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1998 WL 47257 (U.S.) (Appellate Brief)
Supreme Court of the United States.

NATIONAL ENDOWMENT FOR THE ARTS, Petitioner,
v.
Karen FINLEY, et al., Respondents.

No. 97-371.
October Term, 1997.
Feb. 6, 1998.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

# Brief of Amici Curiae The American Association of University Professors The American Council of Learned Societies The College Art Association The Association of American University Presses The National Humanities Alliance The Thomas Jefferson Center for the Protection of Free Expression in support of Respondents

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West Headnotes (2)

**Constitutional Law** Art

Is artistic expression fully protected speech under First Amendment, and is it closely akin to academic freedom? U.S.C.A. Const.Amend. 1.

**Constitutional Law** Government funding

**Constitutional Law** Public funds; grants and loans

**United States** Particular Subjects and Programs

Did Court of Appeals properly invalidate, on First Amendment freedom of expression and Fifth Amendment due process vagueness grounds, statutory requirement that National Endowment for the Arts (NEA), in making grants to artists, take into consideration general standards of decency and respect for diverse beliefs and values of American public? U.S.C.A. Const.Amends. 1, 5; National Foundation on the Arts and the Humanities Act of 1965, § 5(d)(1), 20 U.S.C.A. § 954(d)(1).

***i** TABLE OF CONTENTS



***ii** TABLE OF AUTHORITIES



***iii** CASES:



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Brooks, Tilden 4/30/2025
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## *1 STATEMENT OF INTEREST

This brief amicus curiae [1] is filed in support of appellees on behalf of the American Association of University Professors, the American Council of Learned Societies, the College Art Association, the Association of American University Presses, the National Humanities Alliance, and the Thomas Jefferson Center for the Protection of Free Expression. These organizations share an abiding commitment to academic freedom and to the free exchange of ideas in scholarly and creative work. Collectively, the amici represent virtually the entire community of scholarship in the arts and humanities, as well as the social sciences. Descriptions of the amici and, in two cases, a roster of their constituent organizational members, may be found in the Appendix.

All the amici share a deep concern with the creation and preservation of an environment of artistic, intellectual, and academic freedom in American society. Amici are strongly opposed to the government's position in this litigation, which supports content-based restrictions on government funding. Many of the amici, and their members, are direct recipients of federal funding.

Founded in 1915 to defend academic freedom, the ***2** American Association of University Professors is an organization of over 40,000 faculty members and research scholars in all the academic disciplines and is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. The association has taken a special and growing interest in assaults on the creative freedom of artists in higher education. (*See* App. 1a.)

The American Council of Learned Societies, by action of its Board of Directors, joins in this brief in defense of academic freedom. The ACLS is a federation of 60 national scholarly organizations in the humanities and related social sciences. Founded in 1919, the ACLS supports scholarship through an extensive program of fellowships and grants, represents the American scholarly community in this country and abroad, and sponsors scholarly exchanges with many parts of the world.

The College Art Association represents 2,000 institutions of higher education and museums, as well as 13,000 individuals concerned with scholarship, teaching, and practice in the visual arts. Its members include individual artists, educators, historians, librarians, researchers, museum professionals, colleges and universities, university presses, state humanities councils, and a

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wide spectrum of scholarly and professional groups. CAA has benefited directly as a recipient of grants from the National Endowment for the Arts, including a challenge grant for its fellowship program and a grant for its annual conference.

The Association of American University Presses is a cooperative, nonprofit organization which promotes the work ***3** and influence of university presses, provides cooperative services, and helps its members respond to the changing economy and environment. Formally established in 1937, the Association of American University Presses serves scholars and scholarship. Academic presses exist on the cutting edge of knowledge, and receive large subsidies from state and federal government.

The National Humanities Alliance is a coalition of organizations concerned with the impact of federal laws, regulations, and other actions that affect scholarship in the Humanities. NHA and its 85 members are vitally concerned with maintaining freedom of inquiry, the underlying basis of the humanities. The combined memberships of NHA member organizations is over 800,000 individuals.

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. The Center has, since its opening in 1990, pursued that mission in various forms, including the filing of amicus curiae briefs in cases involving a variety of free expression issues.

The rights of scholars, poets, novelists, artists, museum professionals, theatrical producers, filmmakers, dancers, choreographers, art historians, or philosophers to challenge conventional wisdom, values, and social pieties is a cornerstone of artistic and academic freedom, no less than the rights of scientists funded by the National Institutes of Health. Amici fear that, if public officials may grant or withhold government benefits on the basis of whether creative expression is deemed "decent" or "respectful," the ***4** result will be to stifle the "free play of spirit which all who deal with words or images ought especially to cultivate." *Keyishian v. Board of Regents,* 385 U.S. 589, 601 (1967).

## SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit correctly held that Congress acted unconstitutionally in requiring the National Endowment for the Arts [NEA], in making grants to artists, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." While it is clear that Congress may decline to provide support to individual artists, government's power to make no grants whatever does not imply unlimited authority to direct the terms and conditions on which grants may be allocated. The particular burden which Congress imposed in 1990 violates both freedom of expression guaranteed by the First Amendment and due process guaranteed by the Fifth Amendment. That conclusion should follow here no less clearly than it would if Congress had imposed restrictions on arts grants that disqualified Christians, Moslems, freethinkers, or any other category based on religious, moral, or ideological beliefs, values, or viewpoints.

This Court has consistently affirmed two premises which underlie the Ninth Circuit's judgment: That artistic expression is fully protected by the First Amendment, and that the safeguards of due process and free speech apply to the withholding or conditioning of benefits as they do to direct sanctions. Vague and imprecise language may gravely ***4** chill expression when it governs a governmental grant-making process. Vague standards may also cause grantees to forego protected speech because they are genuinely uncertain about what the law does and does not cover.

Equally clear, though of more recent origin, is this Court's insistence that government may not use the denial of funding in a traditional sphere of free expression to suppress or disadvantage a particular viewpoint. The clear import of the challenged restrictions is to force the NEA to engage in just such selective funding—allowing support of those artists whose works serve "general standards of decency" and foster "respect for diverse beliefs," while withholding funds from artists where doubt exists

Brooks, Tilden 4/30/2025
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about their commitment to such vague desiderata. These restrictions thus involve a classic constitutional violation, as the court of appeals has held.

## I. ARTISTIC EXPRESSION IS FULLY PROTECTED SPEECH, AND IS CLOSELY AKIN TO ACADEMIC FREEDOM.

This Court has consistently affirmed the constitutionally protected status of artistic expression. *See Miller v. California,* 413 U.S. 15, 34 (1973). The Court's decision in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989) articulated the basic values that are at risk in this case:

> Music is one of the oldest forms of human expression.... [R]ulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical ***6** compositions to serve the needs of the state.... The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication is protected under the First Amendment.

491 U.S. at 790. What is true of music is equally true of other visual and performing arts. This Court recently reaffirmed the rationale for protection of art as expression, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group,* 515 U.S. 557 (1995):

> [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' ... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky of Lewis Carroll.

515 U.S. at 569. These principles are central to the judgments of both lower courts in this case. They have been fully accepted by other courts that have had occasion to test limits on legal control or restriction of artistic endeavor. "Artistic expression, no less than academic speech of journalism," declared the district court in this case, "is at the core of a democratic society's cultural and political vitality." *Finley v. National Endowment for the Arts,* 795 F. Supp. 1457, 1473 (C.D.Cal.1992).

Not only does the First Amendment unmistakably protect artistic expression; the legislative history underlying the National Endowment for the Arts is no less protective. Among the Act's central values, declared by its framers, ***7** were devoting "the fullest attention to freedom of artistic and human expression" and ensuring 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." *S. Rep.* No. 89-300, 89th Cong., 1st Sess. (1965); *see also 135 Cong. Rec.* S10374-01 (daily ed. Aug. 4, 1989) (statement of Sen. Pell). Congress departed from those guiding principles on at least two occasions—by adopting the so-called Helms Amendment, declared unconstitutional in *Bella Lewitzky Dance Foundation v. Frohnmayer,* 754 F. Supp. 774 (C.D.Cal.1991), and in the "decency and respect" provisions that have been invalidated by two lower courts.

There are close and vital links of several types between the values that underlie artistic freedom and those inherent in academic freedom. First, a substantial portion of creative and performing artists are members of the academic community, holding faculty appointments on a full or part-time basis. The facilities in which their works are created, displayed and performed are, in turn, parts of the colleges and universities of our nation. Virtually all of those institutions of higher learning, both public and private,

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offer instruction to their students in many facets of the creative and performing arts—instruction which depends directly and substantially upon the artistic freedom of those who teach in the arts. That tolerance is enhanced by the commitment that most such institutions, and the associations to which they belong, have made to the 1940 Statement on Academic Freedom and Tenure, sponsored by the American Association of University Professors, and often relied upon by courts in ***8** academic freedom cases. *See* American Assoc. of Univ. Professors, *AAUP Policy Documents & Reports,* p. 3 (1995 ed.)

Second, academic institutions have over the years sheltered and nurtured novel and imaginative endeavor in the arts. The campus studio and theater have for generations afforded a safe haven to avant garde artists. Had venturesome painters, composers and playwrights not been able initially to experiment within the academic setting, much artistic endeavor which eventually gained broad acceptance might never have come into being. The high level of tolerance that academic communities afford to the artist has been a critical element in developing creativity and innovation in the arts in this country.

