No. 21-2589

In the United States Court of Appeals
for the Seventh Circuit

CAMELOT BANQUET ROOMS, INC, ET AL.
PLAINTIFFS-APPELLEES

VS.

UNITED STATES SMALL BUSINESS ADMINISTRATION, ET AL.
DEFENDANTS-APPELLANTS

On Interlocutory Appeal From Grant of Preliminary Injunction by the
United States District Court for the Eastern District of Wisconsin

No 21-cv-0447

Adelman, J., there presiding.

Brief in Support of Plaintiffs-Appellees for Amici Curiae First Amendment Lawyers Association, Free Speech Coalition, and Association of Club Executives

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October 25, 2021.

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2589

Short Caption: Camelot Banquet Rooms, Inc. v. United States Small business Administration

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

[NEW] First Amendment Lawyers Association, Free Speech Coalition, and Association of Club Executives

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

[NEW] Law Offices of Reed Lee, Law Offices of D. Gill Sperlein

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

[NEW] None for any amicus

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

[NEW] None for any amicus

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

[New] N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

[New] N/A

Attorney's Signature: s/ Reed Lee Date: October 25, 2021

Attorney's Printed Name: Reed Lee

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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☑ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
[New] The First Amendment Lawyers Association (FALA)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
[New] Reed Lee, Law Office and D. Gill Sperlein, the Law Office of D. Gill Sperlein

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

[New] FALA has no parent Corporation

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

[New] No publicly held company owns any interest in FALA

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature:  Date: October 25, 2021

Attorney's Printed Name: D. Gill Sperlein, The Law Office of D. Gill Sperlein

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amicus curiae First Amendment Lawyers Association is an Illinois nonprofit corporation with some 180 members throughout the United States, Canada, and Europe. Its membership consists of attorneys whose practice emphasizes the defense of First Amendment rights and related civil liberties. For more than half a century, FALA members have litigated cases concerning a wide spectrum of such rights, including free expression, free association, and related privacy issues. FALA has frequently appeared as *amicus curiae* before numerous federal courts to provide its unique perspective on some of the most important First Amendment issues of the day.

Amicus curiae Free Speech Coalition is a California nonprofit mutual benefit corporation incorporated in 1990. It is exempt from federal taxation under Section 501(c)(6) of the Internal Revenue Code; and it serves as the North American trade association for the adult entertainment and sexual wellness products industries. Its members include many small businesses as well as individuals engaged producing and disseminating entertainment and information addressing sexual and erotic themes. It has actively litigated free expression cases as a party and has also provided its members' perspectives to numerous federal courts as *amicus curiae*.

Amicus curiae Association of Club Executives is a Florida non-profit corporation incorporated in 1999. It is exempt from federal taxation under Section 501(c)(6) of the Internal Revenue Code; and it serves as the trade association for America's adult night clubs. With over 300 members, including many small businesses operat-

ing substantial adult entertainment cabarets, it serves and protects its members by, *inter alia*, working to dispel the myths surrounding such businesses and their operation. Its members have a keen interest in fair treatment by the government and in recognition of the important role they play as small businesses operating in their communities, providing work to performers and staff, and serving their patrons. Small businesses presenting live on-premises entertainment to patrons have been especially hard-hit by public health measures undertaken to combat the current pandemic, so they are particularly interested in the relief afforded by the PPP.

The parties consent to the filing of this *amicus curiae* brief. In accordance with Federal Rule of Appellate Procedure 29, no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for any party. Members of the First Amendment Lawyers Association, not otherwise involved in the case helped to edit this brief.

SUMMARY OF THE ARGUMENT

Direct—and careful—attention to basic, substantially undisputed constitutional principles leads inexorably to the conclusion that the unconstitutional conditions doctrine prevents the United States Small Business Administration from restricting benefits under the second-round Paycheck Protection Program unless it can be said that this financial assistance program is one which promotes speech (or another specific, closely-related public-service effort) which the government could and would undertake (directly and for itself), were it not for the subsidized private efforts. The government speech doctrine—and its speech-subsidy corollary—provides a principled basis for upholding, in a narrow category of proper cases, a government refusal to subsidize inconsistent speech or similar activity closely connected with a deliberately limited publicly-funded project. In a *proper* government speech subsidy case, the government does not really act as a regulator at all. Rather, it funds and oversees a specific project with particular, carefully limited goals; and it may decide that some speech, connected directly with such a project, would be inconsistent with the goals and limitations motivating the project. But the PPP is not such a carefully limited public service endeavor; it is a broad effort to provide emergency financial assistance to small business devastated by the necessary public health response to a pandemic. The leading case applying government speech subsidy analysis to limit the unconstitutional conditions doctrine draws the applicable constitutional line quite aptly for present purposes: "we have here not the case of a general law singling out a disfavored group on the basis of speech content," said the Supreme Court

in *Rust v. Sullivan*, 500 U.S. 173, 194-95 (1991), "but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded. The PPP *is* a general law, in this sense; and the challenged exclusion *precisely* "singl[es] out a disfavored group of the basis of speech content." The PPP's "prurient sexual nature" exclusion thus imposes an unconstitutional condition upon the challengers' perfectly lawful and legitimate business operations.

