

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**CAMELOT BANQUET ROOMS,
INC., et al.,
Plaintiffs,**

v.

Case No. 21-C-0447

**UNITED STATES SMALL BUSINESS
ADMINISTRATION, et al.,
Defendants.**

ORDER

On August 19, 2021, I granted the plaintiffs' motion for a preliminary injunction and enjoined the U.S. Small Business Administration ("SBA") from applying a regulation excluding businesses that present "live performances of a prurient sexual nature" from the "second draw" Paycheck Protection Program ("PPP"). See *Camelot Banquet Rooms, Inc.*, ___ F. Supp. 3d ___, 2021 WL 3680369 (E.D. Wis. 2021). I ordered the SBA to authorize the plaintiffs' banks to fund the loans by Monday, August 23, 2021. At the government's request, I modified the injunction to give the SBA until September 2, 2021 to comply. The government has since filed a notice of appeal, and it asks me to stay the injunction pending appeal.

To determine whether to grant a stay, I must consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *In re A&F Enters., Inc.*, 742 F.3d 763, 766 (7th Cir. 2014). This standard "mirrors that for granting a preliminary injunction." *Id.* As with a motion for a preliminary injunction, a "sliding scale" approach applies; the greater the moving party's likelihood of success on

the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Id.*

I begin with the government’s likelihood of success on appeal. In its motion for a stay, the government repeats the arguments it made in its brief in opposition to the motion for preliminary injunction. For the reasons explained in my order granting the injunction, I conclude that these arguments are unlikely to succeed on appeal. However, I acknowledge that the Second Circuit reached different conclusions in a similar case involving the original PPP (not the second-draw program). *See Pharaohs GC v. U.S. Small Bus. Admin.*, 990 F.3d 217 (2d Cir. 2021). In granting the preliminary injunction, I concluded that excluding businesses that present erotic expression from a loan program made available to virtually every other form of business in the United States amounted to an attempt to suppress a “dangerous idea,” as that phrase is used in Supreme Court cases involving government funding decisions. *See, e.g., Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983). In contrast, the Second Circuit found “no indication that the [SBA regulation] ‘was intended to suppress’ protected conduct.” *Pharaohs*, 990 F.3d at 229–30. But the court did not provide any explanation for its conclusion. The *Pharaohs* court also rejected the plaintiff’s argument that “the only apparent purpose for this regulation is to exclude small businesses that express a disfavored message from programs that were created to assist all small businesses.” *Id.* at 230. But it did so without much analysis. It only asserted that “legitimate interests may be served by the government’s decision not to subsidize adult-entertainment venues” and then cited two Supreme Court cases, one involving a zoning ordinance and another involving obscene materials that receive no First Amendment protection. *Id.* (citing *City*

of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)). The Second Circuit emphasized that it based its decision on “the limited record” before it, *id.* at 231, and this might explain the brevity of its legal analysis. In any event, while I acknowledge that *Pharaohs* provides some support for the government’s position, I find that the government is unlikely to succeed on appeal in the Seventh Circuit.

I also find that the plaintiffs are likely to suffer greater harm from a stay granted in error than the government is likely to suffer from a stay denied in error. In granting the preliminary injunction, I found that the plaintiffs were likely to suffer two kinds of irreparable harm: (1) permanent exclusion from the PPP because, without an injunction, the government would release its “hold” on the appropriations necessary to fund the plaintiffs’ loans and thus be unable to fund the loans at the end of the case, and (2) irreparable financial harm from being unable to use the funds during the pandemic. In its motion for a stay, the government states that it will continue to set aside funds for the plaintiffs on appeal. See Mot. at 9. This somewhat mitigates the first form of irreparable harm. But Congress is considering legislation that would rescind \$4.7 billion in PPP funds. See Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong., § 90007(d) (2021). If this bill became law while the case was on appeal—which is not unlikely, as the Senate has already passed the bill and the House is set to consider it on or before September 27, see H.R. Res. 601, 117th Cong., § 3(b) (2021)—the SBA might lose the appropriations necessary to fund the plaintiffs’ loans, which would result in their permanent exclusion from the PPP. The SBA represents that \$4.7 billion is “less than the total amount of SBA appropriations remaining,” Mot. at 10, but it does not represent that

the amount remaining would be sufficient to fund the plaintiffs' loans. Thus, I believe there is still some risk that the SBA will be unable to fund the loans once the appellate process is exhausted.

More importantly, even if the SBA could fund the loans at the end of the appeal, the plaintiffs have shown that they need the funds now, while they are under economic duress from the pandemic. The plaintiffs are all bars, restaurants, or entertainment venues. Such businesses have been some of the hardest hit by the pandemic, See Second Decl. of Zachary M. Youngsma ¶¶ 9–11. Most of the plaintiffs are severely in arrears on their rent and/or utility payments, see ECF Nos. 23-3, 23-4, 23-5, 23-7, 23-8 & 23-9, and five of them are currently closed due either to lack of income, see ECF Nos. 23-5 ¶ 6, or to COVID-19 related restrictions, ECF No. 23-8 ¶ 3. Although COVID-19 restrictions are not as tight as they were during the first months of the pandemic, infections are on the rise again due in large part to the Delta variant of the virus, see Youngsma Decl. ¶¶ 14–16. Thus, the plaintiffs need assistance now. Delaying relief until the end of the appellate process would likely cause financial harm that could not be repaired by loans made after the appeals are decided. Further, because the government is not liable for damages, any financial harm the plaintiffs suffer while the appeals are pending would be irreparable.

On the other side of the balance, the government notes that if a stay is not granted and the loans are made, the SBA may be unable to recoup the funds if the injunction is reversed. However, when the government is the opposing party, the harm to it merges with the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009). And the public interest strongly favors the denial of a stay. The purpose of the PPP is to assist small businesses

struggling during the pandemic by helping them pay wages, rents, mortgage interest, and utility bills. See 15 U.S.C. § 636(a)(37)(J). If the government funds the plaintiffs' loans, the plaintiffs are highly likely to place the funds in the stream of commerce, which in turn will benefit their employees, landlords, mortgage holders, and utility companies. The funds would then continue to circulate through the economy, benefitting the public. It is true that Congress decided not to make PPP loans to small businesses that present erotic entertainment, see 15 U.S.C. § 636(a)(37)(A)(iv)(III)(aa), and this decision is entitled to some weight when assessing the public interest. But, as I explained in my order granting the injunction, it is hard to see how the exclusion of such businesses serves the public interest. See *Camelot Banquet*, ___ F. Supp. 3d at ___, 2021 WL 3680369, at *10. Thus, I find that delaying the plaintiffs' loans would not strongly serve the public interest. Moreover, under the sliding scale, given the plaintiffs' strong likelihood of success on appeal, the irreparable harm the plaintiffs would suffer from a stay outweighs the harm the government and the public would suffer without one. Accordingly, the motion for a stay pending appeal will be denied.

For the reasons stated, **IT IS ORDERED** that the defendants' motion for a stay pending appeal is **DENIED**

Dated at Milwaukee, Wisconsin, this 31st day of August, 2021.

s/Lynn Adelman
LYNN ADELMAN
United States District Judge