United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5101 **September Term, 2019**

1:20-cv-00970-RCL

Filed On: May 26, 2020

American Association of Political Consultants and Ridder/Braden, Inc.,

Appellants

v.

United States Small Business Administration and Jovita Carranza, In her Official Capacity as Administrator of the U.S. Small Business Administration,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Griffith, Pillard, and Wilkins, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, appellants' Rule 28(j) letters, and the government's responses, it is

ORDERED AND ADJUDGED that the district court's order, filed April 21, 2020, be affirmed. The district court correctly concluded that appellants did not satisfy the stringent requirements for a preliminary injunction or temporary restraining order. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

This appeal centers on a nearly twenty-five-year-old regulation: 13 C.F.R. § 120.110(r). Pursuant to § 120.110(r), "[b]usinesses primarily engaged in political or lobbying activities" are ineligible for Section 7(a) loans, including loans under the recently enacted Paycheck Protection Program ("PPP"). Appellants argue that § 120.110(r) violates their constitutional rights under the First and Fifth Amendments.

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Appellants are unlikely to succeed on their claim that § 120.110(r) constitutes an unconstitutional condition on their First Amendment rights. "Congress is not required by the First Amendment to subsidize lobbying." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 546 (1983) (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)). And the district court correctly concluded that PPP loans are akin to the subsidy at issue in Regan, particularly in light of the PPP's forgiveness provisions. Moreover, the principles articulated in Regan are not confined to cash subsidies. See Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358-59 (2009). Appellants' assertion that the rationales behind Regan and Ysursa do not apply when the program at issue involves an expectation of repayment is unsupported and their comparison to Matal v. Tam, 137 S. Ct. 1744 (2017), is too tenuous to deem them likely to succeed on the merits.

Further, unlike the grant programs in FCC v. League of Women Voters of California, 468 U.S. 364 (1984), and Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013), § 120.110(r) does not "seek to leverage funding to regulate speech outside the contours of the [PPP] program itself." Alliance for Open Soc'y, 570 U.S. at 214-15. Appellants are still able to pursue their lobbying efforts without federal assistance. See Regan, 461 U.S. at 546; United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 212 (2003). In light of the foregoing, appellants are unlikely to succeed on their unconstitutional conditions claim.

Appellants also argue that § 120.110(r) is an unconstitutional content-based speech prohibition. Although "content-based regulations of speech are presumptively invalid," the government "can make content-based distinctions when it subsidizes speech." Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 188-89 (2007) (citing Regan, 461 U.S. 548-50). Content-based funding decisions that are viewpoint neutral and reasonable have been upheld. Id. at 189; see also Regan, 461 U.S. at 548; Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998).

Section 120.110(r) is viewpoint neutral, as it does not discriminate along partisan lines, and appellants are unlikely to succeed on their argument that the purpose behind § 120.110(r) is unreasonable. The Small Business Administration ("SBA") explained that the reason behind § 120.110(r) is to be consistent with "Government-wide Federal policy that Federal funds [should] not be used for lobbying or political activities because to do so would not be an appropriate or cost-effective use of Federal tax dollars."

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SBA's Brief at 14-15 (quoting 51 Fed. Reg. 37,580, 37,589 (Oct. 23, 1986)). Similar explanations have been upheld as reasonable. See Regan, 461 U.S. 550 (explaining "it is not irrational" for Congress to decide that subsidies should not extend to lobbying organizations); Ysursa, 555 U.S. at 359-60 (concluding that a governmental "interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics" is "plainly reasonable"). Thus, it is unlikely that appellants will prevail on their claim that § 120.110(r) is an unconstitutional content-based speech prohibition.

Further, appellants are unlikely to succeed on their claim that § 120.110(r) violates the equal protection clause implicit in the Fifth Amendment. As demonstrated above, appellants have not shown that their First Amendment rights have been infringed nor have they alleged that § 120.110(r) employs a suspect classification. As a result, rational basis review applies. See Regan, 461 U.S. at 547-48. For the reasons stated above, the SBA's interest in maintaining the regulation is rational. See Regan, 461 U.S. 550; Ysursa, 555 U.S. at 359-60.

Because appellants' have not demonstrated that they are likely to succeed on their constitutional claims, the district court's denial of appellants' motion for a temporary restraining order and preliminary injunction was appropriate.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk