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COMMENTS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-56028, 92-56387, 93-55089

KAREN FINLEY, JOHN FLECK, HOLLY HUGHES, TIM MILLER and
NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS,

Plaintiffs/Appellees,

v.

NATIONAL ENDOWMENT FOR THE ARTS and
MADELEINE KUNIN,
in her official capacity as
Chairperson of the National Endowment for the Arts,

Defendants/Appellants.

ON APPEAL FROM THE
FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

The briefs of appellees and their amici uniformly raise the specter of "government censorship." But such statements miss the thrust of our opening brief. Our principal contention is that the statute does not require grant applications to be measured against standards other than artistic merit and artistic excellence. The NEA construes the compromise legislation that enacted the decency provision only to require the NEA Chairperson take into consideration "standards of decency and respect for diverse beliefs and values of the American public" in promulgating rules and procedures, and then to take the action deemed appropriate.¹ Under the NEA's mode of implementing the

¹ 20 U.S.C. §954(d)(1).

statute, grant applications would continue to be judged only on artistic merit. Other modes of implementation can be imagined; some would raise constitutional questions. But plaintiffs have elected only to attack the statute on its face and not to challenge the NEA's mode of implementation. Because of the abstract nature of the lawsuit that plaintiffs have chosen to bring, we have argued that if there is a possible, constitutional manner of implementing the decency provision, the statute does not raise a serious constitutional question.

Plaintiffs argue in reply principally that because the decency provision may be implemented by the NEA in ways that would violate First Amendment limitations, the decency provision itself must be held unconstitutional. They argue that the decency provision cannot be lawful unless it prevents all potential abuse by the agency.

This argument, discussed in detail below, could be made about all statutes that delegate quasi-legislative authority. Such delegations are typically general, allowing an agency latitude in working out specifics. It will always be possible to imagine ways in which such directives could be implemented that would raise constitutional questions. For example, a statute that directed an agency to establish administrative remedies might be implemented in a way that fails to afford a hearing in all appropriate circumstances. This scheme could properly be struck down by a court as a denial of procedural due process. But the statute that directs the agency to establish

administrative remedies could not itself be held unconstitutional merely because it did not foreclose the agency's acting in an unconstitutional way. Rather, as long as there are lawful ways of fulfilling the statute's directive, a court would require the agency to implement the statute in some constitutionally permissible form.

Likewise in this case. The statute directs the NEA Chairperson to establish rules and procedures that address concerns relating to decency and the diversity of public belief. The NEA construes this statute to require the Chairperson to take the action deemed appropriate. But rather than bring a suit challenging the NEA's method of implementing the statute, if and when the NEA's mode of implementation raises a constitutional question, plaintiffs argue that the delegation of authority to the NEA is unconstitutional because it can be abused. Such facial challenges, brought without regard to how the statute is implemented, must be rejected if there are constitutional ways of implementing the statute.

We discuss more particularly below the NEA's construction of the decency provision and some of the various constitutional ways in which it may be implemented. We also discuss the various objections made by plaintiffs and their amici, demonstrating that the objections are either irrelevant to the issues presented or based upon mistakes of law.

**THE NEA'S CONSTRUCTION AND MODE
OF IMPLEMENTING THE DECENCY PROVISION**

The decency provision requires the NEA Chairperson to "establish * * * regulations and procedures [that] ensure that artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."² In its opening brief, the NEA set forth its construction of this provision: The statute identifies areas of concern -- decency and the diversity of public beliefs -- to which the Chairperson should attend; but the statute does not require action if no problem is identified, nor does it specify how the Chairperson should resolve problems that are identified.³ We demonstrated that this is a reasonable construction, consistent with the language of the statute, and supported by legislative history reflecting that the legislation was a compromise between factions divided over the question of placing content restrictions on NEA grants. We noted also that two powerful lines of authority impel a court to adopt the NEA's construction: (1) Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., when Congress has left a gap for an agency to fill with its regulations, a court must defer to the

² 20 U.S.C. §954(d)(1).

³ Brief for the Appellants, p. 12.

agency's construction as long as it is among the reasonable constructions of the statute;⁴ and (2) under long-settled law, a court is required, whenever possible, to adopt a construction of a statute that allows it to avoid a constitutional controversy.⁵

A facial challenge on First Amendment grounds of the type brought by plaintiffs cannot succeed unless "every application of the statute create[s] an impermissible risk of suppression of ideas."⁶ Thus, if the statute permits the NEA Chairperson to

⁴ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864 (1984).

⁵ See, e.g., Crowell v. Benson, 285 U.S. 22, 62 (1932).

⁶ New York State Club Ass'n v. New York City, 487 U.S. 1, 11 (1988). One group of amici argue that the rule concerning facial challenges is "nearly the opposite." Brief of 60 Arts, Literary, Cultural, and Other Organizations, p. 4. To the extent to which amici are arguing that a direct facial challenge can succeed on something less than a showing that the challenged statute "could never be applied in a valid manner," their argument contradicts New York Club Ass'n. See also Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982) ("[A court] should uphold the [facial vagueness] challenge only if the enactment is impermissibly vague in all of its applications.")

New York Club Ass'n allows facial challenges to succeed on a lesser showing -- that a statute is "substantially overbroad" -- only when plaintiffs are challenging the statute on behalf of the rights of third parties not before the court. Id. And, although plaintiffs have never characterized their complaint as other than a direct facial challenge, amici also suggest that this case presents a substantial overbreadth challenge. Id. But the doctrine of substantial overbreadth is not triggered by the presence of alternative constructions or implementations of a statute; its concern is with whether the speech of absent third parties will be chilled unless plaintiffs, whose own speech is unprotected, are allowed to litigate on the basis of the third parties' rights. For this reason, when plaintiffs are in no different position than parties not before the Court, the Supreme Court has squarely held that the doctrine of "substantial overbreadth" does not apply. Brockett v. Spokane Arcades, Inc.,
(continued...)

implement its directive by doing nothing at all, or by taking some equally constitutional course, then the statute will be unassailably valid in every one of its applications.

Despite the central importance of the NEA's construction, it receives no thematic treatment in plaintiffs' brief. Although their brief repeats the conclusory assertion that "general standards of decency" must be applied by the NEA in judging grant applications, the brief does not discuss our analysis of the language of the decency provision, nor does the brief offer any alternative analysis of the language of the statute.⁷ Their

⁶(...continued)

472 U.S. 491, 503-04 (1985). Neither plaintiffs nor amici contend that there are third parties whose rights or interests differ from their own. Therefore, under Brockett, a "substantive overbreadth" challenge may not be maintained in this case.

⁷ The brief of one amicus, Claes Oldenburg et al., argues that when the words "by peer review panelists" are inserted in the statutory language at an appropriate point, the construction endorsed by the district court becomes possible. Oldenburg brief at 8-10. The proposed construction is in some ways grammatically dubious, suggesting that the term "taking" can be construed to modify "criteria." And, in addition, a construction of a statute that depends upon adding a precise phrase that is not supplied by the context will always be on less sure footing than a construction that relies only upon what has actually been written. However, even if their construction is accepted as possible, their argument would be insufficient. Plaintiffs cannot prevail by showing that their construction of the statute is among the reasonable constructions of the statute -- they must prove that the NEA's construction is not among the reasonable constructions of the statute. For, under the Constitution, the authority to choose from among the reasonable constructions lies not with amici, nor the courts, but with the NEA Chairperson. In this regard, amici make no telling arguments. Their main contention is that if "taking" modified the Chairperson, as the NEA reads the statute, it "would have been placed in the introductory paragraph and not in subparagraph 1." Id. at 9. But this would alter the meaning, requiring the Chairperson to take decency into account, as well, in establishing regulations (continued...)

brief does not discuss the deference due the NEA's construction under Chevron. Their brief does not discuss the Court's obligation to avoid constitutional questions when fairly possible. Their brief repeats the district court's conclusion that the NEA's construction leads to "redundancy," but it does not address our extensive refutation of that conclusion.⁸

Plaintiffs make only three points that require discussion: They argue (1) that "[n]o NEA official has ever advanced the position * * * that the decency standard modifies the directive to the Chairperson * * * rather than the criteria by which grant applications are judged";⁹ (2) that there are statements by Congressmen that are inconsistent with the NEA's construction;¹⁰ and (3) that the implementation of the decency provision has in fact involved use of decency as a criteria.¹¹

1. Plaintiffs' first point, that no "NEA official has advanced th[e] position" set forth in the NEA's briefs, is inaccurate. In his affidavit to the district court, then-Deputy Chairman Randall McAusland stated that:¹²

⁷(...continued)
for subparagraph 2. The placement of the term "taking" is, accordingly, precisely where it should be under the NEA's construction of the statute.

⁸ Compare Brief for the Appellants, pp. 25-29, with Brief for Appellees, pp. 28-29.

⁹ Brief for Appellees, p. 8.

¹⁰ Brief for Appellees, p. 28.

¹¹ Brief for Appellees, pp. 9-11.

¹² SER 126-27 (emphasis added).

[T]he NEA, by ensuring diverse membership on the panels, had fulfilled its mission under the statute of "taking into account" diverse standards and values.

This is the construction that is urged before this Court:

"Taking into account" is something done by the NEA, not the panels. The NEA has elaborated its construction of the statute in its briefs before this Court.

The remaining element in the NEA's construction was implied when the NEA Council, in a December 1990 meeting, recommended that the "general standards of decency" provision would be implemented "by strengthen[ing] the panels and the diversity that we have discussed carefully this morning and make no verbal reference, no written reference to the issue of decency within the guidelines,"¹³ and the NEA Chairperson concurred, stating that "wide representation on the panels and the National Council" would satisfy the decency provision's directives. This shows that NEA considered that it possessed the discretion to choose among appropriate remedies in implementing the decency provision.¹⁴ Thus, NEA officials have unambiguously stated that they construe the decency provision (1) to direct the NEA, not the panels, to "tak[e] into consideration" general standards of decency, and (2) to give the NEA discretion in choosing the manner in which the directive shall be implemented.

¹³ SER 72, 72-73.

¹⁴ SER 73.

2. Plaintiffs' second point does not accurately represent the scope of the legislative history of the Williams-Coleman amendment that enacted the decency provision. As we demonstrated in our opening brief, the decency provision was a compromise between those who wanted a mandatory imposition upon NEA grants of content restrictions relating to decency, and those who desired no restrictions at all.¹⁵ The record of the statements by individual legislators about what this compromise legislation means is exactly what one would expect: There are statements that favor both factions' views. Some statements, such as those of Cong. Henry, upon which plaintiffs rely, suggest that decency would be considered in judging grant applications.¹⁶ Others -- for example, those of Cong. Gunderson -- suggest the opposite:¹⁷

The Williams-Coleman substitute is based on legislation Mr. Coleman and I wrote * * *. Under the bill, the NEA will avoid censoring works for objectionable or obscene content. But that is not to say funding of such works will be allowed. Under this plan, the new NEA will base its funding decisions on standards of artistic merit and artistic excellence only.

The legislative history squarely supports the NEA's construction, not so much because of the comments of individual legislators as to what the statute means, but because the legislation itself is

¹⁵ Brief for the Appellants, pp. 22-24. See also, e.g., 136 Cong. Rec. H9418 (daily ed. Oct. 11, 1990) (remarks of Cong. Kennedy) ("Despite the fact that I support the NEA without any content restrictions, I will support the [Williams-Coleman] amendment * * *.")

¹⁶ Brief for Appellees, pp. 28-30.

¹⁷ 136 Cong. Rec. H9456 (daily ed. Oct. 11, 1990) (remarks of Cong. Gunderson) (emphasis added).

a compromise between opposing factions, and the NEA's construction constitutes a reasonable means of reconciling the opposing factions.

3. Plaintiffs' final point, that, as a historical matter, the grant applications have been judged on the basis of decency considerations, is also inaccurate. The McAusland declaration, discussed above, explains in detail the NEA's mode of implementing the decency provision:¹⁸

[I] explain [to the panel] that the NEA interprets this provision as a whole; that is, that artistic excellence and merit are the criteria upon which grant awards should be based. Therefore, I explain, each panelist should be guided ultimately by his or her conclusions as to the artistic merit and excellence of a proposed grant project or work, and that the NEA, by ensuring diverse membership on the panels, had fulfilled its mission under the statute of "taking into account" diverse standards and values. Because the statute must be read as a whole, neither the Chairman nor I ever instruct a panel to make a separate determination as to whether an application is decent or respectful.

In the same vein, then-Chairperson Frohnmayer stated:¹⁹

We are addressing [the decency provision] by making sure that our panels and the National Council on the Arts are composed of decent citizens, people who recognize the plurality of our society, respect individual dignity, spiritual values, and the rights of all groups and their cultural expressions. * * * What does all this mean to artists, and what does this say about the question of censorship? In the most general sense, the answer is that artists [applying for grants] will be judged on the basis of the criteria which have existed since the very

¹⁸ SER 126-27.

¹⁹ SER 70-71. See also SER 121-22; for Chairperson Frohnmayer's definition of "artistic excellence," see SER 139-41.

beginning of this agency * * * artistic
excellence.

The remarks relied upon by plaintiffs for a contrary conclusion may, in isolation, seem ambiguous. For plaintiffs correctly contend that NEA officials have made statements such as "general standards of decency would be applied by grant-review panels as a matter of course."²⁰ But such remarks, viewed in context, are a variation on NEA's oft-repeated contention that decency is implicit in the process of assessing artistic merit. That is, panels will satisfy decency concerns "as a matter of course" as long as they are diversified and their judgments are confined to artistic excellence and artistic merit. There is nothing in the record to support plaintiffs' conclusion that panels "are instructed to incorporate [decency] considerations into their decision on the artistic merit of applications."²¹ NEA officials "never instruct a panel to make a separate determination as to whether an application is decent * * *."²²

In summary, neither the NEA's policy nor its practice employs "decency," rather than artistic merit, as a criterion in the evaluation of grant applications. However, given plaintiffs' facial challenge, the issue before this Court does not turn upon whether the policy was in fact implemented; if the policy is

²⁰ Brief for Appellees, p. 9, quoting SER 23 (emphasis omitted).

²¹ Brief for Appellees, p. 10.

²² SER 127.

merely among the possible modes of implementing the statute, plaintiffs' abstract challenge must fail.

Plaintiffs attempt to avoid this conclusion with their arguments concerning vagueness, which we address below.

