No. 21-2589

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CAMELOT BANQUET ROOMS, et al.,

Plaintiffs-Appellees,

v.

U.S. SMALL BUSINESS ADMINISTRATION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 21-C-0447 (Adelman, J.)

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY

Plaintiffs' response fails to rehabilitate the district court's injunction, which requires the U.S. Small Business Administration (SBA) to transmit guarantee authority so that plaintiffs' live erotic dance venues may receive second-draw Paycheck Protection Program loans. As the government's opening brief established, Congress expressly prohibited SBA from issuing second-draw loans to numerous categories of businesses, including businesses such as plaintiffs' that present live erotic dance performances. Plaintiffs insist that the government's refusal to provide them an economic stimulus violates their First Amendment rights, but as the motions panel acknowledged in granting a stay pending appeal, such a "selective, categorical exclusion[] from a government subsidy do[es] not offend the First Amendment." *Camelot Banquet Rooms, Inc. v. SBA*, 14 F. 4th 624, 2021 WL 418199, at *3 (7th Cir. Sept. 15, 2021). "[A] legislature's decision not to subsidize the exercise" of First Amendment speech "does not infringe the right." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983).

Plaintiffs attempt to "avoid the controlling line of subsidy cases" by casting the restriction here as an attempt to "suppress[] [a] dangerous idea" or as invidious "viewpoint discrimination," but those efforts are unavailing, as the motions panel recognized. *See Camelot Banquet Rooms*, 2021 WL 418199, at *4 (quotation marks omitted). Plaintiffs' alternative grounds for sustaining the district court's injunction are likewise without merit. The district court's preliminary injunction should be reversed.

ARGUMENT

I. Plaintiffs Have No Likelihood of Success on the Merits

A. The District Court's Preliminary Injunction is Foreclosed by Supreme Court Precedent

The government's opening brief established that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny," but rather rational-basis review. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983); *accord Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188-89 (2007) ("[I]t is well-established that the government can make content-based distinctions when it subsidizes speech."). As the motions panel recognized in granting a stay pending

appeal, it was rational "for Congress to choose not to subsidize" live erotic dance venues through second-draw Paycheck Protection Program loans, particularly given that live erotic dance establishments are often associated with "well-known and widely recognized" "secondary effects." *Camelot Banquet Rooms, Inc. v. SBA*, 14 F.4th 624, 2021 WL 4189199, at *5-6 (7th Cir. Sept. 15, 2021). The district court's preliminary injunction cannot be reconciled with Supreme Court precedent and should be reversed. Plaintiffs' arguments fail to demonstrate otherwise.

1. Plaintiffs primarily assert that Congress's decision to deny Paycheck Protection Program loans to live erotic dance venues "does not satisfy the secondary effects doctrine[]." *See* Resp. Br. 11. Plaintiffs misunderstand the relevance of that doctrine. Plaintiffs rely on cases in which governments imposed "time, place, and manner regulation[s]" on adult entertainment venues. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986); *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 462 (7th Cir. 2009). But Congress here "is not trying to regulate or suppress plaintiffs' adult entertainment," *Camelot Banquet Rooms*, 2021 WL 4189199, at *3, and therefore did not need to justify its regulation under doctrines applicable to time, place,

and manner restrictions. Congress "has simply chosen not to subsidize" plaintiffs' businesses through second-draw Paycheck Protection Program loans, and its choice not to do so is subject to only rational-basis review. *See id.*; *see also* Opening Br. 19-24. The relevance of the secondary-effects doctrine is that in making available special government-backed loans to subsidize certain businesses, the recognized history of secondary effects for live erotic dance venues, *see, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300-01 (2000), is a legitimate factor Congress could have taken into account when deciding how taxpayer dollars should best be allocated. *See Pharaohs GC, Inc. v. SBA*, 990 F.3d 217, 230 (2d Cir. 2021); *see also Camelot Banquet Rooms*, 2021 WL 4189199, at *5.