ARGUMENT OF *AMICI*

I. Under Basic, Well-Settled First Amendment Principles, the Challenger' Categorical Exclusion from PPP Eligibility Imposes an Unconstitutional Condition upon Qualified, Deserving Applicants for Emergency Pandemic-Related Economic Assistance. That Exclusion Cannot be Sustained as a So-Called "Speech Subsidy" Limitation Because it Cannot Be Justified under the Government Speech Doctrine.

The Paycheck Protection Program is a broad government benefit program providing financial relief designed to ease the devastation which small businesses have suffered on account of necessary public health responses to the current pandemic. It is plainly *not* a narrow, carefully constrained project designed to subsidize businesses speaking only on particular subjects on behalf of or in lieu of government—saying, that is, only what the *government wants said*. Under these circumstances, the categorical exclusion of small business operations of a "prurient sexual nature" from PPP loan eligibility violates the unconstitutional conditions doctrine; and it cannot be justified as a limitation on a speech subsidy under the government speech doctrine. These doctrines arise from basic First Amendment principles, and the boundary between them follows from a proper understanding and application of those principles. There can be no doubt, however, *see infra* at 23-25. that the nude or partially-nude erotic performance dancing prompting the "prurient sexual nature" exclusion here is—absent very special and narrow circumstances not limiting the PPP exclusion—fully protected by the First Amendment to the United States Constitution.

A. Government Impermissibly Abridges Freedom of Expression Not Only When It Imposes a Prior Restraint or Subsequent Punishment Upon Protected Expression, But Also When It Imposes Substantial Burdens Or Even When It Selectively Withholds Certain Benefits.

The First Amendment provides, in part, that "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. 1 cl. 3-5. The principal force of this restriction prevents the government from interfering with expression between one or more willing speakers (or writers or performers), *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976)("[f]reedom of speech presupposes a willing speaker") and one or more willing listeners (or readers or audience members), *Rowan v. United States Post Office Department*, 397 U.S. 728, 735 (1970)(upholding statue permitting individual to block mailings from specified mailer). These free expression clauses, of course, nowhere protect speech, writing, and performance more stringently than against interference by prior restraints. *E.g. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)(invalidating denial of permission to use public theater to present rock musical where determination was unconstrained by safeguards necessary to address "the risks of freewheeling censorship"). But it is long- and well-settled that they also prohibit a wide range of *post hoc* government restrictions and burdens on expression as well. *E.g. New York Time Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964)(reversing civil defamation verdict where common law supplied insufficiently speech-protective liability standard); *Fiske v. State of Kansas*, 274 U.S. 380, 387 (1927)(reversing criminal syndicalism conviction where

statute, as applied, "unwarrantably infring[ed] the liberty of" political organizer). Thus the First Amendment prohibits the government from enacting outright prohibitions, *e.g. State of Texas v. Johnson*, 491 U.S. 397, 400 (1989)(invalidating conviction for "desecrat[ing] a venerated object" by publicly burning U.S. flag at demonstration against national political convention"), and it also forbids government imposition of improper burdens or restrictions on the circumstances surrounding such expression, *e.g. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 123 (1991)(invalidating victims'-compensation requirement that proceeds of a convict's writings be deposited directly into official fund).