II

THE DECENCY PROVISION IS NOT VOID FOR VAGUENESS

Plaintiffs make two vagueness arguments: They argue that (1) the phrase "general standards of decency" is unconstitutionally vague because "it has no objective content whatsoever";²³ and (2) the statute is vague, even under the NEA's construction, because it "affords unfettered discretion to the officials who enforce it."²⁴ Both contentions are based upon mistakes of law.

A. Statutes That Direct An Agency To Act, But Do Not Regulate Conduct, Are Not Unconstitutionally Vague.

When laws contain language whose meaning is not "well known enough to enable those within their reach to correctly apply them," they may be "void for vagueness."²⁵ This is because a citizen can only be "free to steer between lawful and unlawful conduct, [if] laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may

²³ Brief for Appellees, p. 18.

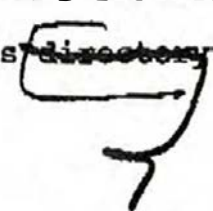
²⁴ Brief for Appellees, pp. 18, 24.

²⁵ Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (emphasis supplied).

act accordingly * * *,²⁶ Plaintiffs claim that the decency provision is vague because the phrase "general standards of decency" provides "no meaningful standard at all."²⁷ They analogize the decency provision to statutes barring "annoying conduct" or "contemptuous treatment of the flag."

But not every law that contains vague terms is void for vagueness. Only laws that purport to regulate conduct -- laws that "prohibit" conduct or bring citizens "within their reach" -- are potentially void if they employ vague terms: Citizens need concern themselves with "steering their conduct" only when a law affects their conduct.

In this respect, the decency provision is unlike statutes barring annoying or contemptuous conduct. The decency provision does not regulate the conduct of citizens at all. It is, rather, a directive to the NEA Chairperson to "establish * * * regulations and procedures."²⁸ These procedures, when in place, may themselves have a bearing on the conduct of citizens. And, for this reason, they may be void if they employ unduly vague terms. But the decency provision, in itself, prohibits nothing; no one's grant application may be denied for failing to conform to the decency provision. Because this ~~directory~~ provision



²⁶ Grayned v. Rockford, 408 U.S. 104, 108 (1972) (emphasis supplied). See id. at n.3 (collecting cases).

²⁷ Brief for Appellees, p. 19.

²⁸ 20 U.S.C. §954(d)(1).

prohibits nothing, no one is "within its reach"; and no one other than the NEA Chairperson need be concerned about its meaning.

**B. The Decency Provision Creates No Possibility Of
Arbitrary Enforcement By The NEA.**

Plaintiffs also argue that because the NEA has a variety of options in implementing the decency provision, it is void for vagueness. Analogizing the statute to licensing schemes that leave enforcement officials free to enforce the requirements in arbitrary ways, they argue that the decency provision "'does not give guidance about how a general decency standard would be applied to individual grant applications'" and is therefore "the very definition of an unconstitutionally vague statute."²⁹

This argument, if accepted, would have profound consequences. Virtually every delegation of quasi-legislative authority to an administrative agency is written in terms that are open to a variety of interpretations. The problems that plaintiffs' argument would create can be illustrated by this Court's recent decision in Information Providers' Coalition v. FCC.³⁰ That case concerned a void-for-vagueness challenge to a law that criminalized using a telephone to make "any indecent communication for commercial purposes which is available to any person under 18 years of age."³¹ The statute does not otherwise

²⁹ Brief for Appellees, p. 24-25 (quoting Brief for the Appellants, p. 31).

³⁰ Information Providers' Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991).

³¹ 47 U.S.C. §223(b).

define "indecenty," a term that is at least as vague as the phrase "general standards of decency." The FCC, had, through its regulations, defined decency with a degree of precision sufficient, in this Court's view, to withstand the vagueness challenge. But, according to plaintiffs' argument, this Court wrongly decided that case. The FCC statute did not limit the agency's discretion to define "indecenty," so plaintiffs' argument would lead to the conclusion that the statute should have been held unconstitutionally vague. Thus, plaintiffs' argument cannot be correct. Indeed, their argument contradicts settled law, since "a broadly worded statute can be sufficiently clarified by [an agency's] narrowing, authoritative interpretation to fend off a vagueness challenge."³²

Plaintiffs' argument fails to distinguish between an agency's exercise of its quasi-legislative powers and its exercise of its enforcement powers. Broad agency discretion in enforcing legislative prohibitions is a matter for legitimate concern, but broad agency discretion in establishing quasi-legislative schemes does not raise the same concerns. A law that forbade "contemptuous" or "annoying" conduct in such broad terms that its enforcement by the police could be arbitrary and unpredictable would make it impossible for citizens to determine whether they are obeying the law. But a directive from the legislature to an agency to establish regulations and procedures that outlaw "contemptuous" or "annoying" conduct does not cause

³² Dirks v. SEC, 802 F.2d 1468, 1471 (D.C. Cir. 1986).

citizens to be concerned about whether their present conduct is lawful or not. Although the agency may have broad discretion in establishing the scheme, until the scheme is established, no conduct is affected. The fundamental concern underlying the vagueness doctrine -- fair notice -- is not implicated until after the quasi-legislative power has been exercised. Only then is something in place that can be enforced.

Accordingly, claims that "delegations of legislative power [are unconstitutional] * * * because of an alleged absence of any ascertainable standards for guidance [of the agency] in carrying out its functions" are typically measured by a far less exacting standard than claims concerning enforcement discretion: As long as the terms of the delegation are not "utterly without meaning," the delegation is valid.³³ Private rights need not be protected by the terms of the delegation. As the Supreme Court has held:³⁴

Necessity * * * fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. * * * [J]udicial review of the remedies adopted by the Commission safeguards against statutory or constitutional excesses.

That is true here, as well.

³³ American Power Co. v. SEC, 329 U.S. 90, 104 (1947).

³⁴ American Power Co. v. SEC, 329 U.S. at 105-06.

C. There Are Alternative Modes Of Implementing The Decency Provision That Also Would Not Be Unconstitutional.

We demonstrated in our opening brief that the decency provision is constitutional even if this Court rejects the NEA's construction of the decency provision and construes the statute to require the NEA to institute some type of decency criteria against which grant applications must be measured. We argued that there would still be clearly constitutional methods of implementing the statute so construed. For example, we suggested that the statute could be implemented so as to prohibit funding of grants whose subject matter would be considered obscene if measured against judicial obscenity standards and whose intended audience was children under twelve years of age. That such a condition upon a government grant would not be unduly vague was established by this Court's decision in Information Providers' Coalition v. FCC, discussed above.³⁵

Plaintiffs make three counter arguments. The first two are the same two made and refuted above -- that the statutory term "general standards of decency" is vague, and that the NEA retains undue discretion.³⁶ Their final argument is that implementing the statute in this manner would contravene congressional intent. They state, without supporting analysis, that this construction would "render redundant a separate provision of the statute [20 U.S.C. §954(d)(2)] that addresses obscenity."³⁷ But this ignores

³⁵ See infra, p. 14.

³⁶ Brief for Appellees, pp. 25-27.

³⁷ Brief for Appellees, p. 28.

our explanation that the statute plaintiffs claim would be rendered redundant, §954(d)(2), concerns material "determined to be obscene," and that this phrase could reasonably be construed by the NEA to refer to material "determined to be obscene" by a judicial tribunal.³⁸ Thus, construing the decency provision to reach material that would otherwise meet the judicial obscenity test -- but has not been "determined to be obscene" -- would not create any redundancy.

Plaintiffs also argue, relying on the remarks of one legislator, that there is legislative history that would support reading the decency provision more broadly, to reach material that would not be held obscene under judicial standards.³⁹ This is true, but not telling. In our opening brief, we referred to legislative history that supports a narrow reading of the decency provision.⁴⁰ Accordingly, at most, their argument would establish that the legislative history supports more than one mode of implementing the statute. But it is the NEA Chairperson who has the authority to choose from among the reasonable means of implementing a statute, and, especially if the Chairperson's choice avoids a constitutional question, a court is bound to respect that choice.

Finally, as this Court recognized in Information Providers' Coalition, Inc. v. FCC, the FCC, without congressional objection,

³⁸ Brief for the Appellants, p. 32.

³⁹ Brief for Appellees, p. 28.

⁴⁰ Brief for the Appellants, pp. 34-35.

construed the statutory term "indecent" to mean material that would be found obscene under judicial standards. It would require at least uncontroverted legislative history to conclude that Congress did not intend the NEA to have similar latitude.

III

THE DECENCY PROVISION IMPOSES NO UNCONSTITUTIONAL CONTENT OR VIEWPOINT RESTRICTIONS ON PROTECTED SPEECH

Relying upon Rust v. Sullivan,⁴¹ plaintiffs argue that "[t]he 'decency' statute also violates the First Amendment because it places impermissible content- and viewpoint-based restrictions on a program designed to promote free expression in the arts."⁴² In addition, they argue that the "'decency' provision's only purpose is to suppress art that some may deem controversial."⁴³ Finally, on the ground that the decency provision "makes 'general standards of decency' part of 'the criteria by which applications are judged,'" plaintiffs argue that "since NEA applications are judged on an applicant's entire body of work, * * * the 'decency' restriction applies to an artist's entire body of work," and, accordingly, penalizes speech that was not supported by government funds.⁴⁴

41 Rust v. Sullivan, 111 S. Ct. 1759 (1991).

42 Brief for Appellees, p. 34, 35-42.

43 Brief for Appellees, p. 42.

44 Brief for Appellees, pp. 43-44.

A. Plaintiffs' Additional Challenges Are Premature.

For the most part, it is sufficient to note that these arguments cannot properly be raised in this lawsuit. Plaintiffs have intentionally limited themselves to a facial challenge to the decency provision. They have not chosen to challenge the manner in which the decency provision has been implemented by the NEA Chairperson; nor have they sought to challenge the decency provision "as applied" to any particular grant application. Yet all the arguments just mentioned involve facts or issues that necessarily cannot be known merely by examining the face of the statute.

For example, plaintiffs seek to have the decency provision overturned on the ground that "general standards of decency" will be applied to an applicant's privately funded, past work to determine the applicant's eligibility for a grant. But it is not possible to derive this conclusion from the face of the statute. Indeed, plaintiffs themselves do not attempt to derive their conclusion from the words of the statute, but instead attempt to generalize upon remarks made by a former Chairperson at a congressional hearing.⁴⁵ The statute, itself, concerns only work

⁴⁵ Plaintiffs point to administrative statements indicating that past performance is looked to by the NEA in determining "'potential for future excellence.'" Brief for Appellees at 44 (referencing id. at 7 n.6, quoting SER 90). But looking to past performance in order to evaluate an artist's potential for artistic excellence does not necessarily mean that an artist's past obscene or indecent performances will render the artist ineligible for a grant for a future performance that is not obscene or indecent. Even on the level of administrative implementation, plaintiffs have made no case that presents the constitutional issue they ask this Court to decide.

to be funded by the NEA, not past work. Thus, if the NEA construed the decency provision to authorize it to deny grant applications from applicants whose past work included indecent or obscene matter, that would only render the NEA's implementation of the statute subject to challenge. If such a challenge were upheld, the proper procedure for a court would be to strike down the NEA's mode of implementation, and direct the agency to implement the provision in a constitutional manner. Plaintiffs' argument does not affect the facial validity of the decency provision.

Likewise, plaintiffs' claim that the decency provision has the purpose and effect of suppressing dangerous ideas is groundless under the interpretation the NEA has urged -- increasing the diversity of panel membership. Also, if the NEA implemented the decency provision by denying grant applications that intended to present matter that a court would find obscene to children under twelve years of age, no protected speech would be suppressed.

Here, as elsewhere, plaintiffs argue as if this Court could and should decide upon the constitutionality of the statute on the basis of unnecessarily extreme readings of the statute's language. However, a court is obliged to take exactly the opposite course from that which they propose: A proper respect for an equal and coordinate Branch of the government requires a court to avoid constitutional clashes "whenever a construction of

the statute is fairly possible by which the [constitutional] question may be avoided.⁴⁶

B. Resolution Of This Controversy Does Not Require A Determination As To The Reach Of Rust v. Sullivan To Government Funding Of The Arts.

Plaintiffs argued successfully to the district court that the decency provision was facially unconstitutional, based in part on the Supreme Court's decision in Rust v. Sullivan. Plaintiffs' reliance on Rust, and the district court's use of Rust, are unwarranted. Appellees and the amici have interpreted our brief to argue for an extension of Rust. To be clear, that is not our intention.

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We support the proposition that the arts enjoy First Amendment protection. Acknowledging that a particular activity enjoys First Amendment protection, however, does not mean that any restriction on government funding of that activity is facially invalid. The burden of plaintiffs' facial constitutional challenge is to show that the decency provision at issue in this case cannot be applied consistent with the First Amendment, regardless of how that provision is construed by the implementing agency. Because only a facial challenge to the statute is presented here, it is unnecessary for this Court to attempt to determine what constitutional standards should apply in making that determination.

⁴⁶ Crowell v. Benson, 285 U.S. at 62.

IV

THE TELEPHONE POLL ISSUE IS MOOT

The parties have entered into a settlement agreement concerning the denials of their grant applications. A copy of that settlement agreement is attached as an appendix to this brief. The parties agree that the telephone poll issue, which is the subject of appeals Nos. 92-56387 and 93-55089, has been mooted by the settlement agreement. These appeals, therefore, should be dismissed by the Court as moot. The parties also agree that the settlement agreement does not affect the government's appeal of the district court's judgment concerning the decency provision in appeal No. 92-56028.

CONCLUSION

Appeals Nos. 92-56387 and 93-55089 should be dismissed as moot. The district court's denial of the government's motion for summary judgment in No. 92-56028, and its grant of summary judgment to plaintiffs, should be reversed.

Respectfully submitted.

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ARTISTS' ORGANIZATIONS,
Appellees**

v.

