UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DV DIAMOND CLUB OF FLINT, LLC
d/b/a Little Darlings, *et al.*

Plaintiffs,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION, *et al.*

Defendants.

Case No. 4:20-cv-10899
Hon. Matthew F. Leitman
Hon. David R. Grand
by referral

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PLAINTIFFS' REPLY IN SUPPORT OF RENEWED EMERGENCY MOTION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs seek access to vital capital available to nearly every other small business in America on the same terms other businesses enjoy. Despite the extraordinary financial crisis facing our country, the SBA[1] has seen fit to deny access to this funding because it disagrees with Plaintiffs' speech.

The government's Response [ECF No. 24], reduced to its essence, is that the SBA should be free to pick and choose the recipients of $659 billion in pandemic relief aid without any identifiable restraint in either the Constitution or its congressional mandate. "Arbitrary and capricious" is just fine, it claims. In support, Defendants speak glowingly and repeatedly of the SBA's own "policy" which includes at least 18 disqualifiers. [Id. at PgID.701-02, 704-05, 712, 714].

Congress, for its part, disagrees with the Defendants' position:

> We recognize that some of the rules under the old 7(a) program may have otherwise required the exclusion of U.S. farmers, ranchers, agricultural businesses, and rural American workers from relief under the PPP. But, as Treasury Secretary Steven Mnuchin has noted, the PPP that Congress created transcends the purposes and limitations of the old program. These are truly extraordinary times, Congress passed and the President signed into law extraordinary measures, and now the PPP and the EIDL must rise to the occasion, unencumbered by limitations that ought to no longer apply because they hinder rather than help economic recovery.

[1] Plaintiffs use here the abbreviated terms and phrases as they were defined in their opening brief.

[Congressional Ltr. to Administrator of April 9, 2020, ECF No. 12-8, PgId.560]. *See also* Correspondence from Chairwoman of the House Small Business Committee to Defendants Carranza and Mnuchin of April 7, 2020 ("[T]he piecemeal guidance and fact sheets Treasury and SBA have released are in many instances confusing, contradictory, and provide little clarity to the millions of small businesses that are in desperate need of assistance"). [ECF No. 12-7, PgID.556].

The message is clear. With the CARES Act, Congress tapped the SBA as an existing mechanism to speed aid to American employers and the American workforce, as well as their landlords, mortgage holders, and utility providers. There is no hint that Congress, instead, appointed the SBA lord of a two-thirds-of-a-trillion-dollar fiefdom to ration relief in accordance with its own whims. Plaintiffs and their workers are entitled to participate in the broad aid authorized by Congress unhindered by the unauthorized and unconstitutional barriers unilaterally imposed by the SBA.

ARGUMENT

The entertainment Plaintiffs present receives protections under *both* the Free Speech and Freedom of Association Clauses of the First Amendment. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991); Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville, 274 F.3d 377, 396-97 (6th Cir. 2001) – both cases litigated by the undersigned. The undersigned is however *unaware* of *any*

courts extending constitutional protections to *prostitution*. Nevertheless, while the SBA has denied most of the Plaintiffs' PPP loan applications because it apparently deems the (constitutionally protected) entertainment they present to be "prurient," it has *approved* PPP loans to ***brothels***. *See* **Exhibit P**. Seriously? ***Brothels*?**

I. THE REGULATIONS[2] ARE UNCONSTITUTIONALLY VIEWPOINT-BASED UNDER THE VERY "SUBSIDY" CASES RELIED UPON BY THE GOVERNMENT

The Constitution does not tolerate government action which has the effect of censoring viewpoints the government finds offensive:

> In the realm of *private speech or expression*, government regulation may not favor one speaker over another. Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). … When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. See R.A.V. v. St. Paul, 505 U.S. 377, 391, 112 S.Ct. 2538, 2547, 120 L.Ed.2d 305 (1992). *Viewpoint discrimination is thus an egregious form of content discrimination.*

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 828–29 (1995). (emphasis added).

The strongest possible argument Plaintiffs could make in this case would be to take the appropriate legal standard and phrase it in a way which emphasizes

[2] For simplicity, Plaintiffs include the SOP in the term "Regulations" herein.

precisely why the "prurient sexual nature" standard is viewpoint-based and unconstitutional. Something like this would do the job nicely:

> 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] it does not engage in invidious viewpoint discrimination, or attempt to suppress the expression of particular ideas.

Or Plaintiffs could take the same ideas and bolster them with citations to Supreme Court precedent:

> 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." [NEA, 524 U.S. 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").

Of course, the government beat the Plaintiffs to the punch, as those two quotations come directly from its Response. [ECF No. 24, PgID.700, 713-14). Defendants themselves fully explain to this Court why 13 C.F.R. §120.110(p) is unconstitutional as a viewpoint-based infringement on Plaintiffs' speech rights.[3]

[3] The analytical framework of content-based and content neutral actions underlying the old "subsidy cases" was radically changed by the Supreme Court in Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). Plaintiffs will address below the overwhelming importance of Reed here. Plaintiffs do not concede that the PPP program is equivalent to a subsidy in the conventional sense. PPL's clearly will *not*

What is it about the "prurient sexual nature" standard which makes it a viewpoint-based regulation? Well, it is clear that funding is not denied to businesses simply because they provide entertainment of some sort. It is equally clear that funding is not denied because the speaker is talking about sex (otherwise, TV and radio stations would have to cease broadcasting the majority of their programs). Neither is it likely that all clothed, "topless," and/or nude performances disqualify an applicant from funding. Rather, the disqualifier only applies to those businesses which provide "prurient" entertainment.

This necessarily means that an SBA administrator or bank official, both of whom likely have little-to-no training on what "prurient" means, must decide which presentations are loan-qualified and which are not. It also means that the SBA has taken one side of the debate when it comes to the presentation of erotic entertainment. The SBA freely funds companies that advocate *against* the message of eroticism while barring only those which *favor* that message and viewpoint.[4]

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be subsidies if loan forgiveness is denied for any of a host of reasons, only one of which relates to the borrowers' failure to use the funds for the designated purposes. *See* 15 U.S.C. § 9005(b) - (d) (to obtain loan forgiveness, the loan proceeds must be used 75% for wages and the rest for rent, mortgage interest, and/or utilities).

[4] It is no secret that numerous conservative religious institutions are vehemently opposed to adult businesses and the presentation of erotic entertainment. Nevertheless, churches are free to obtain SBA funding, and in doing so can engage in *their* government funded advocacy *against* the Plaintiffs' establishments, even as Plaintiffs' speech is placed on an unequal footing for loan purposes because it represents a disfavored viewpoint. *See* US Small Business Administration, Faith-

Defendants' brief never comes to grips with this vital issue. At best, its argument amounts to no more than a tautology: the phrase "prurient sexual nature" does not render the Regulations viewpoint-based because it does not. The exact language found in the Response is:

> 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.

[ECF No. 24, PgID.714].

But that is self-evidently false. The Regulations exclude *only* speakers who have disseminated, or wish to disseminate, entertainment which is adjudged to be "prurient" (whatever that may mean) by some SBA bureaucrat or bank officer. The Regulations do not ban loans to speakers who are *opposed* to that form of entertainment, or to establishments which either present erotic entertainment that is *not* "prurient" or which give up erotic entertainment completely as a condition to being able to access these essential loans. That is the very definition of a viewpoint-

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Based Organizations FAQ - FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM (PPP)…, https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based% 20FAQ%20Final.pdf (last accessed 4/25/20).

based law; simply saying it ain't so does not make the Regulations viewpoint neutral or constitutionally sound.