But apart from actively burdening or altogether prohibiting expression, the government may affect speech in other ways as well. It may, for instance, establish a public forum for expression which private speakers may thereafter use without restriction on account of the content of their expression. *Southeastern Promotions,* 420 U.S. at 556 (1975)(the First Amendment fully protected producers seeking to present *Hair* at municipal theater). The government may also establish a limited-purpose public forum where speech may be restricted to relevant topics but otherwise remains free from content control. *Cf. Rosenberger Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995)("necessities of confining a forum to the limited and legitimate purposes for which it was created may justify government in reserving it for certain groups or for the discussion of certain topics"). And it may specially protect and even financially support public-minded noncommercial

broadcasting which serves to broaden the range of the otherwise available educational and pubic affairs programming. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 367-70 (1984)(reviewing history of spectrum-protection and then more affirmative support for noncommercial broadcasting). Under some circumstances, the government might even be able to require that a privately owned and operated forum be at least partially free from content control by the operators. *Red Lion Broadcasting Co. v. Federal Communication Commission*, 395 U.S. 367, 390 (1969)(upholding broadcast "fairness doctrine," now repealed); *but see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)(striking down state right-to-reply statute for newspaper editorials). And, to be sure, the government may *also* speak for itself, *see* 5 Ronald Rotunda & John Nowak, *Treatise on Constitutional Law* § 20.11(b) (5th ed. 2013); and here First Amendment restrictions are as weak (*i.e.* generous to the government) as they get. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)("Free Speech Clause restricts government regulation of private speech; it does not regulate government speech").

These latter sorts of government efforts actually amount to more-or-less direct *benefits* to the expression promoted, so it is hardly surprising that they are seldom challenged (under the free expression clauses, at least) when and to the extent that they advance the expression selected for benefit. But other expression, of course—which the government might have benefited but did not—can often seem restricted by contrast (*i.e.* when compared to expression which has enjoyed the government benefits). These considerations are commonly assessed under the so-called

"unconstitutional conditions" doctrine, *see generally* Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989), *cf. infra* at 9-12; while the unique issues presented when the government truly speaks for itself (or when it privileges or subsidizes others who will speak for it) have generated a "government speech" doctrine (and a "speech subsidy" corollary), *see generally* Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565 (1980), *cf. infra* at 12-17. These doctrines might appear to be in some tension here; so the questions presented to this court in this case must be resolved by determining the proper scope of each. *See infra* at 17-22.

B. Under the Unconstitutional Conditions Doctrine, Government May Not Condition the Receipt of a Substantial Benefit on the Forfeiture of a Constitutional Right, Even if It Could Altogether Avoid Providing the Benefit to Everyone.

The principle that the Constitution forbids government from conditioning the enjoyment of a valuable privilege or benefit upon circumstances which it could not obtain by direct regulation has direct roots in controversies which run long and deep in American constitutional law. *Compare*, *e.g.*, *McCauliffe v. Mayor of New Bedford*, 155 Mass. 216, 216 (1892)(*per* Holmes, J.:)("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"), *with Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926) (government "may not impose conditions which require the relinquishment of constitutional rights. … It is inconceivable that guarant[e]es embedded in the Constitution of the United States may thus be manipulated out of existence"). As Professor

Sullivan aptly put it: "In the battle of slogans in unconstitutional conditions cases, all would agree that 'government cannot do indirectly what it cannot do directly' has won out over 'the greater power to deny includes the lesser power to grant upon condition.'" Kathleen Sullivan, Unconstitutional Conditions and the Distribution of Liberty, 26 San Diego L. Rev. 327, 327 (1989).

Although the doctrine plainly retains a much broader application, *see*, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6 (1969)(welfare benefits under Equal Protection Clause and interstate travel right); *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963)(unemployment benefits under Free Exercise Clause); *Torcaso v. Watkins*, 367 U.S. 488, 495-966 (1961)(office-holding and religion clauses), the courts have not hesitated to apply it where free expression rights are at stake. Thus the Supreme Court has expressly held that:

> even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly.

Perry v. Sindermann, 408 U.S. 593, 597 (1972)(state college violated nontenured faculty member's free expression rights by failing to re-hire him after he publicly criticized college administration)(internal quotation marks and alteration omitted), *quoting Speiser v. Randall*, 357 U.S. 513, 357 (1958)(invalidating statutory require-

ment that veterans forswear certain political beliefs before receiving tax exemption).

In retrospect, it seems inevitable that free expression rights would move solidly to the center of unconstitutional conditions litigation. *See generally*, Edward Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, Case W. Res. L. Rev. 97, 100-103 (1989)(tracing historical development of doctrine and citing cases). Public employment, for instance, is a benefit which may not be conditioned upon an individual's limitation or waiver of free expression and association rights. *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987)(invalidating discharge of local sheriff's clerical employee resulting from casual comment on unsuccessful Presidential assassination attempt); *Connick v. Myers*, 461 U.S. 138, 140 (1983)(reiterating that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment" but rejecting First Amendment claim by public defender discharged for intra-office circulation of a questionnaire critical of employment conditions); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)("theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected"), *quoting Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967)(invalidating prohibition, together with related restrictions and disclosure requirements, on state university employee membership in subversive organizations); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960)(invalidating statute requiring that public school teachers disclose current and recent past membership in public

advocacy organizations); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)(invalidating statutory "loyalty oath" and associated disclosure requirements for public officers and employees), *See also Branti v. Finkel*, 445 U.S. 507, 514 (1980)(political patronage-based dismissal of public defenders invalidated in part because it "had the effect of imposing an unconstitutional condition upon the receipt of a public benefit"), *citing Elrod v. Burns*, 327 U.S. 347, 360-61 (1976)(similarly invalidating political patronage system under First Amendment).

