague." *Id.* ¶ 520 (Count I). They also assert that the SBA's rule violates the Fifth Amendment, because businesses of a prurient sexual nature are treated differently from other entertainment establishments, violates a Fifth Amendment right to "occupational liberty," *id.* ¶ 523 (Count II), and is unauthorized under the CARES Act, *id.* ¶ 526 (Count III).

Based on these claims, Plaintiffs seek a preliminary injunction prohibiting SBA from continuing to utilize 13 C.F.R. § 120.110(p) as a criterion for PPP loan eligibility, and directing SBA to grant Plaintiffs' applications for PPP loans if they otherwise qualify for them. Pls.' Renewed Emer. Mot. for Entry of a TRO and/or Prelim. Inj. ("Pls.' Mem.") (ECF No. 12) ¶¶ 1-2. That request should be denied.

LEGAL STANDARDS

A preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015), and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *S. Glazers Distribs. of Ohio v. Great Lakes Brewing Co.*, 860 F.3d 844, 848-49 (6th Cir. 2017). A plaintiff seeking a preliminary injunction must show that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Although in the past the Sixth Circuit has referred to these requirements as "factors to be balanced, not prerequisites to be met," *Great Lakes Brewing*, 860 F.3d at 849, *Great Lakes* cast doubt on the continued viability of this approach after *Winter*, recognizing that "a preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed." *Id.* The Supreme Court has also admonished that a preliminary injunction cannot issue on the basis of speculative or possible injury. Rather, the movant must establish that irreparable harm is "*likely* in the absence of an injunction." *Winter*, 555 U.S at 22. Plaintiffs have not carried these heavy burdens.

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

Plaintiffs' request for preliminary injunctive relief must be denied because they "simply [have] no likelihood of success on the merits[.]" *Great Lakes Brewing*, 860 F.3d AT 849. To the contrary, the relief Plaintiffs seek is unprecedented.

It is fundamental to constitutional jurisprudence that "although government may not place obstacles in the path of a person's exercise" of constitutional freedoms, including "freedom of speech, it need not remove those not of its own creation." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549-50 (1983) (cleaned up). The Government, therefore, "is not required by the First Amendment to subsidize lobbying" (as held in *Regan*) or any other form of speech, and does not restrict or penalize speech simply because it has "chosen not to pay for [it]." *Id.* at 546 (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). *See also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (explaining that government "is not required to assist others in funding the expression of particular ideas."); *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003) (plurality) (a "decision not to subsidize the exercise of a fundamental right does not infringe the right.") (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)); *Leathers v. Medlock*, 499 U.S. 439, 450 (1991) (government "is not required to subsidize First Amendment rights[.]").

This bedrock principle ends this case. As Plaintiffs acknowledge, the economic obstacles to the exercise of their First Amendment freedoms were placed in their path by the COVID-19 pandemic and their State governments' efforts to contain it, *see supra* at 10; those obstacles are not of the Federal Government's creation. *See AAPC*, 2020 WL 1935525, at *3. Thus, the Government has no constitutional obligation to remove them. *Regan*, 461 U.S. at 549-50. For their part, Plaintiffs fail to cite a single precedent holding that the Government must fund or subsidize speech on particular topics, or of particular genres, that it did not wish to promote. Yet that is exactly what they ask the Court to conclude here, that SBA is constitutionally obligated to guarantee heavily subsidized PPP loans for businesses that will spend the proceeds on products, services, performances, and displays of a prurient sexual nature that the Government has refused to subsidize for at least a quarter century. No argument advanced cited by Plaintiffs supports that result.

A. Section 120.110(p) Is Not a Content-Based Restriction on Speech.

Plaintiffs first contend that section 120.110(p) must be invalidated as a "content-based restriction[ ] on speech." Pls.' Mem. at 11-14. This claim suffers from numerous fatal defects and has no likelihood of success.

In the first place, section 120.110(p) is not a prohibition or restriction on speech. It simply embodies the SBA's policy that the agency will not use federal funds to subsidize businesses of a prurient sexual nature. *See AAPC*, 2020 WL

1935525 at *5 (holding that an analogous rule prohibiting SBA financing for businesses engaged in political activities or lobbying "is not a prohibition or restriction on speech"). As explained above, the Supreme Court has held time and again that the Government does not penalize, prohibit, restrict, or otherwise infringe on speech simply because it chooses not to pay for it. *See supra* at 13 (citing, *inter alia*, *Regan*, 461 U.S. at 546; *Am. Library Ass'n*, 539 U.S. at 212; *Rust*, 500 U.S. at 193). Hence, Plaintiffs' reliance on such cases as *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (invalidating content-based restriction on posting of signs without a permit) and *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (striking down restriction on corporate political speech during election campaigns) as the touchstones of their analysis, *see* Pls.' Mem. at 12, is categorically misplaced.

The controlling principle here, articulated many times by the Supreme Court, is that the "government can make content-based distinctions when it subsidizes speech" as opposed to regulating speech. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007). It has "broad discretion," in fact, "to make content-based judgments in deciding what private speech to make available to the public." *Am. Library Ass'n*, 539 U.S. at 204-05. *See also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) ("[I]n the subsidy context," the Government may allocate funding "according to criteria that would be impermissible were direct regulation of speech . . . at stake[.]"). Even though content-based, the Government's

funding choices will be upheld unless they are shown to be "the product of invidious viewpoint discrimination," or "aim[ed] at the suppression of dangerous ideas." *Id.* at 586-87; *Regan*, 461 U.S. at 543-49 ("The case would be different if Congress were to discriminate invidiously in its subsidies" with an "inten[t] to suppress any ideas."). *See also Leathers*, 499 U.S. at 447, 450-51 (1991) (explaining that "differential taxation of First Amendment speakers is constitutionally suspect [only] when it threatens to suppress the expression of particular ideas or viewpoints").

Section 120.110(p) is not subject to invalidation under these standards. The SBA's policy against subsidizing loans to businesses of a prurient sexual nature is entirely viewpoint-neutral, and singles out no particular ideas for disfavorable treatment. The rule prohibits federally subsidized loans to these businesses without regard to any ideas they wish to convey, promote, or oppose through the displays depictions, or performances they present, or the products or services they sell. *See AAPC*, 2020 WL 1935525 at *5 (SBA policy against loans to political consultants and lobbyists is viewpoint-neutral and does not suppress certain ideas or beliefs).

In Plaintiffs' view the SBA's policy regarding businesses of a prurient sexual nature exhibits "clear disagreement" with Plaintiffs' "message," Pls.' Mem. at 12, but they are mistaken. Numerous messages and ideas can be conveyed through any given medium of expression, including depictions, displays and performances of a prurient sexual nature. Regardless of the message conveyed, be it Plaintiffs'

message (whatever that may be) or another, section 120.110(p) even-handedly provides that the SBA will not fund it.

It would not matter to the analysis, however, even if section 120.110(p) were taken as an expression of disagreement with Plaintiffs' unstated message. In *Rust*, private clinics that received federal funding to provide family-planning services objected to Government regulations that prohibited the use of those federal funds to counsel patients about abortion as a family-planning method. 500 U.S. at 179-80. The grantees contended that the rules impermissibly discriminated on the basis of viewpoint, because they prohibited all discussion about abortion as a lawful family-planning option. *Id.* at 192. The Supreme Court disagreed, finding "no question but that the … prohibition … [was] constitutional." *Id.* The Court explained that even where protected activity is implicated, the Government, when exercising its authority to subsidize certain activities but not others, may make "value judgment[s]" and "implement [those] judgment[s] by the allocation of public funds." *Id.* at 192-93. "In so doing the Government [does] not discriminate[ ] on the basis of viewpoint; it … merely [chooses] to fund one activity to the exclusion of another." *Id.* at 193. That decision, "without more, cannot be equated with the imposition of a 'penalty'" or the "suppress[ion] [of] a dangerous idea." *Id.* at 193-94.

So too here. Even assuming, as Plaintiffs do, that section 120.110(p) embodies a "value judgment" about their "message," the mere decision that the SBA

will not subsidize the expression of that message is neither viewpoint discriminatory nor offensive to the First Amendment. *See AAPC*, 2020 WL 1935525 at *5. The rule must therefore be upheld.

B. Section 120.110(p) Need Not Conform to Constitutional Standards Governing Prohibitions of Obscenity.

Plaintiffs next appear to argue that section 120.110(p) violates the First Amendment because the standard by which it identifies the type of performances, products, services, and presentations that the SBA will not finance—that is, material of a "prurient sexual nature"—does not "satisfy" the three-prong test for obscenity articulated in *Miller v. California*, 413 U.S. 15, 24 (1973). Pls.' Mem. at 14-21. This argument is baseless.