The government principally relies on Regan v. Taxation Without Representation of Wash., 461 U.S. 540 (1983) to support its position that its regulations survive First Amendment scrutiny. Yet, the Court emphasized in Regan that *"[t]he case would be different* if Congress were to discriminate invidiously in its subsidies in such a way as to "'aim[] at the suppression of dangerous ideas." Id. at 548 (emphasis added) (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)). In quoting Mahar v. Roes, 432 U.S. 464, 476 (1977), and Cammarano (358 U.S. at 513), the Regan Court observed that "[w]here the governmental provision of subsidies is *not* 'aimed at the suppression of dangerous ideas,'" its "power to encourage actions deemed to be in the public interest is necessarily far broader." Regan, 461 U.S. at 550 (emphasis added).[5]

Defendants also cite to N.E.A. v. Finley ("NEA"), 524 U.S. 569 (1998), where the Court considered a First Amendment challenge to a statutory amendment that

[5] Defendants' reliance on Davenport v. Washington Ed. Ass'n, 551 U.S. 177, 188-89 (2007) [PgID.713] is unavailing. Davenport dealt with the regulation of private union money, *not* government subsidies; its discussion of the subsidy cases was limited to a single citation to Regan; and it is doubtful whether the Court's discussion of the effect of content-based regulations on the marketplace of ideas survives Reed. In any event, the *only* authority that the Davenport Court cites in support of its content-based comment is Regan. Hence, Regan's careful admonition against viewpoint discrimination applies to Davenport as well.

required the National Endowment for the Arts to consider, *among other factors*, the "general standards of decency and respect for the diverse beliefs and values of the American Public" when deciding upon arts funding. Id. at 569. Initially, the Court noted that the NEA had read the statute too broadly, observing that "*it does not preclude awards to projects that might be 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application*." Id. at 580-81 (emphasis added). This led the Court to conclude that there was no categorical ban on funding even if a work of art could be considered to be indecent. The Court also emphasized the point made in Regan that viewpoint-based decisions cannot be tolerated even in the funding context: "As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of *directed viewpoint discrimination* that would prompt this Court to invalidate a statute on its face." Id. at 583 (emphasis added). The Court thus concluded: "Accordingly, the provision does not introduce considerations that, in practice, would effectively preclude *or punish*[6] the expression of a particular view." Id. at 583 (emphasis added).

The SBA loans at issue here present a sharp contrast to NEA. Section 120.110(p) imposes an *absolute prohibition* and requires an *absolute condition* for

[6] Certainly, most of the Plaintiffs are being "punished" for the content of the entertainment they present.

loan approval (*i.e.*, loan recipients must not present entertainment of a "prurient sexual nature"). *Contrast* id. at 581 (Congress had "impose[d] *no categorical requirement*"). Furthermore, the SBA program expressly engages in "viewpoint discrimination" - only businesses that present "prurient" sexual expression are denied loans, while those presenting other kinds of erotic speech are eligible.

Ysursa v. Pocatello Ed. Ass'n, 555 U.S. 353 (2009) is no different. Again relying on Regan, the Court concluded that Idaho's ban on political payroll deductions for union employees did not violate the First Amendment because "[t]he prohibition is *not* 'aim[ed] at the *suppression of dangerous ideas* . . . but is instead justified by the State's interest in avoiding the reality or appearance of governmental favoritism or entanglement with partisan politics." Id. at 359 (clarification and emphasis added, clarification in original, citations omitted).

Nor does Rust v. Sullivan, 500 U.S. 173 (1991), support the position of the government. At issue there was a statute providing for family planning services, but which prohibited funds from being "used in *programs* where abortion is a method of family planning." Id. at 178 (emphasis added). A regulation was then promulgated that clarified that the *services* (the Title X *projects*) could not provide for abortion counseling, referral, and activities advocating abortion as a method of family planning. Id. at 179. This is the *quintessential* "government speech" case. Rust dealt

with *governmental programs* where the government is permitted to choose what services can be provided, and what can be said, as part of *its own* programs.

As the Court recently noted post-Reed:

> [T]he Court's precedents have recognized just *one narrow situation in which viewpoint discrimination is permissible*: *where the government itself is speaking or recruiting others to communicate a message on its behalf*.[7] . . . The exception is necessary to allow the government to *stake out positions and pursue policies*[8]. . . . But it is also narrow, to prevent government from claiming that every government program is exempt from the First Amendment.

Matal v. Tam, 137 S. Ct. 1744, 1769 (2017) (Kennedy, concurring on behalf of four Justices in a 4-4 decision) (all emphasis added, citations omitted).

Subsequent cases have verified that Rust is, in fact, a "government speech" case,[9] and, for the reasons as set forth in Tam is irrelevant here. The instant litigation

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[7] Such as in Rust.

[8] Again, such as in Rust.

[9] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001) ("We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000), *or instances, like Rust, in which the government "used private speakers to transmit specific information pertaining to its own program*." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)). *See also* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 378 (6th Cir. 2006) (referring to the Supreme Court's holding in Rust as authority when deciding a government speech doctrine case);; Wells v. City & County of Denver, 257 F.3d 1132, 1140 (10th Cir. 2001); and Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Virginia Dep't of Motor Vehicles, 288 F.3d 610, 616–17 (4th Cir. 2002) ("It is well established that '*the government can speak for itself*.' . . . Pursuant to its many and varied functions, '[t]he government is entitled 'to promote particular messages' . . . . The government may promote its policies and positions either

does not involve *governmental* speech as was the case in Rust. Plaintiffs' entertainment is *private* speech that is not a part of any governmental program *to disseminate* any *government* 'message.' And, of course, even Defendants here do not purport to claim that Rust somehow magically overruled Regan and NEA with respect to the illegitimacy of viewpoint-based funding decisions.

As for the government's reliance on United States v. American Library Ass'n ("ALA"), 539 U.S. 194 (2003), even the Defendants acknowledge that it is only a *plurality* opinion. ALA involved a federal program to fund internet access in public libraries (again, like Rust, a government *program* that *itself* provides the expression, or at least the *mode* of expression). The government required the use of software blocking ('filters') to preclude the viewing of *illegal* materials. Id. at 198-201.

Comparing the circumstances in NEA, the Court observed that libraries frequently make subjective, content-based decisions when deciding what materials they will provide to their patrons. Id. at 205. In addition, the Court questioned whether *public* libraries even *have* First Amendment rights (since *government* does not). Id. at 210-12. Critical to the Court's ruling was the "ease" with which a library

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through its own officials or through its agents. *This authority to "speak" necessarily carries with it the authority to select from among various viewpoints those that the government will express as its own*.") (citing Rust, 500 U.S. at 194, with the description: "noting government's authority to select and fund speech in a non-neutral way in order to *send its own message*") (all emphasis added, other citations omitted).

patron could *disable* the filter. Id. at 209. And, of course, ALA relies on Regan (id. at 212) and did not purport to overrule or modify Regan's limitation on viewpoint-based discriminatory laws. Here, there is no "public program" in which the Plaintiffs participate when providing *their* entertainment. Rather, what is at issue is a broad-scoped *loan* program initiated to keep the small business community solvent in these dire pandemic times.

Similarly unavailing is the government's reliance on Leathers v. Medlock, 499 U.S. 439 (1991). There, the Court upheld a *generally applicable* sales tax that extended to cable television services, while exempting the print media. Id. at 441-42. Like the Lobbying case that the government so heavily relies on here, there was absolutely no *viewpoint* discrimination. The Court took pains to contrast three prior decisions that had invalidated taxes upon the media on First Amendment grounds.[10]

Crucially, the Court in Leathers noted that Regan - the case upon which the government's entire argument rests - "stands for the proposition that a tax scheme

[10] Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (ruling unconstitutional a tax that singled out for higher taxation publications with weekly circulation over 20,000, falling exclusively on 13 newspapers); Minneapolis Star & Tribune, Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (tax on the cost of paper and ink used in the production of publications over the first $100,000, falling on only 14 of the State's newspapers, violated the First Amendment); and Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (general tax that *exempted religious, professional, trade and sports magazines* was invalid because its application "*depended entirely upon their content*."). Leathers, 499 U.S. at 444-46.

that discriminates among speakers does not implicate the First Amendment *unless it discriminates on the basis of ideas*." Id. at 450 (emphasis added). The SBA Regulations certainly *do* discriminate "on the basis of ideas." Summarizing the controlling jurisprudence, the Court stated that a "differential tax of speakers . . . does not implicate the First Amendment *unless the tax is directed at*, or presents the danger of suppressing*, particular ideas.* That was the case in Grosjean, Minneapolis Star, and Arkansas Writers'. . . ." Id. at 453 (emphasis added). So too it is here.