But although the most recent leading cases focus largely on public employment, and sometimes articulate a balancing test in that context, *cf*. *Connick* at 140; *Pickering* at 568), firm and unmodified precedent establishes that the unconstitutional condition doctrine applies to government projects providing for public payments to private parties, *cf*. *Shapiro v. Thompson*, 394 at 627 n. 6 (welfare benefits; *Sherbert v. Verner*, 374 U.S. at 404-405 (1963)(unemployment benefits); *Speiser v. Randall*, 357 U,S, at 357 (1958)(tax exemption), where a *different* narrow principle, *cf*. at 9-12, *infra*, may sometimes apply to limit the doctrine, *cf*. at 17-22, *infra*.

C. Under the Government Speech Doctrine, Government Remains Free to Engage in Its Own Speech for Itself and to Subsidize Others Who Engage in Speech and Closely-Related Public Service Which It Would Otherwise Undertake for Itself.

No one can seriously doubt that government officials may formulate and spend public funds to publish information concerning the government's own processes and programs and even policy statements designed to influence public affairs. Government could hardly accomplish anything at all without speaking on at least some

subjects. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009)("it is not easy to imagine how government could function if it lacked this freedom"); *cf. Rosenberger v. v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995)("when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes"). While there may be some restrictions on what government can say for itself, *Pleasant Grove City v. Summum* at 468 ("This does not mean that there are no restraints on government speech"), those limitations will generally arise elsewhere than from constitutional free expression protections, *e.g.* U.S. Const. Amend. 1 cl. 1 (Establishment Clause—as far as it goes, *see Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005)(plurality opinion)(upholding public park display of donated Ten Commandments monument). And where the government's own speech is truly at issue, there will be no requirement that it provide an identical opportunity for the expression of differing or even opposing views. *Summum*, at 478-80 (display of donated monuments in public park gave no others right to similarly donate monuments for display). Government speech does not, by itself, create a public forum. *Id.*, at 478-79. Rather, government officials may press the government's position on a very wide range of issues without affording opposing speakers equal (or any) time in any particular forum. And surely, the government may establish a National Endowment for Democracy without also funding a National Endowment for Fascism, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), or can name a Lincoln Park without also naming a Davis Park. *See generally* Caroline Corbin, *Government Speech and First Amendment Capture*, 107 Va. L. Rev. 224, 227 (2021)("The start-

ing assumption for the government speech doctrine is that the government must be able to control its own speech in order to function").

The government may thus speak for itself directly, as when officials announce polices and also when they speak and write to persuade others to accept those policies. And government also speaks for itself when it erects publicly-funded monuments as well as when it accepts and places monuments donated by others. *Summum*, at 468 ("government...may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message"), *citing Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005)(where government controls the message "it is not precluded from relying on the government speech doctrine merely because it solicits assistance from nongovernmental sources"); *see also Perry*, at 682 (public park display of donated monument). Again, the lack of any sort of equal time or rebuttal requirement demonstrates that, when it comes to formulating and publishing its own speech in these ways, government is free to engage in what would otherwise be impermissible content-control. This is because, when the government is truly speaking for itself, it is not really regulating expression at all, in any of the senses principally addressed by the First Amendment (*cf.* "no law abridging"). *Summum*, at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech").

But government might also speak for itself, in a slightly less direct sense: by choosing to promote and assist private (*i.e.* non-governmental) speakers or projects

which necessarily involve the speech of others, *e.g.* U.S. Const. Art 1 § 8 cl. 1 (federal Spending Clause), where those others are ready, willing and able to say what the government wants said. Instead of opening a new government agency or expanding the role of an existing one in order to address a particular problem, the government might choose to adopt a funding program which promotes private projects serving the government's stated goals. *E.g. Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 213 (2013)(discussing spending power source of authority to establish grant program promoting particular public health objectives); *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 536 (2001)(similar program to provide legal services to indigent parties facing civil litigation). When government chooses this course, it has some leeway to restrict or even to mandate the content of program-related speech of the private individuals working on the project (as opposed to the off-duty private expression of those same individuals) in order to limit the use of public funds to their intended purpose. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991)("this limitation is a consequence of [the individual's] decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority"). Similar reasons justify an effective government requirement of clear structural bifurcation between educational, charitable, and religious organizations and their respective closely allied lobbying organizations (with important tax exemption afforded to contributors to the former but not the latter) in order to maintain the Congressional determination to avoid avoid injecting tax-exempt contributions into efforts to influence legislation. *Regan v. Taxa-*