As held in *Miller*, government has a "legitimate interest in prohibiting the dissemination or exhibition of obscene material," 413 U.S. at 18, and the *Miller* test sets "the standards which must be used to identify obscene material that [government] may regulate without infringing on the First Amendment," *id.* at 20. As explained *supra*, at 13, section 120.110(p) does not "prohibit[ ]" or even "regulate" speech in any fashion. It simply embodies a determination by the SBA that it will not offer federal financial support for certain "sexually oriented" products, services, and activities, *see* 60 Fed. Reg. at 64360, a decision that does not "infring[e] on the First Amendment," *Miller*, 413 U.S. at 20. *See Am. Library Ass'n*,

539 U.S. at 212; *Rust*, 500 U.S. at 193. Accordingly, the Constitution did not require SBA to adopt the *Miller* test when deciding, and describing, which products, services, and activities it will not finance. It was free for that purpose to rely instead on the standard it chose, material of a "prurient sexual nature."

C. Section 120.110(p) Does Not Violate the Doctrine of Unconstitutional Conditions.

Plaintiffs next argue in passing that section 120.110(p) forces them to "[a]bandon their chosen form of expression or forgo a government benefit," in violation of the doctrine of unconstitutional conditions. Pls.' Mem. at 21. This argument, too, is meritless.

SBA loan programs generally, and the PPP in particular, represent the exercise of Congress's power under the Spending Clause, U.S. Const. Art. I, § 8, cl. 1. These programs, and the considerable sums of taxpayer money that Congress appropriates to fund them, are a form of government subsidy that encourage third-party lenders to make funds available to small-business concerns that otherwise could not find credit on reasonable terms.[1] The Spending Clause gives Congress "broad discretion

[1] The PPP is undeniably a subsidy. The PPP makes $349 billion available to small businesses nationwide to which they would not otherwise have ready access, if at all. The SBA's guarantee provides a powerful financial incentive to lenders to make these loans, loans they would not otherwise be willing to underwrite. In addition, although in theory the loans must be repaid, under the CARES Act and the SBA's interim rules, the interest rate on PPP loans is capped at one percent, collateral is not required, guarantee fees are waived, and perhaps most critically, up to the full principal amount of a loan may qualify for forgiveness. *See supra* at 9. Thus the

to tax and spend for the 'general Welfare,'" including the authority "to impose limits on the use of [the] funds" it appropriates for particular programs or activities, "to ensure they are used in the manner Congress intends." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds," even where the condition "may affect the recipient's exercise of its First Amendment rights." *Id.* at 214 (citing *Am. Library Ass'n*, 539 U.S. at 212). "At the same time, however, … the Government may not deny a benefit to a [party] on a basis that infringes [its] constitutionally protected freedom of speech[.]" *Id.*

The relevant distinction, the Court explained, is between conditions that merely "define the limits of [a] Government spending program" by "specify[ing] the activities the [Government] wants [or does not want] to subsidize"—which are permissible—and conditions that "leverage[ ] federal funding to regulate [recipients'] speech outside the scope of the program"—which are not. *All. for Open Soc'y*, 570 U.S. at 214-17. *See also Rust*, 500 U.S. at 194, 197.

Act makes these loans far less expensive to small-business borrowers than market-rate loans would be. Moreover, these savings for borrowers come at significant, and potentially enormous cost to taxpayers. The SBA subsidizes every PPP loan by paying an origination fee to the lender, *see supra* at ___, and may have to pay billions of additional dollars to lenders to reimburse them for forgiven loans, and make good on SBA's guarantees in the event of borrower defaults. *See AAPC*, 2020 WL 1935525 at *3-4 (concluding that PPP loans are the legal and practical equivalent of subsidies).

To illustrate the difference, both *Alliance for Open Society*, 570 U.S. at 215, and *Rust*, 500 U.S. at 197-98, pointed to *Regan*. There the IRS had denied tax-exempt status to the plaintiff, a non-profit organization, because its intended use of tax-deductible contributions to support its lobbying activities was prohibited by section 501(c)(3) of the Internal Revenue Code. *Regan*, 461 U.S. at 542. The plaintiff challenged this prohibition as an unconstitutional condition imposed on its receipt of tax-deductible contributions from donors. *Id.* at 545. The Court had no difficulty rejecting this claim. *See id.* at 545-46. Treating the tax-deductibility of contributions as "similar to cash grants" to the organization, the Court concluded that the plaintiff could continue to receive tax-deductible contributions for its non-lobbying activities by forming an affiliated tax-exempt entity, under section 501(c)(4) of the Code, that would be permitted to conduct lobbying activities using sources of funds other than tax-deductible (that is, federally subsidized) contributions. *Id.* at 544-46. Thus, the plaintiff was not prohibited from using non-subsidized contributions to engage in lobbying, nor denied other government benefits because of its intent to lobby; "Congress ha[d] merely refused to pay for the lobbying out of public monies." *Id.* at 545.