As will be discussed below, Reed revolutionized the Supreme Court's analysis and treatment of content-based laws. However, even if this Court limits its review to the pre-Reed "subsidy" and tax cases, such as Regan, NEA and Leathers, it would be forced to conclude that the Regulations are not *viewpoint* neutral because, unlike the Lobbyist exclusion, they ban loans solely for entertainment that is subjectively deemed to be "prurient." Simply *saying* that the Regulations do not discriminate on the basis of content does not satisfy the government's burden to justify, under strict scrutiny, this burden on speech and expression.

In addition to the above, viewpoint discrimination can be established here in at least four ways. First, facially, the Regulations distinguish based upon the *type and content* of the expression. Again, businesses engaged in providing all forms of entertainment can qualify for loans. Only those which provide entertainment of a

"prurient sexual nature" (whatever that may mean) are ineligible.[11] Second, as applied, the facts available to this Court show that some "adult" businesses have received loans *irrespective* of the Regulations, while the vast majority are being denied *based upon* the Regulations. [*See* Ex. E to Plaintiffs' Renewed Motion for TRO, Dkt. No. 12, PgID.555] (two Plaintiffs being granted loans while the vast majority of others were denied). [*See also* Verified First Amended Complaint ("FAC") ¶¶ 116, 128, 140, 152, 163. 174, 184, 205, 214, 246, 256, 266, 276, 286, 297, 304, 316, 326, 336, 346, 356, 366, 376, 386, 396, 405, 416, 426, 436, 446, 456, 476, 486, and 496 ("denied" Plaintiffs qualified for PPL's but for the Regulations)]. Third, also as applied, reference to media reports demonstrates that numerous forms of *other entertainment*, even those which undoubtedly present films containing sexual topics or themes, have quickly been granted loans.[12] And, fourth, as discussed above, the SBA is approving loans to *brothels*.

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[11] In contrast, a ban on all "live entertainment" would be viewpoint neutral but would not qualify as being content-neutral under Reed. *See* discussion, *infra*.

[12] *See, e.g.*, Margaret Naczek, Milwaukee Ballet Able to Bring Back Full Staff with PPP Loan, Celebrates 50th Anniversary Virtually, Milwaukee Bus. J., Apr. 21, 2020, https://www.bizjournals.com/milwaukee/news/2020/04/21/milwaukee-ballet-able-to-bring-back-full-staff.html (last visited Apr. 23, 2020) (noting the Milwaukee Ballet received a PPL); Olivia Pulsinelli, Alley Theater Secures PPP Loan to Rehire Employees After Temporary Layoffs, Houston Bus. J., Apr. 14, 2020, https://www.bizjournals.com/houston/news/2020/04/14/alley-theatre-uses-cares-act-to-rehire-employees.html (last visited Apr. 23, 2020) (noting a Houston, TX theater received a PPL).

II. THE REGULATIONS UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF BOTH CONTENT AND VIEWPOINT

Reed profoundly changed our understanding of what it means for a law to be content based. Before Reed, the Court often muddled its pronouncements involving *content* specific and *viewpoint* specific laws; hence, the reason for its clarification in Reed. At issue was a municipal ordinance banning all outdoor signs without a permit but exempting 23 categories of signs. The Supreme Court found the regulations content-based (subjecting them to strict scrutiny) even absent a censorial purpose. Defendants fail to acknowledge this paradigm shift in "content neutrality" jurisprudence – a change *clearly* recognized across the Circuits. [13]

For example, in Norton v. City of Springfield, Illinois, 806 F.3d 411 (7th Cir. 2015) a panel withdrew its prior decision that had concluded that the panhandling law at issued did "*not draw lines based on the content of anyone's speech.*" Id. at 411-12 (emphasis added). Reversing its own decision, the court observed that "Reed understands content discrimination differently." Id. at 412.

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[13] The Justices themselves recognized the revolution in First Amendment jurisprudence wrought by Reed. In her concurrence, Justice Kagan (joined by Justices Ginsberg and Breyer) lamented the broad nature of the Court's ruling invoking strict scrutiny every time content discrimination appears in a law. Id. at 2236-39. Nor is Reed applicable only to sign laws. *See* 135 S.Ct. at 2236-37 (Kagan, J., concurring in the judgment) (relying on the First Amendment *tax* case of Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987); *cf*. Response, pp. 13, 16 (the SBA relying on the tax case of Leathers, *supra*)), and the following Circuit discussion.

Summarizing this sea change in the law, Judge Easterbrook wrote:

> *The majority opinion in Reed effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.*

Id. at 412 (all emphasis added).

Judge Manion concurred separately "*to underscore the significance of the Supreme Court's recent decision in* Reed [], which held that a speech regulation *targeted at specific subject matter* is content-based even if it does not discriminate among viewpoints within that subject matter." Id. at 413 (Manion, J., concurring) (emphasis added). In particular, Judge Manion recognized that Ward v. Rock Against Racism, 491 U.S. 781 (1989), which had been the seminal case dealing with time, place and manner restrictions, was fundamentally altered by Reed. He summarized this sea-change in the law: "Reed saw what Ward missed – *that topical censorship is still censorship*." Id. (emphasis added).

Another case observing this upheaval is Cahaly v. Larosa, 796 F.3d 399 (4th Cir. 2015) (involving an anti-robocall law). The court acknowledged that Reed conflicted with its prior circuit precedent which had held that, when a law could be justified without reference to the content of the regulated speech, it was deemed to be content neutral (and thus subject to lower scrutiny) even though the law facially differentiated between types of speech. Id. at 404-05. "Reed has made clear that, at the first step, the government's justification or purpose in enacting the law is

irrelevant." Id. (emphasis added). Because the law at issue there made *content distinctions on its face*, it did not "reach the second step to consider the government's regulatory purpose." Id. A plethora of other decisions demonstrate Reed's sweeping change of First Amendment constitutional jurisprudence.[14]

Reed begins with the observation that a law is content based if it "*applies to particular speech because of the topic discussed or the idea or message expressed*." Reed, 135 S.Ct. at 2227. Laws are also subject to strict scrutiny if they define "regulated speech by its function or purpose," or if, although facially content neutral,

[14] *See, e.g*, Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (noting that "Reed understands content discrimination differently" than prior panel decisions, and "effectively abolish[es] any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning *now requires a compelling justification*."); Free Speech Coal., Inc. v. Attorney Gen. United States, 825 F.3d 149, 160 (3d Cir. 2016) ("The United States concedes that, in light of Reed, our analysis in [the first appeal on the case], which relied on Ward, cannot stand.") (emphasis added); Cent. Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 632 (4th Cir. 2016) ("[T]his decision [Reed] conflicted with, and therefore abrogated our Circuit's previous formulation for analyzing content neutrality, in which we had held that 'the government's purpose is the controlling consideration.'") (quoting Cahaly, 796 F.3d at 405); Washington Post v. McManus, 355 F. Supp. 3d 272, 296 (D. Md. 2019), aff'd, 944 F.3d 506 (4th Cir. 2019) (Reed "was a *watershed First Amendment case*, refining the analysis of content-based regulations and cementing the primacy of the rule that such regulations receive strict scrutiny.") (emphasis added); Thomas v. Bright, 937 F.3d 721, 730 (6th Cir. 2019) (citing Reed in finding a provision of the Tennessee billboard Act to a facially content-based because the Act required "officials to assess the meaning and purpose of the sign's message in order to determine if the sign violated the Act"); Wagner v. City of Garfield Heights, 675 F. App'x 599, 604 (6th Cir. 2017) ("It appears that our embrace of a context-dependent inquiry into the content neutrality of [the challenged statute] may be inconsistent with Reed.").

they cannot be justified without reference to the content of the regulated speech, or were adopted by the government because of its disagreement with the message the speech conveys. Id.

The Court concluded that because the sign ordinance at issue in Reed was content based, it was *irrelevant* if the distinctions could be justified without regard to the content of the speech. "A law that is content based on its face is subject to strict scrutiny *regardless* of the government's benign motive, content-neutral justification, or 'lack of animus towards the ideas contained' in the regulated speech." Id. at 2228 (emphasis added) (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

Reed also rejected the argument that the government was not *targeting* any particular viewpoint. Rather, the Court observed that "a speech regulation targeted at a specific *subject matter* is content based even if it does not discriminate *among* viewpoints within the subject matter." Id. at 2230 (emphasis added) (citing Consolidated Edison of N.Y. v. Public Serv. Comm'n of N. Y., 447 U.S. 530, 537 (1980)). "[L]aws *favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference . . .* " Reed, 135 S.Ct. at 2230 (emphasis added) (quoting Turner Broadcasting System, Inc. v. FCC, 212 U.S. 622, 658 (1994)). Furthermore, "a speech regulation is content based if the

law applies to particular speech because of the topic discussed or the idea or message expressed." Reed, 135 S. Ct. at 2231.

These are the fundamental changes that Reed brings and, under these principles, the Regulations are *undeniably* content-based. Regan, NEA, and the other "subsidy" decisions relied on by the Government all *predate* Reed and the Court's clarification of the law of subject matter scrutiny. Consequently, and irrespective of the "subsidy" cases discussed above, the Regulations are both impermissibly content-based (i.e. they make distinctions based on subject matter[15]) and viewpoint-discriminatory; they must then be analyzed under strict scrutiny and are *presumed* to be unconstitutional; and should therefore be invalidated.

III. THE REGULATIONS ARE IMPERMISSIBLY VAGUE

Defendants do not even *attempt* to argue that the phrase "prurient sexual nature" has any specific meaning. Instead, the government appears to claim that the SBA has plenary authority to apply the term any way it chooses – including equating it to the "undeniably opaque" "decency and respect" provisions at issue in NEA, *supra.* Administration of the PPP process, however, has aptly demonstrated that the "prurience" standard has been applied in a completely arbitrary fashion bordering on true randomness: some Plaintiffs have been denied loans outright; an

[15] The Administrator's statements in support of its rulemaking also demonstrates content targeting. [Dkt. No. 11-4, PgID.424].

indistinguishable application by DV Diamond Club has been or will be fully funded; while the SBA has seen fit to fund at least one *brothel*.

Where protected expression is at stake *or* a criminal law is at issue, the highest standards of clarity and precision are required. For enactments involving purely economic concerns the standard is much more relaxed, but even then, government cannot act arbitrarily.[16] "Prurience," of course, applies only to speech; it has no "economic" component. Therefore, it is subject to the heightened vagueness standards applicable in First Amendment cases. *See* Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); McGlone v. Cheek, 534 Fed. App'x 293, 297 (6th Cir. 2013) ("[The principle of clarity is especially demanding when First Amendment freedoms are at risk.").

The government argues that this is a subsidy case governed by NEA and that it is free to draft its Regulations as carelessly as it chooses. However, NEA is readily distinguishable. In addition to the reasons already discussed above ("no "categorical

[16] *See, generally*, Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 551 (6th Cir. 2007) ("A more stringent test applies if the provision interferes with constitutional rights, and a less stringent test applies if the provision concerns civil rather than criminal penalties."); Pucci v. Michigan Supreme Court, 601 F. Supp. 2d 886, 901 (E.D. Mich. 2009) (quoting Ass'n of Cleveland Fire Fighters for the same proposition).

requirement," for example), the government is not a patron of the arts here; it is acting as a sovereign rescuing the national economy. *Contrast* id. 524 U.S. at 589 ("But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."). In addition, the imprecision here has the potential to generate a strong chilling effect as businesses attempt to "tone down" their performances to avoid the "prurience" label of doom. *Contras*t, NEA 524 U.S. at 588 ("It is unlikely, however, that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature."). Moreover, NEA involved a statutory provision[17] enacted by Congress and administered solely by the agency. Id. at 580. Finally, the intended purpose of §120.110(p) is to distinguish between speakers and to squelch "prurient" speech by denying life-or-death loans. *Contrast* NEA 524 U.S. at 587 ("[A] more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'").

Even where the speaker is free to engage in expression without respect to the program at issue, the government must act with precision. In Tam, the Court recognized that trademark registration conferred benefits which could not be denied

[17] Agency rules are not cloaked with the same presumption of validity as a statute enacted by Congress. *See*, Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 626–27 (1986).

arbitrarily or on a basis that violates freedom of speech - *even if the applicant has no entitlement to the benefit*. 137 U.S. at 1753, 1760-61 (citing Agency for Int'l Development v. Alliance for Open Society, Int'l, Inc., 570 U.S. 205, 214-15 (2013)).

The government's obligation to draft an intelligible Regulation is not alleviated *even were this Court not to apply First Amendment standards*. That is because the Regulations place Plaintiffs and other applicants at risk of criminal prosecution should they "guess wrong" on the prurience question. In order to obtain a loan, an applicant must certify that it "is eligible to receive a loan under the rules in effect at the time of this application." [PPP Borrower Application Form, ECF No. 11-7, PgID.433]. The applicant must further acknowledge:

> I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is *punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000*.

Id. (emphasis added).

> When criminal penalties are at stake, a relatively "strict test" for vagueness is warranted. Peoples Rights, 152 F.3d at 533 (collecting cases). In general, the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (collecting cases).

United States v. Bennett, 985 F. Supp. 2d 850, 860–61 (E.D. Mich. 2013); *see also* Belle Maer Harbor v. Charter Twp. of Harrison, 170 F.3d 553, 559 (6th Cir. 1999).

Even if the Court were to apply the lowest level of scrutiny – that utilized for civil, purely economic regulations not affecting fundamental rights – the "prurient" standard remains void for vagueness. The standard is inherently vague outside of the obscenity context. *See* Reno v. A.C.L.U., 521 U.S. 844, 873 (1997). And we have seen that lending officers and SBA officials have no clue how to apply these standards in the real world where the results are patently arbitrary. [*See* FAC, ECF No. 11, ¶ 83, PgID.258; Chart of Plaintiffs Denied, ECF No. 12-6]. Administering officials' inability to agree on a precise application of a statute is a strong indicator of vagueness. *See* City of Knoxville v. Entertainment Resources, LLC, 166 S.W.3d 650, 657 (Tenn. 2005) ("The officers' confusion demonstrates that the ordinance fails to provide ascertainable standards for law enforcement").

"Prurient" standing alone is incoherent. Regardless of the standard applied, §120.111(p) does not satisfy the Fifth Amendment requirement that a law be sufficiently precise to guide both the regulated citizen and the regulating officers.