Third, facilities for the creative and performing arts form a vital bridge between the college campus and the community in which it is located. Plays, recitals, concerts, and exhibits enrich in myriad ways the lives of those of those who are neighbors of academic institutions. The university museum or gallery, the college theater or auditorium, or the performing arts center, offers to many residents and neighbors the primary (if not the sole) contact with the academic community and campus life.

Fourth, with special relevance to the central issue of this case, a high proportion of grants to creative and performing artists have been made to persons within the academic community. Indeed, as the district court noted, NEA grants have often been made to artists and to museums, galleries, and other facilities within an academic setting. *Finley,* 795 F. Supp. at 1474. One of the very few grantees ***9** to refuse NEA support in protest of the disclaimer oath (invalidated in *Bella Lewitzky* ) was the University of Iowa Press. Though the grant had been sought to enable the Press to publish a collection of acclaimed poems, the certificate mandated by the Helms Amendment seemed both intrusive and incompatible with basic precepts of academic freedom and free inquiry. *See* Letter from Paul Zimmer, director of the University of Iowa Press to John Frohnmayer, chairman of National Endowment for the Arts (June 5, 1990) (discussing reasons for not accepting an NEA grant of $12,000).

To underscore this vital link between academic and artistic freedom, the district court cited with approval a passage from the statement issued at the close of the 1990 Wolf Trap Conference on Academic Freedom and Artistic Expression, endorsed by one of the amici:
"[E]ssential as freedom is for the relation and judgment of facts, it is even more indispensable to the imagination." ... Faculty and students engaged in the creation and presentation of works of the visual and the performing arts are engaged in pursuing the mission of the university as much as those who write, teach, and study in other academic disciplines.... Artistic expression in the classroom, studio and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities.

*Finley,* 795 F. Supp. at 1474. [The full text of this ***10** Statement appears on page 1a of the Appendix.]

This Court has for four decades consistently stressed the centrality of academic freedom to First Amendment values—from *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) to the relatively recent reaffirmation of that nexus in *Rust v. Sullivan,* 500 U.S. 173 (1991):

> [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of

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> conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

*Rust,* 500 U.S. at 200 (citing *Keyishian,* 385 U.S. at 603, 605-606).

Most recently, in *Rosenberger v. Rector and Visitors of the University of Virginia,* this Court warned that "the danger ... to speech from the chilling of individual thought and expression" is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." 515 U.S. 819, 835 (1995).

Against this background of solicitude for academic freedom, the restrictions challenged here present an ominous prospect. For creative and performing artists in the academic community, the threat is obvious and immediate: A major source of potential funding for their creative endeavors has been confined to those who are willing to ***11** adhere to "general standards of decency" and "respect for diverse beliefs and values." The conscientious academic artist simply has no way to determine what creative activity is, and what is not, acceptable to Congress or to the NEA under these vague and undefined clauses. Even less clearly could such an artist guide the work of his or her students, who might either be participants in a collaborative studio project, or be preparing to seek public support on their own.

Such concerns are not, however, confined to the arts. If such conditions may be imposed on NEA grants, there is no logical reason why government could not restrict any other program of public support to those scholars who exemplify "general standards of decency" and "respect for diverse beliefs and values." A judgment upholding the restrictions challenged here would apply with equal force to grants from the National Institutes of Health, the National Science Foundation, the National Endowment for the Humanities and myriad other federal agencies. Comparably imprecise and ominous language could, under such a precedent, be made part of the grant-seeking process across the board.

The NEA is unique in only one respect—the controversial quality of the art works that provoked the Congressional ban now under challenge. If Congress may lawfully constrain scholarship in the manner it seeks to do here, that power would not stop with the creative and performing arts. If at some later time, Congress became exercised about unorthodox or disquieting research in the physical or social sciences or other areas of the humanities, federal support could equally be limited to those scholars ***12** who agreed to observe "general standards of decency" in their laboratories. If the arts are this vulnerable today, why not biochemistry or sociology or legal history tomorrow? This is a truly frightening prospect—yet one which follows with inexorable logic from the position the Government presses before this Court.

Such a prospect is anathema to everything this Court has said over four decades about the meaning and centrality of academic freedom. Thus to constrain the scholar's inquiry, by whatever means, poses precisely that "danger ... to speech from the chilling of individual thought and expression" which this Court recently and eloquently found "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger,* 515 U.S. at 835.

While artistic freedom is most acutely and immediately imperilled here, far more is at stake. If vague and unbridled restrictions like these could be imposed on public funding for academic research, no branch of scholarship would be immune. The district court and the court of appeals were thus correct in finding these restrictions violative of the constitutional liberty of those who seek government support for their creative endeavors.

Brooks, Tilden 4/30/2025
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## II. THE COURT OF APPEALS PROPERLY INVALIDATED THE CHALLENGED RESTRICTIONS ON FIRST AMENDMENT AND DUE PROCESS GROUNDS.

