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# The First Amendment and Content Restrictions in State Film Incentive Programs

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# **THE FIRST AMENDMENT AND CONTENT RESTRICTIONS IN STATE FILM INCENTIVE PROGRAMS**

*Dr. Joel Timmer*

In recent years, many states have offered incentive programs to lure film production and its associated economic benefits—increased jobs, spending, and tourism—to their states. Several of these programs have restrictions that deny incentives based on a film’s content. For example, Texas denies film incentives to projects that have “inappropriate content” or portray “Texas or Texans in a negative way.” This article concludes that these restrictions do not violate the First Amendment. Two key considerations factor into this conclusion: First, in granting subsidies, the government may apply criteria that would be impermissible in a regulatory context. Second, the denial of a subsidy is not the same as the infringement of a right.

## I. INTRODUCTION

Film production yields many economic benefits, including increased jobs and tourism. It should come as no surprise, therefore, that many states have created incentive programs to lure film production to their state. These programs, however, often come with restrictions, such as what type of content may make a film ineligible. For example, Texas may deny support from its incentive programs to projects that have “inappropriate content” or portray “Texas or Texans in a negative way.”<sup>1</sup>

This article addresses the question of whether the denial of film incentives based on a film’s content violates a filmmaker’s First Amendment free-speech right; it concludes it does not. Part II introduces the *Machete* controversy and the Texas film incentive program. Part III provides an overview of film incentive programs’ inception and the benefits they provide states. Part IV examines the Texas film incentive program’s operation and standards—arguably some of the most restrictive state film incentive program standards in the nation.<sup>2</sup> Part V provides a brief overview of First Amendment protections for film. Part VI examines the public forum doctrine and its applicability to state film incentive program restrictions, while Part VII examines the unconstitutional conditions doctrine and its applicability here. Part VIII builds on Parts VI and VII, analyzing the First Amendment principles applicable to government subsidies like film incentives. Part IX examines two cases in which denials of government funding for art—based on government objections to the art—were found to violate the First Amendment. Part X then returns to the *Machete* controversy, delving more deeply into the court’s decision in *Machete’s Chop Shop, Inc.* and a similar case involving the *Machete* sequel, *Machete Kills*. Finally, Part XI concludes that state film incentive provisions that allow film content to be a consideration for subsidy grants, are unlikely to violate the First Amendment.

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1. See TEX. GOV’T CODE ANN. § 485.022(e) (West 2017).

2. See Brice Wallace, *The Screening Process: A Form of Censorship or a Way to Safeguard Taxpayer Money?*, DESERET NEWS (Nov. 16, 2008, 12:00 AM), [http://www.deseretnews.com/article/705263109/The-screening-process-A-form-of-censorship-or-a-way-to-safeguard-taxpayer-money.html? \[http://perma.cc/6V7F-SG27\]](http://www.deseretnews.com/article/705263109/The-screening-process-A-form-of-censorship-or-a-way-to-safeguard-taxpayer-money.html? [http://perma.cc/6V7F-SG27]).

## II. *The Machete Controversy And The Texas State Film Incentive Program*

Beginning as nothing more than a fake trailer, the film *Machete*, and its sequel, *Machete Kills*, stirred up controversy over the use of Texas' film incentive funds to support projects that portray the state in a negative light.<sup>3</sup> This controversy resulted in two court cases challenging a state's ability to deny financial incentives for a film based on its content. The basis for the controversy is best illustrated by the following quote from a character—Texas State Senator McLaughlin—in the 2010 *Machete* film, speaking at a rally about immigrants:

The aliens, the infiltrators, the outsiders, they come right across by light of day or dark of night. They'll bleed us, they're parasites. They'll bleed us until we as a city, a county, a state, a nation are all bled out. Make no mistake: we are at war. Every time an illegal dances across our border it is an act of aggression against this sovereign state, an overt act of terrorism.<sup>4</sup>

The fake *Machete* trailer originally appeared in the 2007 double feature *Grindhouse*,<sup>5</sup> consisting of the films "*Planet Terror*, written and directed by [Robert] Rodriguez, and *Death Proof*, written and directed by [Quentin] Tarantino."<sup>6</sup> Fake film-trailers and commercials accompany the double feature, all meant to simulate and "heighten the experience of exploitation double features of decades past."<sup>7</sup> The

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3. Reeve Hamilton, *Robert Rodriguez Film at Issue in Incentive Debate*, TEXAS TRIBUNE (Sept. 3, 2010, 5:00 AM), <https://www.texastribune.org/2010/09/03/robert-rodriguez-film-at-issue-in-incentive-debate/> [http://perma.cc/3E5U-MDD2].

4. *Machete (2010)—Plot Summary*, IMDB, <http://www.imdb.com/title/tt0985694/synopsis> [http://perma.cc/J5WF-ERA7].

5. Nikki Finke, *Fox Wins Studio War for Robert Rodriguez' 'Machete'; Now His New Filmmaking Home*, DEADLINE (Jan. 24, 2010, 1:58 PM), <http://deadline.com/2010/01/fox-wins-studio-war-for-robert-rodriguez-machete-and-will-be-his-new-filmmaking-home-23299/> [http://perma.cc/VZ4H-BL7Q].

6. Henriette Maria Aschenbrenner, *Two of a Kind—Robert Rodriguez's and Quentin Tarantino's Culturally Intertextual Comment on Film History: The Grindhouse Project*, 33 POST SCRIPT 42, 43 (2014).

7. *Id.*

*Machete* trailer, directed by Rodriguez, kicks off the double feature. The trailer's protagonist, Machete, is a "Mexican day laborer [who] is set up, double-crossed, and left for dead—then starts everyone's worst nightmare."<sup>8</sup> Considered by some to be "the single best thing about" *Grindhouse*, the trailer went on to rack up 1.4 million YouTube views within a couple of years.<sup>9</sup> The trailer also ended up spawning two actual films,<sup>10</sup> as well as controversy over the Texas film incentive program's support for the film.<sup>11</sup>

Rodriguez based the trailer and films' concept on the story of a Mexican national police officer (a *Federale*) "who gets hired to do hatchet jobs in the U.S."<sup>12</sup> Seeking to create a "'70s-style B-movie'"<sup>13</sup> with a Mexican action hero in Charles Bronson or Jean-Claude Van Damme's vein,<sup>14</sup> Rodriguez packed the *Machete* trailer and films with "a relentless onslaught of over-the-top violence, extreme gore, gratuitous nudity and cheap laughs."<sup>15</sup> It is an "example of the genre cheekily labeled 'Mexploitation'"<sup>16</sup> and "a relentless series of action set pieces in which Machete dispatches his opponents using any and all

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8. Finke, *supra* note 5; see also *Machete (2010)—Plot Summary*, *supra* note 4.

9. Finke, *supra* note 5.

10. Aschenbrenner, *supra* note 6 at 43 (explaining that "[t]he films were both shot back to back and were to be shown in one session with the intention to recreate a complete cultural setting in reminiscence of 1960s–1980s movie theaters in which the audience could watch double features of various B-movies").

11. Hamilton, *supra* note 3.

12. Gavin Edwards, *Online Exclusive: Horror Film Directors Dish about Grindhouse Trailers*, ROLLING STONE (April 19, 2007, 11:49 AM), <http://archive.li/4kZTI> [<https://perma.cc/89HH-PVVQ>].

13. Frank Sheck, *Machete: Film Review*, HOLLYWOOD REPORTER (Oct. 14, 2007, 10:04 PM), <http://www.hollywoodreporter.com/review/machete-film-review-29917> [<http://perma.cc/Y73Z-BPD9>].

14. Peter Sciretta, *Grindhouse: Rodriguez to Turn They Call Him Machete into Feature Length Movie*, /FILM (March 12, 2007), <http://www.slashfilm.com/grindhouse-rodriguez-to-turn-they-call-him-machete-into-feature-length-movie/> [<http://perma.cc/NP5C-BCMP>].