IV. THE SBA LACKS THE AUTHORITY TO RESTRICT THE SCOPE OF THE PPP PROVISIONS OF THE CARES ACT

The government asserts no valid basis for the SBA's claimed plenary authority to restrict the scope of relief provided by the PPP, or even the loans it

historically administers under section 7(a) of the Small Business Act, 15 U.S.C. 636(a). The Administrator's authority has, as the government notes [ECF No. 24, PgID.702], indeed been described as "extraordinarily broad." SBA v. McClellan, 364 U.S. 446, 447 (1960). However, that was in the context of furthering the SBA's "important objectives," including to "aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to preserve free competitive enterprise" and to "maintain and strengthen the overall economy of the nation." Id. (citing 15 U.S.C. § 631).

Unilaterally excluding specified speech-related small businesses is not part of that mandate. The CARES Act is not advanced by the imposition of these Regulations. It does not help the economy to exclude wait staff or bartenders from receiving the benefits of the PPP because the entertainment seen over the employee's shoulder is a woman dancing rather than a boxing match. A Congressional instruction to an agency to conduct itself in service of the "public interest" cannot be mistaken for an expansive delegation of authority.

Further, the government must do more than simply *claim* that a regulation is within its authority. Schurz Communications v. F.C.C., 982 F.2d 1043, 1048 (7th Cir. 1992) involved an F.C.C. regulation where the enabling statute similarly provided for the agency to act in accordance with the "public interest, convenience, or necessity." *Compare* 15 U.S.C. 633(d). Still, the Court explained:

> The difficult question presented by the petitions to review is not whether the Commission is authorized to restrict the networks' participation in program production and distribution. *It is whether the Commission has said enough to justify . . . the particular restrictions that it imposed in the order here challenged*. … It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational—must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response ***to a problem that the agency was charged with solving***. . . ."

Id. at 1049 (citations omitted)

As in Schurz, the "rules flunk this test." Id. at 1050. Erotic speech is not a 'problem' that the SBA is tasked with 'solving.' Moreover, all that the SBA offers in support of the Regulations are its statements found at 60 Fed. Reg. at 64360 [ECF No. 12-9, PgID.564] that the rule was "consistent with its obligation" to "direct its limited resources . . . [to] serve the public interests." The SBA's statements are nothing more than an empty *pro forma* justification.

The SBA's emergency regulations fair no better. They [**Exhibit Q**, SBA 3245-AH34; **Exhibit R**, SBA 3245-AH35; and **Exhibit S**, SBA 3245-AH36] specifically recognize that health measures "some of which are government mandated, are being implemented nationwide and include the closures of *restaurants, bars,* and gyms" and that the PPP is designed to expeditiously provide funds by "streamlining the requirements of the regular 7(a) loan program." [**Ex. Q**, p. 2 (emphasis added)]. Nowhere is there stated any rationale for excluding bars or restaurants that present entertainment the Administrator disfavors.

In addition, the authority the SBA had with respect to its legacy programs does not apply to the PPP. The government asserts that the authority to impose the *general* loan *exclusion* provisions of 13 C.F.R. §120.110 to the special case of PPP loans is derived from the language contained in 15 U.S.C. § 636(a)(36)(B) stating that guaranteed "*covered loans*" are to be made "under the same terms, conditions and processes" as a loan made under section 7(a) (the "normal" small business loan provisions). Response, pp. 8, 30-31, 34. But the cited language has *nothing whatsoever to do* with loan *eligibility*. Rather, that language is contained in the section dealing with loan *guarantees* by the SBA - which makes perfect sense.

A "covered loan" cannot be one that is *ineligible*; that would render the grammatical structure of the provision entirely oxymoronic. *After* a PPP loan application is approved so that it constitutes a "*covered* loan," the *loan* is then properly subject to the same "terms, conditions, and processes" as other Section 7(a) loans (except for the various changes provide for in the PPP, such as no collateral, no personal guarantees, etc.). Had Congress intended to grant the SBA authority to rewrite the liberal eligibility standards found in the PPP by permitting the SBA to create *exclusions* for otherwise *statutorily* eligible small businesses, it could have said so. It did not. The SBA's decision to extend the exclusions applicable only to its legacy programs is beyond the authority delegated by Congress.

Moreover, the difference in purpose and scope of the two different loans (general Section 7(a) loans versus PPL's) demonstrates why Congress did not see fit to include the regulatory exclusions as part of its statute. Section 7(a) loans can be used for virtually anything. In contrast, the PPP and the Regulations promulgated thereunder make clear the limited purposes to which these loans are to be used: Payroll (75% or more), rent, mortgage interest, and utilities. Landlords, mortgage holders, and utility companies should not be suffering as a result of these Regulations. They have no connection to the form of entertainment presented. And the Plaintiffs' employees will use their paychecks under the PPL's to pay their *own bills* (for necessities like rent, utilities, food, and health care). Congress designated specific purposes for loans under the PPP, and the Regulations thwart that intent.

V. THE REGULATIONS VIOLATE OCCUPATIONAL LIBERTY RIGHTS, WHICH ARE ALIVE AND WELL

Unlike Defendants' argument, constitutional rights do not come with an expiration date. The SBA brief dismisses Plaintiffs' occupational liberty claims with a snide comment that "whatever the law may have been in 1897," it has no relevance to in the courts today. Regardless, the concept of occupational liberty remains alive, yes, even in the 21st century.[18]

[18] *See, e.g.*, Conn v. Gabbert, 526 U.S. 286, 291 (1999) (noting that there is "some generalized due process right to choose one's field of private employment); Engquist v. Oregon Dep't of Agric., 478 F.3d 985, 997 (9th Cir. 2007), *aff'd sub nom.* Engquist

VI. THE SBA'S ENABLING STATUTE, 15 U.S.C. § 634(b)(1) DOES NOT IMMUNIZE IT FROM INJUNCTIVE RELIEF

Initially, it bears noting just how radical the government's position is here. Plaintiffs have demonstrated that the challenged Regulations are unconstitutional and beyond the SBA authority. The usual remedy would include entry of an injunction. Yet, the Government maintains that the SBA cannot be enjoined even if

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v. Oregon Dep't of Agr., 553 U.S. 591 (2008) ("We have recognized the liberty interest in pursuing an occupation of one's choice . . . a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions . . . ."); Bigby v. City of Chicago, 766 F.2d 1053, 1057 (7th Cir. 1985) ("There is indeed a concept of liberty of occupation . . . [courts have] continued to provide limited protection for liberty of occupation.") (collecting 1950 and 1960s cases); Pineda v. W. Texas Cmty. Supervision, No. EP-19-CV-57-KC, 2020 WL 466052, at *10 (W.D. Tex. Jan. 27, 2020) ("'[L]iberty . . . means not only the right of the citizen to be free from incarceration, but the term is deemed to embrace the right of the citizen to live and work where he will.") (quoting Williams v. Fears, 179 U.S. 270, 274 (1900) and Allgeyer v Louisiana, 165 U.S. 578, 589 (1897)); Gist v. City of Cumberland, No. CIV. 10-144-GFVT, 2012 WL 602810, at *4 (E.D. Ky. Feb. 23, 2012) ("Generally speaking, freedom to choose and pursue a career, to engage in any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the state.") (quoting Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) and Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); In re Jones, 123 N.E.3d 877, 885 (Ohio 2018) (DeWine, J., concurring) ("The Fourteenth Amendment to the federal Constitution also has been held to protect the right of an individual *to pursue and continue in a* ***chosen occupation*** *free from unreasonable government interference*.") (citing Dent v. West Virginia, 129 U.S. 114, 121-122 (1889); Allgeyer, 165 U.S. at 589) (emphasis added).

its actions or policies are blatantly unconstitutional. The Government's remarkable claim of total immunity from injunctive relief is not supported.[19]

First, it bears reiterating that 5 U.S.C. § 706 (1) and (2) permit this court to "*compel agency action* unlawfully withheld," and to "hold unlawful and set aside agency action" that is "*contrary to constitutional right*, power privilege, or immunity." (Emphasis added). Moreover:

> In interpreting Section 634(b)(1), this Court must be guided by the United States Supreme Court's instruction that "*such sue-and-be-sued waivers are to be liberally construed,* notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor the sovereign."