**NATIONAL ENDOWMENT FOR THE ARTS, and
MADELEINE KUNIN in her official capacity as Acting
Chairperson of the National Endowment for the Arts,
Appellants.**

**On Appeal from the United States District Court
for the Central District Of California**

**BRIEF OF 60 ARTS, LITERARY, CULTURAL,
AND OTHER ORGANIZATIONS AS AMICI CURIAE
IN SUPPORT OF APPELLEES**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	111
CONSENT OF THE PARTIES	vi
INTEREST OF AMICI CURIAE	vi
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE "DECENCY" PROVISION IS UNCONSTITUTIONALLY VAGUE AND WILL LEAD TO SELF-CENSORSHIP BY ARTISTS AND GOVERNMENT DECISIONS VIOLATING THE FIRST AMENDMENT	2
A. The Statutory Language Creates Problems of Government Decisionmaking Infringing First Amendment Rights	2
B. The Applicable Constitutional Standards on Vagueness Illustrate the Impropriety of the Decency Provision	5
C. The Decency Provision Is Void for Vagueness Because Its Operative Terms Do Not Give Proper Guidance and It Can Be and Has Been Applied In a Discriminatory Manner	10
1. The operative words are inherently vague	10
2. The provision can be applied in a discriminatory manner	16
II. THE DECENCY PROVISION IS AN IMPERMISSIBLE RESTRICTION ON SPEECH THAT CANNOT BE JUSTIFIED BY <u>RUST V. SULLIVAN</u>	20
A. The Decency Provision Violates The First Amendment, Notwithstanding Its Relationship To A Government Grant Program	21
B. The Supreme Court's Decision In <u>Rust v. Sullivan</u> Is Consistent With The District Court's Ruling And Does Not Permit The Type Of Restrictions Exemplified By The Decency Provision	25

1.	The District Court correctly held that funding for the arts is like funding for public universities and that <u>Rust</u> is thus inapplicable	25
2.	The rationale behind the approval of the restrictions in <u>Rust</u> does not apply here, even apart from the special First Amendment protections applicable to the arts	29
a.	Unlike <u>Rust</u> , the decency provision involves a content-based restriction, and is not simply a consequence of a limitation on the scope of a federal program	29
b.	The <u>Rust</u> holding does not apply because of the vague and overbroad nature of the decency provision	31
c.	The decency provision is invalid under <u>Rust</u> because it effectively restricts recipients of federal funds in the exercise of their First Amendment rights	34
3.	A broad interpretation of <u>Rust</u> to permit content restrictions on the NEA would set a dangerous precedent severely damaging free expression rights	37
CONCLUSION		39
APPENDIX A: Consent of the Parties		
APPENDIX B: Statements of Interest of Individual <u>Amici Curiae</u>		

TABLE OF AUTHORITIES

CASES

<u>Advocates for the Arts v. Thomson</u> , 532 F.2d 792 (1st Cir.) <u>cert. denied</u> , 429 U.S. 894 (1976)	23
<u>American Council of the Blind v. Doerstin</u> , 644 F.Supp. 811 (D.D.C. 1986)	23
<u>Arkansas Writers' Project, Inc. v. Ragland</u> , 481 U.S. 221 (1987)	22, 30
<u>Baggett v. Bullitt</u> , 377 U.S. 360 (1964)	33
<u>Board of Trustees of Leland Stanford Junior Univ. v. Sullivan</u> , 773 F.Supp. 472 (D.D.C. 1991)	passim
<u>Bella Levitzky Dance Found. v. Frohnmayer</u> , 754 F. Supp. 774 (C.D. Cal. 1991)	6, 16
<u>Bence v. Breier</u> , 501 F.2d 1185 (7th Cir. 1974), <u>cert. denied</u> , 419 U.S. 1121 (1975)	6
<u>Boddie v. American Broadcasting Companies, Inc.</u> , 881 F.2d 267 (6th Cir. 1989), <u>cert. denied</u> , 493 U.S. 1028 (1990)	8
<u>Boutilier v. INS</u> , 387 U.S. 118 (1967)	6
<u>Bradley v. Pittsburgh Board of Education</u> , 910 F.2d 1172 (3d Cir. 1990)	8
<u>Bullfrog Films, Inc. v. Wick</u> , 847 F.2d 302 (9th Cir. 1988)	6, 23
<u>City of Akron v. Akron Center for Reproductive Health</u> , 462 U.S. 416 (1984)	7
<u>Cohen v. California</u> , 403 U.S. 15 (1971)	14, 20
<u>Community for Creative Non-Violence v. Turner</u> , 893 F.2d 1387 (D.C. Cir. 1990)	8
<u>Cornelius v. NAACP Legal Defense and Education Fund, Inc.</u> , 473 U.S. 788 (1985)	22
<u>Crane v. Pezzo</u> , 755 F. 2d 1415 (11th Cir. 1985)	11
<u>Doe v. University of Michigan</u> , 721 F. Supp. 852 (E.D. Mich. 1989)	8

<u>FCC v. League of Women Voters of California</u> , 468 U.S. 364 (1984)	22, 30
<u>FCC v. Pacifica Foundation</u> , 438 U.S. 726 (1978)	11
<u>Federal Election Comm'n v. National Conservative Political Action Comm.</u> , 470 U.S. 480 (1985)	4
<u>First National Bank of Boston v. Bellotti</u> , 435 U.S. 765 (1978)	4
<u>Gentile v. State Bar of Nevada</u> , 111 S. Ct. 2720 (1991)	PASSIM
<u>Gertz v. Robert Welch, Inc.</u> , 418 U.S. 323 (1974)	13
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972)	5, 32
<u>Joseph Burstyn, Inc. v. Wilson</u> , 343 U.S. 495 (1952)	33
<u>Keyishian v. Board of Regents</u> , 385 U.S. 589 (1967)	vii, 20, 26
<u>Kolender v. Lawson</u> , 461 U.S. 352 (1983)	7
<u>Miller v. California</u> , 413 U.S. 15 (1973)	19
<u>National Treasury Employees Union v. United States of America</u> , No. 92-5085 (D.C. Cir. March 30, 1993)	4
<u>New York State Club Ass'n v. New York City</u> , 487 U.S. 1 (1988)	4
<u>Penny Saver Publications, Inc. v. Village of Hazel Crest</u> , 905 F.2d 150 (7th Cir. 1990)	8
<u>Perry v. Sindermann</u> , 408 U.S. 593 (1972)	22
<u>Quincy Cable TV, Inc. v. FCC</u> , 768 F. 2d 1434 (D.C. Cir. 1985)	11
<u>Regan v. Taxation With Representation</u> , 461 U.S. 540 (1983)	22
<u>Rust v. Sullivan</u> , 111 S. Ct. 1759 (1991)	PASSIM
<u>Sable Communications v. FCC</u> , 492 U.S. 115 (1989)	11
<u>Shanloo v. Mississippi State Board of Trustees</u> , 620 F.2d 516 (5th Cir. 1980)	7
<u>Smith v. California</u> , 361 U.S. 147 (1959)	31
<u>Smith v. Goguen</u> , 415 U. S. 566 (1974)	4

<u>Texas v. Johnson</u> , 109 S. Ct. 2533 (1989)	13, 20
<u>United States v. Richman</u> , 110 S. Ct. 2404 (1990)	13, 20
<u>Wieman v. Updegraff</u> , 344 U.S. 183 (1953)	vii

STATUTES AND RELATED MATERIALS

20 U.S.C. § 951	28
20 U.S.C. § 953(c)	27
20 U.S.C. § 954(d)(1)	<u>PASSIM</u>
136 Cong. Rec. H9681 (October 16, 1990) (statement of Rep. Ted Weiss)	10
S. Rep. No. 300, 89th Cong., 1st Sess. (1965)	<u>PASSIM</u>

Department of the Interior and Related Agencies

<u>Appropriations for 1993: Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives</u> , 102d Cong., 2d Sess. (May 5, 1992).	17, 18
---	--------

MISCELLANEOUS

<u>American Association of University Professors et al., Academic Freedom and Artistic Expression</u> , Academe (July-Aug. 1990)	27
<u>M. Carnilly-Weinberger, Fear of Art: Censorship and Freedom of Expression in Art</u> (1986)	32
<u>H.M. Kallen, Art and Freedom: A Historical and Biographical Interpretation of the Relations Between the Ideas of Beauty, Use and Freedom in Western Civilization from the Greeks to the Present Day</u> (1942)	39

CONSENT OF THE PARTIES

Attorneys for Appellant and Appellee have consented to the filing of this amicus curiae brief. Copies of their written consent are included as Appendix A.

INTEREST OF AMICI CURIAE

As described more specifically in Appendix B, amici curiae include 60 literary, arts, cultural, and other organizations from across the country. They include individual institutions like the Museum of Modern Art in New York and the San Francisco Art Institute, state and regional groups like the California Federation of the Arts, and nationwide organizations like the National Assembly of Local Arts Agencies and the American Arts Alliance. They represent many thousands of authors (PEN American Center), writers (Writers Guild of America East), publishers (American Association of Publishers), actors (Actors Equity Association), musicians (American Music Center), photographers (Los Angeles Center for Photographic Studies), and sculptors (International Sculpture Center), as well as theaters (Theatre Communications Group), museums (American Association of Museums), television broadcasters (Public Broadcasting Service), radio broadcasters (National Public Radio), filmmakers (Film Arts Foundation), dancers (Dance Bay Area), and other artists. They

include groups of performing artists like the Lewitzky Dance Company and the Paper Bag Players, and groups that seek to defend the rights of performing artists like Volunteer Lawyers for the Arts and People For the American Way. Many amici and their members regularly participate in government programs sponsored by the National Endowment for the Arts and for the Humanities. Almost all interact with government programs in some way, ranging from obtaining funding to receiving tax exemptions. All share a common commitment to freedom of expression that unites them as amici in this case.

The rights of amici and their members and supporters, be they author, poet, novelist, artist, museum curator, public broadcaster, musician, or other professional, to challenge conventional wisdom and social pieties is a cornerstone of that freedom. Therefore, amici fear that if government officials can be empowered to grant or withhold government benefits on the basis of whether an applicant's artistic expression is deemed consistent with "general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. § 954(d)(1), the result will be to stifle that "'free play of the spirit'" which all who deal with words or images "'ought especially to cultivate and practice,'" Keyishian v. Board of Regents, 385 U.S. 589, 601 (1967), quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1953) (Frankfurter, J. concurring). If individual authors and artists can be excluded from federal support for transgressing vague notions of "decency," there is

little to prevent other parts of the intellectual community from being held hostage to a government official's notion of what is appropriate or politically correct. Amici believe that the "decency" clause cannot be applied without offending fundamental First Amendment principles, and accordingly support the decision below.

SUMMARY OF ARGUMENT

The statutory criteria at issue here are plainly unconstitutional. "General standards of decency" and "respect for the diverse beliefs and values" of the American public are impermissibly vague. Such criteria interfere with the creative process directly and chill free expression. Once the government determines to provide public funding for the arts, it may not refuse to fund an artist's work on the basis of the viewpoint expressed by the art or because of the unorthodoxy or unpopularity of the artist's message to some. Injecting content or viewpoint-based criteria such as the "decency" and "diverse beliefs and values" provisions into the grant-making process represents an impermissible attempt by Congress to restrict First Amendment rights through a federal funding program. The notion that such restrictions can be justified by the Supreme Court's recent decision in Rust v. Sullivan, 111 S. Ct. 1759 (1991), is clearly erroneous and represents a dangerous attempt to severely restrict free expression, which would have far-reaching effects throughout American society. The district court's decision invalidating the decency provision should be affirmed.

ARGUMENT

I. THE "DECENCY" PROVISION IS UNCONSTITUTIONALLY VAGUE AND WILL LEAD TO SELF-CENSORSHIP BY ARTISTS AND GOVERNMENT DECISIONS VIOLATING THE FIRST AMENDMENT

A. The Statutory Language Creates Problems Of Government Decisionmaking Infringing First Amendment Rights

The law in question in this case contains two provisions that violate the First and Fifth Amendments' prohibitions against vague laws. Section 103(b) of the Arts, Humanities and Museum Amendments of 1990, which amended 20 U.S.C. § 954(d), contains the following language:

(d) No payment shall be made under this section except . . . in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that --

(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public...(emphasis added).

In order to evade the force of the decision below, the government appellants have offered a novel construction of the statutory language. In yet a third effort to escape the vagueness problem inherent in the words of the law, they now argue that the "decency" and "respect" language simply directs "the Chairperson to 'tak[e] into consideration' the

issue of general standards of decency when promulgating grant application regulations." Appellants' Brief at 17.¹ In other words, the language does not direct the Chairperson to take any particular action with respect to these criteria. However, in issuing regulations, the Chairperson may decide to take these factors into consideration. Since the Chairperson did not do so in this case, the government maintains, there is no vagueness problem under the statute.

As the district court held, the statutory language simply does not lend itself to the type of construction urged by appellants. Congress clearly intended the NEA to establish standards and procedures in connection with grant applications and awards, as every government agency dispensing federal funds ordinarily does. In connection with those general standards and procedures, Congress mandated that the NEA must make awards based upon artistic excellence, "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The language requires that the NEA apply these criteria. The law states that the NEA "shall ensure" that these criteria are applied -- both artistic

¹ As noted in the district court decision, the government argued first below that the statutory language "merely implements a method for selecting review panel members," and not a method for passing upon grant applications. Second, it argued below that the "decency" and "respect" language described "factors [that were] implicit in the assessment of artistic merit." 795 F. Supp. at 1471.

excellence and "decency" and "respect for the diverse beliefs and values of the American public."

In addition, the very fact that the NEA can present two or three alternative constructions of the statutory language itself strongly supports plaintiffs' contention that the law is unconstitutionally vague and does not give guidance to the NEA, peer-review panels or grant applicants, all of whom must take action based upon their construction of the law. While it may sometimes be correct that the presence of a possible constitutional interpretation of a statute may prevent it from being declared unconstitutional, the rule with respect to First Amendment concerns is "nearly the opposite": the broad and almost indeterminate nature of the decency clause and its potential for abuse reinforces its unconstitutionality².

Furthermore, the situation before this Court presents the problem of imprecise language "'inhibit[ing] the constitutionally protected speech of third parties,'" about which the Supreme Court warned in New York State Club Ass'n v. New York City, 487 U.S. 1, 11 (1988) (citation omitted). Aside from the inherent imprecision of this language and the broad political discretion it would appear

² National Treasury Employees Union v. United States of America, No. 92-5085 (D.C. Cir. March 30, 1993) (Randolph, J., concurring) slip op. at 1. Accord, e.g. Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2732 (1991); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 490-501 (1985); First National Bank of Boston v. Bellotti, 435 U.S. 765, 786-95 (1978); Smith v. Goguen, 415 U.S. 566, 573 (1974).

to lodge in the NEA, grant applicants faced with the ambiguous language of the law would hesitate to create art that would offend the sensibilities of the government grant-approvers. Thus it creates the problems of self-censorship that trigger facial analysis of the statutory provisions in question.

B. The Applicable Constitutional Standards on Vagueness Illustrate the Impropriety of the Decency Provision

The basic standards for vagueness were outlined by the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' [*Id.* at 408-09 (citations omitted).]