15. Sheck, *supra* note 13.

16. *Id.*

sharp objects available, from surgical instruments to the fearsome titular blade.”<sup>17</sup>

With plans to shoot the first *Machete* film in Texas, the film’s production company, Machete Chop Shop (“Chop Shop”), applied for a grant to help finance the film’s production under Texas’ Film Incentive Program.<sup>18</sup> The Texas Film Commission granted Chop Shop preliminary approval for a grant for *Machete*.<sup>19</sup>

Prior to the release of *Grindhouse*, and in response to recent developments, Rodriguez recut the *Machete* trailer to take aim at Arizona and its newly-enacted anti-immigration law.<sup>20</sup> The trailer featured an introduction by the title character saying, “‘This is Machete with a special Cinco de Mayo message . . . to Arizona.’ Mayhem, including shots of angry illegal immigrants rising up in rebellion, followed.”<sup>21</sup> In response to the recut trailer, conservative radio talk show host and accused “conspiracy theorist,” Alex Jones began a campaign against the film.<sup>22</sup> Jones asserted that *Machete* was likely “to trigger racial riots and racial killings in the United States,”<sup>23</sup> and he

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17. *Id.*

18. *Machete Prods., L.L.C. v. Page*, 809 F.3d 281 (5th Cir. 2015).

19. *Id.* Specifically, the commission notified Chop Shop that an initial review concluded that the film fulfilled the Incentive Program’s content requirement, but that this assessment “‘pertain[ed] only to the qualification of the application’ and that ‘[i]f the final content is determined to be in violation of the rules and regulations of the incentive program, the project [would] not be eligible to receive funds’ from the Program.” *Machete’s Chop Shop, Inc. v. Tex. Film Comm’n*, 483 S.W.3d 272, 276 (Tex. Ct. App. 2016) (alteration in original).

20. That law was SB 1070, which made “it a crime for immigrants not to carry their documents.” Jay A. Fernandez & Borys Kit, *How “Machete” Inflames Immigration Debate*, HOLLYWOOD REPORTER (Aug. 26, 2010, 10:40 PM), <http://www.hollywoodreporter.com/news/how-machete-inflames-immigration-debate-27149> [<http://perma.cc/E3GU-48MM>]; Soraya Roberts, *Robert Rodriguez Cuts ‘Illegal’ Trailer for ‘Machete’ to Protest Arizona Immigration Law*, DAILY NEWS (May 6, 2010, 10:39 AM), <http://www.nydailynews.com/entertainment/tv-movies/robert-rodriguez-cuts-illegal-trailer-machete-protest-arizona-immigration-law-article-1.190695> [<https://perma.cc/C3S6-4FXY>].

21. Fernandez & Kit, *supra* note 20.

22. Richard Whittaker, *Is that a Wrap for Incentives?*, AUSTIN CHRONICLE (Jan. 28, 2011), <https://www.austinchronicle.com/screens/2011-01-28/is-that-a-wrap-for-incentives> [<https://perma.cc/3D4B-5RQP>].

23. Hamilton, *supra* note 3.

denounced the film as the “equivalent of a Hispanic Birth of a Nation” for inciting “racial jihad.”<sup>24</sup> When it came to light that the commission had given preliminary approval to the film’s grant application, and that it had assisted filmmakers with location access,<sup>25</sup> Jones also began a campaign to eliminate state funding for the film.<sup>26</sup> This resulted in “a wave of letters to the Governor’s Office and the Texas Film Commission, savaging [*Machete*] as a call to a race war.”<sup>27</sup>

In the film, Danny Trejo plays “Machete,” the Federale named “for his deadly skill” with the device.<sup>28</sup> Towards the beginning of the film, Machete defies his superior’s direct order and attempts to free a kidnapping victim from a drug lord, only to learn that the drug lord is working with his superior.<sup>29</sup> Disappointed that Machete will not take bribe money to look the other way, his superior has Machete’s wife killed in front of him and informs Machete that his daughter has suffered a similar fate.<sup>30</sup> Machete is left to die,<sup>31</sup> but he survives, ending up as a day laborer and vigilante in Texas.<sup>32</sup> There, a businessman hires

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24. *Id.*

25. *Racist Film ‘Machete’ Produced with Taxpayer Funds*, INFOWARS (May 14, 2010), <https://www.infowars.com/racist-film-machete-produced-with-taxpayer-funds> [<https://perma.cc/4352-FLWX>].