Plaintiffs therefore err in insisting that Congress needed to introduce "evidence in the record" to justify its decision not to subsidize plaintiffs' businesses. Resp. Br. 10. As the government's opening brief explained, that misunderstands the inquiry under rational-basis review. *See* Opening Br. 27-28. Under rational-basis review, the burden is on plaintiffs to "negat[e] every conceivable basis which might support" Congress's decision. *Heller v. Doe ex rel. Doe*, 509 U.S. 312,

320 (1993) (quotation marks omitted); *Pharaohs*, 990 F.3d at 230. As the motions panel recognized, the rational-basis test "does not require the legislature to have made a contemporaneous record on the subject." *Camelot Banquet Rooms, Inc.*, 2021 WL 4189199, at *3 (citing *Heller v. Doe ex rel. Doe*, 509 U.S. 312 at 319-21); *accord Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013) (explaining that, under rational-basis review, the government need not "produce evidence to sustain the rationality of the classification" (quotation marks omitted)).

For similar reasons, plaintiffs are incorrect that the law is invalid because it is fatally "underinclusive." Resp. Br. 13. Under rational-basis review, classifications need not be "made with mathematical nicety." *Camelot Banquet Rooms, Inc.*, 2021 WL 4189199, at *5 (quoting *Heller*, 509 U.S. at 321) (quotation marks omitted). "The problems of government are practical ones and may justify, if they do not require, rough accommodations." *Id.* "As long as the chosen scheme rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Illinois Health*

Care Ass'n v. Illinois Dep't of Pub. Health, 879 F.2d 286, 291 (7th Cir. 1989) (quotation marks omitted); *see* Opening Br. 28-29.

2. Plaintiffs' contention that the Paycheck Protection Program is not a "'subsidy'" within the meaning of *Regan* and similar cases, Resp. Br. 14, also lacks merit. The Paycheck Protection Program makes available billions of dollars in special loans that have a capped interest rate, do not require collateral, are guaranteed by the government, and are eligible for loan forgiveness up to the full principal amount borrowed. *See, e.g.*, 15 U.S.C. § 636(a)(36)(H)-(L); *id.* § 636m. The Paycheck Protection Program is undoubtedly a subsidy program "akin to the subsidy at issue in *Regan*," as both the D.C. and Second Circuits have recognized. *American Assoc. of Political Consultants v. SBA*, 810 F. App'x 8, 9 (D.C. Cir. 2020); *see Pharaohs GC*, 990 F.3 at 228-29 (recognizing that the Paycheck Protection Program is "a selective subsidy program" and citing *Regan*, 461 U.S. at 548).

Plaintiffs insist that *Regan* and its progeny are limited to only "narrow" subsidy programs. Resp. Br. 16. That purported distinction finds no support in the case law. Indeed, the subsidy at issue in *Regan* was "tax exempt status under § 501(c)(3) of the Internal Revenue Code"

made broadly available to all manner of non-profit organizations. 461 U.S. at 542. The relevant "line" established by the Supreme Court in its subsidy cases is "between government regulation of speech, on one hand, and government subsidy of speech on the other." *Camelot Banquet Rooms*, 2021 WL 4189199, at *3; *see Regan*, 461 U.S. at 540, 545; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) ("[T]he Government is not required to subsidize the exercise of fundamental rights."). And here, as established, "Congress is not trying to regulate or suppress plaintiffs' adult entertainment," "[i]t has simply chosen not to subsidize it." *Camelot Banquet Rooms*, 2021 WL 418199, at *3. That decision was rational, for the reasons already explained.

3. Plaintiffs also contend that the law is invalid under *Regan* because it is an attempt to "suppress" a message with which the government disagrees. Resp. Br. 19-20. But plaintiffs, like the district court, identify nothing to support that assertion other than the fact that Congress has chosen to subsidize some types of businesses, but not others. *See Camelot Banquet Rooms*, 2021 WL 4189199, at *4 ("The only sign we see here of a supposed effort to 'suppress' is the choice not

to subsidize."). As the government's opening brief explained, however, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980); *accord Camelot Banquet Rooms*, 2021 WL 4189199, at *4.

