DID THE SMALL BUSINESS ADMINISTRATION STRIP CERTAIN SMALL BUSINESSES OF CONSTITUTIONAL RIGHTS? ADULT ENTERTAINERS' ELIGIBILITY UNDER THE PAYCHECK PROTECTION PROGRAM

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I. INTRODUCTION

A. The Paycheck Protection Program

The Coronavirus Aid, Relief, and Economic Security ("CARES") Act was signed into law on March 27, 2020,[1] following its overwhelming approval from bipartisan majorities in Congress.[2] Passed in response to the economic shockwaves induced by the global Coronavirus epidemic, the two-trillion-dollar economic relief package was intended to provide emergency assistance to individuals, families, and businesses affected by the pandemic.[3]

One of the most noteworthy aspects of the CARES Act, at least to the small business community and financial institutions, was titled the Paycheck Protection Program ("PPP" or "Program").[4] Codified under Title I, Keeping American Workers Paid and Employed Act, the PPP was implemented by the Small Business Administration ("SBA") with support from the United States Department of the Treasury.[5] The PPP

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[1] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, 134 Stat. 281 (2020).

[2] *See H.R. 748: Coronavirus Aid, Relief, and Economic Security Act*, GOVTRACK (Mar. 25, 2020, 11:17 PM), https://www.govtrack.us/congress/votes/116-2020/s80 [https://perma.cc/8CPG-WP7F] (passing the Senate with a vote of 96 to 0); *H.R. 748: Coronavirus Aid, Relief, and Economic Security Act*, GOVTRACK (July 17, 2019, 6:56 PM), https://www.govtrack.us/congress/votes/116-2019/h493 [https://perma.cc/K79L-4QF9] (passing the House of Representatives with a vote of 419 to 6).

[3] *United States: President Signs CARES Act In Response to Coronavirus Pandemic*, LIBR. OF CONGRESS (Mar. 27, 2020), https://www.loc.gov/item/global-legal-monitor/2020-03-27/united-states-president-signs-cares-act-in-response-to-coronavirus-pandemic/ [https://perma.cc/K5A3-SGS4].

[4] Coronavirus Aid, Relief, and Economic Security Act § 1102, 134 Stat. at 286–94.

[5] *Id.* § 1101–1114, 134 Stat. at 286–313.

was temporarily added under the scope of the SBA's existing 7(a) loan program by the CARES Act.[6]

As initially written, the PPP provided eligible small business applicants with loans sufficient to cover payroll, mortgage, utility, and rent expenses for an eight-week period.[7] One of the distinguishing aspects of PPP loans, when compared with other SBA 7(a) loans, is the prospect that PPP loans could be fully forgiven by the SBA if certain criteria are satisfied.[8]

PPP funds were distributed to small businesses through traditional lending avenues such as national and community banks, fintechs, and credit unions.[9] After a small-business submitted its application to an approved PPP lender, the lender would conduct a review of the application along with the small business's financial records to confirm the accuracy of the information provided and the applicant's eligibility for the requested PPP funds.[10] If approved by the lender, the application would then be submitted to the SBA for approval and a commitment to guarantee the PPP loan.[11] Following the SBA's agreement to guarantee the loan, the lender would disburse funds to the small business to be used for payroll and other expenses.[12]

B. Relationship Between PPP Guidance and Existing SBA 7(a) Lending Guidelines

While the lender's underwriting obligation was relatively narrow under the terms of the PPP,[13] one important facet of its review and approval process was confirming that the applicant was eligible for the

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[6] *Id.* § 1102, 134 Stat. at 286–94.

[7] *Id.* § 1102(a)(2), 134 Stat. at 290.

[8] *Compare* Small Business Jobs Act, Pub. L. No. 83–163, § 207(a), 67 Stat. 230, 235 (1953), *with* Coronavirus Aid, Relief, and Economic Security Act § 1106, 134 Stat. at 297–98.

[9] *Paycheck Protection Program (PPP) Information Sheet: Lenders*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf [https://perma.cc/X475-6LPM] (last visited Mar. 27, 2024).

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See* Coronavirus Aid, Relief, and Economic Security Act § 1102, 134 Stat. at 290 ("In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, a lender shall consider whether the borrower [] was in operation on February 15, 2020; and [] had employees for whom the borrower paid salaries and payroll taxes; or [] paid independent contractors, as reported on a Form 1099-MISC."); *Protection Program Loans Frequently Asked Questions* (FAQs), SMALL BUS. ADMIN. (June 13, 2023), https://www.sba.gov/sites/default/files/2023-07/FAQPPPBrrwrsLndrsQstns1_72.pdf [https://perma.cc/QZ3S-VHWE] (explaining in the answers to Questions #1 and #4 the lender's obligations in reviewing applications and determining eligibility).

Program.[14] In order to guide this analysis, the SBA published both Interim Final Rules ("IFRs")[15] and Frequently Asked Questions ("FAQs")[16] throughout the course of implementing the Program. When questions and issues arose regarding subject matter beyond the scope of the CARES Act, IFRs, or FAQs, as was often the case, lenders were forced to either (1) take legal and regulatory risks by navigating the unchartered PPP waters unguided, or (2) return to the SBA's existing 7(a) guidelines for instruction, despite the unique aspects of the Program and the landscape imposed upon lenders and borrowers by the COVID-19 pandemic.[17]

One such issue, which is of particular importance to this Article, is whether otherwise eligible small businesses engaged in live adult entertainment, which are traditionally excluded from eligibility for SBA 7(a) loans, were eligible for PPP loans under the CARES Act.[18] On at least three occasions, small businesses and the SBA turned to the judicial system to determine the applicability of the 7(a) loan program's default rule, or "Ineligibility Rule,"—which proscribes SBA loans from being provided to such industry participants—to the Program.[19] This Article will begin by outlining the facts and judicial analysis in each of those three cases before presenting a proposed legal evaluation of the constitutionality of the Ineligibility Rule under both the First and Fifth Amendments. It is the author's hope that this will contribute to the literature around legal issues that arose during the COVID-19 pandemic and provide an opportunity for thoughtful consideration of how courts, federal agencies, and lawmakers can learn from the events of 2020 to better protect constitutional rights in future national crises.

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[14] Coronavirus Aid, Relief, and Economic Security Act § 1102(a)(2), 134 Stat. at 290.

[15] *E.g.*, Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (Apr. 15, 2020); Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 85 Fed. Reg. 21747 (Apr. 20, 2020).

[16] *See Protection Program Loans Frequently Asked Questions*, *supra* note 13.

[17] The CARES Act, in part, amended Section 7(a) of the Small Business Act to add the PPP under the statutory scope of the SBA's 7(a) lending authority. Coronavirus Aid, Relief, and Economic Security Act § 1102(a), 134 Stat. at 286.

[18] 13 C.F.R. § 120.110(p).

[19] *See* DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., 960 F.3d 743, 745 (6th Cir. 2020); Camelot Banquet Rooms, Inc. v. U.S. Small. Bus. Admin., 24 F.4th 640, 643 (7th Cir. 2022); Pharaohs GC, Inc. v. U.S. Small Bus. Admin., 990 F.3d 217, 223 (2d Cir. 2021). For purposes of this Article, application of 13 C.F.R. § 120.110(p), as adopted by the SBA's Standard Operating Procedure, to PPP applicants shall be referred to as the "Ineligibility Rule."

II. SIXTH CIRCUIT: *DV DIAMOND CLUB OF FLINT, LLC V. U.S. SMALL BUSINESS ADMINISTRATION*

A. Facts

On April 8, 2020, DV Diamond Club of Flint, LLC ("Diamond Club"), an adult entertainment venue in Flint, Michigan, requested an emergency temporary restraining order (among other things) in the U.S. District Court for the Eastern District of Michigan.[20] Diamond Club, which maintained permits for the sale of alcohol, adult entertainment, and dancing, had been closed to the public since March 24, 2020 as a direct result of the Coronavirus pandemic.[21] Specifically, Diamond Club was legally obligated to close in order to comply with Michigan Executive Order No. 2020-21, issued by Governor Whitmer, in an attempt to circumvent the spread of the Coronavirus.[22]

Diamond Club submitted an application for a PPP loan through Oxford Bank, an SBA approved lender, on April 6, 2020.[23] Prior to having actually been denied access to PPP funds by either Oxford Bank or the SBA, Diamond Club filed its complaint out of its reasonable belief that its application would be rejected due to an incorrect application of the SBA's Ineligibility Rule and Standard Operating Procedures ("SOP").[24] Diamond Club formed this reasonable belief when it learned that banks had disqualified or rejected "numerous other similar businesses which presented non-obscene female performance dance entertainment" from PPP loans on the basis that these clubs presented "'live performances of a prurient sexual nature' within the meaning to 13 C.F.R. §120.110(p)."[25]

In the alternative, Diamond Club feared that even if its application was not rejected outright, if it waited for affirmative guidance from the SBA on the issue, such approval would have been delayed until the congressional allocation of PPP funds was exhausted—thereby rendering any subsequent approval from the agency meaningless for

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[20] Plaintiff's Verified Complaint for Emergency Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Relief at 1–2, *DV Diamond Club*, 459 F. Supp. 3d 943 (No. 20-cv-10899) [hereinafter Plaintiff's Verified Complaint].