tion With Representation of Washington, 461 U.S. 540 (1983)(tax-exemption operates as a government subsidy)(upholding prohibition of lobbying activities by nonprofit organizations receiving tax-deductible contributions such as are available to non-lobbying educational, charitable, or religious nonprofits).

Thus the legitimate purpose of this authority to restrict speech and closely related program activities in connection with government-supported programs is to ensure that targeted public funds are used for their intended purposes and not otherwise. For this reason, these cases establish a speech-subsidy *corollary* to the government speech doctrine, not an independent basis for arbitrarily restricting subsidies. Reasons are limits in constitutional law; and thus the scope of the instant speech-subsidy analysis is limited to circumstances where the government speech doctrine legitimately operates in the first place. Although it is easy to lift isolated quotes from the leading cases which fail to stress the connection, legitimate speech subsidy analysis is always tied directly to the purpose of the funded government project. The speech subsidy cases do not stand for an untethered proposition that the federal spending power categorically avoids other constitutional restrictions. *See Rust v. Sullivan*, 500 173, 194 (1991)("we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded"). Careful attention to these constitutional details thus provides the principled basis for avoiding results where the

spending power swallows the other applicable constitutional constraints—including the unconstitutional conditions doctrine—whole.

D. Government Speech-Subsidy Analysis Limits the Unconstitutional Conditions Doctrine Only in Situations Where the Government Speech Doctrine Properly Applies in the First Place. The Government Speech Doctrine Is Simply Not a Basis For the Very Broad Pandemic-Related Financial Assistance Provided by the Paycheck Protection Program.

Together, the foregoing basic First Amendment principles explain why the government speech doctrine, *supra* at 12-17, can sometimes limit the unconstitutional conditions doctrine, *supra* at 9-12: when government speaks for itself, it is not really regulating speech at all. And this limiting effect similarly controls when government deliberately subsidizes others to speak for it and then limits their program-related expression in order to avoid misuse of public funds and to limit its public program to its carefully-specified intended purpose. This last consideration unquestionably provides a principled basis for extending a measure of deference to speech restrictions imposed in order to maintain public program limits. *Rust v. Sullivan*, 500 U.S. 173, 179 (1991)(restricting use of family-planning counseling funds appropriated under Public Health Service Act "to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities"—not including abortion); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983)(restricting use of tax-deductible contributions to subsidize nonprofit corporations where "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that

nonprofit organizations undertake to promote the public welfare"). This control over the legitimate scope of government programs does *not*, however, establish that the Spending Clause altogether trumps the First Amendment. If that were so, the government could selectively fund the construction of places of worship and then restrict the contents of sermons preached there; and the same would also hold true under the free expression clauses as well.

But even where the relevant government spending is clearly a speech subsidy (*i.e.* directed at supporting a particular project which will necessarily involve expression), permissible Spending Clause restrictions must define or reinforce "the limits of the government spending program," whereas those "conditions that seek to leverage funding to regulate speech outside the contours of the program itself" remain invalid as unconstitutional conditions. *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 214-15 (2013)(invalidating regulation requiring recipients of anti-AIDS public health funding to publicly renounce support for legalized prostitution). So do restrictions which are not narrowly tailored to further a substantial government interest in preventing abuse of the funded project. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984)(invalidating prohibition on editorializing by educational stations subsidized through the (government) Corporation for Public Broadcasting); *Legal Services Corp. v. Velasquez*, 513 U.S. 533, 547-49 (2001)(invalidating (government) Legal Services Corporation funding restrictions on publicly subsidized litigation challenging existing welfare law provisions). More fundamentally, all of these

indirect government-speech cases *distinguish*, *see Taxation With Representation* at 545—they do not overrule—*Speiser v. Randall*, 357 U.S. 513 (1958), which long ago invalidated a state property tax exemption requirement that the recipient sign a declaration disavowing advocacy of the forcible overthrow of the U.S. government. The property tax exemption for honorably-discharged veterans there at issue benefited those veterans for their *past* military service, not for future actions—expressive or otherwise—which the government might seek to promote. There was not the slightest suggestion in that case that the challenged condition served the government's own speech purposes, even indirectly. Moreover, much more recently, the United States Supreme Court has repeatedly cautioned that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Alliance for Open Society* at 215, *quoting Velasquez*, at 547.