The void-for-vagueness doctrine applies when civil penalties are imposed upon an individual. See Boutilier v. INS, 387 U.S. 118, 123 (1967) ("the 'void for vagueness' doctrine [is] applicable to civil as well as criminal actions"). It applies when administrative rules are used to sanction a government employee. See Bence v. Breier, 501 F.2d 1185, 1188 (7th Cir. 1974), cert. denied, 419 U.S. 1121 (1975). It also applies when governmental benefits are awarded to persons outside of government, as with NEA grants. See, e.g., Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 512-14 (9th Cir. 1988).

Thus, in Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 783 (C.D. Cal. 1991), the court held that a 1989 NEA certification requirement to prevent funding of art which could be considered obscene was unconstitutionally vague: "The chilling effect on these two plaintiffs arising from the NEA's vague certification requirement is unmistakably clear The Court finds that because the certification requirement includes unconstitutionally vague provisions, it also violates grantees First Amendment rights by causing a chilling effect on their artistic expression."

In determining whether the decency provision is unconstitutionally vague, the court should look at the specific language of the statute. In numerous cases, the federal courts have refused to stretch the meaning of the

operative words of a law beyond their commonly accepted meaning for a person "of ordinary intelligence" who would be affected by the law. Thus, in Kolender v. Lawson, 461 U.S. 352 (1983), the Court found that a law requiring a person to give "credible and reliable" identification was too vague as applied in a loitering statute. In City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 451 (1984), the Supreme Court found that a law requiring the "remains of the unborn child" to be "disposed of in a humane and sanitary manner" was too vague.

In a case involving language very similar to that involved here, Shamloo v. Mississippi State Board of Trustees, 620 F.2d 516, 523 (5th Cir. 1980), the Fifth Circuit held that a college rule permitting only "activities of a wholesome nature" on campus was unconstitutionally vague. The court noted that the language obviously lent itself to discriminatory enforcement, based upon political considerations:

The requirement that an activity be wholesome before it is subject to approval is unconstitutionally vague. The testimony revealed that the regulations are enforced or not enforced depending on the purpose of the gathering or demonstration. Dr. Johnson admitted that whether or not something was wholesome was subject to interpretation and that he [and other administrators] could come to different conclusions as to its meaning. . . . The regulation's reference to wholesome activities is not specific enough to give fair notice and warning. [Id. at 524.]

More recently, a college policy prohibiting conduct that "stigmatizes or victimizes an individual on the basis of race, ethnicity, sex, sexual orientation, creed," or similar characteristics was found unconstitutionally vague. Doe v. University of Michigan, 721 F. Supp. 852, 856 (E.D. Mich. 1989).³

In one of its most recent pronouncements on vagueness, Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), the Supreme Court held that Rule 177(3) of the Nevada Supreme Court Rules was void for vagueness. The rule provided that while lawyers may not make any extrajudicial comments about a pending case that has a "substantial likelihood of materially prejudicing" an adjudicative proceeding, a lawyer "may state without elaboration . . .

³ For other recent vagueness cases, see, e.g., Penny Saver Publications, Inc. v. Village of Hazel Crest, 905 F.2d 150 (7th Cir. 1990) (city ordinance prohibiting solicitation of sale of real estate unconstitutionally vague as applied to real estate advertisers in general circulation newspapers); Community for Creative Non-Violence v. Turner, 893 F.2d 1387 (D.C. Cir. 1990) (permit requirement for exercising free speech rights in subway unconstitutionally vague in use of terms such as speaking in "conversational tone"); Boddie v. American Broadcasting Companies, Inc., 881 F.2d 267 (6th Cir. 1989), cert. denied, 493 U.S. 1028 (1990) (federal wiretap statute unconstitutionally vague as applied to prohibition against use of nonconsensual wiretaps for "injurious" purposes). See also Bradley v. Pittsburgh Board of Education, 910 F.2d 1172 (3d Cir. 1990) (vagueness doctrine could apply to a ban on a teacher utilizing a teaching technique entitled "Learnball," as the reach of the prohibition was uncertain).

the general nature of the . . . defense." *Id.* at 2721. In the Court's plurality opinion, Justice Kennedy concluded that the latter "safe harbor" rule was void for vagueness, and the lawyer could therefore not be disciplined for violating it:

Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide 'fair notice to those to whom [it] is directed.' . . . A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the 'general' nature of the defense without 'elaboration' provides insufficient guidance because 'general' and 'elaboration' are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. [*Id.* at 2731 (emphasis added).]

Justice Kennedy went on to state: "The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." 111 S. Ct. at 2732 (emphasis added).

Justice O'Connor -- who provided the fifth vote for holding the rule void for vagueness -- believed that lawyer speech was not fully protected by the First Amendment and might be regulated under a lesser standard. But she agreed that there was real doubt about the reach of the Rule's operative words and that, therefore, it must be struck down: "Both Gentile and the disciplinary board have valid arguments on their side [as to what the rule permitted

a lawyer to say], but this serves to support the view that the rule provides insufficient guidance," and is therefore void for vagueness. 111 S. Ct. at 2749.

The Gentile case sets forth the appropriate standard in this case: first, it laid down the principle that "classic terms of degree" that have no established meaning in the operative words of a statute render a law void for vagueness; second, it established that the possibility of discriminatory application is sufficient to strike down a law on vagueness grounds. As demonstrated below, under either of these standards, the decency clause must be struck down.

C. The Decency Provision Is Void for Vagueness Because Its Operative Terms Do Not Give Proper Guidance and It Can Be and Has Been Applied In a Discriminatory Manner.

1. The operative words are inherently vague

As one Congressman pointed out in vain on the floor of the House of Representatives during debate over the bill that led to the decency provision, the bill "sets new standards for judging grant applications violating the first amendment." 136 Cong. Rec. H9681 (October 16, 1990) (statement of Rep. Ted Weiss). The key terms -- "general standards of decency" and "respect for the diverse beliefs and values of the American public" -- have no established meaning under the law. It is true that the term "indecent language" in the Federal Communications Act was specifically

defined by the FCC and that definition was upheld by the Supreme Court in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). The FCC had specifically defined the term as meaning "language that describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities and organs." Id. at 732. But Congress specifically rejected that definition in enacting the "decency" provision and instead adopted a provision much broader than the particular provisions of the law at issue in Pacifica.⁴

The law in question here does not deal with specific indecent words but "general standards of decency." Does that mean that the entire body of an applying artist's work must be measured? Can a single indecent image or word in the artist's entire body of work be sufficient to doom his or her application for a grant? Under such a standard, James Joyce would not qualify for a governmental grant because of the indecent words in Ulysses. Even if the standard requires consideration of an entire work, how does one measure whether a work taken as a whole is "decent" or

⁴ In addition to the absence of the type of definition of indecency that was present in Pacifica, the Supreme Court has made clear that even the limited regulation of indecency in that case was permissible only because of the unique nature of over-the-air broadcasting. Id., 438 U.S. at 731 n. 2, 740, 748-49. Particularly outside that context, so-called indecent expression is clearly protected by the First Amendment. See Sable Communications v. FCC, 492 U.S. 115, 125-31 (1989); Quincy Cable TV, Inc. v. FCC, 768 F. 2d 1434, 1448 n. 31 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Cruz v. Ferte, 755 F. 2d 1415, 1420-21 (11th Cir. 1985).

not?

In addition, the operative terms of the law introduce not only "classic terms of degree" within the meaning of Gentile, but normative terms about which there is and can be no agreement. What are "general standards of decency?" Are they measured on a geographical basis -- are the standards of decency the same in Peoria or New York City? Are they measured in terms of the artistic community within each area, or the religious community or ethnic community, or the lowest common denominator of taste in a specific locale or on a national basis?

Furthermore, the "decency" provision covers more than language or verbal works. As discussed in further detail in Section II.B.2. below, it may well cover all the artistic work that an applicant has ever created. How can one measure whether a work of the visual or performing arts meets a "general standard of decency?" Were nudity alone the measure, sculptures such as Michelangelo's David or the bas-relief around the Supreme Court's own chambers would fall within the ban.

Equally vague are the other operative words of the law -- "respect for the diverse beliefs and values of the American public." Those terms -- which strike at opinions and beliefs communicated by artistic works -- have never been utilized or defined in any area of the law. Any attempt to make them the basis for governmental decision

making runs afoul of the bedrock provision of the First Amendment -- namely that "there is no such thing as a false idea." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). As the Supreme Court stated in that case, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Id at 339-40.

To say that art funded by the NEA must show "respect for the diverse values and beliefs of the American public" provides the NEA with no standards whatsoever in determining how to perform its statutory duty. Does the provision mean that an applicant for a grant cannot offend any of the countless diverse "values and beliefs" held by any of the groups that make up our pluralistic society? That would obviously be an impossible standard, given the diversity of opinion here. Does the provision mean that an applicant cannot offend what the so-called "moral majority" of the nation holds dear or what others deem "politically correct"? That would offend the principle of diversity that lies at the heart of the First Amendment and that the recent flag burning cases have reinforced. See Texas v. Johnson, 109 S. Ct. 2533 (1989); United States v. Eichman, 110 S. Ct. 2404 (1990). Does the standard refer to religious values and beliefs, or political or racial or ethnic values or beliefs, or social values or beliefs, or economic values or beliefs? As the Supreme Court has reminded us many times,

"one man's vulgarity is another's lyric," Cohen v. California, 403 U.S. 15, 25 (1971).

Frankly, no "general standards of decency" exist for which Americans of "ordinary intelligence" would agree upon a "common accepted meaning." The very essence of "decency" is subjective, varying among people of different ages, gender, races, religions, education, experience, languages, senses of humor, and geographical locations. And what is meant by "general standards of decency"? Can the NEA be expected to know something that sociologists, pollsters, researchers, scholars and other observers of American culture have never been able to identify -- a single, permanent, immutable, orthodox standard of decency, true for all persons at all times in all places?

Is the sanctity of human life a "general standard of decency?" Would persons of "ordinary intelligence" be expected to know that art depicting the murder of innocent victims cannot qualify for NEA funding? Would a modern-day DiPaolo be denied an NEA grant for the gruesome "Beheading of Saint John the Baptist?" If rape violates "general standards of decency," could "Rape of the Sabine Women" have received NEA funding? How are artists to know?

And what are artists of "ordinary intelligence" to make of a requirement that their art show "respect for the diverse beliefs and values of the American public?" How can any one work of art satisfy this standard? Must a single

painting that portrays the joy of Easter Sunday also show the solemnity of Yom Kippur and the fervor of an evangelical tent meeting? Must a play portraying gay lifestyles in a favorable light also depict the deeply held religious belief that homosexuality is a sin? Must a poem describing suicide also condemn it? Must art that despises war also celebrate Desert Storm? The framers of the Constitution certainly believed in respecting the diverse beliefs and values of the American people. In large part that is why they adopted the First Amendment. What they did not believe was that such respect could be imposed by governmental fiat.

If the vagueness of the terms "decency" and "diverse beliefs and values" each standing alone were not bad enough, the combination of the two renders the provision indecipherable. For it is the very essence of America's "diverse beliefs and values" that some will find certain beliefs and values decent and others will find them indecent. The "decency" standard appears to be groping for a consensus of what we share in common, while the "diversity" standard appears to be grasping at some notion of what is different about us. Consequently, as an artist struggles to meet the "diversity" standard, he or she may well offend someone and thereby may violate the "decency" standard. Who can know what is the correct path? It is next to impossible to guess at what Congress meant by all this, and the uncertainty is compounded by the very

subjective, idiosyncratic, personal nature of art itself. The combination of these two vague standards creates an even vaguer amalgam, whose parts are at war with each other.

On strictly definitional grounds, the provisions in question offend the most basic concepts of the vagueness criteria. Provided with such elastic criteria, the NEA cannot avoid making grants on an ad hoc, arbitrary, and discriminatory basis. Compounding this problem is the self-censorship that would be inevitable if an applicant's hope of obtaining necessary funding were to rest on not offending anyone at the NEA, or on its Council or artists' peer review panels, or in Congress. First Amendment artistic freedom would be chilled to the bone. See Bella Lewitzky Dance Foundation, supra, 754 F. Supp. at 783 (NEA obscenity certification process would have chilling effect on applicants in view of NEA's central position in both public and private funding in the artistic community).

2. The provision can be applied in a discriminatory manner

If there were any doubt about the vagueness of the decency provision, the fact that it can be and has been applied in a discriminatory manner makes clear its unconstitutionality under the Supreme Court's standard in Gentile. The government contends that under former NEA Chair John Frohnmyer, the decency provision was not employed as a substantive criterion in making grant

decisions. Plaintiffs have accumulated substantial evidence demonstrating the contrary. But even apart from the facts with respect to Mr. Frohnmayer, amici and the public at large were made all too clearly aware of the force of the decency provision by the record of his successor as NEA Chair.

Specifically, former acting NEA Chair Anne-Imelda Radice, who succeeded Mr. Frohnmayer, testified to Congress on her implementation of the decency clause in May, 1992. Ms. Radice was questioned by Rep. Regula, who expressed concern about the fact that Mr. Frohnmayer had "seemed somewhat reluctant to make the decisions that [Rep. Regula] felt were his responsibilities" with respect to decency. Rep. Regula specifically asked Ms. Radice how she planned to "implement the requirement in the law" that "'the chairperson shall' -- 'shall' not 'may' -- 'shall ensure that artistic merit and artistic excellence are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and the values of the American public.'" Department of the Interior and Related Agencies Appropriations for 1993: Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 102d Cong., 2d Sess. (May 5, 1992) at 613-14.

Ms. Radice replied unequivocally that she took her "oath of service very seriously" and "will do all in my

power to observe the 'shall' of that provision we've been given by Congress." Id. at 614. She added that while the NEA panels and Council had been diversified and strengthened, "when a decision has to be made by the Chair, the decision will be made." Id. Mr. Regula then commented favorably on a news article stating that Ms. Radice's "immediate priority is to stop NEA funding of sexually-explicit art." Id. Ms. Radice explained that if the NEA finds "a proposal that does not have the widest audience possible -- the article referred to sexually-explicit material; when that's the only thing that leaps out at you from a grant application, even though it may have been done very sincerely and with the highest artistry. We just can't afford to fund that, and I'll make the decision, if needed." Id. at 615.