Elk Assocs. Funding Corp. v. U.S. S.B.A. ("Elk"), 858 F.Supp. 2d 1, 21-22 (D. D.C. 2012) (emphasis added) (quoting F.D.I.C. v. Meyer, 510 U.S. 471, 480 (1994); citing Fed. Housing Admin., Region No. 4 v. Burr, 309 U.S. 242, 245 (1940)).

Additionally and contrary to the government's assertions, the most persuasive authorities hold that "§634(b)(1) does not bar injunctions in all circumstances."

[19] The Government does a disservice to the Court by citing only those few cases which declined to issue an injunction against the SBA. The Fifth Circuit opinion in Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1290 (5th Cir. 1994) simply observed that the issue had been decided in an earlier case. That decision - Valley Const. Co. v. Marsh, 714 F.2d 26, 29 (5th Cir. 1983) - held that the statute says what it says with no attempt at further analysis. The case from the Fourth Circuit - J.C. Driskill, Inc. v. Abdnor, 901 F.2d 383 (4th Cir. 1990) – did not even involve injunctive relief.

Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1056 (1st Cir. 1987).[20] The discussion of this issue in District of Columbia precedent is particularly rich and nuanced. *See, e.g.*, Cavalier Clothes, Inc. v. United States, 810 F.2d 1108, 1112 (Fed. Cir. 1987) , and Elk, 858 F.Supp. 2d 1. Those cases conclude that "nothing either in the language or the legislative history of §634 suggests that Congress intended to grant the SBA any greater immunity from injunctive relief than that possessed by other governmental agencies." Cavalier Clothes, 810 F.2d at 1112.[21]

The Government's brief neither discusses the many cases which favor Plaintiffs' position nor grapples with the fact that a U.S. District Court in Wisconsin entered a Temporary Restraining Order against the SBA *in an almost identical case* only a matter of days ago. Camelot Banquet Rooms, Inc. v. SBA, No. 20-CV-601

[20] *See, e.g.*, Aerotronics v. United States, 661 F.2d 976, 977 (D.C. Cir. 1981); Valley Forge Flag Co., Inc. v. Kleppe, 506 F.2d 243, 245 (D.C. Cir. 1974); Elk, *supra*; San Antonio Gen. Maint., Inc. v. Abdnor, 691 F.Supp. 1462, 1467 (D. D.C. 1987); Related Indus. v. United States, 2 Cl.Ct. 517, 522 (1983) Dubrow v. Small Business Admin., 345 F.Supp. 4, 7 (C.D. Cal. 1972); Simpkins v. Davidson, 302 F.Supp. 456, 458 (S.D. N.Y. 1969) (per curiam); U.S. Women's Chamber of Commerce v. U.S. Small Bus. Admin., 2005 WL 3244182 at *14 (D. D.C. Nov. 30, 2005).

[21] Even Courts which have refrained from entering injunctive relief against the SBA on account of the § 634 "anti-injunction' language, have concluded that declaratory relief is permissible. *See*, Ulstein, 833 F.2d at 1055 (citing cases); *See, also*, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 579–80 (S.D. N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019) ([T]hough we conclude that injunctive relief may be awarded in this case … we decline to do so at this time because declaratory relief is likely to achieve the same purpose."). While declaratory relief is certainly available to Plaintiffs, it would not provide them with a full and complete remedy to the SBA's unconstitutional actions, extending through its designated lending banks.

(E.D. Wis. Apr. 15, 2020) (Enjoining the enforcement of the 13 C.F.R §120.110(p) "prurient materials" disqualifier against sexually oriented businesses on the basis of identical legal theories), [ECF No. 12-5, PgID.553].

In fact, it is well-establish that courts may enjoin the SBA when: 1) "the SBA exceeds its statutory authority," (Elk, 858 F.Supp. 2d at 20), and 2) when such injunctions "would not interfere with internal agency operations." (Ulsteins, 833 F.2d at 1057). Plaintiffs' requested relief fits well within *both* categories.

Certainly, SBA does not have the statutory authority to violate the Constitution. In fact, no legislation could even give such authority.

> Some courts have read the anti-injunction language in Section 634(b)(1) literally and concluded that injunctive relief against the SBA is absolutely foreclosed. *See, e.g.,* J.C. Driskill, Inc. v. Abdnor, 901 F.2d 383, 386 (4th Cir. 1990); Valley Constr. Co. v. Marsh, 714 F.2d 26, 29 (5th Cir. 1983); Mar v. Kleppe, 520 F.2d 867, 869 (10th Cir. 1975). Such a sweeping interpretation of Section 634(b)(1) has not taken hold in this Circuit, where courts have strongly intimated that injunctive relief is available, at a minimum, when the SBA exceeds its statutory authority. *See* Valley Forge Flag Co., Inc. v. Kleppe, 506 F.2d 243, 245 (D.C. Cir. 1974) (per curiam); U.S. Women's Chamber of Commerce v. U.S. Small Bus. Admin., 2005 WL 3244182, at *14 (D. D.C. Nov. 30, 2005); San Antonio Gen. Maint., Inc. v. Abdnor, 691 F.Supp. 1462, 1467 (D.D.C.1987).

Elk, 858 F. Supp.at 20.

As shown above, Congress did not delegate carte blanche authority to the SBA to invent non-statutory reasons to deny relief to businesses which Congress deemed to be in desperate need of assistance. Likewise, the CARES Act did not authorize

the SBA to make content-based and viewpoint-based decisions as to who gets loans. The SBA has surely exceeded its statutory and Constitutional authority when it elected to apply §120.110(p) against Plaintiffs and others.

Moreover, Plaintiffs' request for injunctive relief cannot possibly interfere with the SBA's internal functioning. Applications have been submitted. The monies have been set aside. All that is needed is for the SBA to issue the loan placeholder numbers that Plaintiffs were entitled to in the first place, and to give direction from the SBA to the lending banks to stop using the Regulations. This will do nothing but require the SBA to follow Congress's directives. The limited information available to the parties suggests that all or almost all of their applications would have been approved and funded by those lenders but for §120.110(p).[22] [*See* Declarations of Hoffer, Byrne, and Polakis, ECF Nos. 26-1, 26-2, 26-3]. Plaintiffs ask only that that this unauthorized and unconstitutional provision be enjoined so that the CARES Act *and* the SBA can function normally and in the way Congress intended. That intervention will not disrupt any of the SBA's *legitimate* activities.

Courts have correctly noted that the legislative history of §634 does not support a conclusion that the SBA is unique or enjoys unique immunities. *See, e.g.*, Related Indus. v. United States, 2 Cl.Ct. 517, 522 (1983) ("[N]othing in either §

[22] In terms of administrative burden, the Court should note that Plaintiffs' combined requested loan amounts represent less than **.00285%** of the *total* amount allocated by Congress in the first round of PPP funding.

634(b)(1) or its legislative history indicates that Congress intended to give the SBA any greater immunity from injunctive relief or other legal process than that possessed by any other governmental agency. Rather, it merely intended to insure that the SBA be treated the same as any other government agency in this respect").

This Court should follow the majority consensus and the recent decision by the Wisconsin District Court, which enjoined the SBA from enforcing §120.110(p) for precisely the same reasons asserted in this case under almost identical facts.

VII. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A TEMPORARY RESTRAINING ORDER

In terms of proving irreparable harm, Plaintiffs need go no further than to show that the Regulations infringe upon their First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347 (1976). The government mounts no serious response to Plaintiffs' clear showing of irreparable harm. Instead, it makes two minor points, both of which are utterly unpersuasive.