In reaching this conclusion, *Regan* distinguished the precedent on which Plaintiffs rely, *Perry v. Sinderman*, 408 U.S. 593 (1972). *See* 461 U.S. at 545; Pls.' Mem. at 21. In *Perry*, the Court concluded that an untenured professor at a state

college could not be terminated based on his constitutionally protected expression, holding that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests[.]" 408 U.S. at 597-98. *Regan* explained, however, that a "mere[ ] refus[al]" to pay for the expression of a private party "out of public monies" does not "fit[ ] the [*Perry*] model." 461 U.S. at 545. Government does "not infringe[ ] any First Amendment rights" within the meaning of *Perry* when it "simply [chooses] not to pay for" a private party's speech. *Id.* at 546.

That is the situation here. Section 120.110(p) does not prohibit businesses of a prurient sexual nature from expressing themselves using their own funds, or deny them benefits "independent of [SBA loans] "on account of [their] intention" to engage in expressive activities. SBA "merely refuse[s] to pay for [these activities] out of [SBA] monies." *Regan*, 461 U.S. at 545. That decision is perfectly constitutional.

That conclusion is reinforced by *American Library Association*, *supra*. The plaintiffs there challenged a federal law that required public libraries receiving federal financial assistance for the purpose of providing Internet access to install filtering software designed to block access to online pornography. *See* 539 U.S. at 198-99. The plurality rejected the contention that Congress had imposed an unconstitutional condition on the libraries' receipt of this federal assistance. *Id.* at 210-12. Congress had not "penalize[d]" libraries that chose not to install filters by

denying them other, unrelated federal benefits, and the libraries remained free to offer unfiltered Internet access to their patrons using their own funds, without the benefit of federal aid. *Id.* at 212. Congress had simply decided not to subsidize unfiltered Internet access.

Likewise, under section 120.110(p), no small business is denied benefits outside the parameters of SBA lending simply because it engages in prurient sexual activities. Businesses that wish to conduct these activities are free to do so using their own funds rather than Government-subsidized loans. What they cannot do is have it both ways, as Plaintiffs insist. They are not entitled to federal subsidies *and* to use those subsidies to finance activities, even expressive activities, that the Government does not wish to fund, any more than public libraries were entitled both to receive federal subsidies *and* to use those subsidies for unfiltered Internet access that the Government did not wish to pay for.

D. Section 120.110(p) Does Not Impose A Prior Restraint.

Plaintiffs' reliance on the "prior restraint" doctrine, *see* Pls.' Mem. at 21-23, is also mistaken. The "term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted). But in administering the PPP, SBA "does not *forbid*" Plaintiffs from "engag[ing] in any expressive activities in the future, nor does

[SBA] require [Plaintiffs] to obtain prior approval for any expressive activities." *Id.* at 550-51. The Plaintiffs' performers may "dance [as] provocatively" as Plaintiffs would like tomorrow, Pls.' Mem. at 23, "without any risk" that SBA would "impose[]" a "legal impediment to . . . Plaintiffs' ability to engage in any expressive activity [they] choose[]." *Alexander*, 509 U.S. at 551.

Rather, all that section 120.110(p) provides is that Plaintiffs "cannot finance [their] enterprises" with SBA loans, which may be a practical challenge because of the COVID-19 pandemic and the emergency measures taken in response to it, but which certainly is not a "legal impediment" of the sort at issue in the licensing cases on which Plaintiffs rely. *Compare* 509 U.S. at 549-51, *with*, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (describing municipality's licensing scheme for "sexually oriented businesses"). Put another way, SBA's decision not to add loans to Plaintiffs to its portfolio of guarantees is a portfolio-management decision, "not a restraint on private speech." *Cf. Am. Library Ass'n*, 539 U.S. at 209 n.4 (rejecting dissent's "prior restraint" theory because a "library's decision to use filtering software is a collection decision, not a restraint on private speech . . . .a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected.").

E. Section 120.110(p) Is Not Impermissibly Vague.

Plaintiffs next contend that section 120.110(p) is impermissibly vague. Pls.' Mem. at 23-26. This argument, too, is unavailing.