Later that same month, Ms. Radice apparently took steps to implement her interpretation of the law. In a highly publicized decision, Ms. Radice personally vetoed proposed grants to the MIT List Visual Arts Center and the Anderson Gallery at Virginia Commonwealth University, despite their approval by the NEA's peer review panel and National Council. A number of other peer review panels protested, and participants in one panel suspended their work entirely, commenting that despite attempted defenses by Radice, her action indicated that "the criteria used to judge grants have been altered and have been subjected to

concerns neither stated nor defined in the program guidelines." New Art Examiner, June/Summer 1992 at 11, col.

2. A news article characterized the vetoes as "the first official moves reflecting" an apparent policy not to "support art that might be considered offensive or blasphemous." Boston Herald, May 13, 1992, at 57, col. 1. See also Washington Post, Nov. 23, 1992 at B7 (describing Radice decision to reject grants for "three gay film festivals").

These events exemplify all too specifically the vague, discriminatory, and chilling potential of provisions like the decency clause, which has already produced a "chilling effect" on plaintiffs and on the arts and literary communities represented by many of the amici. Such vague restrictions interjected into the creative process chill free expression, invite arbitrary and discriminatory enforcement, and promote impermissible viewpoint discrimination. As the Supreme Court has unequivocally stated:

We emphasize once again that . . . 'standards of permissible statutory vagueness are strict in the area of free expression . . . ' [T]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly [indicate] what is being proscribed.

Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967) (citations omitted). By this standard, it is evident that

the decency provision is impermissibly vague and unconstitutional.

II. THE DECENCY PROVISION IS AN IMPERMISSIBLE RESTRICTION ON SPEECH THAT CANNOT BE JUSTIFIED BY RUST V. SULLIVAN

In addition to the vagueness of the decency provision, the district court found that it unconstitutionally seeks to "suppress speech" on the basis of content that is "offensive to some in society." 795 F.Supp. at 1475. As the court recognized, it is well established that such content-based suppression violates the First Amendment.⁵ The government nevertheless seeks to defend the decency clause by claiming that it pertains to a program involving government subsidies or benefits, and that Rust v. Sullivan, 111 S.Ct. 1759 (1991), permits the government to discriminate on the basis of content or viewpoint in such a program. As demonstrated below, however, the content and viewpoint discrimination inherent in the decency provision is clearly unconstitutional under a long line of First Amendment precedent, including Rust v. Sullivan.

⁵ See, e.g., United States v. Eichman, 110 S.Ct. 2404 (1990); Texas v. Johnson, 109 S.Ct. 2533 (1989); Cohen v. California, 403 U.S. 15 (1971).

A. The Decency Provision Violates The First Amendment, Notwithstanding Its Relationship To A Government Grant Program

When Congress created the NEA, it recognized that artistic expression, like academic freedom and journalism, is at the core of a democratic society's cultural and political vitality. The Senate Report that accompanied the NEA's creation stated that:

[T]he committee affirms that the intent of this act should be the encouragement of free inquiry and expression. The committee wishes to make clear that conformity for its own sake is not to be encouraged, and that no undue preference should be given to any particular style or school of thought or expression The standard should be artistic and humanistic excellence.

Senate Committee on Labor and Public Welfare. Establishing a National Foundation on the Arts and Humanities, S. Rep. No. 300, 89th Cong., 1st Sess. 3-4 (1965).

By injecting "decency" and "respect" for "diverse beliefs and values" into the criteria for determining artistic merit and excellence, however, the decency provision would allow the NEA to use its funding discretion to impose conditions that suppress or discriminate against art that it deems to be offensive or disagreeable. As the district court recognized, such criteria are content-based, not content neutral, and are clearly distinguishable

from permissible judgments on artistic quality and merit.⁶

The fact that NEA grants are government sponsored does not give the government carte blanche to suppress constitutionally protected expression under the guise of judging artistic excellence and artistic merit. On the contrary, the Supreme Court has consistently invalidated similar statutes that allocate benefits and grants based on the viewpoint or content of the expression to be funded.⁷

As the Court held as early as 1972:

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the Government may deny ... the benefit for any number of reasons, there are some reasons upon which the Government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (emphasis added).

⁶ In fact, not only is the decency clause content-based, but it also qualifies as viewpoint-based, to the extent that its limitation on controversial or offensive subjects has the purpose or effect of viewpoint discrimination against disfavored speakers or points of view. See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 812 (1985) (when the "purported concern [is] to avoid controversy" then government action may improperly "conceal a bias against the viewpoint advanced by the excluded speakers"). Such viewpoint-based discrimination is clearly unconstitutional. Id. Accord, Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983).

⁷ See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

This Court has expressly recognized this principle in a context similar to this case. In Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988), the government sought to deny a government benefit -- government certification of films that exempted them from import duties -- on the basis of content. Under USIA regulations, films that attempted to "influence opinion" or "espouse or criticize a cause or policy" were denied certification. Id. at 511. This Court ruled the USIA regulations unconstitutional. As the court explained, such "content-based distinctions are patently offensive to the First Amendment." Id. In addition, the court reasoned, "by conditioning a valuable governmental benefit on the basis of speech content," the government "patently transgressed the well-established principle that government may not condition the conferral of a benefit on the relinquishment of a constitutional right."⁸ Precisely the same conclusion applies in this case.

Unlike Advocates for the Arts v. Thompson, 532 F.2d 792 (1st Cir.), cert. denied, 479 U.S. 894 (1976) (cited in Appellant's Brief at 38), where the court held that New Hampshire state officials did not violate the

⁸ Id. Accord, e.g., American Council of the Blind v. Boorstin, 644 F.Supp. 811, 816 (D.D.C. 1986) (ruling unconstitutional the elimination of sexually-oriented magazine from Library of Congress braille program, despite the fact that Library had no independent obligation to include the magazine and could have eliminated it for other reasons, because action constituted "viewpoint-based discrimination impinging on freedom of expression").

First Amendment when they denied a specific art grant to a literary magazine based on the magazine's literary and artistic merit, the NEA's decency provision goes beyond the criteria of artistic excellence and merit, and penalizes artists whose work has been or is controversial. In fact, the present case presents a scenario that the court in Advocates for the Arts acknowledged would warrant a constitutional remedy. As the court recognized, where there is a "pattern of discrimination" impinging on First Amendment rights, then "a constitutional remedy would surely be appropriate." Id. at 798. This case does not involve an individual grant where there may be differences of opinion about how to "define artistic merit," id. at 797, but instead a statutorily commanded pattern of discrimination infringing on basic First Amendment freedoms. Under established First Amendment precedent, the decency provision is unconstitutional.

B. The Supreme Court's Decision In Rust v. Sullivan Is Consistent With The District Court's Ruling And Does Not Permit The Type Of Restrictions Exemplified By The Decency Provision

Despite the consistent line of cases demonstrating the invalidity of restrictions like the decency clause, the government has argued that it is permissible under Rust, which upheld the so-called abortion "gag" rule at federally funded family planning clinics. The district court ruled

that Rust is inapplicable because government funding for the arts, like funding for universities, relates to a fundamental and "traditional sphere of free expression" as to which the Rust Court itself recognized that content-based restrictions cannot constitutionally apply. 795 F.Supp. at 1473 (citing Rust, 111 S.Ct. at 1776).

The government's brief in this case maintains that this rationale does not apply to the arts and that the decency clause is thus permissible under Rust. As demonstrated below, however, the district court correctly decided that the arts constitute a sphere of free expression similar to universities and, in any event, Rust does not apply here for several other reasons. In addition, as discussed below, the overly broad interpretation of Rust apparently urged by the government would contradict fundamental First Amendment principles and seriously endanger free expression.

1. The District Court correctly held that funding for the arts is like funding for public universities and that Rust is thus inapplicable

The government misunderstands the district court's rationale for treating the arts like public universities for Rust purposes. The government seeks to distinguish the arts from universities based on a "place versus subject matter" distinction, arguing that the university is a place and art is a subject. Appellant's Brief at 36-37. This

argument is simplistic at best. It fails to provide any rationale for this distinction other than the obvious fact that it provides the government with the outcome it desires. Indeed, the government's "place versus subject matter" distinction could lead to such absurd results as protecting a professor's speech in a university auditorium but permitting viewpoint-based suppression if it occurs one block off campus.

The rationale for the university exception in Rust does not lie in the fact that the university is a "place," but in the fact that "the university is a traditional sphere of free expression." Rust, 111 S.Ct. at 1776 (emphasis added). It is because free expression is so fundamental to the functioning of a democratic society that the government is prohibited from using public funds to impose restrictions on speech in universities. It is because public universities educate our citizens and provide the training for our future leaders that our nation does not allow conditions that would inhibit a free and robust exchange of ideas to be attached to funding for universities. See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

Art is similarly an expressive activity, regardless of its purported characterization as a "subject" or a "place." Artistic expression serves many of the underlying First Amendment values served by scholarly

expression. And it is no less important to cultivate and protect an environment conducive to artistic expression. The close relationship between academic freedom and artistic expression was emphasized by participants in a conference sponsored by the American Association of University Professors, the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the Wolf Trap Foundation. A statement from that conference noted that "[f]aculty and students engaged in the creation and presentation of works of the visual and performing arts are engaged in pursuing the mission of the university as much as those who write, teach, and study in other academic disciplines."⁹

The NEA's statutory structure also establishes the fundamental nature of the arts as a sphere of free expression. The statute creating the NEA prohibits it or any other federal agency from interfering with the "policy determination" or "administration or operation" of grant recipients. See 20 U.S.C. § 953(c). Congress' declaration of purpose in 20 U.S.C. § 951 with respect to the NEA and related agencies establishes that:

The Congress hereby finds and declares
... that ... it is necessary and
appropriate for the Federal Government
to help create and sustain not only a

⁹ Academic Freedom and Artistic Expression, Academe at 13 (July-Aug. 1990) (cited at 795 F.Supp. at 1474).

climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

20 U.S.C. § 951. Additionally, the Senate Report accompanying the NEA's creation devotes an entire section to "freedom of expression," and warns that conformity for its own sake should not be encouraged, and that preference should not be given to any particular style or school of thought or expression. S. Rep. No. 300, 89th Cong., 1st Sess. 3-4 (1965).

Therefore, in the art framework, just as with universities, the fact that public funds are allocated to support expressive activities does not permit the Government to impose whatever restrictions it pleases on speech. As such, the district court was correct in stating that art is part of the "traditional sphere of free expression ... fundamental to the functioning of our society." 795 F.Supp. at 1473 (citing Rust, 111 S.Ct. at 1776).

2. The rationale behind the approval of the restrictions in Rust does not apply here, even apart from the special First Amendment protections applicable to the arts

a. Unlike Rust, the decency provision involves a content-based restriction, and is not simply a consequence of a limitation on the scope of a federal program

Even apart from the particular First Amendment protections applicable to the arts under Rust, it is clear

that Rust cannot justify the type of content-based restrictions imposed by the decency clause. The majority in Rust explained that in its view, the restrictions on counseling relating to abortion did not constitute a viewpoint or content-based restriction at all; instead, the Court ruled that the regulation was merely ancillary to a programmatic policy decision to fund only pre-conception family planning, from which abortion-related counseling was simply "excluded from the scope of the project funded."¹⁰ In the context of the NEA, this rationale would permit the agency, for example, to make the programmatic choice to fund poetry but not short stories, or to fund sculpture every other year. But once the NEA had decided to fund poetry, for example, the rationale of Rust would not permit viewpoint or content-based restrictions such as forbidding "indecent" or "disrespectful" poetry.

By the same token, Rust cannot be employed to defend the restrictions mandated by the "decency" clause. At its core, the Supreme Court treated Rust as a regulation of conduct, not speech. The Court emphasized that "we have here ... a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." Rust, 111

¹⁰ Rust, 111 S.Ct. at 1773; see also id. at 1772. (explaining that the government in Rust had not "discriminated on the basis of viewpoint" but had "merely chosen to fund one activity to the exclusion" of another).

S.Ct. at 1773 (emphasis added). In contrast to the Title X programs in Rust, NEA grants do not fund a service like pre-conception family planning, but instead fund inherently expressive activity. It is one thing to sanction a limitation on abortion-related speech that is simply ancillary to the federal exclusion of abortion funding that the Supreme Court has held to be constitutionally permissible. It is quite another thing to impose content restrictions specifically and directly on speech. Having decided to fund artistic speech, Congress cannot now impose conditions that suppress certain types of constitutionally protected expression simply because some may object on the basis of content or viewpoint to such expression.

As discussed above, the Supreme Court has consistently invalidated the allocation of subsidies and grants based on the viewpoint or content of the expression to be funded. For example, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987), the Court struck down content-based discrimination in subsidies to magazines. In FCC v. League of Women Voters of California, 468 U.S. 364, 400 (1984), the Court held that it was unconstitutional for the government to ban editorializing by public television broadcasters. Rust did not overrule these and similar cases. Rust left intact the fundamental constitutional principle that the government may not condition a subsidy on the waiver of First Amendment rights

to freedom of expression and may not use the carrot of government benefits as a stick to suppress "dangerous ideas." That principle controls this case and supports the decision below to invalidate the decency clause.

- b. The Rust holding does not apply because of the vague and overbroad nature of the decency provision

The Rust Court recognized that in areas where free expression is fundamental to the functioning of our society, such as the university setting, the government's ability to control speech by means of conditions attached to the expenditure of government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. See Rust, 111 S.Ct. at 1776. It is a core principle of constitutional law that vague and overbroad statutes offend due process and that statutes "must provide explicit standards for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In particular, "because the free dissemination of ideas may be the loser," stricter standards of vagueness and overbreadth apply to the laws impinging on First Amendment expression. Smith v. California, 361 U.S. 147, 151 (1959).

As discussed above, art is an area where free expression is fundamental to the functioning of our society. "Art, like universities, the press, and public demonstrations, is a frequent target of political

repression by totalitarian governments, reflecting those governments' judgments that it is a forum for dissent and opposition."¹¹ Moreover, when President Johnson proposed creating the NEA, he noted that government should not "seek to restrict the freedom of the artist to pursue his calling in his own way. [since] [f]reedom is an essential condition for the artist." See S. Rep. No. 300, 89th Cong., 1st Sess. 13 (1965). Even if Rust were otherwise applicable, therefore, the First Amendment vagueness and overbreadth doctrine would make it inapplicable in this case.

The Rust decision addressed a congressionally designed program of "preconceptional" family planning that stopped short of providing either prenatal or abortion counselling. The Congressional program in Rust presented a clear line between programs that covered abortions and programs that exclude abortions. The speech restriction was specific: a Title X provider was precluded from making any reference to abortion except as permitted by specific government rule.