Plaintiffs cannot dispute that Congress restricted second-draw Paycheck Protection Program loan eligibility for numerous categories of businesses, including publicly traded companies, *see* 15 U.S.C. § 636(a)(36)(D)(viii); business concerns with ties to China, *see id.*. § 636(a)(37)(A)(iv)(III)(cc)(AA); and more than a dozen types of businesses described under 13 C.F.R. § 120.110, including firms "primarily engaged in political or lobbying activities," *id.* § 120.110(r); *see* 15 U.S.C. § 636(a)(37)(A)(iv)(III)(aa) (incorporating 13 C.F.R. § 120.110's restrictions into the eligibility restrictions for second-draw Paycheck Protection Program loans except for non-profit businesses and religious institutions).

Plaintiffs suggest that Congress allowed Paycheck Protection Program loans to lobbying firms, *see* Resp. Br. 19-20, but that is mistaken. Congress expanded Paycheck Protection Program loan

eligibility to certain tax-exempt organizations that are described in Section 501(c)(6) of the tax code, a section that permits organizations to engage in lobbying activities without losing their tax-exempt status, *see* 26 U.S.C. § 501(h). But in expanding Paycheck Protection Program loan eligibility to these organizations, Congress specified that such an organization is ineligible if its purpose is to engage in political activity, 15 percent or more of its business involves lobbying, or its lobbying costs exceed $1,000,000. *See* 15 U.S.C. § 636(a)(36)(D)(vii); *see also id.* § 636(a)(36)(A)(xvii); *id.* § 636(a)(36)(D)(ix) (expanding eligibility to all other tax-exempt § 501(c) organizations but restricting loans to businesses engaged in substantial lobbying activities). That is consistent with Congress's exclusion on providing second-draw Paycheck Protection Program loans to businesses primarily engaged in political or lobbying activities, *id.* § 636(a)(37)(A)(iv)(III)(aa); *see* 13 C.F.R. § 120.110(r), which, as plaintiffs recognize (Resp. Br. 19), the D.C. Circuit has held does not violate the First Amendment, *see American Assoc. of Political Consultants*, 810 F. App'x at 9-10.

In any event, even if Congress had decided to expand Paycheck Protection Program eligibility for businesses engaged in substantial

lobbying activities, that would not demonstrate that Congress's restriction on providing second-draw Paycheck Protection Program loans to businesses such as plaintiffs' is an attempt to suppress any speech, particularly in light of the numerous other categories of businesses that are excluded. As the Supreme Court has explained, "[c]ongressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion," and Congress "has the authority to determine whether the advantage the public would receive" from subsidizing certain categories of businesses "is worth the money." *Regan*, 461 U.S. at 549, 550 (quotation marks omitted). Congress's various adjustments to the metes and bounds of the Paycheck Protection Program as the pandemic has continued is a quintessential legislative policy choice that is "not open to judicial review unless in circumstances which here we are not able to find." *Id.* at 549 (quotation marks omitted).

Plaintiffs gain no ground by attempting to cast the law as "viewpoint" discrimination, Resp. Br. 21, an argument even the district court did not fully embrace, A23 (recognizing that the exclusion was not "technically" viewpoint discrimination). Congress prohibited second-

draw loans to businesses whose performances, products, or services are "prurient," 13 C.F.R. § 120.110(p); 15 U.S.C. § 636(a)(37)(A)(iv)(III)(aa); meaning performances that are "lustful," "erotic," "or arousing of sexual interest or desire," *see* Benderson Decl. 4, Dkt. No. 21-7 (quotation marks omitted). As the government's opening brief explained (pp. 29-30), courts have rejected the argument that "prurien[t]" erotic material, even when constitutionally protected, is a "viewpoint" within the meaning of the First Amendment. *Pharaohs*, 990 F.3d at 231; *accord PMG Int'l Div., LLC v. Rumsfeld*, 303 F.3d 1163, 1171 (9th Cir. 2002) (rejecting argument that sexually-explicit materials "articulate the 'viewpoint' that the sexual response is positive"). Prurience "identif[ies] a *category* or subject matter of expressive conduct." *Camelot Banquet Rooms*, 2021 WL 4189199, at *6.