The void-for-vagueness doctrine, as Plaintiffs observe, is a due-process doctrine requiring that a law "give the person of ordinary intelligence a reasonable opportunity to know what is *prohibited*, so that he may act accordingly." *Id.* at 23 (emphasis added) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). "A statute which either *forbids or requires* the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007) (emphasis added) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925)). And as Plaintiffs also correctly recite, the doctrine requires greater "precision of *regulation*" in areas touching on First Amendment rights. *Keyishian v. Bd. of Regents Univ.*, 385 U.S. 603-04 (1967) (emphasis added); *see* Pls.' Mem. at 23.

However, Section 120.110(p) is not a prohibition or regulation of speech that forbids or requires Plaintiffs to do anything. Rather, it merely sets terms on which the Government will exercise its broad discretion to subsidize speech, or not. *All. for Open Soc'y*, 570 U.S. at 215; *Rust*, 500 U.S. at 192-94. Accordingly, the controlling precedent so far as Plaintiffs' vagueness claim is concerned is a case they

overlook, *National Endowment for the Arts v. Finley*, *supra*. In *Finley*, four performance artists and an artists' association brought suit contesting the validity of a federal law that required the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when making grant determinations. 524 U.S. at 572, 576-78. Congress enacted this "decency and respect" provision following the public controversy that erupted after an NEA grant was used to fund an exhibition of homoerotic photographs by Robert Mapplethorpe, and another was awarded to photographer Andres Serrano, whose work, entitled "Piss Christ," depicted a crucifix immersed in urine. *Id.* at 574-76. The district court agreed with the plaintiffs' contention that the "decency and respect" criteria were unconstitutionally vague, stating that they "fail[ed] adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.* at 578. The court of appeals agreed with the district court, "[c]oncluding that the decency and respect criteria [were] not susceptible to objective definition." *Id.* at 579. The Supreme Court reversed.

The Court acknowledged that "[u]nder the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards," and that the terms of the "decency and respect" provision were "undeniably opaque." *Id.* at 588. "[I]f they appeared in a criminal statute or regulatory scheme," the Court allowed, "they could raise substantial vagueness

concerns." *Id.* Nevertheless, the Court sustained the validity of the "decency and respect" provision because, in the context of a grant program, "[i]t [was] unlikely … that speakers [would] be compelled to steer too far clear of any 'forbidden area.'" *Id.* (distinguishing, *inter alia*, *Grayned v. City of Rockford*). And even if some artists "conform[ed] their speech to what they believe[d] to be the decisionmaking criteria in order to acquire funding," "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id.* *Finley* thus establishes that "the standard set in evaluating statutes related to subsidies for speech is less demanding than the standard for statutes that impose penalties for speech." *Ostrom v. O'Hare*, 160 F. Supp. 2d 486, 496 (E.D.N.Y. 2001); *see also Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 94 (1st Cir. 2004); *United States v. Nat'l Training & Info. Ctr., Inc.*, 532 F. Supp. 2d 946, 953-54 (N.D. Ill. 2007) ("[B]ecause there is no right to government subsidization of free speech, regulations relating to entitlement programs are entitled to greater leniency in their construction.").

Under *Finley's* far less demanding standard, section 120.110(p) is plainly constitutional. Plaintiffs condemn the rule's "prurien[ce]" standard as "fail[ing] to supply intelligible guidelines for businesses" or the "objective guidance needed to avoid arbitrary application." Pls.' Mem. at 24. But for all intents and purposes here the PPP is a grant program, and as a standard by which the Government makes grant

determinations, "prurient sexual nature" is no more opaque, indeed it is far less so, than the criteria "general standards of decency," and "respect for the diverse beliefs and values of the American public," that the Court readily upheld in *Finley*. And although section 120.110(p) has governed SBA lending decisions under the section 7(a) program for nearly a quarter-century, *see supra* at 14, Plaintiffs do not even allege, much less offer proof, that they or other speakers like them have steered clear of "forbidden area[s]," or "conform[ed] their speech to what they believe to be the decisionmaking criteria" in order to obtain SBA business loans. *See Finley*, 524 U.S. at 588-89. Section 120.110(p) is not impermissibly vague.

F. Section 120.110(p) Easily Meets Fifth Amendment Requirements.

Plaintiffs next maintain that section 120.110(p) violates Fifth Amendment guarantees of Equal Protection and "occupational liberty." Pls.' Mem. at 26-28. Neither contention has merit.