[21] *Id*. at 12–14.

[22] *Id.* at 13; *see* Office of Governor Gretchen Witmer and Lt. Governor Garlin Gilchrist II, Mich. Exec. Order No. 2020-21 (March 23, 2020), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/23/executive-order-2020-21 [https://perma.cc/4JSW-GMJK] (ordering the temporary suspension of activities that are not necessary to sustain or protect life in response to COVID-19).

[23] Plaintiff's Verified Complaint, *supra* note 20, at 14.

[24] *Id* at 14–16.

[25] *Id.*

Diamond Club's employees.[26] In light of the urgency created by the finite PPP resources available for small businesses, Diamond Club turned to the judiciary to determine the constitutionality of banks' decisions to exclude businesses presenting live adult entertainment from accessing PPP funds under the CARES Act.[27]

B. Diamond Club's Constitutional Allegations

Diamond Club contended that the SBA's denial of PPP applications based on the applicant's participation in the adult entertainment industry violated the Constitution under multiple distinct theories.[28] First, Diamond Club argued that the SBA's application of the Ineligibility Rule as to adult entertainment venues was a content-based restriction on speech that could not succeed under strict scrutiny.[29] In the alternative, the complaint alleged that the SOP restriction was a content-neutral restriction that would fail under intermediate scrutiny.[30]

In addition to these alleged violations of Diamond Club's First Amendment rights, Diamond Club argued that the SBA's application of existing 7(a) exclusions violated its equal protection privileges afforded under the Fifth Amendment.[31] Diamond Club based this claim on its view of the PPP Ineligibility Rule as functioning to "treat establishments presenting certain forms of performance dance entertainment, such as Diamond Club, differently from establishments presenting other forms of entertainment or no entertainment, for no compelling, important, or rational reason" and because it is "impermissibly vague."[32]

C. District Court's Grant of Plaintiffs' Motion for Preliminary Injunction

Following the filing of the initial complaint, the district court held a socially distant video conference with all parties in order to discuss

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[26] *Id.* at 15–16.

[27] *See id.* at 16–19.

[28] *Id.* Plaintiffs also made a claim under the Administrative Procedures Act ("APA"). Plaintiff's Verified Complaint, *supra* note 20, at 19. A discussion of the APA claim, however, is beyond the scope of this Article which instead focuses solely on the constitutional law implications of the PPP.

[29] *Id.* at 16.

[30] *Id.* at 17.

[31] *Id*. at 17–19.

[32] *Id.* at 18.

Diamond Club's emergency motion.[33] The SBA offered to set aside the PPP funds requested by Diamond Club in escrow while the court considered and ruled on the emergency motion.[34] Less than a month after the initial scheduling conference, the district court granted Diamond Club's motion for a preliminary injunction.[35] In its grant of the preliminary injunction, the court declined to reach any of Diamond Club's constitutional claims because:

> [i]t is well settled that if a case may be decided on either statutory or constitutional grounds, [courts], for sound jurisprudential reasons, [should] inquire first into the statutory question. This practice reflects the deeply rooted doctrine that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.[36]

The court relied on the Administrative Procedures Act ("APA") in ruling that the SBA abused its discretion.[37] The court held that the Ineligibility Rule was in direct conflict with the CARES Act and was therefore facially invalid under the first prong of *Chevron*.[38] Because the court in this case determined that the SBA exceeded its statutory authority when it applied the Ineligibility Rule to the Program, the court concluded that the issue could be sufficiently resolved without considering any of the constitutional challenges.[39]

D. Sixth Circuit's Denial of SBA's Motion for a Stay of the Preliminary Injunction

The SBA immediately appealed to the Sixth Circuit Court of Appeals, requesting a stay under Federal Rule of Appellate Procedure 8(a)(2) until the appeal could be decided on its merits.[40] The Sixth Circuit considers four factors when making a determination under Rule 8(a):

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[33] Order Setting Briefing Schedule For Plaintiff's Renewed Emergency Motion for Entry of a Temporary Restraining Order And/Or Preliminary Injunction at 2, *DV Diamond Club*, 459 F. Supp. 3d 943 (No. 20-cv-10899).

[34] *Id.*

[35] DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., 459 F. Supp. 3d 943, 965 (E.D. Mich. 2020).

[36] *Id.* at 964 (internal quotation marks omitted) (alteration in original) (quoting Harris v. McRae, 448 U.S. 297, 306–07 (1980)).

[37] *Id.* at 954–58 ("The Administrative Procedures Act prohibits agencies from taking action 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" (quoting 5 U.S.C. § 706(2)(C))).

[38] *Id.* at 962.

[39] *Id.*

[40] DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., 960 F.3d 743, 745 (6th Cir. 2020).

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[41]

In analyzing the likelihood that the SBA would prevail on the merits of its appeal, the Sixth Circuit applied the two-prong *Chevron* framework to the SBA's interpretation of the CARES Act as excluding businesses engaged in sexually-oriented activities.[42] Under *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[43] Citing the CARES Act's language that the PPP intended to provide economic relief for "any business concern,"[44] the court found Congress's intent that the PPP be made available to all businesses—including those who may otherwise be excluded from SBA lending programs—to be unambiguous.[45] This determination rendered any additional analysis under the second prong of *Chevron* unnecessary.[46] Because the court found that the CARES Act's language left no room for uncertainty, it reasoned that there was not a great likelihood that the SBA would prevail on the merits of its appeal.[47] Therefore, it found the Act's language to weigh in favor of the first factor.[48]

In a concise discussion, the Sixth Circuit surmised its findings as to the other three factors used in determining whether a stay is appropriate. [49] First, the risk to Diamond Club of going out of business if it could not access PPP funds was far greater than any risk to the SBA if it disbursed the funds.[50] Second, the public's interest in keeping businesses from closing during the COVID-19 pandemic was also served by enforcing the preliminary injunction.[51] And third, the risk that other businesses would be prevented from accessing the PPP funds disbursed to Diamond Club, the court reasoned, was an inherent risk in the SBA's

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[41] *Id.* at 745–46.

[42] *Id*. at 746 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Couns., Inc., 467 U.S. 837, 842–43 (1984)).

[43] *Chevron*, 467 U.S. at 842–43.

[44] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 1102(a), 134 Stat. 281, 288 (2020).

[45] *DV Diamond Club*, 960 F.3d at 746–47.

[46] *See id.*

[47] *See id.* at 747.

[48] *See id.*

[49] *See id.*

[50] *Id.*

[51] *DV Diamond Club,* 960 F.3d at 747.

structuring of the Program such that funds were disbursed on a "first-come, first-served basis," and was not greatly enhanced by denying a stay of the District Court's preliminary injunction.[52] Based on these four factors, the Sixth Circuit denied the SBA's motion for a stay of the injunction.[53]

E. Justice Siler's Dissent

Disagreeing with the majority, Justice Siler contended that the plain text of the CARES Act did not speak precisely to the question at issue with Diamond Club's PPP application.[54] Specifically, he noted that "the relevant language in the Act seems to be ambiguous because it is open to two plausible interpretations."[55] The first plausible interpretation of the provision providing PPP funds to "any business concern" is the one offered by the majority.[56] But Justice Siler also pointed out that the phrase may have merely been modifying the preceding language in the Act, which made eligible for the PPP loans any business with up to five-hundred employees.[57] The confusion in determining congressional intent is bolstered by the CARES Act's instructions that PPP loans should be administered "under the same terms, conditions, and processes" as 7(a) loans.[58] In light of these conflicting provisions in the CARES Act, Justice Siler placed a greater deal of confidence in the SBA's likelihood of success on the merits of its appeal, and he contended that factor should have skewed the analysis in favor of granting the SBA's motion for a stay of the district court's preliminary injunction.[59]

III. SEVENTH CIRCUIT: *CAMELOT BANQUET ROOMS, INC. V. U.S. SMALL BUSINESS ADMINISTRATION*

Diamond Club was not the only small business whose eligibility under the PPP was threatened by application of the SBA's existing 7(a) guidelines on the adult entertainment industry.

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[52] *Id.*

[53] *Id.*

[54] *Id.* (Siler, J., dissenting).

[55] *Id.*

[56] *Id.*; *see DV Diamond Club,* 960 F.3d at 746–47 (majority opinion).

[57] *Id.* at 747 (Siler, J., dissenting).

[58] *Id.* at 748.