The court of appeals correctly ruled that the key words in the challenged sections were so vague as to deny First Amendment and due process rights to artists whose expression those words governed. That court also correctly held that the language in question was no mere declaration of Congressional preference, but was clearly intended to control the allocation of scarce federal funds. Those conclusions reflected a close and careful study of the legislative history, as well as logical analysis of the relations between the original statute and the 1990 amendments. Petitioner renews here the contrary claims that both lower courts soundly and squarely rejected—claims which would effectively render these amendments an idle exercise in legislative enactment.

Vague language, always inimical to free expression, is especially dangerous when it is applied to artistic endeavor. As the court of appeals warned, "the twin dangers of a vague law—lack of notice and arbitrary or discriminatory application—may chill the exercise of important constitutional rights." *Finley v. National Endowment for the Arts,* 100 F.3d 671, 675 (9th Cir.1996). Those risks are especially severe for artists of the kind whose grants are in issue in this case. It was President Ronald Reagan who wisely observed: "Artists have to be brave; they live in a realm of ideas and expression, and their ideas will often be provocative and unusual. Artists stretch the limits of understanding." John Frohnmayer, *Talking Points for 1st Amendment Congress,* Kansas City, Mo., April 19, 1991.

The risks of uncertainty for those who engage in other forms of expressive activity transcend the creative and ***14** performing arts. Indeed, the hazards of vague restraints may be even greater in other areas of scholarship. As this Court cautioned over forty years ago in *Sweezy v. New Hampshire:*

> No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust.

354 U.S. 234, 250 (1957). The immediate concern for giving artists adequate and meaningful guidance in sensitive matters extends well beyond the creative and performing arts. Few branches of scholarship do not share such concerns; few would be unaffected by such amorphous and elusive standards.

The language now being challenged before this Court is manifestly imprecise. The amendment in question contains no definition of either "general standards of decency" or "respect for the diverse beliefs and values of the American people." Neither phrase could remotely be thought a term of art, the meaning of which is well-known and obvious despite the absence of definitions within the amendment. Nor does either phrase in this statute have meaning comparable to the general standard which guides NEA grant-making, that of "artistic excellence." That phrase has acquired meaning both from long experience within the professional community of creative and performing artists, and from the presence of such artists on the panels that play so crucial a role in application of the statutory criteria. ***15** There is nowhere in the NEA process, by contrast, either recognized expertise on "general standards of decency" or accumulated and recognized experience which might guide the interpretation and application of otherwise broad desiderata.

The use of somewhat similar language in other contexts also gives no meaningful guidance to NEA grantees. "Indecent," for example, was once sustained by this Court in a very limited application to licensed broadcasting, *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), though with a more focused definition, and under vastly different conditions, as this Court noted just

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months ago in *Reno v. ACLU,* 117 S. Ct, 2329, 2341-42 (1997). Moreover, "general standards of decency" could hardly be equated with "indecent," even if the contexts were identical.

Much the same could be said of the other phrase—"respect for the diverse beliefs and values of the American people"—for the understanding of which the amendment also gives no guidance. However meritorious such a commitment might seem as a personal credo, it is a vastly different matter to give such a subjective precept the force of law, through an act of Congress that governs both a granting agency and the lives of its grantees.

Some months after the decision of the court of appeals, this Court's judgment in *Reno v. ACLU,* 117 S. Ct. 2329 (1997), reinforced and buttressed the vagueness ruling below. The language in issue here—"standards of decency"—is strikingly similar to the key term—"indecent"—which, this Court found (in the Communications Decency Act) "lacks the precision that the First Amendment requires when ***16** a statute regulates speech." *Id.* at 2346.

Although "decency" and "indecent" have occasionally been allowed by courts for certain very limited purposes, the use of such language to control arts grants is far closer to Congress' ill-fated attempt to ban "indecent" material on the Internet. Here, as in the *Reno* case, "the scope [of the "decency" language] is not limited to commercial speech or commercial entities." *Id.* at 2347. Here, too, the statute's "open-ended prohibitions embrace all nonprofit entities and individuals" who may be engaged in protected expression. *Id.* In this case, quite as clearly as in *Reno,* "undefined terms ... cover large amounts of nonpornographic material with serious educational or other value." *Id.* Here, just as in *Reno,* existing and defined prohibitions already address the dissemination of obscene material and child pornography. *Id.* at 2347 n. 44. Thus, the parallels are striking between these two Congressional uses of undefined terms which have so broad and ominous a reach over protected artistic expression.

There is one difference between these two uses of "decency." Restrictions on government support are not the same as direct criminal or even civil sanctions. Petitioner insists that difference is crucial. At one time, it might have been dispositive—when only "rights" were protected, and "privileges" were ephemeral. Such a distinction has, however, long since ceased to define government's duty to respect First Amendment interests of those with whom it deals in important matters. Thirty five years ago, in *Sherbert v. Verner,* 374 U.S. 398 (1963), this Court found ***17** it already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 374 U.S. at 404. Since that time, the First Amendment interests of government beneficiaries have been recognized in myriad contexts. *See, e.g., FCC v. League of Women Voters,* 468 U.S. 364 (1984).