26. Whittaker, *supra* note 22.

27. *Id.* (explaining that “[o]ver the course of six months, the film commission received around 500 letters”); see Alexander Zaitchik, *Does Robert Rodriguez’s ‘Machete’ Evoke ‘Race War’?*, S. POVERTY LAW CTR. (Sept. 10, 2010), <https://www.splcenter.org/hatewatch/2010/09/10/does-robert-rodriguez%E2%80%99s-%E2%80%98machete%E2%80%99-advocate-%E2%80%98race-war%E2%80%99> [<http://perma.cc/6GD4-FWVH>].

28. *Action Comedy ‘Machete’ Explores Illegal Immigration Controversy*, VOA (Sept. 6, 2010, 8:00 PM), <https://www.voanews.com/a/action-comedy-machete-explores-illegal-immigration-controversy-102338284/164770.html> [<https://perma.cc/9F65-J6SS>]; Nicole Kinsley, *Texas Film Commission Permitted to Slice and Dice Financial Incentives to Machete Films*, TRADEMARK AND COPYRIGHT LAW, (Feb. 29, 2016) <http://www.trademarkandcopyrightlawblog.com/2016/02/texas-film-commission-permitted-to-slice-and-dice-financial-incentives-to-machete-films/> [<http://perma.cc/6Q3M-485B>].

29. *Machete (2010)—Plot Summary*, *supra* note 4.

30. *Id.*

31. *Id.*

32. *See id.*

him to assassinate a Texas senator using inflammatory rhetoric while campaigning against illegal immigrants.<sup>33</sup> Before carrying out the plot, Machete learns he has been double-crossed and is shot and wounded by one of the businessman's aides.<sup>34</sup> The assassination turns out to be a ploy by the businessman and senator who are working together;<sup>35</sup> their goal is to use Machete's failed assassination attempt to stir "anti-immigrant sympathies among Texas voters."<sup>36</sup> Here is where the film's tagline—"They just fucked with the wrong Mexican"<sup>37</sup>—comes into play. Seeking revenge, Machete "initiates an out-and-out killing spree, recruiting an angry mob along the way, whose leader decries 'We didn't cross the border, the border crossed us' in downtown Austin."<sup>38</sup> With the assistance of "an army of illegal immigrants" he has gathered, Machete seeks revenge against the men who double-crossed him.<sup>39</sup> Ultimately, Machete becomes a hero for oppressed immigrants.<sup>40</sup>

Alex Jones, in criticizing the film's potential to incite "violence" and "riots," describes its ending this way:

By the end, the vicious revenge killer [Machete] is cast in the holy light of a martyr; his likeness is placed on religious candles as the Virgin Mary or Jesus Christ would be. Vulnerable illegal immigrants, seeking to evade crude Militia Men characters as they cross the border, pray to Machete for protection, in the hopes [that] he will wipe out their enemies. Machete becomes a folk hero of

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33. Alex Jones and Aaron Dykes, *New Film 'Machete' Evokes Race War*, INFOWARS (May 9, 2010), <https://www.infowars.com/new-film-machete-to-provoke-race-war/> [http://perma.cc/9TA9-ZYDZ]; Sheck, *supra* note 13.

34. Bruce Watson, *'Machete' Trailer Takes a Smart Slash at Arizona's Immigration Law*, AOL (May 8, 2010, 10:00 AM), <https://www.aol.com/2010/05/08/machete-movie-trailer-smart-slash-arizona-immigration-law/> [http://perma.cc/6BU2-ME96].