Thus the indirect government speech subsidy cases are not simply Spending Clause cases. Each involved a particular government-funded project (*e.g.* U.S. Leadership Against HIV/AIDS Act, Corporation for Public Broadcasting, Legal Services Corporation, tax-exemption support for nonprofit educational, charitable, or religious associations) aimed at supporting activities which *inextricably* involve expression. Where the public funding program in question cannot honestly be so characterized—such as a public assistance program aimed at easing some of the general economic disruptions associated with widespread contemporary social distancing and other public health measures, *cf.* Interim Final Rule, Business Loan Program

Temporary Changes; Paycheck Protection Program as Amended by American Rescue Plan, 86 Fed. Reg. 15083 (March 22, 2021)—a government-speech-subsidy defense against an unconstitutional conditions challenge, properly understood, cannot even get of the ground. That is precisely why *Speiser v. Randall*, 357 U.S. 513, 518 (1958), did not involve an indirect government speech defense. The subsidy there at issue (a property tax exemption) was targeted at recipients regardless of whether they expressed themselves on any issue at all. If government spending power included the authority to arbitrarily exclude distasteful expression from any benefit under a general economic assistance program, then *Speiser* would have been decided the other way. *See also Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987)(tax exemption withheld from general interest magazine but available to other narrower-interest publications specified by general content unconstitutional even absent censorial motive). But the government in *Speiser* could *not* condition that subsidy upon a public declaration concerning a particular political matter, altogether irrelevant to the subsidy program at issue. Indeed, that tax exemption was not aimed at supporting any private expression at all.

And neither is the Paycheck Protection Program. Its subsidies are designed to avoid stagnation or collapse in an economy which relies critically on small businesses and their workers. *See generally* Final Rule, Borrower Appeals of Final SBA Loan Review Decisions Under the Paycheck Protection Program, 86 Fed. Reg. 51589 (Sept. 16, 2021)(Background Information). The subsidies are available to non-expressive small businesses as well as to expressive ones. The program would operate

as intended even if all of the applicants happen to engage exclusively in business activities which have nothing to do with expression. There is thus no meaningful sense in which the government is counting on PPP-subsidy recipients to convey messages or engage in *expression* which the government supports and hopes to promote—*speech which the government wants said*. The "prurient sexual interest" condition restricting PPP loans can hardly be "recast...as a mere definition of [this] program" of general small business subsidies prompted by widespread economic disturbances resulting directly from public health measures necessitated by a pandemic. *Cf. Velasquez* at 547. Any suggestion that the government-speech-subsidy doctrine supports the "prurient sexual interest" restriction on the Paycheck Protection Program overlooks the fact that that doctrine—as its very name demonstrates—is fundamentally about *speech which the government wishes to promote* as its own. That is the doctrine's *sine qua non*; and it is altogether absent here.

It is a profound mistake to imagine the government speech doctrine or its speech subsidy corollary as a blank check for the government to disfavor (or avoid an otherwise general connection with) expression which it finds distasteful. The Supreme Court unmistakably disavowed *that* notion more than sixty years ago in *Speiser*. The challengers here need not establish that the PPP exclusion represents an instance "of the Government suppressing a dangerous idea." *Rust* at 194, *quoting Regan* at 548, *quoting Cammarano v. United States*, 358 U.S. 498, 513 (1959). *That* hyperbolic formulation has been articulated as a contrasting counterfactual (*i.e.* dicta) in every case where it has been mentioned in this context. The chal-

lengers here need only distinguish the very few leading cases approving and applying speech subsidy analysis by establishing that the restriction here bears no close relation to a project's carefully and deliberately limited fundamental scope and purpose. And that is why the Court, in the leading case applying speech-subsidy analysis (most of them reject it) to a challenge involving a particular, carefully limited family planning program, went out of its way to note that it was simply upholding "a prohibition on a project grantee or its employees from engaging in activities outside of its scope." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). "We have here not a case of a general law singling out a disfavored group on the basis of speech," said the Court, "but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Ibid*. But Paycheck Protection Program restriction on recipients who engage in "prurient expression"—unconnected as it is to any narrow, carefully-targeted and -tailored social program— *is* precisely that.

II. No Other Basic First Amendment Principle Applies Here to Rescue the PPP's Categorical "Prurient Sexual Nature" Exclusion From Invaldation Under the Unconstitutional Conditions Doctrine.

There are particular First Amendment doctrines which sometimes support direct government regulation of erotic or sexually explicit expression, but none applies here to support the challenged PPP exclusion. Like other constitutional principles, each of these doctrines must be carefully confined to applications supported by the reasons justifying the doctrine in the first place. *See supra* at 16 ("[r]easons are limits in constitutional law"). They cannot be casually invoked as untethered, arbitrary

restrictions on our critical general free expression protections without the risk of weakening First Amendment protections for other categories of expression disfavored by government—traditionally or in the future.

A. None of the Erotic Performance Dancing Prompting the Benefit Exclusion Here Has Been Found Legally Obscene, So All of It Remains Fully Protected by Well-Settled First Amendment Principles.

During its long struggle with the "intractable obscenity problem," *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704(1968)(Harlan, J., concurring in part and dissenting in part), the Supreme Court noted approvingly the Model Penal Code definition of "prurient interest" as "a shameful or morbid interest in sex, nudity, or excretion." *Roth v. United States*, 354 U.S. 476, 487 n. 20 (1957)(plurality opinion), *cited in Kois v. State of Wisconsin*, 408 U.S. 229, 230 (1972)(*per curiam*). It is hardly clear that the erotic performance dancing prompting the benefit exclusion comes close to here meeting this definition. In any event, great care should be taken here to avoid undermining the now well-established legal test for obscenity: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California,* 413 U.S. 15, 24 (1973)(internal quotation marks and citations omitted). The *Miller* standard, which has stood the test of time, has been our shared constitutional frame of reference for very nearly fifty years, has been cited in nearly 2,500

reported decisions at every level of our Federal and State judiciaries, and has been relied upon by Congress for an SBA limitation *not* at issue here, *see*, *e.g.*, 15 U.S.C. § 633(e)(prohibiting Small Business Administration from assisting "any business concern or other person engaged in the production or distribution of any product or service that has been determined to be obscene by a court of competent jurisdiction").

As the just-cited statutory section properly recognizes, obscenity cannot be broadly presumed under the First Amendment, but must be proven in each case on specific facts before adverse action can be taken. *E.g. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975)(government could not presume rock musical to be obscene without affording "appropriate procedural safeguards"). Under *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942)("There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"), expression meeting the legal definition of, *inter alia*, obscenity is unprotected by the First Amendment. But the Supreme Court has clearly recognized that the sort of erotic performance dancing at issue here regularly falls short of obscenity, *City of Eire v. Paps A.M.*, 529 U.S. 277, 289 (2000)(plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991)(plurality opinion), *accord Id.* at 581 (Souter, J., concurring), *accord Id.* at 587 (White, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting); *Scad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981)(reversing conviction for presenting live erotic performance dancing where ordinance prohibited all live entertainment); *Doran v. Salem Inn. Inc.*,422 U.S. 922, 932 (1975)(bar-

room-type performance dancing protected under First Amendment though subject to limited regulation under Twenty-First), and thus remains constitutionally protected. And although Court pluralities have often characterized such performance dancing as reaching the "outer ambit" of First Amendment protection, *Paps* at 289; *see also Doran* at 932 ("customary bar-room type of nude dancing may involve only barest minimum of protected expression" (internal quotation marks omitted), the Supreme Court has never applied the *Chaplinsky* analysis as a sliding slope of gradually decreasing First Amendment protection. Rather expression of a character approaching an unprotected category remains fully protected unless and until it is established that the particular expression at issue has passed over a constitutional cliff. So there is no proper sense in which the erotic performance dancing in question here receives any sort of weakened or diminished constitutional protection. This is why the main argument of this brief assesses the constitutional conditions and government speech doctrines (and the latter's speech subsidy corollary) under historically established First Amendment principles.

B. The Secondary Effects Doctrine Can, With Proper Findings, Support Carefully Drawn Time, Place, and Manner Restrictions on Sexually-Oriented Entertainment; But It Provides No Support for the Blanket PPP Exclusion Challenged Here.