First, the government faults Plaintiffs for an alleged lack of proof that their businesses will be ruined absent PPP funding. This argument not only contravenes reality, but is undermined by the clear legislative purpose and history of the CARES Act itself. As the Court is well aware, Plaintiffs' businesses are currently shuttered and not in operation as a result of the COVID-19 pandemic, a fact requiring no

special proof in light of the voluminous news coverage of state-by-state "stay at home" orders. *See, e.g.,* Alaa Elassar, "This is Where All 50 States Stand on Reopening," CNN.com (April 24, 2020), available at https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/. Common sense alone establishes that a shuttered business has no revenue stream from which to pay its workers (some of whom still work to preserve assets, etc.), its rent, and its financial obligations, and that an inability to pay its debts will quickly lead to bankruptcy and ruin. Given these realities, absent outside financial assistance, Plaintiffs' businesses face the same fate as all others impacted by COVID-19 closures: certain economic death and the permanent cessation of protected expression.

Moreover, and perhaps more significantly, Congress clearly understood that periods of prolonged business closure were likely to threaten the ability of small businesses to reopen, and it acted to prevent that outcome. *See, e.g.,* Sen. Portman PPP Press Release (April 9, 2020), available at https://www.portman.senate.gov/newsroom/press-releases/portman-explains-how-small-businesses-can-apply-sba-paycheck-protection.[23] In other words, the CARES Act itself specifically

[23] Notably, Ohio Senator Rob Portman remarked of the PPP:

> [S]mall businesses have been hit particularly hard by this coronavirus pandemic…. They've got rent and utilities and many are trying to keep some people on payroll. So in this new package that Congress passed called the CARES Act there is a provision that I think can be very helpful to small businesses. It's called the PPP program, Paycheck

contemplates that businesses forced to close may not be financially able to reopen absent an immediate influx of funding. For the government to argue otherwise now completely contradicts the very legislation it so vociferously defends.

Reduced to its core, the government's counter-argument contains a critical logical fallacy. On the one hand, the government argues that it is entitled to discriminate against businesses which present objectionable speech; it all but concedes that Plaintiffs' ineligibility for PPP loans rests upon the type of speech they offer. [Response, ECF No. 24, Pg.ID. 712-13]. On the other hand, the government argues that Plaintiffs will not suffer irreparable harm, because their First Amendment rights are not implicated by the Regulations. [Id. at PgID.731-32]. Both of these assertions cannot be true. Rather, it is clear from the SBA's action that *it* intended to harm Plaintiffs' allegedly "prurient" expression by declining to fund it. *See* Legatus v. Sebelius, 901 F.Supp.2d 980, 997 (E.D. Mich. 2012) ("Violation of a First Amendment right in itself constitutes irreparable harm.")

> Protection Program. In essence, it tries to help small businesses keep the doors open, but also, keep their employees on board.
>
> ****
>
> So this is a way to help keep the doors open. It's a way to ensure that our small business community, which is so essential to our economy, and so essential to employment – more than half of Americans work in small businesses – can not just stay open but also keep some of these employees on board…. It's also important because, once the economy starts to pick up again, … then there will be an opportunity with these businesses still open, and these employees still there, to be able to get back in business more quickly.

VIII. A PRELIMINARY INJUNCTION WOULD FURTHER THE PUBLIC INTEREST

Plaintiffs have already cited authority that protection of constitutional rights is *always* in the public interest. Defendants respond with the false assertion that Congress defined the public interest by specifically adopting the loan exclusion set forth in 13 C.F.R. § 120.110 as part of the PPP / CARES Act. As Plaintiffs establish above, that is patently *untrue*. Rather, Congress expressed a policy of assisting American workers by linking loan forgiveness to maintenance of payrolls. Here, the public interest is furthered when American workers are *paid* so that they in turn are able to pay *their* bills. The public interest is served when landlords are paid their rent; when mortgage holders receive their installment payments; and when utility bills are paid current. Finally, Defendants' argument of a "zero sum game" Response, ECF No. 24, PgID.733] is the proverbial red herring. These loans *are* to be provided on a "first-come, first-served" basis. Plaintiffs got in line, or *tried* to get in line, early. They do not seek to "jump" anyone. All they ask is that their applications be evaluated based on the time they applied, or tried to apply; free from the flagrantly unconstitutional Regulations.

IX. NO BOND SHOULD BE REQUIRED

Plaintiffs initially note the irony of the government's argument that Plaintiffs, who are placed in dire financial straits as a result of the coronavirus pandemic, must

post a bond in order to preserve their rights to obtain emergency financial assistance from funding meant to assist them. Nevertheless, there is no shortage of authority observing that no bond should be required when the protection of constitutional rights (particularly those under the First Amendment) are at stake.[24]

X. RESPONSES TO THE COURT'S QUESTIONS

At the recent hearing, this Court posed several questions to Plaintiffs' counsel and requested that counsel furnish certain information. Plaintiffs respond below.

Is it Proper to Join Additional Plaintiffs from Outside the District which might be Subject to Different State Closure Orders" Plaintiffs respond: "Yes."

Fed.R.Civ.P. 20(a)(1) adopts a liberal policy favoring permissive joinder of plaintiffs:

> Persons may join in one action as plaintiffs if: they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all plaintiffs will arise in the action.

[24] *See, e.g.,* Temple Univ. v. White, 941 F.2d 201, 220 (3d Cir. 1991) ("A district court should consider the impact that a bond requirement would have on enforcement of [a federal right or 'public interest'], in order to prevent undue restriction of it") (clarification added); First Puerto Rican Festival, Inc. v. City of Vineland, 108 F.Supp.2d 392, 396 (D. N.J. 1998) (The "equities involved in Plaintiff's attempt to vindicate its First Amendment rights, and the threat that protected speech may be quashed, outweigh the City's potential ability to recover the extraordinary costs" of plaintiff engaging in the conduct in question); McCormack v. Twp. of Clinton, 872 F.Supp. 1320, 1328 (D. N.J. 1994) (waiving bond when First Amendment rights were at stake); See, also, Eliason v. Rapid City, 2018 WL 620481, at *13 (D. S.D. 2018); Planned Parenthood of Del. v. Brady, 250 F. Supp. 2d 405, 411 (D.Del. 2003).

Rule 20 "is designed to promote judicial economy, and reduce inconvenience, delay, and added expense." Coughlin v. Rogers, 130 F.3d 1350, 1351 (9th Cir. 1997). For this reason, and as this Court itself has noted, "[t]he permissive joinder rule is to be *construed liberally* in order to promote trial convenience and to prevent multiple disputes." Patrick Collins, Inc. v. John Does 1-21, 286 F.R.D. 319, 321 (E.D. Mich. 2012) (emphasis added).

Rule 20(a)(2) imposes two specific conditions to join defendants in one action: 1) a right to relief is asserted against them jointly or severally relating to, or arising out of the same transaction or occurrence; and 2) that any question of law or fact common to all defendants will arise in the action. *See* Fed. R. Civ. P. 20(a)(2). The first Rule 20 prong, the "same transaction" requirement, refers to similarity in the factual background of a claim. Coughlin, 130 F.3d at 1350. Claims that "arise out of a systematic pattern of events" and "have [a] very definite logical relationship" arise from the same transaction or occurrence. Bautista v. Los Angeles Cnty., 216 F.3d 837, 842–3 (9th Cir. 2000). Under Sixth Circuit precedent, the words "transaction or occurrence" are to be given "broad and liberal interpretation in order to avoid a multiplicity of suits." Allstate Insur. Co. v. Electrolux Home Products, Inc., 2016 WL 6995271, at *2 (N.D. Ohio Nov. 30, 2016).