The statute here therefore does not resemble the trademark-registration statute at issue in *Iancu v. Brunetti*, which prohibited trademarks expressing views that a "'substantial composite of the general public' would find" "shocking to the sense of truth, decency, or propriety," but allowed the "registration of marks expressing more accepted views on the same topic." 139 S. Ct. 2294, 2298 (2019). Nor

does the law resemble the anti-pornography ordinance at issue in *American Booksellers Ass'n v. Hudnut*, which permitted sexually explicit speech if it treated women as men's equals, but prohibited sexually explicit speech if it treated women "as submissive in matters sexual or as enjoying humiliation." 771 F.2d 323, 324-25 (7th Cir. 1985). Those cases only underscore the wide gap between a law that targets particular viewpoints, and the law at issue here.

B. Plaintiffs' Alternative Grounds for Sustaining the District Court's Preliminary Injunction Are Meritless

Plaintiffs raise a variety of alternative bases for upholding the injunction, none of which has merit.

1. Plaintiffs rely on 15 U.S.C. § 633(e), a provision of the Small Business Act that independently prohibits SBA from providing any financial assistance to businesses engaged "in the production or distribution of any product or service that has been determined to be obscene by a court of competent jurisdiction." *Id.* According to plaintiffs, this provision means that SBA can refuse to lend to sexually explicit businesses only if the businesses has been adjudicated by a court as obscene. *See* Resp. Br. 28-30. That is meritless. Simply

because Congress in § 633(e) expressly forbid SBA from lending to businesses that have been determined by a court to be "obscene" does not mean that Congress required SBA to lend to businesses that, although not obscene in the legal sense, are nonetheless sexually explicit. *See* A17 (recognizing that "nothing in the text of § 633(e) supports" plaintiffs' interpretation). In any event, Congress in the Economic Aid Act explicitly incorporated SBA's longstanding restriction on providing loans to sexually explicit businesses into its eligibility rules for second-draw Paycheck Protection Program loans, and thus at a minimum, "it is clear that Congress did not object to the SBA's applying additional limits to the second-draw" Paycheck Protection Program, since "it directed the SBA to do exactly that in the legislation creating the program." A17.

Plaintiffs' suggestion that the government has somehow "conce[ded]" this argument, Resp. Br. 30, is difficult to fathom. The government fully explained below why plaintiffs' reliance on § 633(e) was misplaced, *see* Opp'n to Prelim. Inj. 12-16, and the district court agreed with the government, A17-18.

2. Plaintiffs' alternative constitutional arguments are also unavailing.

Plaintiffs invoke the "unconstitutional conditions" doctrine, *see* Resp. Br. 39, which provides that although the government may "define the limits of [a] [G]overnment spending program" by "specif[ying] the activities the [government] wants [or does not want] to subsidize," the government may not "leverage funding to regulate speech outside the contours of the federal program itself." *Alliance for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 206, 214-15 (2013). In other words, the government cannot "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

The Paycheck Protection Program "does not seek to leverage funding to regulate speech outside the contours of the program itself." *See American Ass'n of Political Consultants*, 810 F. App'x at 9 (alteration and quotation marks omitted). Plaintiffs remain free to conduct their businesses as they see fit using their own funds or funds

borrowed from any other sources, Congress has merely "define[d] the limits of" the Paycheck Protection Program loans by specifying that such loans are not intended for businesses that present live performances of a prurient sexual nature. *See Alliance for Open Soc'y, Int'l*, 570 U.S. at 214-15. That is not an unconstitutional condition. *See Pharaohs*, 990 F.3d at 229-30 (rejecting claim that exclusion of live erotic dance venues from first-draw Paycheck Protection Program loans "improperly leverages the subsidy to regulate speech"); *American Ass'n of Political Consultants*, 810 F. App'x at *9 (restriction on providing first-draw loans to political consulting and lobbying groups "d[id] not seek to leverage funding to regulate speech outside" the Paycheck Protection Program (quotation marks omitted)). The Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017), which invalidated under the Free Exercise Clause a policy that "expressly discriminate[d]" against grant recipients "solely because of their religious character," provides no support to plaintiffs. *Contra* Resp. Br. 41.