Plaintiffs' Equal Protection argument is foreclosed by *Regan*, and *Ysursa*. In *Regan* the plaintiff, in addition to raising a First Amendment challenge, also "contend[ed] that the equal protection component of the Fifth Amendment render[ed] the [section 501(c)(3)] prohibition against substantial lobbying invalid." 461 U.S. at 546. The Supreme Court disagreed. *Id.* at 547-51. First, because prohibiting the use of federally subsidized contributions for lobbying purposes did not violate the First Amendment rights of non-profit organizations, and because the

law was not evidently aimed at suppressing particular ideas, the Court concluded that it was subject only to rational-basis review, not strict scrutiny, under the Fifth Amendment. *Id.* at 548-49. The lobbying restriction easily withstood review under this standard, for it was "not irrational" of Congress to decide that the public interest in promoting additional lobbying by charities would not be worth the taxpayer expense. *Id.* at 550; *see also Ysursa*, 555 U.S. at 359-60 ("Given that the State has not infringed the unions' First Amendment rights" by refusing to make public employee payroll deductions for union political activities, "the State need only demonstrate a rational basis to justify [its decision].").

Section 120.110(p) must be upheld on the same grounds. Because the rule restricts only the use of federally subsidized funds, not a firm's own monies, to engage in business of a prurient sexual nature, and because the rule is neither viewpoint-based nor aimed at suppressing particular ideas, the rule is subject only to rational-basis review under the Fifth Amendment. It clearly meets that test. If it was "not irrational" of the Government in *Regan* to decide it would not be worth the expense to taxpayers of subsidizing lobbying, speech that lies "at the core of First Amendment protections[,]" *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016), then it was also not irrational of the SBA to decide that it would not be worth the commitment of its finite resources to subsidize additional speech of a

prurient sexual nature, which lies at "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (plurality opinion).

Plaintiffs' "occupational liberty" argument also lacks merit. Whatever the law may have been in 1897, *see* Pls.' Mem. at 27 (citing *Allgeyer v. St. of La.*, 165 U.S. 578 (1897)), the Seventh, Eleventh, and Eighth Circuits agree that "claims alleging the deprivation of occupational liberty are [no longer] cognizable under substantive due process." *Machoka v. City of Collegedale*, 2019 WL 1768861, at *5 (E.D. Tenn. Apr. 22, 2019) (citations omitted). And even if the Supreme Court's contemporary jurisprudence of substantive due process still recognized a right of occupational liberty, it would also still be the case that a "decision not to subsidize the exercise" of such a right would "not infringe the right." *Rust*, 500 U.S. at 193.

G. The CARES Act Does Not Bar Application of Section 120.110(p).

Plaintiffs also incorrectly argue that the CARES Act does not allow reliance on section 120.110(p) to deny them eligibility under the PPP. Pls.' Mem. at 28-30. The plain text of the CARES Act authorizes SBA to continue to apply section 120.110(p) when administering PPP loans, and Plaintiffs' contrary contention is based on "isolated provisions," not the statute as a whole. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U. S. 280, 290 (2010).

As discussed, the CARES Act added the PPP as a new paragraph (36) to the SBA's pre-existing section 7(a) loan authority, 15 U.S.C. § 636(a)(36), stating:

"*[e]xcept as otherwise provided in this paragraph*, the [SBA] may guarantee [PPP] covered loans "under the *same terms, conditions, and processes* as a loan made under this subsection," *i.e.*, section 7(a). *Id.* § 636(a)(36)(B) (emphases added). Then the CARES Act details exactly how PPP covered loans should differ from other section 7(a) loans. *Id.* § 636(a)(36)(D)-(R). For example, among these differences, the PPP authorizes the SBA to make covered loans to various non-profit organizations, independent contractors, and self-employed individuals, as well as to small business concerns, *id*. § 636(a)(36)(D)(i), (ii); and relaxes size limitations to allow businesses with as many as 500 employees (or more, depending on industry) to receive assistance, *id.* § 636(a)(36)(D)(i)(I). But the PPP contains no such express provision barring application of section 120.110(p). And because the PPP requires that the SBA change its usual terms, conditions, and processes for making loans only as "provided in" the text of the PPP itself, § 636(a)(36)(B), there is no ground for inferring an unwritten exception. To do so as Plaintiffs suggest would not only ignore plain statutory language, but also violates basic principles of statutory interpretation. When Congress enacts a provision explicitly defining the reach of a statute, it implies that matters not specifically defined are not within the statute's reach. *See, e.g. First Am. Title Co. v. Devaugh*, 480 F.3d 438, 453 (6th Cir. 2007) ("the mention of one thing implies the exclusion of another").