35. Hamilton, *supra* note 3.

36. *Id.*

37. See Finke, *supra* note 5.

38. Jones & Dykes, *New Film 'Machete' Evokes Race War*, *supra* note 33.

39. Watson, *supra* note 34.

40. See *Machete (2010)—Plot Summary*, *supra* note 4.

sorts, like a Father Hidalgo figure,<sup>41</sup> and his iconography carries over into the traditional use of the machete as a symbol of peasant uprisings.<sup>42</sup>

Following the political controversy, the commission departed from its favorable preliminary determination and instead “denied Chop Shop’s application for a grant due to ‘inappropriate content or content that portrays Texas or Texans in a negative fashion.’”<sup>43</sup> Yet, there had been no significant changes to the script from the time of the commission’s preliminary approval to the film’s completion.<sup>44</sup> Chop Shop therefore filed suit, alleging a violation of its Fourteenth Amendment due process rights and contesting the commission’s authority.<sup>45</sup> The case, *Machete’s Chop Shop, Inc. v. Texas Film Commission*, raised the question of whether a state may deny a filmmaker incentives because the state objects to the content of a filmmaker’s production.<sup>46</sup> After all, the Supreme Court has stated that, “the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.”<sup>47</sup>

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41. Father Hidalgo was a leader of the Mexican War of Independence. See *Miguel Hidalgo y Costilla*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Miguel\\_Hidalgo\\_y\\_Costilla](https://en.wikipedia.org/wiki/Miguel_Hidalgo_y_Costilla) [<http://perma.cc/3MKL-5DPN>].

42. Alex Jones & Aaron Dykes, *Leaked ‘Machete’ Script Confirms Race War Plot*, INFOWARS (May 13, 2010), <https://www.infowars.com/leaked-machete-script-confirms-race-war-plot/> [<http://perma.cc/YFD9-TR5Z>] (emphasis omitted).

43. *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 286 (5th Cir. 2015).

44. Kinsley, *supra* note 28.

45. *Machete’s Chop Shop, Inc.*, 483 S.W.3d at 277.

46. See *id.*

47. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

### III. STATE FILM INCENTIVE PROGRAMS

#### A. *The Inception of Film Incentive Programs*

In 1992, Louisiana became “the first state to adopt state tax incentives for film and television production.”<sup>48</sup> Once Louisiana’s program proved successful in encouraging strong film and television production growth within the state, other states responded by offering their own incentives.<sup>49</sup> As a result, “[b]y 2009, 44 U.S. states, Puerto Rico, and Washington D.C. offered some form of film and television production incentives.”<sup>50</sup> The basic theory behind these incentive programs is that states themselves benefit economically from bringing production to their locales.<sup>51</sup> Specifically, “film production[s] . . . create new jobs and boost sales at area businesses, as companies rush to fill positions, purchase equipment and acquire other resources to keep filming on schedule. Benefits . . . then spread, as spillover effects of the initial ‘shock’ multiply through the local economy.”<sup>52</sup>

#### B. *State Subsidies*

According to the Council of State Governments, the most common types of state film and television production subsidies are:

- “Tax credits [which] reduce income tax liability. To qualify, companies must generally commit to some minimum amount of in-state production expenditures. The credit is usually offered as a percentage of these dollars.”<sup>53</sup>

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48. *State Film Production Incentives and Programs*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 13, 2016), <http://www.ncsl.org/research/fiscal-policy/state-film-production-incentives-and-programs.aspx> [<https://perma.cc/AW8W-UVCV>].

49. *Id.*; see, e.g., Bryn Elise Sandberg, *Film and TV Tax Incentives: A State-by-State Guide*, HOLLYWOOD REPORTER (Apr. 21, 2016, 10:00 AM), <http://www.hollywoodreporter.com/news/film-tv-tax-incentives-a-885699> [<https://perma.cc/AW8W-UVCV>].

50. *State Film Production Incentives and Programs*, *supra* note 48.

51. Zach Huitink, *An Update on State Film Industry Incentives*, THE COUNCIL OF STATE GOV'TS (June 15, 2011, 12:02 PM), <http://knowledgecenter.csg.org/kc/content/update-state-film-industry-incentives> [<https://perma.cc/K5R8-H9V6>].