Art cannot readily be subjected to the same type of specificity. Art is subject to varying interpretations and responses, and subjective evaluations are unavoidable. Therefore, if the government is allowed to use "decency" as

¹¹ See M. Carmilly-Weinberger, Fear of Art: Censorship and Freedom of Expression in Art, 103-35 (1986) (tracing art censorship from second century B.C. to the present, including Nazi Germany and the Soviet Union under Stalin).

a standard to determine whether art should be funded, it "is bound to have stultifying consequences on the creative process of ... art." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 531 (1952). The government would be able to target a wide and unspecified area, and government officials would be allowed to conduct subjective interpretations of artworks without the type of objective standard available in Rust. Consequently, the decency provision will chill the creative expression of artists because, unlike Rust, there simply is no clear and definitive indication of what the decency provision prohibits. Therefore, artists will be forced to steer far wider than the "indecent" zone and to restrict their creations "to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. 360, 372 (1964). As discussed in detail in Sections I and II.A. above, such a result violates established constitutional principles. Rust does not authorize such unconstitutional restrictions.

- c. The decency provision is invalid under Rust because it effectively restricts recipients of federal funds in the exercise of their First Amendment rights

Rust specifically distinguished between restrictions on "projects" and restrictions on "recipients." The first may sometimes be permissible; the

second is strictly prohibited.¹² Rust reconfirmed decisions that have struck down restrictions conditioning receipt of government benefits on recipients' agreement to refrain from constitutionally protected activities on their own time. See Rust, 111 S.Ct. at 1774-75. The Court specifically stated that its holding does not disturb cases where it was found unconstitutional for the government to place conditions upon the recipient of the subsidy rather than on the particular program or service, since the effect was to prohibit the recipient from engaging in the protected conduct altogether. Id.

In Board of Trustees of Leland Stanford Junior Univ. v. Sullivan, 773 F.Supp. 472 (D.D.C. 1991), a case decided subsequent to Rust, the court ruled that a confidentiality clause that the government required in a research contract violated the First Amendment. The court distinguished Rust, noting inter alia that the researchers lacked the option of speaking about the research on their own time, or in circumstances where their speech was paid for by the university or some other private donor. Stanford, 773 F.Supp. at 476.

The decency provision also imposes speech

¹² The government creates an "unconstitutional condition" when it "place[s] a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." Rust, 111 S.Ct. at 1774.

restrictions upon institutional and individual recipients, rather than just on projects. A substantial part of NEA grants are not project specific, but rather fund an institution's or individual's overall work. Moreover, NEA applications are effectively judged on an applicant's entire body of work as well as on the particular project proposed.

While the district court suggested that there was a dispute of fact on this issue, analysis of the NEA statute and the inherent nature of art makes clear that any such dispute would relate only to the extent of such consideration, not the fact that it occurs. For example, it would be impossible to determine whether artists merit fellowships as "individuals of exceptional talent," 20 U.S.C. § 954(c), without considering their past work in some manner. By definition the NEA funds projects that do not yet exist, and therefore it must also take past work into account in some manner in deciding whether projects meet the standard of "artistic excellence and artistic merit...taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). The decency provision would affect an NEA grantee's work prospectively as well; for example, a museum receiving a grant for expansion can hardly build two facilities, one dedicated to the full range of expression and one limited only to

"decent" or "respectful" art.

Accordingly, the decency provision effectively means that applicants must refrain from creating or presenting any art that conflicts with "general standards of decency and respect for the diverse beliefs and values of the American public," even if that art is created entirely with non-federal funds, or risk losing NEA grants. As such, the decency provision would serve to coerce applicants to quell their creativity in all areas, whether NEA funded or not, in an effort to comply with the broad scope of the decency provision's content restrictions. Therefore, the decency provision, similar to the confidentiality clause in Stanford, violates the First Amendment because it imposes a condition on speech that extends beyond defining how federal funds should be used and effectively restricts recipients' speech outside of the scope of federally funded projects.

3. A broad interpretation of Rust to permit content restrictions on the NEA would set a dangerous precedent severely damaging free expression rights

At bottom, the decency provision is an attempt to legitimize the censorship of expression in art, literature, and entertainment. If the decency clause is upheld, the government's ability to restrict free expression will be unprecedented. Government could limit NEA subsidies or

other support to art that promotes a bureaucrat's vision of "traditional" family values. It could deny subsidies to art that depicts subject matter that a government official finds objectionable, disrespectful, or indecent.

An interpretation of Rust that would permit such conduct, however, would extend much further. As the court explained in Stanford, "few large-scale endeavors are today not supported, directly or indirectly, by government funds -- from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few..." Stanford, 773 F.Supp. at 478. A broad construction of Rust that would support content-based "decency" restrictions on the NEA "would, at least potentially, subordinate the free speech rights of the participants in the programs receiving such federal monies to the government's wishes." Id.

The potential effects of such an interpretation on institutions which work in areas beyond the arts, including several of the present amici themselves, illustrate this conclusion. If the provision of some government funds to an institution permits content-based restrictions, then government could prohibit libraries from carrying books on disfavored topics or by objectionable authors. The content of exhibits of public museums could be censored to conform with the government's version of political correctness. Political officials, not professional journalists, could

dictate the content of public broadcasting programs. Tax exemptions could be denied to disfavored religious groups, and government officials could veto the second or third class mail permits of partisan political opponents or publications that criticize their policies.

The fact that such censorship would be permissible, of course, does not mean that government would "rush out at once to curtail the free speech rights of those with whom they deal." Stanford, 773 F.Supp. at 478, n.19. Nevertheless, "establishment of the principle that such action can pass constitutional muster is sure to be implemented, and it is bound to have increasingly wide negative effects on a free society, as the legality of censorship accompanying federal [and other government] monies becomes more and more common and thus more and more deeply ingrained in the fabric of government and society." Id.

In short, upholding the decency clause through a broad construction of Rust "would be an invitation to government censorship wherever public funds flow," presenting "an enormous threat to the First Amendment rights of American citizens and to a free society." Stanford, 773 F.Supp. at 478. As President Franklin D. Roosevelt once explained, "[t]he conditions for democracy and for art are one and the same. What we call liberty in

politics results in freedom in the arts."¹³ This principle, amici submit, warrants rejection of the government's attempts to reverse the decision below and to uphold the "decency" clause.

CONCLUSION

For the reasons discussed above, the decision below striking down the "decency" provision should be affirmed.

Respectfully submitted,

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¹³ H.M. Kallen, Art and Freedom: A Historical and Biographical Interpretation of the Relations Between the Ideas of Beauty, Use and Freedom in Western Civilization from the Greeks to the Present Day 905 (1942) (quoting President Roosevelt).

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Attorneys for Amici Curiae

APPENDICES



**PEOPLE FOR
THE AMERICAN WAY**
Defending Constitutional Liberties

APPENDIX A: CONSENT OF THE PARTIES

May 7, 1993

Mr. David Cole
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

Re: Finley v. N.E.A.

Dear David:

I am writing to obtain your formal consent on behalf of appellees to file an AMICUS brief by People For The American Way and a number of other organizations in the above-referenced case. Enclosed are a copy of the consent form for your signature and a stamped self-addressed envelope in which to return the executed consent form to our office.

Sincerely yours,

Elliot M. Minberg
Legal Director

I HEREBY CONSENT to the filing of an amicus curiae
brief by People For The American Way in support of the position
of the appellee in the case Finley v. N.E.A.

DATE 5/23/93

Daniel D. Gell
Attorney of Record for Appellee



PEOPLE FOR THE AMERICAN WAY

Defending Constitutional Liberties

May 7, 1993

Alfred Mollin, Esq.
U.S. Department of Justice
10th and Constitution Avenue, NW
Room 3336
Washington, DC 20530

Re: Finley v. N.E.A.

Dear Mr. Mollin:

I am writing to follow up on our telephone conversation in which I requested your consent for People For The American Way ("People For") to file an amicus brief in the above-referenced case. People For wishes to file a brief supporting the district court's decision. Our brief will address the unconstitutionality of the decency provision and the applicability of Rust v. Sullivan. We expect that a number of organizations, primarily museums and other art institutions, will be signing on to our brief.

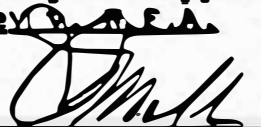
Enclosed are a copy of the consent form for your signature and a stamped self-addressed envelope in which to return the executed consent form to our office. Thank you for your cooperation.

Sincerely yours,

Elliot M. Minberg
Legal Director

I HEREBY CONSENT to the filing of an amicus curiae
brief by People For The American Way in support of the position
of the appellee in the case Finley v. F.A.

DATE 5-13-93



Attorney of Record for Appellant
U.S. Department of Justice

APPENDIX B -- STATEMENTS OF INTEREST OF INDIVIDUAL AMICI

Actors' Equity Association

Actors' Equity is the union of professional Actors and Stage Managers in the United States, representing close to 40,000 individuals. One of the basic tenets of this organization is to support freedom of expression and the right of artists (whether it be actor, director or playwright) to create unfettered by censorship. This has been Equity's position since it was founded in 1913.

American Arts Alliance

The American Arts Alliance was founded in 1977 and is the principal advocate for America's professional non-profit arts organizations and their publics in representing arts interests and advancing arts support before Congress and other branches of the Federal government. The Alliance advocates the development of national policies which recognize, enhance and foster the contributions that the arts make to America. We believe that not only does an individual's right of freedom of expression ensure such contributions, but the imposition by government of content restrictions on artists and arts institutions which receive government funds violates the First Amendment.

American Association of Museums

The American Association of Museums represents the entire museum community, including art, history, science, military and children's museums, as well as arboreta, aquariums, and zoos, and general and specialty museums. Many of our members receive Federal grants. We do not think it is in the best interest of the museum community or the United States for the Federal government to be allowed to apply political and ideological tests to grants. The threatened actions in this case could severely curtail academic, scientific and artistic freedom in our member organizations.

American Conservatory Theater

The American Conservatory Theater (A.C.T.) is a nonprofit regional theater company founded in 1965 in San Francisco. It has a professional actor training program which is accredited to grant Master's degrees in Fine Arts. One of A.C.T.'s beliefs is that theatrical excellence achieves its fullest realization when repertory performance and professional training are concurrent and inseparable.

American Council for the Arts

The American Council for the Arts (ACA) is a national organization whose purpose is to define issues and promote public policies that advance the contribution of the arts and the artist to American life. To accomplish its mission, ACA conducts research, sponsors conferences and public forums, coordinates work by 28 national arts organizations to promote arts education, publishes books, reports, and periodicals on arts issues, advocates for legislation that benefits the arts, and maintains a 15,000-item specialized arts library. ACA has continued to advocate for a strong and effective NEA, and accordingly joins this amicus brief.

American Documentary, Inc.

The American Documentary, Inc. (P.O.V.) is a non-profit corporation which produces, acquires and distributes television programming for broadcast over the Public Broadcasting Service. The American Documentary receives direct support from the National Endowment for the Arts and has used programming produced by independent producers which have themselves received financial support for the NEA. The commitment of P.O.V. to innovative programming of the highest quality could be adversely affected by the restrictions on the content of programming such as those at issue here.

American Music Center

The American Music Center is a national service organization which promotes the creation, performance, and appreciation of American contemporary music. Founded in 1939 by composers such as Aaron Copland, Howard Hanson, and Otto Luening, the Center serves as an information resource concerning American music and as an advocate for the American composer. As an advocate for living American artists, we are concerned about the effect of content restrictions on the creative artist. It is important to insure that the composer is able to compose operas, choral works, songs, theater works, symphonies, chamber music, etc. without the fear of censorship.

Arts Action Coalition

Arts Action Coalition is a group of artists and art professionals from across the U.S., who formed an association in 1992 to ensure that the views of artists and curators are included in discussions of government policy in the arts. Formed as an adjunct to the board of directors of National Artists Equity Association, Arts Action Coalition assists in keeping the Equity membership informed and active in matters where government policies affect the lives and professions of individual artists. Arts Action Coalition is strongly opposed to interference with artistic freedom of expression or with interference in the ability of curators or presenters of works of art to select the work they deem, in their professional opinion, best suited to the project at hand. Arts Action Coalition is pleased to join in this amicus brief.

Associated Writing Program

The Associated Writing Program (AWP) is a nonprofit arts organization with member creative writing programs at 210 colleges and universities. We have an additional 4,500 individual members and subscribers. AWP supports the rights of all writers to freedom of expression and opposes the use of a vague "decency" standard in the awarding of government funding for the arts.

Association of American Cultures, Inc.

The Association of American Cultures (TAAC) is a national membership arts service organization committed to cultural diversity as a distinct element in America's arts policy, and dedicated to serve the creation, production, presentation and preservation of ethnic arts, artists and arts organizations. TAAC serves a network of over 6,000 ethnic artists and multi-cultural arts organizations. TAAC has taken a leadership role in advocating for freedom of expression and opposes content restrictions attached to government funding.

Association of American Publishers

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history,

and fiction.

Association of Art Museum Directors

The purpose of the Association of Art Museum Directors (AAMD) is to aid its members in establishing and maintaining high standards for themselves and the museums they represent, thereby increasing the contribution of art museums to society. It serves as a forum for the exchange of information and the exploration of ideas, and as a voice with which museum directors express their joint concerns and those of their institutions. The AAMD, which was founded in 1916, represents one hundred sixty directors of the most important art museums throughout the United States, Canada, and Mexico. The AAMD is vitally concerned that freedom of expression be maintained. The various fields of artistic expression are exemplified throughout the history of civilization by societies which have and will continue to be measured by their cultural accomplishments. The culture of this nation continues to be substantially strengthened by the National Endowment for the Arts and its efforts on behalf of excellence and access.

California Federation of the Arts

Founded in 1976, the California Federation of the Arts is a statewide, nonprofit service organization that is dedicated to providing an open and equitable forum for the development and achievement of cultural policies that make the arts an essential part of the life of every Californian. Each year the Confederation leads local and statewide advocacy campaigns to maintain public support for the arts, to promote cultural equity, freedom of expression, and arts education. The Confederation's programs include the annual events of Arts Day and The Congress of the Arts; the publication of the California Arts Advocate, Art Facts, and advocacy training guides; and information referral. The Confederation's main office is in Sacramento with satellite operations in San Francisco and Los Angeles.