H. The Small Business Act Provides That "No Injunction" Shall Issue Against the SBA.

Plaintiffs are also unlikely to succeed on the merits because Congress has restricted the availability of injunctive relief against the SBA. Specifically, the Small Business Act provides that the SBA may

> sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; *but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the [agency] or [its] property[.]*

15 U.S.C. § 634(b)(1) (emphasis added). Many courts have interpreted this statute to preclude injunctive or any similar relief against the SBA, *see, e.g., Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1290 (5th Cir.1994); *Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir.1990) (explaining that "courts have no jurisdiction to award injunctive relief against the SBA"), although others have held that this provision does not necessarily bar injunctions against the SBA in all circumstances, *see, e.g., Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1056–57 (1st Cir.1987). It is unnecessary to resolve questions surrounding the statute's reach at this time, because Plaintiffs have failed to show that a preliminary injunction is warranted, regardless of whether it is precluded by section 634(b)(1). Nevertheless, this provision casts still further doubt, if any were needed, on the likelihood of Plaintiffs' success in this case. *See AAPC*, 2020 WL 1935525 at *5-6.

II. PLAINTIFFS HAVE NOT ADDUCED EVIDENCE OF IRREPARABLE HARM.

In addition to the reason that Plaintiffs' exhibit no likelihood of success, Plaintiffs' request for a preliminary injunction must also be denied because they have not presented any evidence, by affidavit or otherwise, of irreparable harm.

Plaintiffs contend that absent relief they "will surely suffer" the "ruination" of their businesses. Pls.' Mem. at 30. But they do not submit even a scintilla of evidence to substantiate that assertion. *See id.* A court "cannot grant a preliminary injunction based on conclusory statements alone and needs evidence that . . . [a] plaintiff would suffer irreparable injury without an injunction." *Kensu v. Rapelje*, 2014 WL 1028948, at *4 (E.D. Mich. Mar. 14, 2014) (citing *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 102–03 (6th Cir. 1982)). *See also Roseman v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW)*, 2018 WL 10015627, at *5 (E.D. Mich., Nov. 16, 2018); *Rose v. Delta Airlines, Inc.*, 2016 WL 1275516, at *9 (E.D. Mich., Apr. 1, 2016).

Relying on *Elrod v. Burns*, 427 U.S. 347, 373 (1976), Plaintiffs argue that "[t]he loss of [their] First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pls.' Mem. at 30. But that theory of injury pre-supposes that Plaintiffs have established a likelihood of success on the merits of their First Amendment claims. *See ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (explaining that under *Elrod* a finding of

irreparable injury is mandated "*if* it is found that a constitutional right is being threatened or impaired") (emphasis added), *aff'd on other grounds*, 545 U.S. 844 (2005). For the reasons already discussed, however, Plaintiffs' constitutional claims have no merit. Thus, Plaintiffs fail under *Elrod*, as well, to demonstrate an injury entitling them to preliminary relief.

III. A PRELIMINARY INJUNCTION WOULD BE CONTRARY TO THE PUBLIC INTEREST.

Finally, to obtain preliminary injunctive relief in a case against the Government, Plaintiffs must show that an injunction prohibiting application of section 120.110(p) under the PPP would be in the public interest. *Nken*, 556 U.S. at 435. Plaintiffs cannot make that showing, because Congress has already determined that the SBA should continue to apply the restrictions on eligibility codified under section 120.110 when administering the PPP.

As discussed *supra*, at 8, when Congress passed the CARES Act, it decided that PPP covered loans should be made under the same terms and conditions as other SBA section 7(a) loans, "[e]xcept as otherwise provided" in the PPP. 15 U.S.C. § 636(a)(36)(B). The PPP sets forth in careful detail which provisions of section 7(a), and the SBA's implementing regulations, are waived or modified for purposes of making PPP covered loans. *Id*. § 636(a)(36)(D)-(R). Section 120.110(p) is not among them. Thus, Congress already decided that the substantial but not unlimited amount of funding available for PPP covered loans would be best reserved for small

businesses other than the 18 types of businesses designated under section 120.110, all of which have become accustomed to doing business without access to SBA subsidies for a quarter century or more.