52. *Id.*

53. *Id.*

- “Cash rebates . . . for qualified production expenses.”<sup>54</sup>
- Cash grants, “generally awarded to offset either a) a percentage of the dollar value of qualified production expenditures, or b) all the associated sales and use tax.”<sup>55</sup>
- Other assistance, including “lodging exemptions, free access to filming locations, and low-cost use of government services (such as police officers to direct traffic around an outdoor set).”<sup>56</sup>

Because these incentive programs can help film-producers save significantly on production costs, they are highly appealing.<sup>57</sup>

### C. *Benefits to the State*

States can benefit in at least four ways from attracting production to their locales.<sup>58</sup> The first benefit is the attraction of “out-of-state investment” to the state. Film production requires filmmakers to purchase “many goods and services, such as hardware, lumber, catering, and security, which are provided by state vendors and suppliers.”<sup>59</sup> Additionally, production personnel may also boost economic activity in a locale by spending money on lodging, dining, and entertainment. In turn, the state collects taxes on all of these expenditures.<sup>60</sup> The second benefit is the creation of jobs for state residents. “The majority of film production work is performed by a wide array of employees such as technicians, truck drivers, caterers, construction crews, architects, and attorneys. 70 to 80 percent of those film production workers are hired locally.”<sup>61</sup> The third benefit is the stimulation of “film-related state

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54. *Id.*

55. *Id.*

56. *Id.*

57. Scott Ahmad, *Can the First Amendment Stop Content Restriction in State Film Incentive Programs?*, 16 UCLA ENT. L. REV. 395, 403 (2009).

58. *Id.*

59. *Id.*

60. *Id.*(citations omitted).

61. *Id.*(citations omitted).

tourism,”—tourists traveling to visit locations featured in a film.<sup>62</sup> The fourth benefit is that filmmakers may “invest significant resources to develop communities in order to create the right look for a film. In that process, they make many improvements, including building repair, road pavement, and garden planting. The improvements remain long after the filming ends.”<sup>63</sup>

A study on the impact of the Texas Incentive Program found the following benefits for the State of Texas:

Based on the \$58.1 million paid and encumbered as of December 31, 2010, total economic benefits from the moving image industry incentive program were approximately \$1.1 billion in direct, indirect, and induced economic activity in Texas from 2007 through 2010. This can be interpreted another way: for every dollar of the \$58.1 million the Texas Film Commission had paid or encumbered as of December 31, 2010, \$18.72 in private sector economic activity had been generated within the State of Texas.<sup>64</sup>

Numbers provided by the State of Texas seem to confirm the incentive program’s benefits:

[T]he [Texas] comptroller’s office reported that in 2005, before the incentives took effect, there were 51 film and TV projects in Texas, spending a total of \$155 million. By 2009 [after the incentives took effect in 2007],<sup>65</sup> there were 244 projects worth \$249.7 million.<sup>66</sup>

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62. *Id.* at 403–04 (citations omitted) (observing that, for example, “65,000 tourists a year visit the cornfield in Iowa where the 1989 movie *Field of Dreams* was set”).

63. *Id.* at 404 (citations omitted) (observing that, for example, “[a]ccording to the National Governors Association, the film industry has been the key to economic recovery in Louisiana after the devastation caused by Hurricane Katrina in 2005”).

64. James E. Jarrett & Bruce Kellison, *Texas Moving Image Industry Incentive Program: The Economic Benefits from Incentives*, (April 2011), <https://repositories.lib.utexas.edu/bitstream/handle/2152/14734/bbr-2011-texas-film-incentives.pdf?sequence=2&isAllowed=y> [<https://perma.cc/C9BT-326V>].

65. *History | Texas Film Commission*, TEX. FILM COMM’N, <https://gov.texas.gov/film/page/history> [<https://perma.cc/PJF4-F72P>].

66. Richard Whittaker, *Is that a Wrap for Incentives?*, AUSTIN CHRONICLE (Jan. 28, 2011), <https://www.austinchronicle.com/screens/2011-01-28/is-that-a-wrap-for-incentives> [<https://perma.cc/3D4B-5RQP>].