The one recent case that might seem to dilute protection for the expressive rights of public beneficiaries is *Rust v. Sullivan,* 500 U.S. 173 (1991), in which this Court sustained a regulation that limited certain uses of federal funds by health facilities. The import of *Rust* is, however, narrow at best on the issues of this case. The restriction challenged there was directed not at the speech of individuals, but rather at government funding of private entities and persons to deliver the government's message. *Rust* clearly distinguished cases "in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service." [emphasis in original] 500 U.S. at 197. That distinction reflected the reality that if only *organizational* activities are constrained, individuals associated with that organization remained (at least theoretically) free, on their own time, to enjoy the full range of First Amendment rights.

The realities of the creative arts do, however, provide a crucial contrast. Individual artists deemed ineligible for public funding are, only in the most theoretical sense, "free to pursue" creative activity on their own time. The reality is that government funding has been for many years a component in the total system of support for individual ***18** artists, and a key source of leverage for private support in many forms. Thus any suggestion that an artist who is barred under these criteria from receiving federal funding is, like a staff member in a funded health facility, constrained in speech only to a limited extent, overlooks a crucial difference.

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Whatever doubt might remain after *Rust* about government beneficiaries' First Amendment freedoms was put to rest by this Court's later decision in *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995). In striking down a public university's refusal to grant funds to student publications that advanced a religious view, the Court not only vindicated First Amendment interests of those who receive government funds, but also stressed the duty of government to allocate those funds in a viewpoint-neutral manner. Both principles are directly implicated here. Thus, while *Rust* dealt essentially with (and sustained conditions on) government speech, *Rosenberger* dealt instead with public funds for individual expression, on which such conditions are not acceptable.

In *Rosenberger,* the university relied unsuccessfully on a broad reading of *Rust,* urging deference to its judgments in dispensing scarce resources. The distinction between the two cases is crucial here: After describing *Rust* as a situation in which "government ... used private speakers to transmit specific information pertaining to its own programs," *Rosenberger* was sharply distinguished as a case in which government "instead expends funds to encourage a diversity of views from private speakers." ***19** 515 U.S. at 833-34. Whatever powers *Rust* gave a government grantor in the former situation—for example, "to ensure that its message is neither garbled nor distorted by the grantee"—has no force in the latter setting, where grantees' First Amendment rights and interests of academic freedom must be fully respected. *Id.* at 853.

Clearly, the restrictions challenged here are much like those which were invalidated in *Rosenberger;* Congress' initial premise, in 1965, was that the NEA should, as a grantor, give "the fullest attention to freedom of artistic and humanistic expression" and that "no undue preference should be given to any particular style or school of thought." *S. Rep.* No. 89-300, 89th Cong., 1st Sess. (1965); *see also 135 Cong. Rec.* S10374-01 (daily ed. Aug. 4, 1989) (statement of Sen. Pell).

*Rosenberger* bears even more directly on the nature of the challenged NEA restrictions. Central to that judgment was the precept that "the University may not discriminate based on the viewpoint of private persons whose speech it facilitates" through funding. *Rosenberger,* 515 U.S. at 834. Two concerns underlie that principle:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University ***20** setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

*id.* at 835.

What Congress did in 1990 was precisely what *Rosenberger* held that government may not do in making grants—at least where it "expends funds to encourage a diversity of views from private speakers." *Id.* at 834. Despite the inherent vagueness and imprecision of the "decency and respect" constraints, there can be no doubt that Congress sought to "cast disapproval on particular viewpoints" by denying funding to certain artists and their works. *Id.* at 836.

The very words of the amendment's sponsor, Representative Henry, reveal precisely such a design: "We add to the criteria of artistic excellence and artistic merit," he assured his colleagues, "a shell, a screen, a *viewpoint* that must be constantly taken into account on behalf o[f] the American public." [emphasis added] *136 Cong. Rec.* H9417 (daily ed. Oct. 11, 1990) (statement of Rep. Henry). There can be no ambiguity about what the chief architect of the law had in mind. It is rare for the sponsor of restrictive language to proclaim viewpoint bias as a virtue. Yet when that is done, as it has been here, the infirmity of the resulting language should follow even more clearly.

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One final difference deserves brief comment. The amendment challenged here does not by its own force restrict NEA grants, but rather directs the grant-maker to be guided ***21** by the newly imposed criteria. Petitioner argues that the constitutional claims of grantees are muted by this less direct nexus. The difference seems at best a technical one, without substantive import.