Plaintiffs offer no justification for disturbing that legislative judgment. They invoke the public interest in free expression, Pls.' Mem. at 31-32, but section 120.110(p) does not interfere with their freedom of speech. *See AAPC*, 2020 WL 1935525 at *6-7. If the public interest in free expression did not warrant preliminary relief on behalf of political consultants and lobbyists, *see id.*, whose speech "is at the core of First Amendment protections[,]" *Susan B. Anthony List*, 814 F.3d at 473, then surely it does not compel relief on behalf of topless "female performance dance entertainment," *e.g.*, Am. Compl. ¶ 75, which lies at the "outer perimeters" of protected speech, *Barnes*, 501 U.S. at 565–66. *See also Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

Plaintiffs also suggest that diverting funds to their businesses would accrue benefits for the "rest of society," Pls.' Mem. at 32, but that is a zero-sum game. Where the demand for PPP loans exceeds the available funds, PPP financing allocated to Plaintiffs necessarily would come at the cost of denying it to others seeking the same assistance. The fact that Plaintiffs happen to engage in expressive activities does not entitle them to overturn Congress's funding choices, or to receive

Government largesse at the expense of others who are just as much in need of the Government's assistance in this time of crisis as are Plaintiffs, if not more so.

IV. IF THE COURT GRANTS INJUNCTIVE RELIEF, THEN PLAINTIFFS SHOULD POST BONDS.

If the Court were to grant a preliminary injunction (which it should not), the injunction should only require the SBA to continue to reserve guarantee authority for Plaintiffs who submitted loan applications that were denied. At the preliminary injunction stage the Court should not require SBA to transmit loan authorization numbers to Plaintiffs' lending institutions, resulting in disbursement of the loan proceeds to Plaintiffs that the SBA may never succeed in recouping.

If the Court nevertheless were to order provisional relief resulting in the disbursement of PPP loans guaranteed by the SBA, the Court should require Plaintiffs to post bonds. "Courts may issue injunctions 'only if the movant gives security.'" *Brown v. City of Upper Arlington*, 637 F.3d 668, 674 (6th Cir. 2011) (quoting Fed. R. Civ. P. 65(c)). "The rule protects the enjoined party from any pecuniary injury that may accrue while a wrongfully issued equitable order remains in effect, and requires a court to consider the question of requiring a bond before it issues an injunction." *Id*. (cleaned up). Here, SBA would suffer such "pecuniary injury" if, after the issuance of a preliminary injunction, the agency ultimately prevailed on the merits yet could not recover from Plaintiffs the loan proceeds they had already spent. Injunctive relief in this case, therefore, should be predicated on

Plaintiffs posting bonds to cover the full amount of the SBA's guarantees on their loans. *See, e.g.*, *Roche Diagnostics Corp. v. Med. Automation Sys., Inc.*, 646 F.3d 424, 428 (7th Cir. 2011) ("A party injured by an erroneous preliminary injunction is entitled to be made whole.").

Contrary to Plaintiffs' contention, cases involving constitutional issues are not exempt from Rule 65's bond requirement. If anything, the cases cited by Plaintiffs indicate that bonds should be required. For example, Plaintiffs cite a pair of cases—*Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978 (1st Cir. 1982) (*rev'd on other grounds*, 467 U.S. 526 (1984)) and *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011)—where courts declined to require bonds in cases brought by individual plaintiffs, rather than businesses. In *Crowley*, where the plaintiff was indigent, the court explained that "[a]pplicants in commercial cases—merchants, manufacturers, and others—can be assumed capable of bearing most bond requirements, so hardship to them is less of a factor." 679 F.2d at 1000. Given that Plaintiffs are commercial entities applying for business loans, analogy to those decisions supports imposing a bond here. And in *Moore v. Johnson*, 2014 WL 4924409, at *9 (E.D. Mich. May 23, 2014), also cited by Plaintiffs, the court noted that "[n]o party here has sought a security bond[.]" Here, in contrast, the Government is requesting that Plaintiffs post

bonds and has demonstrated that bonds are necessary to protect it from unjust loss if a wrongful injunction is issued.

CONCLUSION

For the reasons above, Plaintiffs' renewed emergency motion for entry of a temporary restraining order and/or a preliminary injunction should be denied.

Dated: April 24, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DAVID M. MORRELL
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director

ERIC WOMACK
Assistant Director

/s/ James J. Gilligan
JAMES J. GILLIGAN
Special Litigation Counsel

INDRANEEL SUR
Trial Attorney

Federal Programs Branch, Civil Division
United States Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-3358
E-mail: james.gilligan@usdoj.gov

Counsel for Defendants