Nor is the law void for vagueness. Resp. Br. 34. As an initial matter, "[a] plaintiff who engages in some conduct that is clearly

proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010). Plaintiffs' businesses—self-described "strip clubs" and/or "gentlemen's clubs" offering nude and topless dancing, *see* Gilligan Decl., 8-9, Dkt. No. 21-1—fall within the statute's scope. *See* 60 Fed. Reg. 64,356, 64,360 (Dec. 15, 1995) (identifying, when proposing 13 C.F.R. § 120.110(p), an "establishment featuring nude dancing" as an example of a business within the regulation's scope). SBA has applied its regulation to such businesses for approximately twenty-five years. *See* 61 Fed. Reg. 3226, 3240 (Jan. 31, 1996).[1]

In any event, the void-for-vagueness doctrine is a due-process doctrine requiring that a law "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As already established, the statute at issue does not prohibit or regulate

[1] Even if there were doubts as to the statute's application to plaintiffs' businesses, SBA offered to conduct eligibility reviews of any plaintiffs believing they may have been erroneously denied Paycheck Protection Program loans. *See* Gilligan Decl. at 11-12, Dkt. No. 21-1; Gilligan Decl., Ex. 54, Dkt. No. 21-6, at 4. None accepted the offer. *See* Gilligan Decl. at 11-12, Dkt. No. 21-1.

plaintiffs' speech—it merely sets the terms on which the government will exercise its discretion to subsidize (or not subsidize) certain speech through a government loan program. The statute is not impermissibly vague in this context. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 583, 588-89 (1998) (distinguishing between vagueness concerns in criminal or regulatory statutes and vagueness concerns in other contexts, such as grants, and holding a grant provision requiring consideration of "decency and respect" was not void for vagueness).[2]

For substantially the same reasons, the statute does not impose a prior restraint. Resp. Br. 36. The "term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such

[2] Plaintiffs suggest that "heightened scrutiny" is required because the Paycheck Protection Program "imposes civil and/or criminal penalties," Resp. Br. 34, but that is not accurate. SBA's application form merely advises borrowers "that knowingly making a false statement to obtain a guaranteed loan from SBA" may be punishable under statutes that prohibit making knowing or willful false statements to the government, *e.g.*, 18 U.S.C. §§ 1001, 1014, and 15 U.S.C. § 645. *See* Paycheck Protection Program Second Draw Borrower Application Form (Mar. 18, 2021), https://go.usa.gov/xMuTS. To the extent that raises any vagueness concerns (plaintiffs do not explain how), they are dispelled by the fact that each of these statutes contains an express scienter requirement. *See United States v. Calimlim*, 538 F.3d 706, 711 (7th Cir. 2008).

communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotation marks omitted). The law at issue does not forbid plaintiffs from engaging in any activity, nor has Congress required plaintiffs "to obtain prior approval for any expressive activities." *Id.* at 550-51.

II. The Remaining Preliminary Injunction Factors Do Not Favor Plaintiffs

As established in the government's opening brief, the remaining preliminary injunction factors do not favor plaintiffs. Plaintiffs' arguments do not demonstrate otherwise.

Plaintiffs contend that they are suffering irreparable injury and that an injunction would be in the public interest because the law infringes their "First Amendment freedoms." Resp. Br. 42. But as explained, Congress has not restricted or regulated plaintiffs' speech, and plaintiffs remain free to engage in their First Amendment activities using funds other than second-draw Paycheck Protection Program loans. Plaintiffs' assertion that they "may well be out of business" absent a Paycheck Protection Program loan, *see* Resp. Br. 42, does not establish a sufficient likelihood of irreparable injury so as to justify the extraordinary relief of a preliminary injunction. *See Winter v. Natural*

Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"); *see also* Opening Br. 32. That Congress may reallocate unspent Paycheck Protection Program funds to other priorities, *see* Resp. Br. 42, does not aid plaintiffs for the reasons explained in the government's opening brief, *see* Opening Br. 32-33.

Finally, although plaintiffs assert that granting them second-draw Paycheck Protection Program loans would serve the "purpose" of the program, Resp. Br. 43, Congress explicitly excluded businesses such as plaintiffs' from eligibility for second-draw Paycheck Protection Program loans, which reflects Congress's legislative judgment that the public interest is best served by allocating taxpayer resources to purposes other than subsidizing businesses such as plaintiffs' at this time. The government has a significant interest in not allowing taxpayer dollars to be used in a manner that Congress has determined is not in the public interest.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, this Court should reverse the district court's grant of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,646 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Courtney L. Dixon
Courtney L. Dixon