A plausible variant brings this analysis full circle. Suppose that, in *Rosenberger,* the university's governing board (instead of directly setting the funding criteria) had told the Dean of Students to "take into consideration" the absence of sectarian or religious content in funding student publications. Suppose, further, that the case had unfolded just as it did—that a student journal with substantial sectarian material had been deemed ineligible for funding because of its religious content. To argue that this Court would, on so technical a ground, have avoided the issue it squarely faced in *Rosenberger,* simply defies credulity. If denial of funding for a particular viewpoint, under a board directive, abridged the First Amendment, surely it would not matter that the board accomplished the same end by telling the administration it must "take into consideration" a disapproved viewpoint.

Given the close links between academic and artistic freedom, developed more fully in Section I of this brief, the conclusion to the relevant part of *Rosenberger* has special bearing upon the present case:

> The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free ***22** speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

515 U.S. at 836. Few cases afford more appropriate opportunities than does this one for the reaffirmation of those abiding principles. Few occasions illustrate more graphically the role of the First Amendment as a guarantor of creative and artistic liberty as vital elements in freedom of expression.

## *23 CONCLUSION

For the foregoing reasons, amici respectfully urge affirmance of the judgment of the court of appeals.

## *1A APPENDIX

### Statement from 1990 Wolf Trap Conference on Academic Freedom and Artistic Expression

The following is a concluding statement by the participants in the 1990 Wolf Trap Conference on Academic Freedom and Artistic Expression, 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. The statement was endorsed by AAUP's Committee A on Academic Freedom and Tenure and by its Council at their meetings in June, 1990.

Attempts to curtail artistic presentations at academic institutions on grounds that the works are offensive to some members of the campus community and general public occur with disturbing frequency. Those who support restrictions argue that works presented to the public rather than in the classroom or other entirely intramural settings should conform to their view of the prevailing community standard rather than to standards of academic freedom. We believe that "essential as freedom is for the relation and judgment of facts, it is even more indispensable to the imagination." [1] In our judgment academic freedom in the

creation and presentation of works in the visual and performing arts, by ***2a** ensuring greater opportunity for imaginative exploration and expression, best serves the public and the academy.

The following proposed policies are designed to assist institutions to respond to the issues that may arise from the presentation of artistic works to the public in a manner which preserves academic freedom:

1) Academic Freedom in Artistic Expression. Faculty 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 are those who write, teach, and study in other academic disciplines. Works of the visual and performing arts are important both in their own right and because they can enhance our experience and understanding of social institutions and the human condition. Artistic expression in the classroom, studio, and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities. Since faculty and student artistic presentations to the public are integral to their teaching, learning, and scholarship, these presentations no less merit protection. Educational and artistic criteria should be used by all who participate in the selection and presentation of artistic works. Reasonable content-neutral regulation of the "time, place, and manner" of presentations should be developed and maintained. Academic institutions are obliged to ensure that regulations and procedures do not impair freedom of expression or discourage creativity by subjecting work to tests of propriety or ideology.

***3a** 2) Accountability. Academic institutions provide artistic performances and exhibits to encourage artistic creativity, expression, learning, and appreciation. The institutions do not thereby endorse the specific artistic presentations nor do the presentations necessarily represent the institution. This principle of institutional neutrality does not relieve institutions of general responsibility for maintaining professional and educational standards, but it does mean that institutions are not responsible for the views or attitudes expressed in specific artists' works any more than they would be for the content of other instruction, publication, or invited speeches. Correspondingly, those who present artistic work should not represent themselves or their work as speaking for the institution and should otherwise fulfill their educational and professional responsibilities.

3) The Audience. When academic institutions offer exhibitions or performances to the public, they should ensure that the rights of the presenters and the audience are not impaired by a "heckler's veto" from those who may be offended by the presentation. Academic institutions should ensure that those who choose to view or attend may do so without interference. Mere presentation in a public place does not create a "captive audience." Institutions may reasonably designate specific places as generally available or unavailable for exhibitions or performances.

***4a** 4) Public Funding. Public funding for artistic presentations and for academic institutions does not diminish (and indeed may heighten) the responsibility of the university community to ensure academic freedom and of the public to respect the integrity of academic institutions. Government imposition on artistic expression of a test of propriety, ideology, or religion is an act of censorship which impermissibly denies the academic freedom to explore, teach, and learn.

***5a Descriptions of Amici Curiae**

Founded in 1915, the American Association of University Professors is an organization of over 40,000 faculty members and research scholars in all the academic disciplines. The Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements central to higher education. The American Association of University Professors policies are widely respected and followed as models in American colleges and universities. *See e.g.,* *Bignall v. North Idaho College,* 538 F.2d 243,249 (9th Cir.1976); *Mabey v. Reagan,* 537 F.2d 1036, 1043 (9th Cir.1976); *Adamian v. Jackson,* 523 F.2d 929, 934-5 (9th Cir.1975).