In total, projects approved for incentives created 27,057 jobs, including 3,790 full-time positions.<sup>67</sup>

The comptroller's report went on to estimate "that eligible projects have brought \$600 million in economic activity to Texas."<sup>68</sup>

While several studies have found incentive programs beneficial, others have reached a contrary conclusion. Some studies have found that incentive programs do not provide meaningful economic benefits to states that offer them.<sup>69</sup> For example, critics argue that subsidies and credits cost states and "reward producers for projects they might have undertaken anyway."<sup>70</sup> Many production-related jobs "are temporary and part-time," and non-residents often fill a large portion of them—especially the highest-paid jobs.<sup>71</sup> Critics also suggest that "[f]ilm subsidies don't pay for themselves, so state taxpayers bear the burden."<sup>72</sup> Competition among states to attract productions may also force states to "give movie-makers generous subsidies *indefinitely* in order to 'stay in the game.'"<sup>73</sup>

The popularity of state incentive programs is in decline. By "2016, only 37 states . . . maintain[ed] film incentive programs [compared to 44 in 2009], and several of [those] states . . . tighten[ed] the requirements for qualifying expenses and reel[ed]-in per-project and annual program caps."<sup>74</sup> Studies suggest these incentive programs'

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67. *Id.*

68. *Id.*

69. See, e.g., Michael Thom, *Lights, Camera, but No Action? Tax and Economic Development Lessons from State Motion Picture Incentive Programs*, THE AM. REVIEW OF PUB. ADMIN. (June 5, 2016), <http://journals.sagepub.com/doi/abs/10.1177/0275074016651958> [<https://perma.cc/BWK7-96ZH>]; Robert Tannenwald, *State Film Subsidies: Not Much Bang for too Many Bucks*, CTR. ON BUDGET & POLICY PRIORITIES, <http://www.cbpp.org/research/state-film-subsidies-not-much-bang-for-too-many-bucks?fa=view&id=3326> [<http://perma.cc/S2VY-4VZD>].

70. Tannenwald, *supra* note 69.

71. *Id.*

72. *Id.*

73. *Id.*

74. *State Film Production Incentives and Programs*, *supra* note 48.

decline is due to their costliness, inability to induce overall economic growth, and “failure to raise tax revenue.”<sup>75</sup>

In addition to fiscal concerns, Texas policymakers have also expressed content concerns about some of the films receiving state support.<sup>76</sup> *Machete*, discussed *infra* in more depth, is not the only film to have drawn such concern. *Glory Road*, a Texas-filmed 2006 sports drama tells “the inspirational tale of the [1966] Texas Western Miners, the first all-black college basketball team to win a national championship.”<sup>77</sup> The film raised concern among Texas legislators and led to content-based considerations being added to the Texas Incentive Program.<sup>78</sup>

Although *Glory Road* is based on actual events, the filmmakers took poetic license in portraying the story.<sup>79</sup> A scene depicting “a racially charged incident” during a college basketball game caused the most concern.<sup>80</sup> Portrayed “as a factual event,” the scene shows a white Texas A&M (Aggies) team “thr[owing] epitaphs disparaging” the opponent team’s black players.<sup>81</sup> The scene also depicts the “Aggie fans as racist.”<sup>82</sup> Texas A&M, having not been involved in the actual

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75. William Luther, *Movie Production Incentives: Blockbuster Support for Lackluster Policy*, TAX FOUND. (Jan. 2010), <https://files.taxfoundation.org/legacy/docs/sr173.pdf> [<https://perma.cc/936X-VP4B>].

76. Charles Ealy & Chris Garcia, *‘Waco’ Gets the Red Light from Texas Film Commission*, AUSTIN AM.-STATESMAN (May 25, 2009), <http://www.culteducation.com/group/1220-waco-davidians/24339-waco-gets-the-red-light-from-texas-film-commission.html> [<http://perma.cc/49GR-W7SL>].

77. Hilary Hylton, *Filming Texas in a Good Light*, TIME (July 2, 2007), <http://content.time.com/time/printout/0,8816,1639352,00.html> [<https://perma.cc/XW9M-7HWU>]; Ealy & Garcia, *supra* note 76.

78. *Id.*

79. Katy Vine, *This Film Is Not Yet Rated*, TEX. MONTHLY (July 2009), <http://www.texasmonthly.com/articles/this-film-is-not-yet-rated/> [<http://perma.cc/9LY5-RWLF>].