[59] *Id.*

A. Facts

In March 2020, Wisconsin implemented "stay at home orders" requiring many non-essential businesses to close their doors temporarily in an effort to slow the spread of COVID-19.[60] Two such businesses were Silk Exotic Gentlemen's Club and The Vegas Gentlemen's Club (collectively, the "Clubs").[61] Like Diamond Club, the Clubs operated facilities in which dancers provided adult entertainment.[62] In compliance with several of the Wisconsin Department of Health Service Emergency COVID Orders, the Clubs shut down and subsequently applied for PPP loans in an effort to provide payroll to existing employees.[63] Both banks with which the Clubs applied for PPP loans declined the applications, citing SBA's prohibition of businesses presenting "live performances of a prurient sexual nature" from participating in SBA loan programs.[64]

B. The Clubs' Constitutional Allegations

Like the plaintiffs in the Sixth Circuit case petitioned, the Clubs in the Seventh Circuit brought claims under the protections afforded by the First and Fifth Amendment to the U.S. Constitution.[65] The Clubs contended that the dances performed on their premises are protected speech under the First Amendment.[66] As such, they argued that the SBA's denial of their participation in the PPP due to their exercise of such constitutionally protected speech violated the Free Speech Clause of the First Amendment.[67] As to the Fifth Amendment claim, the Clubs maintained that the SBA's application of the PPP Ineligibility Rule violates the Equal Protection component of the Fifth Amendment's Due Process Clause because the Ineligibility Rule does not accomplish a legitimate governmental interest.[68]

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[60] Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 458 F. Supp. 3d 1044, 1050 (E.D. Wis. 2020).

[61] *Id.* at 1049–50.

[62] *Id.* at 1050.

[63] *Id.*; *see* Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Request for Immediate Telephonic Hearing and Support Legal Memorandum at 5–6, Schuster v. U.S. Small Bus. Admin. (E.D. Wis. Apr. 21, 2020) (No. 20-cv-634), 2020 WL 2610842; *see, e.g.*, Office of Governor Tony Evers, Wisc. Emergency Order #5 (Mar. 27, 2020) https://evers.wi.gov/Documents/COVID19/UPDATEDOrder10People.pdf [https://perma.cc/PW33-Q5XV] (prohibiting mass gatherings of ten people or more).

[64] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1050–51 (internal quotation marks omitted) (quoting 13 C.F.R. § 120.110(p)(1)).

[65] *Id.* at 1049.

[66] *Id.* at 1051.

[67] *Id.*

[68] *See id.* at 1049, 53.

C. District Court's Grant of Plaintiffs' Motion for Preliminary Injunction

The United States District Court for the Eastern District of Wisconsin issued a consolidated decision and order in two separate cases brought by the Clubs.[69] The court first addressed the issue of whether the SBA could be the subject of an injunction action.[70] While courts are split on whether injunctive relief can be issued against the SBA,[71] the district court held that in this case, the SBA could be enjoined from acting.[72] And even if the SBA was exempt from injunctive actions, it was not the only defendant in these cases.[73] The Clubs also sought relief from the Department of the Treasury and the United States Secretary of the Treasury.[74] Therefore, the court proceeded with its analysis of the Seventh Circuit's preliminary injunction factors.[75]

Similar to the four-factor test utilized in the Sixth Circuit, the four factors considered by the district court in the Seventh Circuit include whether: (1) "without such relief, [the plaintiff] will suffer irreparable harm before final resolution of its claims;" (2) "traditional legal remedies would be inadequate;" (3) the plaintiff "has some likelihood of success on the merits;" and (4) it "is in the public interest" to grant the injunction.[76] As to the first prong, the court determined that the Clubs would suffer irreparable harm without an injunction.[77] In reaching this conclusion, the court reasoned that because PPP funds were finite and issued on a first-come, first served basis:

> Once the funds Congress appropriated for the PPP are exhausted, the SBA will be unable to guarantee further loans. Congress's initial allocation of $349 billion was exhausted in two weeks. Although the fund has been replenished, the current allocation will almost certainly be exhausted by the time this case is litigated to conclusion. And while

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[69] *Id.* at 1049–50.

[70] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1051–52. The defendants pointed out in their brief that other courts have held that the "sue and be sued" provision of the Small Business Act under 15 U.S.C. § 634(b)(1) bars injunctive relief against the SBA. Defendant's Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction at 24, *Camelot Banquet Rooms*, 458 F. Supp. 3d 1044 (E.D. Wis. 2020) (No. 20-cv-601) [hereinafter Defendant's Brief in Opposition].

[71] *See id.* at 24–25 (explaining the circuit split by citing cases that have varied in their conclusions as to whether 15 U.S.C. § 634(b)(1) serves as a per se bar on injunctions against the SBA).

[72] *Camelot Banquet Rooms,* 458 F. Supp. 3d at 1052.

[73] *Id.* at 1051.

[74] *Id.*

[75] *Id.* at 1052.

[76] *Id.* at 1052–53.

[77] *Id.* at 1061.

> the temporary restraining order currently in place preserves guarantee authority for the plaintiffs' loans, denying a preliminary injunction would necessarily involve dissolving that order. The SBA could then use the guarantee authority for other applicants. Thus, without a preliminary injunction, the plaintiffs will almost certainly suffer irreparable harm in the form of being permanently excluded from the PPP.[78]

The court discussed the irreparable harm the Clubs would suffer and the Clubs' lack of adequate remedies at law.[79] In its discussion, it acknowledged that even though the SBA is subject to injunctions, it would most likely be exempt from liability for any damages.[80] And any such monetary damages would come too late for employees of the Clubs who have gone without pay during the time required to litigate the claims.[81] It based this statement on both the sovereign immunity doctrine, under which the federal government and its officials sued in their official capacities are immune from damages, as well as a Tenth Circuit holding that the SBA's "sue and be sued" clause does not render the SBA liable for damages arising from an SBA decision not to guarantee a loan.[82] Based on those principles, the court determined that any other legal remedies beyond the grant of an injunction would be inadequate to address the Clubs' potential financial damages if they were denied a PPP loan.[83]

The district court also discussed the Clubs' likelihood of success on the merits, the third factor in a preliminary injunction analysis, at length.[84] Early in its discussion, the court analyzed the definition of a "prurient sexual nature" as relied upon by the SBA.[85] Based on the specific facts of the Clubs' performances, the court held that the Clubs did not engage in entertainment of a "prurient sexual nature" and on that fact alone, the Clubs should not have been denied participation in the PPP.[86]

Despite that initial conclusion, the court went on to consider whether—assuming the Clubs were within the scope of businesses engaged in such proscribed entertainment—the application of that Ineligibility Rule exceeded the authority of the SBA under the CARES

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[78] *Camelot Banquet Rooms,* 458 F. Supp. 3d at 1062.

[79] *Id.* at 1061–63.

[80] *Id.* at 1061–62.

[81] *See id.*

[82] *Id.* at 1061 (citing Ascot Dinner Theatre, Ltd. v. Small Bus. Admin., 887 F.2d 1024, 1027–28 (10th Cir. 1989)).

[83] *Id*. at 1061–62.

[84] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1053–61.

[85] *Id.* at 1054–55.

[86] *Id.* at 1055.

Act.[87] Relying on the plain text of the CARES Act, the court noted that "Congress did not single out any industry for ineligibility under the PPP."[88] Despite congressional nullification of some SBA regulations under the PPP, the court did not conclude that such selective removal of some regulations should be interpreted as a congressional blessing on application of the remaining regulations.[89] Instead, it noted that even though Congress did explicitly waive certain regulations (such as certain SBA affiliation rules) from applying to PPP applicants, the SBA should not assume that Congress "combed through all SBA regulations" and intended for any regulation not expressly overridden to apply to the PPP.[90] Based on these assumptions and arguments, the court held that the SBA had overstepped its bounds by consistently applying the Ineligibility Rule to the PPP loan applications as it would other 7(a) loans.[91] This determination also weighed in favor of the Clubs being successful on the merits of their claims.[92]

Completing the analysis for the third prong, the court considered whether the regulation itself was unconstitutional.[93] The Clubs' constitutional claims are outlined above,[94] and the SBA argued in response that the exclusion of such adult entertainment venues from access to PPP funds was a constitutionally permissible speech-related constraint on receipt of federal funds.[95] It acknowledged that while the federal government banning such entertainment entirely would be a violation of the First Amendment, merely refusing to subsidize such entertainment under the Spending Clause of Article I was not a violation of the First Amendment.[96] As to these opposing viewpoints, the court held that were the SBA permitted to exclude the Clubs and other similarly situated businesses from participation in the PPP, they would be introducing content-based discrimination into a program that was designed to aid small businesses during a global pandemic, regardless of the speech communicated by such small businesses.[97] The court acknowledged that were the SBA able to provide a legitimate government interest justifying such a restriction, the Ineligibility Rule may withstand

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[87] *Id.* at 1055–57.