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The American Association of University Professors has taken a special interest in recent years in assaults on the creative freedom of artists in higher education. In 1990 it co-sponsored the Wolf Trap Conference on Academic Freedom and Artistic Expression, bringing together forty curators, professors, university administrators, and trustees for a close examination of the nature of artistic discourse on campus. The conferees agreed that artistic expression, like other scholarly and teaching activities, functions best when freed of constraints on its content. They concluded that public funding of the arts should introduce no added tests or impairments. The district court relied on the statement ***6a** resulting from the conference, *Academic Freedom and Artistic Expression* (which appears on page 1a of the Appendix), to illustrate the nexus between artistic expression and other forms of scholarly discourse.

The American Council of Learned Societies ("ACLS") is a consortium of 60 learned societies in the humanities and social sciences.[2] Founded in 1919 and ***7a** governed by a fifteen member Board of Directors and representatives of each of the societies, the ACLS supports scholarship through an extensive program of fellowships.and grants, represents the American scholarly community in this country and abroad, and sponsors scholarly exchanges with many parts of the world. The ACLS and its members thus have an important interest in the outcome of this case. Both the individual societies and their members, as well as the ***8a** ACLS itself, receive funding from government agencies for the conduct of research. The successful completion and dissemination of that research depends upon freedom of inquiry of the most broad-ranging kind during the research process itself, and freedom of expression of an equally broad character at the resulting point of publication.

The Association of American University Presses is a cooperative, nonprofit organization which promotes the work and influence of university presses, provides cooperative services, and helps its members respond to the changing economy and environment. Formally established in 1937, its ranks now include eighty-two full members, thirteen affiliates (smaller university presses), seven international (overseas) members, and fifteen associates (scholarly presses not affiliated with universities). These presses vary greatly in size, publishing as few as one and as many as 1,200 titles in a year. They are active across many scholarly disciplines, including the social sciences, humanities, arts, and science and technology. Together they published nearly 8,000 books in 1995-96 and more than 700 scholarly journals. Roughly 16 percent of all new titles published in the United States last year were issued by university presses.

The essential purpose of university presses, as the publishing divisions of their parent institutions, is to serve scholars and scholarship in general. They exist on the cutting edge of knowledge and often function as the natural outlet for information, theory, and methodology that will influence human endeavor in the decades and generations to ***9a** come. Because so many presses are part of state universities and rely upon money from the federal government in the form of grants or subsidies from the National Endowment for the Arts, the National Endowment for the Humanities, and other agencies, the Association of American University Presses has a very strong interest in funding decisions remaining ideologically neutral and nonviewpoint-discriminatory.

The College Art Association ("CAA") is a nationwide, nonprofit organization whose members include 13,000 individual artists, art historians, and museum professionals, as well as 2,000 institutions of higher education and museums. CAA was founded in 1911 as a learned society and professional organization to promote the highest standards of scholarship and teaching in the history and criticism of the visual arts, and to foster the highest levels of technical skill in teaching and practices of art. The CAA is committed to the creation and preservation of an environment of artistic, intellectual and academic freedom. The Association values and seeks diversity among its members. It promotes and encourages, through its programs and publications, a spirit of free inquiry and innovative creative enterprise.

The CAA annual conference is the only national forum for the visual arts, providing artists, art historians, critics, museum directors and curators, educations, art administrators and other visual arts professionals from throughout the United States and

from foreign countries with ***10a** an opportunity to discuss new research, criticism, and topical issues affecting the profession. The conference includes numerous slide presentations of visual art that could well be considered "indecent."

The CAA itself has benefitted directly as a recipient of grants from the National Endowment for the Arts for its annual conference and fellowship program. In addition, many of its individual and institutional members have received NEA grants. Several of CAA's members have been involved in the ongoing debate in this country over freedom of artistic expression. They include the Corcoran Gallery, which was the site of the initial uproar over the Robert Mapplethorpe show *The Perfect Moment.* The Cincinnati Contemporary Art Center refused to censor the same show. The School of the Art Institute of Chicago, a private professional college of art and design, has seen several years of controversy involving student exhibitions which shocked or offended some segments of the community. CAA is profoundly concerned with the issues raised by this appeal.

The National Humanities Alliance (NHA) is a nonprofit organization founded in 1981 to unify the public interest in the support of federal programs in the humanities. A coalition of 85 organizations, the NHA represents a broad spectrum of the humanities —scholarly and professional associations; organizations of museums, libraries, historical societies, higher education, and state humanities councils; university-based and independent centers of scholarship; and other organizations concerned with national policies that ***11a** affect scholarship and other humanities activities.[3] All of ***31a** NHA's member organizations and/or their individual members receive federal funds to conduct a wide variety of humanities activities, including research, seminars, development of collections, publication, and public programs. Their interests are directly and immediately affected by vague and viewpoint-based restrictions on the receipt of federal funds.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization in Charlottesville, Virginia, whose sole mission is to safeguard freedoms of speech and press in all their many forms. The Center pursues that mission in varied ways. It has filed briefs amicus curiae in both federal and state courts in matters affecting freedom of expression. It has provided testimony requested by legislative bodies, sponsored national conferences, and taken various steps to enhance public awareness of threats to First Amendment freedoms. The arts are of particular interest to the Center, as they serve both as a form of exposition deserving of protection, and as a means for enlightening the public about the role of free expression ***14a** in society.