Chicago Artists' Coalition

The Chicago Artists' Coalition is an 18 year old service and advocacy organization for visual artists. The Coalition and its Committee for Artists' Rights has been at the fore of observing events which impact First Amendment Rights in Chicago and elsewhere. The Coalition believes that the practice of discriminating against artwork based on application of a "standard of decency" is not only irrelevant to the support of art in this country, but it also adds precedent to the writing of

ambiguous unsustainable language into a process fraught (and blessed) with interpretive nuance. The Coalition believes that a successful appeal of the decision invalidating "decency" language would have a damaging effect on the ability of artists to function, and accordingly, join this Amicus Curiae brief.

Council of Literary Magazines and Presses

CLMP's mission is to preserve, promote and support literary magazines and presses. These magazines and presses offer a door to freedom of expression in America. Experimental literature, work by emerging writers and writing by minority groups has been presented primarily by the independent literary magazines and presses in our country because economic concerns and cultural indifference have often precluded publishing in the commercial market. Publishers of periodicals and books that are primarily literary exist in all regions, all populations and all nationalities of our country. CLMP is becoming a primary service organization and advocate in this dynamic field.

Creative Time, Inc.

Creative Time Inc., is a not-for-profit organization that presents the work of emerging and established artists, in all forms and media, to the public in unusual, unconventional and underutilized spaces. Many artists presented by Creative Time address social issues in their work: choice, homelessness, AIDS, homophobia, racism, sexism, pollution. While not exclusively presenting issue-oriented art, Creative Time provides an important means for artists who speak out through their hard work to be heard. Creative Time believes that to restrict content not only censors artists, it denies the public the opportunity to experience the art of their time. Creative Time was a part of the original Amicus brief filed in the district court in Finley v. NEA.

Dance Bay Area

Dance Bay Area exists to encourage a creative environment for dance throughout the Bay Area region by providing programs and services for its members in the areas of economic development, information, public policy, and visibility. Founded in 1973 by a small group of dancers, choreographers, and arts managers as the San Francisco Bay Area Dance Coalition, Dance Bay Area today serves as a central resource organization for dance in northern California and is the largest of its kind in the western United States. Dance Bay Area has played a vital role in the support of dance throughout the ten-county Bay Area, the largest dance market outside of New York City. Approximately 10,000

members of the dance community and the general public benefit annually from our referral line, monthly publication, and other programs and services. As a recipient of NEA funds regranted to dance artists, the type of restrictions at issue here would require more administrative oversight than possible, jeopardizing this crucial program. Both on behalf of Dance Bay Area and its members, such restrictions would imperil artistic integrity, and Dance Bay Area accordingly joins as an amicus in this case.

Department for Professional Employees, AFL-CIO

The Department for Professional Employees, AFL-CIO, comprises twenty-seven national and international union organizations representing three million people employed in all of the major professional and technical occupations. The Department counts among its affiliates several that have a substantial number of members employed in the arts, entertainment and mass media sector as well as in education and the sciences. These unions have an interest in defending the First Amendment right of speech and artistic expression which is at issue in the Finley case. For this reason, the Department for Professional Employees wishes to join in the amicus brief.

Feminists for Free Expression

Feminists for Free Expression is a non-profit organization composed of a diverse group of feminist women working to preserve the individual's right and responsibility to read, listen, view and produce material of her choice, without the intervention of the state, "for her own good." We believe that censorship has traditionally been used to silence women and deter the growth of women's rights in general. We believe that genuine feminism encourages individuals to choose for themselves, whether that choice be for medical, social or intellectual reasons.

Film Arts Foundation

Film Arts Foundation (FAF) is a San Francisco-based membership service organization for independent film and videomakers. Founded in 1976 by a handful of filmmakers, FAF now has over 2,300 members and is the largest regional organization of independent producers in the country. FAF's purpose is to support and encourage artistic expression through independent film and videomaking by providing services in the areas of centralized information, low-cost equipment access, education and training, funding, and exhibition and distribution. FAF thus finds it essential that independent filmmakers, including those whose work is supported by the National Endowment for the Arts, have the freedom to pursue their personal vision, and to express

in their art what they learn along the way. We take as self-evident that acceptance of federal funding does not preclude an individual's freedom of expression, and therefore support the decision below that legislation requiring the Arts Endowment to take into consideration "general standards of decency" is unconstitutional.

Frameline

Founded in 1982, Frameline is the nation's only non-profit organization exclusively devoted to the promotion, distribution, exhibition and funding of independently produced works by lesbian and gay media artists. Frameline serves audiences, artists and exhibitors by: 1) producing the San Francisco International Lesbian and Gay Film festival; 2) operating a national distribution program for films and videos by lesbian and gay producers; 3) serving as a clearinghouse for information and referrals about lesbian and gay media artists and exhibitors; and 4) providing direct financial support to media artists seeking to complete important new works. Frameline recognizes that limiting the speech, expression or artistic freedom of individuals and/or organizations directly undermines the artistic process and the rights of an individual to express himself/herself in a manner free from government interference.

Foundation for Baroque Music

The Foundation for Baroque Music, organized in 1959, produces an annual summer Festival of Baroque Music in Saratoga Springs and Greenfield Center, NY. The Festival features American and European specialists in the field of early music, with emphasis on historically informed performances. It was one of the first such American festivals to concentrate in this area. Government interference with artistic freedom of expression is contrary to the beliefs of this organization, and for this reason FBM wishes to join in the AMICUS brief of the Finley case.

Gottlieb Foundation, Inc.

The Adolph and Esther Gottlieb Foundation was incorporated in 1976, in order to educate the public about the art and culture of the times which Adolf Gottlieb worked, and to provide assistance to mature creative painters and sculptors. In pursuance of these goals, the Foundation has organized numerous exhibitions, lectures, and publications for institutions in the U.S. and abroad, has provided assistance in the form of two grant programs, and information, seminars and referrals for individual artists. In furtherance of its mission to assist and educate, and in keeping with the views of Adolph Gottlieb, the Foundation

has voiced its strong opposition to any interference in the ability of artists to create, or in restricting the presentation or distribution of their art. For these reasons, the Adolph and Esther Gottlieb Foundation joins with its colleagues in this amicus brief.

Hollywood Policy Center Foundation

The Hollywood Policy Center (HPC) was established in January, 1989, by a broad range of men and women within the entertainment industry -- including actors, writers, directors, producers, musicians, studios executives, and attorneys -- who believe that the entertainment industry can play a visionary role in issue-oriented advocacy. The HPC's broad agenda includes a commitment to freedom of choice, freedom of expression, international human rights, civil rights and civil liberties, Native American religious freedom, gay rights, citizen participation in democracy, equality, peace, and the rights of children. HPC supports free expression and opposes censorship of any kind.

Hollywood Women's Political Committee

Comprised of politically active women from film, television and the arts, the Hollywood Women's Political Committee (HWPC) is dedicated to supporting issues, candidates and legislation that promote peace, equality, freedom of speech, freedom of choice and environmental conservation. The group was formed by entertainment community activists eager to demonstrate the industry's strong commitment to these issues. The outcome of Finley v. NEA is of great concern to the Hollywood Women's Political Committee and the individuals in the entertainment community that the organization represents because of the impact the ruling could have on freedom of speech in the arts community. We oppose any type of censorship.

Institute for Arts Education

The Institute for Arts Education is a nonprofit, public-benefit corporation that provides aesthetic education programs, teacher development workshops, and community outreach services in the arts for public and private school classrooms in the City and County of San Diego. The primary purpose of the organization is to provide opportunities for young people to exceed their usual knowledge of the structure of the arts by developing a deeper capacity to understand their personal creativity and expression. We are joining as amicus curiae because the Institute has a long-standing policy of freedom of expression as regards the arts and the learning process. Content restrictions of any kind are at

cross-purposes to a full examination of ideas.

International Sculpture Center

The International Sculpture Center (ISC) is a U.S.-based , non-profit arts organization dedicated to both sculptors and contemporary sculpture. In this dual capacity, the ISC is a service and an educational organization, with more than 10,000 members in the U.S. Within the scope of the ISC, sculpture is most broadly defined as all developments in three dimensional art from the most traditional to the most experimental. The ISC focuses on the presentation of sculpture to local and national audiences; the collection and dissemination of significant technical, aesthetic, statistical and other newsworthy information on sculpture and sculptors; and above all, the development of a stable environment and support system which allows sculptors the security to create new work and advance their careers as professionals. In addition, the ISC's programs include other visual art mediums when such activities are deemed critical to the creation of a supportive environment for sculpture and sculptors. It is because of this mission that the ISC feels that the lower court's decision in Finley v. NEA should be affirmed. The ISC agrees with the lower court's ruling that the language used in the "decency standard" was too vague and broadly worded. In addition, the "decency standard" that the NEA must apply when judging application for grants interferes with freedom of artistic expression under the First Amendment. To impose content restrictions of this type on artists applying for federal funding is therefore unconstitutional.

Jacques Marchais Center of Tibetan Art

The Jacques Marchais Center of Tibetan Art (The Tibetan Museum) was founded in 1945 to foster interest, study and research in the art culture of Tibet and other Asian civilizations. The purpose of Tibetan Buddhist art is to act as an aid to meditation. Deities in Tibetan and Indian art are sometimes shown in the "Yab-Yum" or Father-Mother position of sexual union, symbolizing the union of wisdom and compassion leading to enlightenment, the goal of following the religious path. As a museum of Asian Art, we are very concerned that a vague "decency" standard not be misapplied to art from another cultural context with an entirely different meaning and tradition.

Koncepts Cultural Gallery

We at Koncepts Cultural Gallery, an organization with a distinguished history of presenting Jazz music, understand how artwork of great quality and with deep historical roots can be marginalized by the mainstream. Koncepts opposes government censorship of the arts and accordingly joins in this amicus curiae brief.

La Jolla Playhouse

The La Jolla Playhouse, a not-for-profit professional theatre, has -- in its ten seasons -- become known for its bold productions and for the development of new and emerging talent. The Playhouse has become a home for artists from around the world, including playwrights Athol Fugard, Keith Reddin and Lee Blessing, all of whom have premiered plays at the Playhouse. The Playhouse believes artists must be at the forefront in determining projects, and often goes to artists for their ideas rather than asking them to work on a previously determined production. In that spirit, freedom of expression is particularly important in artistic undertakings. Art and artists reflect and represent society, in all of its pain and its glory. Artists must have the freedom to explore those emotions and experiences, and be allowed to present their own interpretation of reality.

Lewitzky Dance Company

The Lewitzky Dance Company is a chamber-size ensemble of solo-artists devoted to maintaining the Lewitzky repertoire, choreographing new works, and developing existing and new audiences for dance through touring, workshops, and demonstrations. The company tours nationally and internationally for six months of the year and has performed to date in 43 states and 19 countries on 4 continents. The remaining six months are spent in Los Angeles, performing, training, and creating new works. The company's interest in this case stems from its very existence as an arts organization. The company believes that any artist being prevented from practicing his or her art freely or being penalized for so doing threatens all artists, and for that matter all citizens. In short, it is censorship, and that is contradictory to the first amendment. The Lewitzky Dance Company itself successfully sued the National Endowment for the Arts in 1990, on the grounds that the "anti-obsenity" clause that was then included in the contract that the Lewitzky Dance Company was asked to sign was also a violation of first amendment rights.

Literary Network

The Literary Network, a project of CLMP and Poets & Writers, is organizing the field of literature, including writers, booksellers, librarians, English teachers, small presses and literary magazines, to respond to attacks on freedom of expression. The Literary Network has a special focus on the National Endowment for the Arts.

Los Angeles Center for Photographic Studies

Founded in 1974, the Los Angeles Center for Photographic Studies (LACPS) is a non-profit artist-run organization dedicated to presenting diverse and challenging work by emerging and established photographers and artists. Through its exhibitions, installations, public art projects, lecture series, workshops and publications, LACPS seeks to expand the definition of photographic art, celebrate photography and related practices within the larger context of visual media, encourage diverse cultural representation, develop a broad audience for photographic arts and remain an eclectic resource for local visual arts. LACPS is committed to presenting artists' projects which might not otherwise or easily find outlets in conventional institutions. The organization strives to encourage and support artists whose works represent elements of the diverse social, cultural, and political character of Los Angeles, California and the United States. LACPS sees the arts as an integral part of a productive society within which artists provide intellectual nourishment and stimulate social debate and/or change.

Los Angeles Contemporary Exhibitions

The Los Angeles Contemporary Exhibitions (LACE) is a non-profit interdisciplinary artists' organization that presents art and ideas and serves as a forum for an evolving dialogue between both emerging and established artists and their audiences. LACE reflects the multiplicity of Los Angeles cultural; Latino, African-American, Euro-American, Asian-American, Gay, Lesbian, and Feminist viewpoints are all significantly represented in its programs and audiences. LACE's commitment to diversity extends to the presentation of work which employs methods, materials, themes or issues which some may find difficult or offensive. As a recipient of funding from local, state and federal government sources, and as a presenter of art which some consider controversial, LACE is profoundly interested in the issues and outcome of this case.

Meet the Composer

Meet the Composer, a national organization, supports the performance, commissioning and recording of works by American

composers. Eight Thousand MTC events take place yearly across the USA and reach five million people. All forms and expressions of American music are represented. As citizen custodians of liberty, Meet the Composer honors freedom of expression and this nation's rich, diverse, cultures. We oppose censorship. We uphold the Constitution and the Bill of Rights. We honor tolerance in all human endeavors. We stand by artists' rights to express their creative vision.

Museum of Modern Art

The Museum of Modern Art was founded in 1929 in New York to foster appreciation and understanding of the modern visual arts which were then barely recognized by traditional art museums. As the preeminent institution devoted to the arts of the 20th century, the Museum of Modern Art has played a critical role in the evolution and recognition of modern art and design both in the United States and internationally. The Museum's collection now includes more than 100,000 paintings, sculptures, drawings, prints, photographs, architectural models and plans, and design objects, approximately 12,000 films and more than 4 million film stills. Attendance generally ranges between 1.2 million and 1.5 million visitors each year. The Museum of Modern Art opposes any legislative or any governmental interference with artistic freedom of expression, which it believes essential to creativity, and is proud to join in this amicus brief.