[88] *Id.* at 1055–56.

[89] *See id.* at 1056.

[90] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1056.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1057–61.

[94] *See supra* Part III, Section B.

[95] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1057.

[96] *Id.*

[97] *Id.* at 1057–58, 1060–61.

equal protection scrutiny under the Fifth Amendment.[98] However, the court found that the SBA's only justification for the regulation is to exclude businesses promoting a disfavored message, and that is not a legitimate government purpose.[99] Therefore, the application of the rule would also violate the Fifth Amendment's principles of equal protection.[100]

Lastly, the court considered the fourth prong of the injunctive relief test: whether an injunction would further the public interest.[101] It succinctly concluded that because the PPP loan funds would be used to provide ongoing payment to the employees of the Clubs in the midst of a government-mandated shutdown of the employers, it was in the public's best interest for the court to grant the injunction.[102] Based on these four factors, and the court's conclusions as to each, the U.S. District Court for the Eastern District of Wisconsin granted the Clubs' motion for a grant of a preliminary injunction against the SBA.[103]

D. Seventh Circuit

Within a few days, the SBA filed a notice of appeal and petitioned the Seventh Circuit Court of Appeals for a stay pending the appeal of the district court's injunction.[104] On May 4, 2020, the same day the motion was filed, the Seventh Circuit temporarily stayed the district court's preliminary injunction in a brief order.[105] However, the Seventh Circuit vacated its earlier temporary stay order on May 20, 2020, when it denied the stay of the district court's preliminary injunction.[106]

A year later, additional adult entertainment businesses from across the country who were, or anticipated being, adversely affected by the Ineligibility Rule during the "Second Draw" of the program joined the action.[107] Like with the earlier case, the District Court for the Eastern District of Wisconsin granted a preliminary injunction,[108] which the

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[98] *Id.* at 1060–61.

[99] *Id.*

[100] *Id.* at 1061.

[101] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1064.

[102] *Id.*

[103] *Id.* at 1065.

[104] Government's Notice of Appeal at 1, *Camelot Banquet Rooms*, 458 F. Supp. 3d 1044 (No. 20-cv-601); Government's Emergency Motion for Stay or, In the Alternative for Thirty-Six Additional Hours for Compliance at 1, *Camelot Banquet Rooms*, 458 F. Supp. 3d 1044 (No. 20-cv-601).

[105] Order, *Camelot Banquet Rooms*, No. 20-1729 (7th Cir. May 4, 2020).

[106] Order, *Camelot Banquet Rooms*, No. 20-1729 (7th Cir. May 20, 2020).

[107] Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 555 F. Supp. 3d 598, 601–02 (E.D. Wis. 2021).

[108] *Id*. at 617–18.

SBA appealed to the Seventh Circuit.[109] The court reversed the district court's decision and granted a stay of the injunction against the SBA after analyzing plaintiffs' likelihood of success on the merits under the First Amendment; the rational-relation test; the viewpoint-based discrimination doctrine; and the unconstitutional conditions doctrine.[110]

i. First Amendment

The court began its consideration of the plaintiffs' First Amendment claims by reiterating the principle that the Ineligibility Rule infringes on First Amendment protections only if the Rule attempts to regulate or suppress protected speech.[111] The government, the court reminds, is not required to subsidize First Amendment activity; it is prohibited from suppressing it.[112] In this instance, the court held that the Program was a government subsidy, and thus the exclusion of the plaintiffs from the Program under the Ineligibility Rule was not a violation of the First Amendment.[113]

The flaw with this conclusion, in this author's opinion, is two-fold. First, the Program was not merely a straightforward government subsidy as the court attempts to classify it. The PPP loans obtained by businesses were exactly that—loans. They were credit facilities given expedited review and underwriting by independent financial institutions based on criteria set forth in the Program guidelines.[114] If certain obligations were not met, the businesses would be ineligible for SBA loan forgiveness and would be responsible for payment of the remaining principal balance of the PPP loans at a one-percent interest rate.[115] As such, the Ineligibility Rule excluded a subset of small businesses from access to business credit at financial institutions (many of whom redirected lending resources to focus on PPP loans), and not necessarily from a government subsidy.

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[109] Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 24 F.4th 640, 643–44 (7th Cir. 2022).

[110] *Id.* at 646–51. It should be noted that this second case was based on the second round of funding authorized by Congress under the Program. *Id.* at 645. For the second round, Congress adopted statutory language to explicitly exclude adult entertainment venues. As such, the issues under the APA and *Chevron* are not applicable in this case. *Id*.

[111] *Id*. at 646 ("The Supreme Court has repeatedly drawn a line between government regulation of speech, on one hand, and government subsidy of speech, on the other.").

[112] *Id*.

[113] *Camelot Banquet Rooms*, 24 F.4th at 646.

[114] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 1102, 134 Stat. 281, 286–94 (2020).

[115] *Id*.; *First Draw PPP Loan*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/first-draw-ppp-loan [https://perma.cc/Q3YX-Q2TQ] (last visited Mar. 1, 2024).

Second, the court's view that the Ineligibility Rule does not "suppress" the protected speech but merely declines to subsidize it fails to consider the context of the pandemic and the economic and political realities which necessitated the Program. The capital accessed through the Program was not for expansion or reinvestment in businesses; it was intended to cover payroll and other necessary expenses to keep small businesses from closing permanently and employees from going unpaid during the government-mandated shutdowns due to the COVID virus.[116] By denying adult entertainment venues access to this particular Program, the Ineligibility Rule, as applied, was very likely to suppress the protected speech at issue because without PPP loans, these venues were likely to have to shut their doors permanently. Were this a traditional SBA loan applied for in a different set of circumstances, the distinction between a government subsidy and suppression of a protected form of speech may weigh differently. But in the reality of what was at stake for businesses applying for PPP loans, the Ineligibility Rule's exclusion was a suppression of speech for all practical purposes.

ii. Rational-Relation Test

Unlike the other appellate courts,[117] the Seventh Circuit also analyzed the Ineligibility Rule under the rational-relation test.[118] This test requires plaintiffs to exclude any possible rational grounds that Congress might have deemed sufficient for the statutory distinction.[119] Opting to consider the broader context under this analysis, the court noted that because the government was responding to an economic emergency, spending programs—especially this one—should be subject to the "least rigorous form" of judicial review.[120] Unsurprisingly, the need to "help defuse potential criticisms of a generous emergency program that might be used to undermine political support for the Program" was a rational justification for the Ineligibility Rule, which was able to muster the minimal relation needed to satisfy the Seventh Circuit's "least rigorous form" of judicial review.[121]

iii. Viewpoint-Based Discrimination Doctrine

The court next considered the district court's holding that because the Ineligibility Rule suppressed a "dangerous idea" (namely, the

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[116] Coronavirus Aid, Relief, and Economic Security Act § 1102(a)(2), 134 Stat. at 286–94.
[117] *See supra* Part II, Section D; *infra* Part IV, Section D.
[118] *Camelot Banquet Rooms*, 24 F.4th at 646–47.
[119] *Id*. at 647.
[120] *Id*.
[121] *Id*. at 647–48.

prurience or "sexually arousing message" conveyed by the dancing at plaintiffs' businesses), it was viewpoint discrimination in violation of the First Amendment.[122] Disagreeing with the plaintiffs' contention, the Seventh Circuit held that "it would be a category mistake to think that prurience or lasciviousness reflects a 'viewpoint' that the government may not discriminate against. The terms instead identify a category or subject matter of expressive conduct that may be subject to some forms of government regulation."[123] Distinguishing adult entertainment as a category of expressive conduct rather than a viewpoint, the court found that the plaintiffs were likely to fail on the merits of their claim of viewpoint discrimination.[124]

iv. Unconstitutional Conditions Doctrine

Lastly, the court addressed whether the Ineligibility Rule would survive an analysis under the unconstitutional conditions doctrine.[125] This doctrine "prevents a government from requiring a funding recipient to waive its own constitutional rights as a condition of receiving government funding."[126] In describing the nuanced balancing act of identifying whether a program criteria is "an unconstitutional condition [or] a permissible congressional choice about whom to include in a government spending" program, the Seventh Circuit, relying on guidance from the Supreme Court, considered whether the condition defines the limits of the government spending program or seeks to leverage funding to regulate speech outside the contours of the program itself.[127] With this litmus test identified, the Seventh Circuit held that the Ineligibility Rule did not violate the unconstitutional conditions doctrine as Congress "was not trying to pressure plaintiffs to change their adult entertainment" but was instead simply choosing to exclude them from the Program.[128]

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[122] *Id*. at 648–49.

[123] *Id.* at 649.

[124] *Camelot Banquet Rooms*, 24 F.4th at 648–49.

[125] *Id*. at 649–51.