## Footnotes

1 This brief amici curiae is filed with the consent of the parties and was authored by the counsel for amici. Only amici contributed to the financial costs of preparing and submitting this brief.

1 Helen C. White, "Our Most Urgent Professional Task," *AAUP Bulletin* 45 (March 1959), 282.

2 ACLS Constituent Societies: African Studies Association; American Academy of Arts and Sciences; American Academy of Religion, American Anthropological Association; American Antiquarian Society; American Association for the Advancement of Slavic Studies; American Comparative Literature Association; American Dialect Society; American Economic Association; American Folklore Society; American Historical Association; American Musicological Society; American Numismatic Society; American Oriental Society; American Philological Association; American Philosophical Association; American Philosophical Society; American Political Science Association; American Psychological Association; American Society for Aesthetics; American Society for Eighteenth-Century Studies; American Society for Legal History; American Society for Theatre Research; American Society of Comparative

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Brooks, Tilden 4/30/2025
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Law; American Society of International Law; American Sociological Association; American Studies Association; Archaeological Institute of America; Association for Asian Studies; Association for Jewish Studies; Association for the Advancement of Baltic Studies; Association of American Geographers; Association of American Law Schools; Bibliographical Society of America; College Art Association; College Forum of the National Council of Teachers of English; Dictionary Society of North America; Economic History Association; German Studies Association; Hispanic Society of America; History of Science Society; Latin American Studies Association; Law and Society Association; Linguistic Society of America; Medieval Academy of America; Metaphysical Society of America; Middle East Studies Association of North America; Modern Language Association of America; National Communication Association; Organization of American Historians; Renaissance Society of America; Sixteenth Century Studies Conference; Society for Cinema Studies; Society for Ethnomusicology; Society for French Historical Studies; Society for the History of Technology; Society of Architectural Historians; Society of Biblical Literature; Society of Dance History Scholars; and Sonneck Society for American Music.

3 Active Members of the National Humanities Alliance: American Academy of Religion; American Anthropological Association; American Association of Museums; American Council of Learned Societies; American Folklore Society; American Historical Association; American Musicological Society; American Philological Association; American Philosophical Association; American Political Science Association; American Society for Aesthetics; American Society for Eighteenth-Century Studies; American Society for Legal History; American Sociological Association; American Studies Association; Archaeological Institute of American; Association for Asian Studies; Association for Documentary Editing; Association for Jewish Studies; Association of American Colleges and Universities; Association of American Geographers; Association of American Law Schools; Association of Research Libraries; Center for Research Libraries; Chicago Historical Society; Coalition for Networked Information; College Art Association; Council of American Overseas Research Centers; Council on Library and Information Resources; Federation of State Humanities Councils; The George Washington University; History of Science Society; Independent Research Libraries Association; Linguistic Society of America; Medieval Academy of America; Middle East Studies Association; Modern Language Association; National Association of Scholars; National Council of Teachers of English; National Humanities Center; National Speech Association; Organization of American Historians; Phi Beta Kappa Society; Renaissance Society of America; Research Libraries Group; Shakespeare Association of American Shelby Cullom Davis Center for Historical Studies, Princeton University; Sixteenth Century Studies Conference; Social Science Research Council; Society for Historical Archaeology; Society for the History of Technology; Society of Biblical Literature; Special Libraries Association; and Virginia Center for the Humanities.

Associate Members of the National Humanities Alliance: African Studies Association; American Association for State and Local History; American Comparative Literature Association; American Dialect Society; American Library Association; American Numismatic Society; American Society for Theater Research; Association of American University Presses; Association of Art Museum Directors; Center for the Humanities, City University of New York, Graduate Center; Center for the Humanities, Wesleyan University; College English Association; Community College Humanities Association; The Council of the Humanities, Princeton University; Doreen B. Townsend Center for Humanities, University of California, Berkeley; The Hastings Center; Institute for Advanced Study; Institute for the Humanities, University of Michigan; Institute for the Medial Humanities, University of Texas Medical Branch, Galveston; Institute of Early American History and Culture, College of William and Mary; International Research and Exchanges Board; Midwest Modern Language Association; Northeast Document Conservation Center; Philological Association of the Pacific Coast; Popular Culture Association; Society for Ethnomusicology; Society of Architectural Historians; Society for Cinema Studies; Society of Christian Ethics; South Central Modern Language Association; and University of California Humanities Research Institute, University of California, Irvine.

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