The assertion of identical legal claims against a common party satisfies the second prong. *See, e.g.,* Third Degree Films v. Does 1-36, 2012 WL 2522151, at *4

(E.D. Mich. May 29, 2012). Rule 20 does not require that all questions of law and fact raised by the dispute be common, but neither does it establish any qualitative or quantitative test of commonality. Lee v. Dell Products, L.P., 2006 WL 2981301, at *10 (M.D. Tenn. Oct. 16, 2006). The common-question rule requires not that common questions of law or fact predominate, but only that the claims involve the same or closely related factual and legal issues. Allstate, 2016 WL 6995271, at *3.

Applied to this case, both Rule 20 factors for permissive joinder and the presumption in favor of joinder weigh in favor of including the out-of-state Plaintiffs in this action. As an initial matter, the claims raised by the out-of-state Plaintiffs "arise out of a systematic pattern of events" – namely, the differential treatment of their PPP loan applications based upon the "prurient" exclusion – and therefore arise from the same transaction or occurrence. Bautista, 216 F.3d at 842–3. In addition, the out-of-state Plaintiffs raise identical constitutional challenges to the PPP program and therefore satisfy the common-questions standard. *See* Third Degree Films, 2012 WL 2522151, at *4.

Joinder of the out-of-state Plaintiffs facilitates the underlying purposes of Rule 20, namely judicial economy, efficiency, and consistency. Allowing all Plaintiffs impacted by the "prurient" exclusion to bring their claims in one lawsuit avoids the duplication of work that would be necessitated should the out-of-state

Plaintiffs be required to sue in each of their home jurisdictions. In fact, the joinder of Plaintiffs in this suit actually benefits the government, because it permits the SBA to defend a singular action, rather than the dozens across the country. Furthermore, consolidating all Plaintiffs' claims prevents the possibility of inconsistent outcomes and patchwork resolutions based solely on the notion that reasonable people can reach different conclusions. The Supreme Court "strongly encourage[s]" joinder under these circumstances. United Mine Workers, 383 U.S. at 724.

The Court has questioned the impact of patchwork, state-by-state "stay at home" orders on the joinder question, and it is true that Plaintiffs may reopen their businesses on varying timelines in the future. However, the variation in those executive orders is immaterial, because Plaintiffs' right to relief – the focus of Rule 20 – arises from a singular, common federal loan regulation. Moreover, the loans are for payroll for employees *currently* employed (to be used for payroll with 8 weeks of loan fund disbursement), *and for the payment of rent, mortgage interest and utilities; payment of which are* ***unaffected*** *by stay-at-home orders*.

Even were some out-of-state Plaintiffs to fully reopen their businesses, they would still be prejudiced by the inability to secure a PPP loan and would still be placed in a detrimental financial position compared to other entertainment competitors not flagged as "prurient." As a result, because the PPP loan regulations are at the heart of this action, variation in the ability of out-of-state Plaintiffs to

reopen does not prejudice Plaintiffs' request for permissive joinder. *See, generally*, Patrick Collins, Inc. v. John Does 1-21, 282 F.R.D. 161, 166 (E.D. Mich. 2012). (Rule 20 envisions a flexible inquiry to determine where the claims raised by joined parties are "logically related."); MRP Properties, Inc. v. United States, 2017 WL 5732912, at *6 (E.D. Mich. Nov. 28, 2017) (Rule 20 inquiry focuses on whether there is common government action, not identical damages).

Should the National Association of Governmental Guaranteed Lenders ("NAGGL") be added as a Defendant? Plaintiffs respond: "No."

The undersigned has investigated the loan application process, which has included but is not limited to: 1) a number of detailed and lengthy calls with a member of the Oakland County (Michigan) SBA loan board (who in turn sought further information in regard to the questions posed by the undersigned (in accordance with the inquires of this Court); 2) discussions with numerous clients (both Plaintiffs here and otherwise) in regard to the conversations that *they* have had with officials at their lending bank; and 3) examination of the bank letters that are being filed under seal contemporaneously herewith. That information has led the undersigned to conclude that, while some of the lending banks in question are receiving recommendations from NAGGL, those recommendations are based upon directives from the SBA. In addition, many other banks are getting their "marching orders" directly from the SBA. Accordingly, at present, the undersigned does not

possess sufficient information that would permit the filing of an action against NAGGL in accordance with Rule 11.

Should the lending banks be added as Defendants? Plaintiffs respond: "No."

First, as discussed in ¶¶ 515 and 516 of the FAC [PgId.359-60] and at the April 20, 2020 status conference, many of the Plaintiffs have very tenuous relationships with their depository banks (which are the desired lenders here) as a result of a long-standing DOJ program directed at the adult nightclub industry known as Operation Choke Point. As reflected by the declaration of Matthew J. Hoffer, Esq. [ECF No. 26-1, ¶¶ 12-14, PgID.802-03] obtaining the requested bank letters and declarations as requested by this Court has been problematic. The banks do not want to be stuck in the middle between the Plaintiffs and the federal government, which is guaranteeing these loans. Requiring the Plaintiffs to bring in the lending banks as Defendants could result in this case going down as the greatest Pyrrhic victory in the annals of jurisprudential history. The relief afforded to Plaintiffs in this litigation might evaporate overnight if the banks terminate their relationships with the Plaintiffs in response to their unnecessary joinder to this litigation

Second, as discussed immediately above, the banks are doing nothing more than *following the directives of the SBA*. A number of the letters filed under seal flat out state that for the banks to even reconsider processing loan applications, they need direction *from the SBA*. Moreover, in the investigation of these matters referenced

above, Plaintiffs' counsel now understand that it is *the SBA* that is approving loan applications and issuing the "placeholder" numbers and is also denying certain loan applications.

Third, and in that regard, injunctive relief against the SBA would bind the lending banks because those banks act as agents on behalf of the SBA and are in privity with the SBA. Pursuant to the Lender Agreement they act "under delegated authority from SBA" and "assume[] all obligations, responsibilities, and requirements associated with delegated processing of [PPP loans]." [**Exhibit T**, p. 2, ¶ 3]. Such requirements necessarily include the Regulations. Therefore, banks have *no* authority to process and approve PPP loans based on anything *other* than the Regulations. With no discretion, and authority circumscribed by the Regulations, banks act in every sense as "agents" of the SBA in administering the PPP loan program.[25] As agents of a party (the SBA), banks receiving actual notice are bound by injunctive relief under Fed. R. Civ. P. 65(d)(2)(B).

Additionally, because the SBA's delegation of authority requires the banks to simply follow the Regulations, the banks have no identifiable interest in the Regulations—much less interests distinguishable from those of the SBA. Given this

[25] Moreover, construing the SBA's delegation of authority as anything *more* than a strict principal-agent relationship that requires banks to strictly implement the Regulations would effectively grant banks quasi-legislative rule-making authority over SBA loans.

identity of interests, the banks are in privity with the SBA. Therefore, adjudicating the Regulations' legality in the banks' absence would not violate the banks' due process rights.[26]

As a practical matter, since the SBA's delegation of authority tasks the banks with applying the Regulations, the SBA must notify the banks that the Regulations no longer apply. Otherwise, the injunction will be an abstraction without practical effect.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Honorable Court grant the motion and order the relief originally requested.

Respectfully submitted,

Dated: April 27, 2020

/s/ Bradley J. Shafer

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[26] The privity inquiry essentially asks whether the nonparties are "so identified in interest with [the party] that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.) The identified-in-interest requirement protects against what might otherwise be a denial of the non-party's due process rights. *See* Chase Nat. Bank v. City of Norwalk, Ohio, 291 U.S. 431, 437, (1934); *see also,* Berkwitz v. Humphrey, 163 F. Supp. 78, 11 Ohio Op. 2d 91 (N.D. Ohio 1958).

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CERTIFICATE OF SERVICE

I certify that on April 27, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

/s/ Matthew J. Hoffer
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