[126] Emily R. Hutchinson, Note, *Solomon's Choice: The Spending Clause and First Amendment Rights in* Forum for Academic & Institutional Rights v. Rumsfeld, 80 WASH. L. REV. 943, 950 n.56 (2005).

[127] *Camelot Banquet Rooms*, 24 F.4th at 650 (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 210–18 (2013)).

[128] *Id*. at 651.

IV. SECOND CIRCUIT: *PHARAOHS GC, INC. V. U.S. SMALL BUSINESS ADMINISTRATION*

A. Facts

In March 2020, Pharaohs GC, Inc. ("Pharaohs"), a gentleman's club near Buffalo, New York, suspended business in compliance with New York Executive Order 202.8 which mandated that non-essential businesses "shall reduce the in-person workforce at any work locations by 100%."[129] Following this closure, and the passage of the CARES Act shortly thereafter, Pharaohs applied for a PPP loan through Live Oak Bank.[130] The application requested a loan amount of $345,067.50 for payment of wages to Pharaohs' seventy-six employees as well as other approved expenses under the SBA's PPP guidance.[131] During Live Oak Bank's review of Pharaohs' application to determine eligibility under the PPP guidelines, an underwriter at Live Oak Bank communicated to Pharaohs that its application would be declined because Pharaohs provides live entertainment of a prurient sexual nature.[132] Before formal denial of its PPP application by Live Oak Bank, Pharaohs filed suit in the U.S. District Court for the Western District of New York and moved for a preliminary injunction to prevent denial of its PPP application.[133]

B. Pharaohs' Constitutional Allegations

Consistent with other plaintiffs challenging this program requirement,[134] Pharaohs contended in its complaint that the application of the SBA's 7(a) lending program's restriction of adult entertainment venues to PPP applicants violated its First and Fifth Amendment rights.[135] Pharaohs' reasoning for this claim was that the restriction placed an

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[129] Office of Governor Andrew Cuomo, N.Y. Exec. Order No. 202.8 (Mar. 20, 2020) https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf [https://perma.cc/H2TS-3SD5] (continuing temporary suspension and modification of laws relating to the disaster emergency); *see* Pharaohs GC, Inc. v. U.S. Small Bus. Admin., No. 20-CV-665, 2020 WL 3489404, at *1 & n.2 (W.D.N.Y. June 26, 2020).

[130] *Pharaohs*, 2020 WL 3489404, at *2.

[131] *Id.* at *1 n.1; Pharaohs GC, Inc. v. U.S. Small Bus. Admin., 990 F.3d 217, 225 (2d Cir. 2021).

[132] *Pharaohs*, 2020 WL 3489404, at *2.

[133] *Id*.

[134] *See supra* Part II, Section B & Part III, Section B. Pharaohs also brought a challenge that the restriction was unlawful under the APA because it was inconsistent with the CARES Act; however, a discussion of challenges under the APA is beyond the scope of this Article. *See* Complaint at 15–16, *Pharaohs*, No. 20-CV-665 (W.D.N.Y. June 26, 2020), 2020 WL 2893507.

[135] *Pharaohs*, 2020 WL 3489404, at *6–8.

undue burden on nude dancing, which it argued was a protected form of expression.[136]

C. District Court's Denial of Plaintiffs' Motion for Preliminary Injunction

The District Court weighed factors similar to those relied upon by the Sixth and Seventh Circuits as it considered Pharaohs' request: whether (1) Pharaohs "is likely to succeed on the merits" of its case; (2) Pharaohs "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in its favor"; and (4) "an injunction is in the public interest."[137] The court began its analysis with the first factor and turned, naturally, to the *Chevron* doctrine in determining Pharaohs' likelihood of success in its challenge of the SBA's interpretation of the Act.[138] The District Court for the Western District of New York relied on its own recently published opinion in finding that the SBA did not exceed its statutory authority under *Chevron* by enforcing the Ineligibility Rule.[139]

The court reasoned that the verbiage, "any business concern," as used in the CARES Act was a source of ambiguity depending on whether it was interpreted in isolation or within the context of the Act.[140] When reading the phrase in isolation, as Pharaohs recommended, the text seemed a fairly straightforward invitation to all business concerns.[141] However, the SBA argued that the text was not intended to be read in such manner but instead modified the preceding phrase "small business concerns" to include businesses with up to five-hundred employees instead of the SBA's standard 7(a) size limitations.[142] In adopting this second approach, the phrase could have been interpreted as broadening the population of eligible businesses by modifying the more restrictive phrase of "small business concerns" and was not intended to open up the Program to literally all business

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[136] *Id*. at *6.

[137] *Id*. at *2 (internal quotation marks omitted) (quoting Trump v. Deutsche Bank AG, 943 F.3d 627, 640 (2d Cir. 2019), *vacated sub nom*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020)).

[138] *Id.* at *3.

[139] *Id.* at *4 (relying largely on the analysis in *Diocese of Rochester v. U.S. Small Business Administration*, 466 F. Supp. 3d 363 (W.D.N.Y. 2020), in which the court held that the SBA did not exceed its statutory authority under the CARES Act by excluding debtors in bankruptcy from participation in the Program).

[140] *Id.*

[141] *Pharaohs*, 2020 WL 3489404, at *5.

[142] *Id*. at *3.

concerns.[143] Because of this ambiguity, the court held that Congress had not spoken specifically to the issue of adult entertainer's eligibility in the Act but had instead left that issue to be determined by the SBA.[144]

Determining that the SBA had authority under *Chevron* to adopt eligibility rules, the court next considered whether the Ineligibility Rule at issue was "arbitrary, capricious, or manifestly contrary to" the Act.[145] The court in this case endorsed the SBA's justification of allocating limited funds in pursuit of what it has determined to be the public's best interest.[146] Evidently, Pharaohs did not argue that the Ineligibility Rule was unreasonable, but instead focused on the first prong of *Chevron* exclusively.[147] These conclusions weighed against Pharaohs' likelihood of success on the merits of its case.

Following the *Chevron* analysis, Judge Vilardo proceeded with analyzing the plaintiff's constitutional claims. As to Pharaohs' First Amendment claim, the court utilized the Supreme Court's framework in *Regan v. Taxation With Representation of Washington*[148] to determine whether the Program was a government subsidy such that a content-based distinction may be permissible.[149] It is well established that while the government may not prevent a person from exercising his or her constitutional rights, the government does not have an affirmative obligation to subsidize such activity.[150] The district court held that it was more likely that the SBA would succeed with its position that PPP loan funds are subsidies (specifically because of the potential for forgiveness of the loan) and, as such, the SBA has discretion in determining what types of speech it is willing to subsidize.[151]

Going a step further, the court did consider whether an otherwise permissible restriction on a government subsidy would be unconstitutional because the exclusion was "the product of invidious viewpoint discrimination."[152] In stark contrast to the district court in *Camelot Banquet Rooms*'s statement that the Program was available to "nearly

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[143] *Id*. at *4.

[144] *Id*. at *5.

[145] *Id*. (internal quotation marks omitted) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Couns., Inc., 467 U.S. 837, 844 (1984)).

[146] *Id.* at *6.

[147] *Pharaohs*, 2020 WL 3489404, at *6.

[148] 461 U.S. 540 (1983) (considering whether the government's decision not to subsidize exercise of the fundamental right of lobbying a government infringes upon that protected right).

[149] *Pharaohs*, 2020 WL 3489404, at *6.

[150] *Id*.; *see also supra* notes 111–13 and accompanying text.

[151] *Pharaohs*, 2020 WL 3489404, at *7–8.

[152] *Id*. at *7 (internal quotation marks omitted) (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998)).

every other form of small business in the United States,"[153] the Western District of New York concluded that "more than a dozen types of businesses are excluded" from the Program.[154] Because adult entertainment venues were not singled out as the sole victim of an ineligibility rule, the court appeared comfortable with the enforcement of this particular Ineligibility Rule. Based on these analyses, the court found that Pharaohs was unlikely to succeed on its First Amendment claims.[155]

A consideration of Pharaohs' Fifth Amendment claim followed the *Chevron* and First Amendment considerations. The court applied a mere "rational basis" standard of review which required it to consider whether the Ineligibility Rule bore a rational relation to a legitimate governmental purpose.[156] Concisely, the court easily hurdled the low standard required for rational basis review by finding that the SBA had a legitimate interest in prioritizing "the best use of taxpayer funds in light of preexisting government policies and the public interest" and that the Ineligibility Rule was rationally related to that legitimate governmental purpose.[157] Because the court found that as to Pharaohs' claims under *Chevron* and the First and Fifth Amendments that Pharaohs had not shown its likelihood of success, the court reached its conclusion without discussing the remaining three factors in the preliminary injunction analysis.[158]

In addition to the four factors utilized substantively by other jurisdictions, courts in the Second Circuit are unique in that they place an enhanced burden on findings in favor of a mandatory injunction which commands "a positive act, as opposed to one that merely maintains the status quo."[159] Such injunctions, the Second Circuit has instructed, should be handed down "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief."[160] Pharaohs' requested preliminary injunction would have required such a positive

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[153] Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 458 F. Supp. 3d 1044, 1053 (E.D. Wis. 2020).