For some time now, the so-called "secondary effects" doctrine has been applied to justify certain time, place, and manner restrictions on expression involving sexual themes or content. *City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41, 46-47 (1986)(upholding municipal zoning ordinance restricting location of, but not alto-

gether excluding, adult motion picture theaters); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 , 71-72 (1976)(plurality opinion)(time, place, and manner restrictions imposed by "anti-skid row ordinance" may apply to adult mini motion picture theaters in order to ameliorate their blighting effect on surrounding neighborhood), *accord Id.* at 73-82 (Powell, J., concurring)(applying intermediate scrutiny); *but see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 75-76 (1982)(reversing convictions for presenting performance dancing in adult bookstore in violation of ordinance prohibiting all live entertainment). In general, time, place, and manner restrictions arise when government acts to address non-expression-related concerns but unavoidably affects the expression involved in an incidental way. *E.g. Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984)(municipal interest in regulating visual clutter justified prohibition against posting signs on public property); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649-51 (1981)(upholding prohibition against peripatetic religious solicitation at state fair); *FCC. v. Pacifica Foundation*, 438 U.S. 726, 750 (1978)(upholding sanction against daytime radio broadcast of indecent comedy recording); *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949)(plurality opinion)(upholding, as applied, prohibition against operation of sound trucks on public streets), *accord Id.* at 89 (Frankfurter, J., concurring)(approving "[w]ise accommodation between liberty and order"), *accord Id.* at 97 (Jackson, J., concurring)("Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others"); *but see Police Department v. Mosely*, 408 U.S. 92, 94-95 (1972)(invalidating

content-based time, place, and manner regulation prohibiting picketing near school where labor picketing was categorically excepted from ban). For this reason, too, they have traditionally drawn intermediate constitutional scrutiny when challenged under the First Amendment. *E.g. Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984)(prohibition against camping by protesters who were otherwise permitted to demonstrate near White House); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)(upholding conviction for burning draft card during antiwar demonstration); *but see Reed v. Town of Gilbert*, 576 U.S. 155, 164-66 (2015)(content based sign ordinance subject to strict scrutiny).

But the PPP loan exclusion at issue here has none of the features of restrictions previously approved as a result of secondary effects concerns. Nothing about it varies according to the time, place, or manner in which the expression prompting the exclusion occurs. Nothing is directed (let alone supported by findings) to ameliorating any secondary effects at all. And finally, nothing prevents this exclusion from applying to small business which are fully complying with the very common zoning restrictions which already ameliorate the secondary effects of the affected businesses. Again, when constitutional "doctrines" take on a life of their own, untethered from the reasons justifying them, governments may well try to deploy them in just this sort of overkill fashion. But the First Amendment forbids such applications.

Finally, while it is sometimes important, particularly in the context of limited public forum analysis, to assess whether a challenged arrangement discriminates

against particular *viewpoints*, *e.g. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), such a further inquiry is irrelevant and out of place where expression is burdened by a government program restrictions have nothing to do with the stated, carefully limited project goals. That *all* public broadcasting editorials were banned was not enough to rescue an arbitrary public funding restriction. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984). Moreover, a subject-matter/viewpoint distinction would hardly be very clear in a case such as this. There is certainly a category of expression—variously called "erotica" or "pornography"—which expressly addresses sexual themes and is designed to arouse sexual thoughts, emotions, and passions, *see Pornography* (full definitions), https://www.merriam-webster. com/dictionary/pornography (full definitions); and just as surely, some find this sort of expression objectionable for precisely this reason. But when they do, it is not clear that they are singling out a particular subject-matter category of expression rather than objecting to the *pervasive* viewpoint which such expression invariably adopts. The subject matter/viewpoint distinction is hardly very robust in cases like this one, in contrast to a rigorous assessment of whether, in the context of a limited-purpose government project, the restriction on expression is narrowly tailored to the project's purpose limitation or is essentially arbitrary with respect to it. That is why the courts appropriate focus is on the fit—or lack thereof—between the funded project's purpose and the restriction imposed.

CONCLUSION

For all of the foregoing reasons, as well as for the reasons advanced by the Plaintiffs-Appellees, this Court should affirm the District Court's order granting a preliminary injunction.

Respectfully submitted,

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October 25, 2021.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type and volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Seventh Circuit Rule 32(c) because, exclusive of portions exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,982 words, as indicated by the Tools>Word Count function of Office Libre Writer 6.4.7.2 running under Linux Mint 20.2. This brief contains no footnotes.

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 29(a)(4) and 32(a)(5) and Seventh Circuit Rule 32(b) and (c) as well as the type style requirements of Federal Rules of Appellate Procedure 29(a)(4) and 32(a)(6) because it is set, double-spaced in a proportional 12-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I, Reed Lee, counsel for *amicus curiae* and a member of the bar of this Court, certify that, on October 25, 2021, I caused a copy of the foregoing Brief of *Amici Curiae* in Support of the Plaintiffs-Appellees to be filed with the Clerk and served on the parties through this Court's electronic filing system. I further certify that all parties required to be served have been duly served.

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