National Artists Equity Association

National Artists Equity Association (NAEA) is a nonprofit visual artists advocacy organization with approximately 5,000 members across the country. Its members include visual artists working in various fields and media, including painting, printmaking, sculpture, and photography. Since its founding in 1947, NAEA has worked to further the aims of visual artists and to address their legal and professional concerns. Throughout the recent controversy surrounding the reauthorization of the National Endowment for the Arts, NAEA has always supported the visual artist's right to freedom of expression and NAEA has opposes all attempts to add 'decency language' to the reauthorization legislation or guidelines at the National Endowment for the Arts. Artistic excellence should continue to be the one and only criteria for receipt of public funds in the arts.

National Assembly of Local Arts Agencies

The National Assembly of Local Arts Agencies (NALAA) is a nonprofit organization that represents local arts agencies in

developing an essential place for the arts in America's communities. NALAA believes that the arts are fundamental to the continued growth of our diverse and multicultural communities. Local arts agencies are vested with the responsibility to further local cultural and artistic interests and ensure access to them. To that end, NALAA, in partnership with its field, takes leadership in strengthening and advancing local arts agencies through professional development, information, advocacy and formulation of national arts policy. NALAA is specifically interested in having the lower court's decision in this case affirmed. The "decency standard" which the National Endowment for the Arts was required to consider in awarding grants is unconstitutional because the language is too vague and broadly worded. Furthermore, artistic expression is protected under the First Amendment and should therefore not be limited or censored on the basis of content restrictions attached to government funding.

National Assembly of State Arts Agencies

The National Assembly of State Arts Agencies (NASAA) is a non-profit, tax exempt membership organization representing the state arts agencies of the United States and six U.S. jurisdictions including American Samoa, the District of Columbia, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands. NASAA serves as the collective voice and service organization for these agencies. NASAA believes the arts are central to the educational, economic and cultural well being of our society. Such a society values the unique capacities of individuals, the diversity of the cultural groups to which they belong and the communities which they live. NASAA, in support of the First Amendment's guarantee for freedom of expression, recognizes the United States judicial system as the appropriate venue for the resolution of disagreements on interpretation of artistic expression.

National Public Radio

National Public Radio (NPR) is a membership organization which produces, acquires and distributes radio programming to ten million listeners throughout the United States, and which represents its member stations on matters of public policy. NPR works in partnership with its 477 member stations to bring information and pleasure to the American public through news and cultural programming. NPR has received direct support from the National Endowment for the Arts for its public radio programming; in addition, it has used programming produced by independent producers and member stations which have themselves received financial support from NEA. The commitment of NPR and its member stations to development and distribution of innovative programming of the highest quality is adversely affected by restrictions on the content of programming such as those at issue here.

New Museum of Contemporary Art

The New Museum of Contemporary Art, a non-profit institution founded in 1977, is a New York City museum devoted to exploring nontraditional ideas and experimental works in an ongoing investigation of what art is and how it relates to society. Historically, it seeks to ensure the artists' choice to communicate their visions in the broadest sense possible, as well as our audiences' choice in receiving those visions, and to stimulate critical inquiry. With this mission, the Museum has become a critical resource and gathering-ground for educators, community organizations, and many professionals involved in a range of issues that affect diverse areas of society. Additionally, the Museum's focus on discovering new, emerging artists -- many of whom are outside of the mainstream and have little public exposure -- would be impossible without government funding. Censorship and stifling of the arts seriously threatens multi-faceted arts institutions like ours and the cultural and educational programs that these institutions have increasingly provided as a social service to the broader population, especially to young people.

New York City Arts Coalition

The New York City Arts Coalition represents over 100 non-profit arts organizations -- from major museums to alternative spaces; representing organizations to advocacy groups; borough arts councils to grant-givers. Since our establishment in 1986, we have provided economic data, policy analysis and advocacy support during every major budgetary and political crisis in the arts as well as providing support for ongoing non-crisis advocacy efforts. We regularly monitor proposed changes impacting the

arts on the federal, state and local level. Materials are made available, when possible, to non-members as well as members.

New York Federation for the Arts

The New York Federation for the Arts (NYFA), founded in 1971, provides direct financial support to individual artists and supports artists and art as central to cultural growth and diversity. One of the largest providers of artists services and programs of all artistic practices in the country, NYFA seeks to connect artists with audiences and educate audiences about the artist behind the art they see. NYFA participates in education projects which help people understand the artists' condition in society and freedom of expression issues, based on a belief that creativity is the right of every citizen. The Foundation opposes any restrictions on artists' freedom of expression and supports government funding of the arts and artists.

New York Folklore Society, Inc.

The New York Folklore Society is a non-profit organization dedicated to furthering cultural equity and cross-cultural understanding through its progress serving the field of folklore and folklife in New York State. Folklife and folk culture expressions are rooted in community traditions and are intimately linked to a community's sense of identity. The standards applied to concepts such as decency vary widely across -- as well as within -- cultures and communities. A community or culture continually defines itself in changing circumstances partially through its free dialogue and debate about such categories. The guarantees of freedom of expression contained within the Constitution are absolutely essential enablers of this democratic process. It is this process, which occurs through the arts as well as through economic and political discourse, that the government should support; the government should not attempt to support or enforce a particular outcome of free exchange of ideas that identify the hallmark of democracy. On this basis, the New York Folklore Society is pleased to join this amicus curiae brief.

Pacifica Foundation

Pacifica Foundation is the licensee of five public, non-commercial radio stations which are qualified for support of the Corporation for Public Broadcasting. It is a California non-profit corporation which is tax exempt. Pacifica operates five stations, a national news bureau in Washington, DC, an alternative archive of 30,000 tapes in Los Angeles, and a national program service which distributes special national programming to approximately 60 non-commercial stations

throughout the country. All five stations produce over 90% of their own programs and all five have a significant portion of their program schedules dedicated to the arts, particularly music and drama. Pacifica has consistently been awarded NEA grants in the past and in 1990 turned down grants from the NEA because of the "indecent" language inserted into the contracts. In 1991, Pacifica declined to apply for NEA grants because of the public statements issued concerning language required as part of the grant application process. When this disputed contract language was struck down as unconstitutional, Pacifica did reapply for NEA funding and was awarded a grant for FY 93, which it has accepted.

Paper Bag Players

The Paper Bag Players is a company that makes and creates the scripts, music, props and costumes for all their shows. These shows are performed for children ages 4 through 9 years. It is concerned with censorship and artistic freedom, and accordingly joins as amicus in this case.

PEN American Center

PEN American Center ("PEN") is an organization of over 2,500 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking restrictive rules that limit freedom of expression in this country. PEN and its members have received NEA grants since 1965, and would suffer severe hardships in their efforts to create if the vague and uncertain "indecent" provisions were applied. Indeed, PEN administers or sponsors over ten literary awards in which leading authors pass judgment upon the literary merit of other writers. They would be at a total loss if they were required to apply such vague notions as "general standards of decency" before awarding grants to applicants. These terms have no established meaning in the literary field, and applying them would require the governing boards to make political judgments totally foreign to their expertise. PEN accordingly joins this brief.

PEN Center USA West

PEN Center USA West, founded in 1952 and incorporated as an autonomous non-profit association in 1981, is part of an international organization of professional writers begun in 1921 to foster understanding among men and women of letters in all countries. The fourth largest of International PEN centers in the world, PEN West is composed of over 900 professional writers

from throughout the Western United States. Its mission is to stimulate and maintain interest in the written work, to foster a sense of identity and community among western writers, and to defend freedom of expression. PEN West has an active domestic and international freedom-to-write component. It participates in international human rights campaigns on behalf of censored and/or imprisoned writers and fights censorship in this country. PEN West opposes any legislative and/or governmental interference with artistic freedom of expression and is pleased to join in this amicus brief.

People For the American Way

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. The organization's primary interest is to educate the public on the vital importance of the democratic tradition of liberty and freedom, and to defend it through litigation and other means as necessary. People For has actively defended the rights of artists and of all citizens to express their views and to resist improper restrictions and censorship by government at all levels. People For has obtained leave to file an amicus brief in this case in order to help vindicate the important First Amendment principles at stake, such as the principle that government cannot condition funding or participation in other programs on the relinquishment of First Amendment rights.

Public Broadcasting Service

The Public Broadcasting Service (PBS) is a non-profit membership organization whose 193 members are the licensees of 341 public television stations. PBS serves as the national program distribution arm of those stations, and as such, has a vital interest in ensuring stations' access to programs that reflect the full and unrestricted breadth of opinion and artistic expression protected by the First Amendment. Over the last two decades, the NEA has contributed more than \$40 million to support the production of more than 1600 hours of programming distributed by PBS as part of its National Program Service, including such acclaimed PBS programs as American Playhouse, Live from Lincoln Center, American Masters, Wonderworks, Alive from off Center, Great Performances, and POV. Although PBS does not itself produce any programs, it vigorously opposes governmental efforts to restrict the creative work of the NEA recipients whose programs PBS distributes.

Public Television Playhouse Inc.

Public Television Playhouse Inc. (American Playhouse) is a non-profit corporation which produces, acquires and distributes motion pictures and television programming for broadcast over the Public Broadcasting Service. American Playhouse receives direct support from the National Endowment for the Arts and uses programming produced by independent producers which themselves receive financial support from the NEA. The commitment of American Playhouse to innovative programming of the highest quality is adversely affected by restrictions on the content of programming such as those at issue here.

Putnam Arts Council

The Putnam Arts Council is a not for profit 501(c)3 cultural service organization chartered in 1963 by the state of New York for educational and museum purposes. Its mission is to promote, foster, perpetuate and encourage the arts in all forms in Putnam County and its environs. 1991 marked the 20th anniversary of its operation at the Belle Levine Art Center facility in Mahopac. It is our belief that our local arts agency plays a key role not only in the development of the arts community -- its artists and its organizations -- but also in community building as a whole. The Putnam Arts Council does impact the development and growth of the community by fostering the integration of aesthetics and everyday life, articulating the community's identity and promoting economic stability and planned growth. We are pleased to join this amicus curiae brief.

San Francisco Art Institute

The San Francisco Art Institute is dedicated to exploration, discovery, and creation in contemporary art. We teach over 700 students each year and strongly encourage them to express themselves as freely as possible. Limitations on artistic expression affect all of us in the arts, even if we are not directly connected to the specific case in question. Furthermore, we are proud to count Karen Finley as one of our graduates (MFA, 1981). We awarded her an Honorary Doctorate in 1992, and her work was included in an exhibition of visiting faculty which opened in December, 1992.

Schoharie County Arts Council

The Schoharie County Arts Council is opposed to content restrictions on government funding as proposed in the so-called decency clause. As a recipient of NEA funding in 1992, we

presented an Irish Music Festival. We also present a yearly "National Small Works Exhibition" which usually features contemporary work by outstanding artists across the U.S. It also frequently features work of a political, religious and sexual nature. The decency clause could potentially jeopardize our own NEA funding, as well as overall artistic freedom.

Theatre Communications Group

Theatre Communications Group (TCG) is the national organization for nonprofit professional theatres. TCG serves 324 theatres located in 44 states and the District of Columbia, and provided numerous services and programs to assist the work of thousands of actors, directors, playwrights, literary managers, and other theatre personnel. TCG offers fellowships, commissions and grants to promising playwrights, directors and designers; it commissions the publication of new works; and it does extensive research and reporting on the state of professional theatre. The nonprofit theatres represented by TCG range from small ensemble companies to multi-million dollar institutions and perform and produce an immense variety of plays. Such theatres also contribute significantly to the development of new plays and playwrights. Every Pulitzer Prize-winning play since 1976 received its premiere professional production at a nonprofit theatre. The theatres represented by TCG reflect the pluralistic nature of American theatre, and include companies devoted to the creative enhancement and appreciation of a wide diversity of cultures. However, the richness of American theatre, and the freedom of artistic expression giving root to that diversity, have been endangered by the NEA's attempts to deviate from one of its primary stated tasks: to lend support to "projects and productions which have substantial artistic and cultural significance, giving emphasis to American creativity and cultural diversity." TCG accordingly joins this brief.

Volunteer Lawyers for the Arts

Volunteer Lawyers for the Arts (VLA) is a New York nonprofit organization which provides free arts-related legal assistance and education to artists and arts organizations in all Creative fields. VLA's clients include performance artists, choreographers, non-profit theatre and dance companies and visual artists. Because VLA works actively to protect and improve the rights of artists, it joins this amicus effort because an extension of the Rust v. Sullivan holding to the artistic arena would violate first amendment principles fundamental to the creation of art in our society. In addition, the district court properly recognized the unconstitutional vagueness of the "decency" provision in the NEA's governing statutes.

Walker Art Center

Walker Art Center is a multidisciplinary arts center supporting the creative expression of artists and the active engagement of audiences. Its programs in the visual, media and performing arts explore links between art and life. By investigating questions that shape us as individuals, communities and cultures, Walker encourages debate that distinguishes a healthy society. The values that inhere in the First Amendment are core values of Walker Art Center as well, and artists such as Karen Finley have been regularly presented here.

Western Alliance of Arts Administrators

The Western Alliance is a service organization which provides services to, and represents, performing arts presenting organizations, artists, artist managers, and other arts service organizations who are involved in presenting and touring the performing arts in the 14 Western states. It is our view that application of the reasoning found in the Rust v. Sullivan case to funding policies at the National Endowment for the Arts and other Government agencies will severely damage artistic freedom and freedom of expression. As the representative organization for artists and arts presenters in the West, we are compelled to participate in this important effort.

Women's Philharmonic

The Women's Philharmonic is the only orchestra in the country dedicated to the promotion of women composers, conductors, and performers. Through our nationally acclaimed orchestra and our National Women Composers Resource Center, the Women's Philharmonic brings these remarkable works to public attention and incorporates them into the standard orchestral repertoire. The censorship involved in this case could set a dangerous precedent for all artists. Particularly for an organization such as the Women's Philharmonic, which focuses specifically on women composers and performers because of past and present discrimination, this policy by the NEA, if upheld, is a frightening portent for the future.

Writers Guild of America, East

The Writers Guild of America, East, Inc. is a labor union representing more than 3,000 writers for television and motion pictures, including television news and public television. The Guild, as an institution, has a vital interest in first amendment issues including freedom of expression. Our membership feels strongly that government officials must not be empowered to grant

or withhold government benefits depending on whether an applicant's artistic expression is deemed consistent with vague criteria such as "general standards of decency and respect for the diverse beliefs and values of the American public." Accordingly, the district court's decision invalidating the decency provision should be affirmed.

CERTIFICATE OF SERVICE

Two copies of the Brief Amicus Curiae were deposited in United States, First Class, Postage Prepaid on this 2nd day of June, 1993, to each of the following attorneys:

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