[154] *Pharaohs*, 2020 WL 3489404, at *7.

[155] *Id.* at *8.

[156] *Id*. The decision to rely on the lowest threshold of review was based on the court's earlier finding that Pharaohs' First Amendment rights had not been infringed upon by the Ineligibility Rule or that it is a suspect classification. *Id.* Had either of those factors weighed differently, though, the SBA's prohibition may have been subject to a higher level of scrutiny. *Id*.

[157] *Id*. (internal quotation marks omitted) (citation omitted).

[158] *Pharaohs*, 2020 WL 3489404, at *9.

[159] *Id*. at *2.

[160] *Id*. (internal quotation marks omitted) (quoting Tom Doherty Assocs., Inc. v. Saban Ent. Inc., 60 F.3d 27, 34 (2d Cir. 1995)).

act—it would have barred the SBA from enforcing the Ineligibility Rule and instead, assuming Pharaohs met other SBA PPP requirements, required the SBA to provide a PPP loan to Pharaohs. Pharaohs failed to convince the court of its entitlement to relief and did not meet this circuit's higher standard of a "clear showing."

D. Second Circuit

The Second Circuit's standard for consideration of a preliminary injunction is whether the lower court abused its discretion in denying the preliminary injunction.[161] As discussed in greater detail below, the Second Circuit did not find that the district court abused its discretion, because Pharaohs did not have a high likelihood of success on the merits of its constitutional claims.[162]

The court began by considering Pharaohs' argument that the Ineligibility Rule impermissibly regulates constitutionally protected speech.[163] The Second Circuit's standard of review intended only to provide the "barest minimum" degree of protection to the prurient dancing at issue in this case.[164] The court focused on the fact that the rule is a funding condition that sets the scope of a government subsidy.[165] Similar to the exclusion of lobbying organizations from tax exemptions for non-profits in *Regan*,[166] the court held that the Ineligibility Rule was merely the government refusing to subsidize the exercise of the fundamental right of prurient dancing.[167] Such failure to subsidize an activity does not reach the same constitutional implications as an infringement on the right to engage in that activity.[168] The distinction, the court concluded, was that because the SBA was merely electing to not subsidize the expression taking place at Pharaohs and other similar businesses, rather than attempting to suppress such expression, the Ineligibility Rule was a permissible restriction, and Pharaohs was unlikely to succeed on the merits of its first claim.[169]

Next, the court addressed Pharaohs' position that the Ineligibility Rule fails a rational-basis review because it excludes small businesses

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[161] Pharaohs GC, Inc. v. U.S. Small Bus. Admin., 990 F.3d 217, 225 (2d Cir. 2021).

[162] *Id*. at 231.

[163] *Id*. at 228. The Court considered Pharaohs' APA claims prior to this discussion; however, challenges under the APA are beyond the scope of this Article. *See id*. at 226–28.

[164] *Id*. at 229 (internal quotation marks omitted) (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975)).

[165] *Id*.

[166] Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547–48 (1983).

[167] *Pharaohs*, 990 F.3d at 229–30.

[168] *Id*.

[169] *Id*.

which express a disfavored message.[170] This, according to Pharaohs, is an impermissible purpose.[171] Because the court viewed the Ineligibility Rule as a funding condition for a government subsidy rather than a funding condition attempting to regulate speech, it applied a mere rational-basis review.[172] Under this standard of review, the Ineligibility Rule need only "bear a rational relation to a legitimate government purpose."[173] The court was satisfied that the SBA's justification for the Ineligibility Rule—that the rule served as a means of "prioritizing [the government's] finite resources"—was a legitimate government purpose.[174] The rational relation between the Ineligibility Rule and this legitimate government purpose, according to the SBA, is that the Ineligibility Rule allows the government to "direct its limited resources and financial assistance to small businesses in ways which will best accomplish the SBA's mission, serve its constituency, and serve the public interests."[175] Despite the lackluster boilerplate explanation of the rational relationship provided by the government, the court noted that Pharaohs had provided the court even less evidence that the Ineligibility Rule lacks a rational relationship to a legitimate government interest.[176] Because, in the Second Circuit, it is the movant's obligation to negate any arguments that may support a rational relation to a regulation, in what essentially appears to be a question of who presented the least amount of evidence in support of their position, the court ruled that Pharaohs was unlikely to succeed on the merits of this second claim.[177]

Lastly, the Second Circuit ruled on the likelihood of Pharaohs succeeding on its claim that the Ineligibility Rule is unconstitutional viewpoint discrimination. Pharaohs argues that "nude dancing illustrates the viewpoint that 'lust or sexual desire is good.'"[178] The court disagreed with the club's position entirely—holding that "prurient" describes a type of content, not a viewpoint.[179] The issue with such

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[170] *Id.* at 230.
[171] *Id*. at 230–31.
[172] *Id*. at 230.
[173] *Pharaohs*, 990 F.3d at 230.
[174] *Id.*
[175] *Id*. (internal quotation marks omitted) (quoting Business Loan Programs, 60 Fed. Reg. 64356, 64360 (Dec. 15, 1995)).
[176] *Id*. at 231.
[177] *Id*.
[178] *Id*. (citation omitted).
[179] *Pharaohs*, 990 F.3d at 231.

entertainment, in the court's eyes, is the subject-matter itself, not the viewpoint promoted by the subject-matter.[180]

Because the court held that Pharaohs did not have a likelihood of success on the merits of its various claims, it did not find an abuse of discretion on the part of the district court in denying Pharaohs' petition for a preliminary injunction of enforcement of the Ineligibility Rule.[181] As such, the appellate court affirmed the denial of the injunctive relief.[182]

V. CONSTITUTIONAL ANALYSIS

A. Introduction

As has been previously discussed in this Article, the SBA's decision to preclude the plaintiff adult entertainment businesses from the PPP resulted in multiple constitutional challenges before federal courts even in the midst of judicial restrictions due to COVID-19. The rights afforded in the First Amendment to the United States Constituion served as one avenue for such challenges. The text of the First Amendment proscribes Congress from passing any law "respecting an establishment of religion, or prohibiting the free exercise thereof; *or 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."[183]

The protections afforded to speech in the First Amendment have generally been understood to apply to three types of potentially unconstitutional legislation: direct regulation of speech; regulation of expressive conduct; and restrictions on the time, place, and manner of speech.[184] The preliminary issue in a constitutional analysis of the PPP as applied to adult entertainment venues is to determine whether the performances are entitled to First Amendment protections.[185] If the adult dancing taking place was determined to be "obscene," it would not be a category of speech within the protected universe of freedom of speech.[186] However, as the U.S. Supreme Court ruled in *Schad v. Mt.*

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[180] *Id.*

[181] *Id*.

[182] *Id*. at 232.

[183] U.S. CONST. amend. I (emphasis added).

[184] VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1 (2019).

[185] *See* Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 458 F. Supp. 3d 1044, 1060–61 (E.D. Wis. 2020).

[186] *See, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957).

Ephraim, the dancing at issue in these cases is categorically understood to be a form of expression protected by the First Amendment.[187]

Accordingly, the parties in each case seem to agree that because the dancing is a form of expression protected by the First Amendment, if the SBA were attempting to prohibit the expression taking place at the small businesses, it would be an unconstitutional violation of First Amendment rights.[188] The issue at the heart of this constitutional challenge is whether the Ineligibility Rule is a back-door attempt to unconstitutionally prohibit a protected form of expression.

B. Standard of Scrutiny

Before beginning a constitutional analysis of the SBA's PPP Ineligibility Rule, it will be important to determine what level of scrutiny is warranted. Unlike a viewpoint restriction, which may be found per se unconstitutional;[189] or a time/place/manner restriction, which may necessitate a less stringent analysis;[190] in this author's opinion, this exclusion of a protected First Amendment form of speech is most likely a content-based restriction because it is the content of the activity that invokes the exclusion from the federal funding program.[191]

This standard is more stringent than that applied by the Seventh Circuit in *Camelot*[192] or the Second Circuit in *Pharaohs*.[193] The Second and Seventh Circuits' application of lower standards of review were predicated on the courts' conclusions that the Ineligibility Rule was not a content-based restriction but was instead a condition to federal funding.[194] This author disagrees with that position for two reasons. First, while PPP loans may have been eligible for forgiveness at a future

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[187] 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment Protections from official regulation.").

[188] *See, e.g.*, *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1057.

[189] *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

[190] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[191] *Cf.* United States v. Playboy Ent. Grp. Inc., 529 U.S. 803, 811–13 (2000) (finding a restriction on television operators who provide adult entertainment channels to be content-based); *see also* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547–48 (1983) ("The 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.'" (alteration in original) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959))).

[192] *See* Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 24 F.4th 640, 646–47 (7th Cir. 2022) (applying rational-relation review, "the least rigorous form of judicial review").

[193] *See* Pharaohs GC, Inc. v. U.S. Small Bus. Admin., 990 F.3d 217, 228–29 (2d Cir. 2021) (applying only the "barest minimum" of protection to nude dancing (internal quotation marks omitted) (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975))).

[194] *See Camelot Banquet Rooms*, 24 F.4th at 647; *Pharaohs*, 990 F.3d at 229.

point,[195] at the time of application when the Ineligibility Rule was applied, they were treated as loans, and approved applicants entered into promissory notes and loan agreements with non-governmental financial institutions.[196] Until the point that an application for forgiveness of a PPP loan and all supporting documents were submitted and approved by the financial institution and SBA, these funds were treated as unsecured loans by both the lenders and the borrowers.[197] As such, it is a mischaracterization to view the Ineligibility Rule as applying to "federal funding" as there was equally as likely a probability at the time of application that the borrower may not be eligible for forgiveness and be responsible for repaying the loan as any other borrower on a commercial loan.[198]

Second, unlike the federal government's election not to subsidize lobbying in *Regan*, the SBA did not elect to not subsidize all night clubs or all entertainment venues. It excluded only the clubs or entertainment venues whose content the SBA disliked. A night club with jazz music or an entertainment venue that hosted flamenco dancers would have been eligible under the PPP.[199] This is analogous to a hypothetical scenario in which the government in *Regan* had refused to subsidize only the lobbyists advocating for content with which the government disagreed, such as all lobbyists who lobbied on the topic of congressional term limits.

However, this author does not consider this as going so far as to be viewpoint discrimination like the district court found in *Camelot*.[200] Such a scenario might have arisen had the SBA applied the Ineligibility Rule only to LGBTQ+ adult entertainment venues, for example. In

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[195] *See* Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 86 Fed. Reg. 3692, 3706 (Jan. 14, 2021) (codified at 13 C.F.R. pts. 113, 120, 121); *PPP Loan Forgiveness*, SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness [https://perma.cc/FYM5-9U5U] (Feb. 13, 2024).

[196] *See* Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23450–51 (Apr. 28, 2020) (codified at 13 C.F.R. pts. 120, 121).

[197] *See* OFFICE OF CAPITAL ACCESS, U.S. SMALL BUS. ADMIN., STANDARD OPERATING PROCEDURE 118 (2023), https://www.sba.gov/sites/sbagov/files/2023-06/FinalCloseoutSOP_50_57_3.pdf [https://perma.cc/XPV9-VB35].

[198] *See* discussion *supra* notes 114–15.

[199] *See Where Did $380B in PPP Money Go?*, CNNPOLITICS, https://www.cnn.com/projects/ppp-business-loans/ [https://perma.cc/V6BJ-3DRQ] (last visited Mar. 2, 2024); *PPP Funded Companies: Hispanic Flamenco Ballet Ensemble Inc.*, SBA.COM, https://www.sba.com/ppp-funded-companies/florida/hispanic-flamenco-ballet-ensemble-inc-10077026 [https://perma.cc/R65J-LUR9] (last visited Mar. 2, 2024).

[200] *See* Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 458 F. Supp. 3d 1044, 1060–61 (E.D. Wis. 2020).

continuing with the *Regan* analogy above, that would be more similar to the government refusing to subsidize only lobbyists who lobbied *in favor of* congressional term limits rather than any lobbyists who lobbied on the issue of congressional term limits (for or against). Because the Ineligibility Rule is applied to businesses providing this content, regardless of how it is produced or in what way it is presented, this author declines to go as far as considering it to be viewpoint discrimination.

As a content-based restriction, the SBA's PPP Ineligibility Rule should be examined using a strict scrutiny standard as opposed to an intermediate scrutiny or rational basis standard.[201] Under the strict scrutiny standard, the SBA must present both a "compelling interest" in the restriction as well as evidence that the restriction as applied is "narrowly tailored" to accomplish the compelling interest.[202]

C. First Amendment Analysis

As explained in greater detail above, in order for the Ineligibility Rule to survive a First Amendment analysis, the SBA must first show that it has a "compelling interest" in the objectives underlying the restriction. The SBA's exclusion of businesses that present "live performances of a prurient sexual nature" from the PPP, according to the agency's brief in *Camelot*, was made "in furtherance of [the SBA's] statutory mandate to consider the public interest when directing its limited resources."[203] This is similar to the SBA's original published explanation when it first adopted the exclusion for traditional 7(a) loans in 1995:

> Having considered the legal precedent and the congressional mandate, SBA has determined that it may exclude small businesses engaging in lawful activities of an obscene, pornographic, or prurient sexual nature. Under the proposed rule, SBA would not provide financial assistance to small businesses which present live performances of a prurient sexual nature or which derive significant gross revenue from the sale, on a regular basis, of products or services, or the presentation of depictions or displays, of a pornographic, obscene, or prurient sexual nature.

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[201] *See, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364, 380–84 (1984) (applying strict scrutiny to the challenged statute after finding that strict scrutiny applies when a statute appropriates funds to facilitate private speech and discriminates based on content).

[202] *See, e.g.*, *id.* at 375, 380; Burson v. Freeman, 504 U.S. 191, 198 (1992) (reiterating the strict scrutiny standard which requires that "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983))).

[203] Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 458 F. Supp. 3d 1044, 1053 (E.D. Wis. 2020).

> Thus, an establishment featuring nude dancing, or a book, magazine or video store containing merchandise of a prurient sexual nature would not be eligible for SBA financial assistance if the obscene, pornographic, or prurient activity contributed to the generation of a significant portion of the gross revenue of the business.
>
> SBA considers this proposed rule to be consistent with its obligation to direct its limited resources and financial assistance to small businesses in ways which will best accomplish SBA's mission, serve its constituency, and serve the public interest. Applicants' First Amendment freedoms are in no way abridged. They may still express their views, exercise their freedoms, operate their businesses, and obtain any other aid available to them.[204]

While this explanation may be sufficient to support the exclusion from general SBA 7(a) loans (which is a constitutional issue far beyond the scope of this Article), it is difficult to see how directing the SBA's limited resources—which appears to be the main justification for the restriction—is consistent with the emergency funding intended to be distributed under the CARES Act. Even though the SBA may generally have greater freedom in allocating its finite amount of funding under normal 7(a) lending circumstances, congressional allocation of over $800 billion for the PPP[205] and the dire economic circumstances invoked by the global pandemic[206] make it difficult to see how the need to protect finite resources is consistent with the objective of the CARES Act. Congress allocated billions of dollars of resources to open the PPP up to a wider purview of the American economy than the SBA would normally serve in light of the unprecedented nature of the threats to small businesses.

Congressional influx of financial capital to the SBA for the PPP makes the SBA's normal justification for the ineligibility rule—direction of limited resources—arguably inapplicable to the applicants of the PPP. In light of the material change in the financial circumstances of the SBA for direction to small business applicants under the PPP, it is difficult to see how the condition achieves a "compelling interest" of

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[204] Business Loan Programs, 60 Fed. Reg. 64356, 64360 (Dec. 15, 1995) (codified at 13 C.F.R. pt. 120).

[205] David Autor et al., *The $800 Billion Paycheck Protection Program: Where Did the Money Go and Why Did It Go There?*, 36 J. ECON. PERSPS. 55, 56 (2022); Alicia Parlapiano et al., *Where $5 Trillion in Pandemic Stimulus Money Went,* N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/interactive/2022/03/11/us/how-covid-stimulus-money-was-spent.html [https://perma.cc/R6WD-FZX9].

[206] Do-Hyun Hong, *The Economic Impact of the COVID-19 Pandemic on the United States*, MICH. J. OF ECON. (Jan. 9, 2022), https://sites.lsa.umich.edu/mje//2022/01/09/the-economic-impact-of-the-covid-19-pandemic-on-the-united-states/ [https://perma.cc/6LGN-W8K5].

the government, especially when contrasted with the CARES Act's objective of providing relief to small businesses forced to close their doors in compliance with state mandated stay-at-home orders.

Not only does the SBA most likely not have a "compelling interest" in restricting the use of funds allocated to the PPP under the CARES Act, but proscribing an entire industry from participation in the Program is not a "narrowly tailored" application of even a justifiable interest. For the sake of argument, were the SBA to convince a court that it had a "compelling interest" in keeping federal funds from adult entertainers due to the content of their performances, a narrowly tailored approach to accomplishing such an objective could be to limit the types of employees of adult entertainment venues whose salaries could be counted for determination of PPP loan amounts. The SBA already provided specific guidance regarding calculation of full-time equivalent, or "FTE," salaries for purposes of eligible loan funds, and could have provided similar guidance regarding adult entertainment employees rather than banning the entire industry from applying for any such funds.[207] This narrowly tailored approach would have allowed small businesses to pay rent, utilities, and other employees such as security, custodians, cooks, and sound technicians who did not engage in the speech at issue under the Ineligibility Rule.

D. Fifth Amendment Analysis

Equal protection concerns arise when the government either denies an opportunity or imposes a burden on a specific group which it does not apply to others.[208] The Fifth Amendment's Due Process Clause specifically states that no person shall "be deprived of life, liberty, or property, without due process of law."[209] Inherent in this admonition is an assurance that all persons shall be treated equally under the laws.[210] Since the adoption of the Fifth Amendment, courts have clarified that equal protection does not always mean everyone must be

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[207] *See* SMALL BUS. ADMIN., PPP LOAN FORGIVENESS CALCULATION FORM (2020), https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf [https://perma.cc/FF76-HEAL].

[208] Romer v. Evans, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause . . . . simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").

[209] U.S. CONST. amend. V.

[210] *See id.*

treated identically.[211] In order to determine if a governmental action violated the Equal Protection Clause of the Fifth Amendment, courts consider both the legitimacy of the justification for the distinction and how well the distinction accomplishes said justification.[212]

As discussed in detail above, the content-based restriction of prohibiting businesses which host performances of a prurient nature should be subject to strict scrutiny.[213] This level of scrutiny necessitates that the state have a compelling purpose and its means must be narrowly tailored to achieve the purpose.[214] The same arguments apply to a strict scrutiny analysis of the Ineligibility Rule under the Fifth Amendment as applied under the First Amendment.[215] The SBA does not have a compelling interest in regulating the moral turpitude of an industry by withholding emergency payroll funds designated for small businesses by Congress. The only justification offered by the SBA for this ineligibility rule's application to SBA lending in general is the SBA's duty to allocate limited resources.[216] As outlined above, the congressional allocation of over $800 billion for PPP recipients[217] makes the SBA's claim of having to manage limited resources seem like a far cry from a "compelling interest."

Thus, the exclusion of an entire industry could hardly be "narrowly tailored" as the strict scrutiny standard requires. The exclusion is instead more easily described as the SBA alienating an industry whose protected First Amendment speech the SBA finds offensive, despite the ongoing national emergency which warranted congressional passage of the CARES Act. Additionally, as explained above,[218] were the SBA to have a compelling interest in a frugal application of PPP funds, the Ineligibility Rule is far from narrowly tailored as it places a blanket ban on the industry as a whole, rather than on which employees may be counted in determining FTE equivalents for purposes of a PPP application. The exclusion of an adult entertainment venue's custodian

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[211] *See* Richardson v. Ramirez, 418 U.S. 24, 52–53 (1974).

[212] *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547–48 (1983); Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin, 458 F. Supp. 3d 1044, 1060–61 (E.D. Wis. 2020).

[213] *See supra* Part V, Section B.

[214] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1984).

[215] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[216] *Camelot Banquet Rooms*, 458 F. Supp. 3d at 1053 (citing Defendant's Brief In Opposition, *supra* note 70, at 1–2).

[217] *See* Jonathan O'Connell, Erica Werner and Aaron Gregg, *Senate Reaches Deal to Extend Paycheck Protection Program Hours Before It Was Set to Expire*, WASH. POST, (June 30, 2020), https://www.washingtonpost.com/business/2020/06/30/paycheck-protection-program/ [https://perma.cc/AN5D-ZKNY].

[218] *See supra* Part V, Section C.

or sound technician from being paid a living wage during the COVID crisis because the business may also employ dancers of whom the SBA disapproves, is not a "narrowly tailored" response to the SBA's general opposition to adult entertainment when managing more limited 7(a) program funds.

Ironically, as further evidence of the failure of the Ineligibility Rule to be "narrowly tailored" in accomplishing the SBA's objectives, many of the dancers at the crux of the SBA's "public interest" concerns are 1099 independent contractors,[219] and are therefore already excluded from the PPP FTE calculation.[220] This Ineligibility Rule, therefore, negatively impacted employees of businesses for the actions of independent contractors with whom the employer contracted.

Under both the First and Fifth Amendments, the PPP Ineligibility Rule fails constitutional scrutiny. As such, it should not have been enforced, and the SBA should have permitted adult entertainment venues to apply for emergency payroll funding under the Paycheck Protection Program.

VI. CONCLUSION

While the constitutional challenges to the SBA's Ineligibility Rule were just a few of several challenges to the SBA's rulemaking under the CARES Act, they are unique in their reliance on the U.S. Constitution rather than the Administrative Procedures Act. In the midst of uncertainty and global panic, when hoarding basic necessities is the knee-jerk reaction of many in the public,[221] it is just as—if not more—

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[219] *See, e.g.*, Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 249–51 (2017); Bryce Covert, *Strip Clubs Get Away with Exploiting Dancers Every Day*, *But These Strippers Are Fighting Back*, THINKPROGRESS (Nov. 4, 2015, 1:00 PM), https://archive.thinkprogress.org/strip-clubs-get-away-with-exploiting-dancers-every-day-but-these-strippers-are-fighting-back-fb3a204bcc5a/ [https://perma.cc/KG8C-TT33]; *Your Rights*, WE ARE DANCERS, https://wadusa.org/know-your-rights/your-rights/ [https://perma.cc/62QA-V2AM] (Mar. 1, 2024) ("These days, most clubs classify dancers as independent contractors . . . ."); Margot Roosevelt, *Are You an Employee or a Contractor? Carpenters, Strippers and Dog Walkers Now Face that Question*, L.A.TIMES (Feb. 23, 2019, 5:00 AM) https://www.latimes.com/business/la-fi-dynamex-contractors-20190223-story.html [https://perma.cc/8E8E-VHQU]; Thornton v. Crazy Horse, Inc., No. 3:06–cv–00251–TMB, 2012 WL 2175753, at *6–7 (D. Alaska June 14, 2012).

[220] *Protection Program Loans Frequently Asked Questions* (FAQS), *supra* note 13 ("15. Question: Should payments that an eligible borrower made to an independent contractor or sole proprietor be included in calculations of the eligible borrower's payroll costs? Answer: No. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business's payroll costs . . . .").

[221] Scottie Andrew, *The Psychology Behind Why Toilet Paper, of All Things, Is the Latest Coronavirus Panic Buy*, CNN, https://www.cnn.com/2020/03/09/health/toilet-paper-

important than in seasons of stability to make the intentional effort to avoid discriminating against the vulnerable or unpopular in society. As an attorney for one of the plaintiffs in these cases stated: "This is not an adult entertainment issue . . . . This [is] a guy that sweeps the floor that's not getting a paycheck issue."[222] In this instance, the judicial system and Constitution were the only safe harbors into which small-business owners could retreat in pursuit of relief from the SBA's Ineligibility Rule. At the offset of the Program, Congress had not specifically included adult entertainment businesses when drafting the CARES Act and waiving other affiliation rules; the SBA, working diligently to create and manage an entirely new program in a matter of weeks was not willing to revise its standard 7(a) policies, and banks were not willing to accept the legal and financial risks of acting beyond the scope of the CARES Act and SBA guidelines. The only chance these businesses had to pay their employees was a plea to the judiciary under their constitutionally protected rights.

While the SBA may be well within the scope of its authority to restrict general 7(a) loans from being used to start new small businesses expanding ethically questionable activities, the objective of the CARES Act was a platform through which the federal government could provide some level of aid to employees of small businesses facing financial jeopardy because of COVID-19. It is in such volatility that the protections afforded under the Constitution are most important. These were not entrepreneurs being denied additional government-funded startup capital. These were hourly employees whose livelihoods had been temporarily upended by the states in which they live in an effort to slow the spread of an unprecedented virus. The Constitution and Bill of Rights are a floor of protection to keep Americans who may not align with mainstream values from suffering irreparable harm as a result of their exercise of constitutionally protected, but unpopular or controversial, expression of speech. Unfortunately, the Ineligibility Rule, lacking a compelling interest to support its enforcement or a narrowly tailored application of its prohibition, stripped certain small businesses of constitutional rights in a moment of national crisis.

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shortages-novel-coronavirus-trnd/index.html [https://perma.cc/N4M8-D2UU] (Mar. 9, 2020, 5:14 PM).

[222] Robert Channick, *Admiral Theatre Is Among a Bevy of Adult Businesses Suing to Get a PPP Loan. So Far, the Nightclubs Are Winning*, CHICAGO TRIBUNE (May 21, 2020, 10:28 AM), https://www.chicagotribune.com/coronavirus/ct-coronavirus-ppp-admiral-adult-nightclub-sba-lawsuit-20200521-lngidvs46vexlhespzzz7nlyzm-story.html [https://perma.cc/PQ5G-65NU].