80. *Id.*

81. *Id.*

82. Ealy & Garcia, *supra* note 76; Hylton, *supra* note 77.

incident, took offense and objected to being “disparaged” in this manner.<sup>83</sup>

It was around the time of the *Glory Road* controversy that the Texas Legislature began considering the creation of a state film incentive program.<sup>84</sup> Initially, the proposal for the program “had no content provision, except for [a prohibition on state funding of] pornography.”<sup>85</sup> Following the *Glory Road* controversy, State Senate Finance Committee Chairman Steve Ogden (R-Bryan)—“whose district includes Texas A&M University”—added a provision to the bill preventing incentives from being granted to films depicting Texas or Texans in a negative light.<sup>86</sup>

The Motion Picture Association of America (MPAA) opposed the provision on First Amendment grounds and urged Texas Governor Rick Perry to veto the bill, stating:

This provision is a direct indictment of the creative process and American values of free expression that are fundamental to our democracy. . . . Motion pictures made in the United States are the most popular form of entertainment worldwide because filmmakers are free to tell stories on film without fear of government censorship. Such restrictions . . . burden protected speech and constitute prior restraint and government intervention, which the U.S. Supreme Court has ruled many times is impermissible.<sup>87</sup>

Nevertheless, the provision became law.<sup>88</sup>

Texas is not the only state to consider the content of film and television projects seeking state funding.<sup>89</sup> In Wisconsin, productions

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83. Vine, *supra* note 79.

84. *Id.*

85. *Id.*

86. Hylton, *supra* note 77; *see also* Ealy & Garcia, *supra* note 76.

87. Brice Wallace, *The Screening Process: A Form of Censorship or a Way to Safeguard Taxpayer Money?*, DESERET NEWS (Nov. 16, 2008, 12:00 AM), <http://www.deseretnews.com/article/705263109/The-screening-process-A-form-of-censorship-or-a-way-to-safeguard-taxpayer-money.html> [<http://perma.cc/6V7F-SG27>] (quotation omitted).

88. TEX. GOV'T CODE ANN. § 485.022(e) (West 2017).

do not qualify for incentives if they “will hurt the reputation of the state.”<sup>90</sup> Similarly, a production that “portrays West Virginia in a ‘significantly derogatory manner’ is ineligible for West Virginia film credits.”<sup>91</sup> Pennsylvania and Kentucky only provide support for productions that positively affect state tourism.<sup>92</sup> Other states impose similar restrictions.<sup>93</sup>

#### IV. THE TEXAS FILM INCENTIVE PROGRAM: OPERATION AND STANDARDS

The Texas Film Commission (“Commission”)—a division of the Texas Music, Film, Television and Multimedia Office—administers the Texas film incentive program, formally called the Moving Image Industry Incentive Program (“Incentive Program”).<sup>94</sup> The Incentive Program provides filmmakers various types of assistance, including state-funded financial grants.<sup>95</sup> For a grant to be approved, the Commission “must consider at a minimum: (1) the current and likely future effect a moving image project will have on employment, tourism,

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89. See Hollis L. Hyans & Open Weaver Banks, *Should Filmmakers Be Content to Have Taxing Authorities Judge Their Content?*, MORRISON & FOERSTER NEWS 1, 2 (Winter 2012), <http://media.mofo.com/files/uploads/Images/120117-State-Local-Tax-Insights-Winter-2012.pdf> [perma.cc/2GSR-J9CX].

90. *Id.*

91. *Id.* (citing W. VA. CODE § 11-13X-3(b)(8)(F) (2016)).

92. *Id.* (citing KY. REV. STAT. ANN. § 148.546(9) (West 2015); see *Film Tax Credit Program Guidelines*, PA. DEP’T OF CMTY. & ECON. DEV. (Oct. 2009), [http://filminpa.com/wp-content/uploads/2009/07/Film-Tax-Credit\\_Guidelines-09.pdf](http://filminpa.com/wp-content/uploads/2009/07/Film-Tax-Credit_Guidelines-09.pdf) [https://perma.cc/57YX-BF8M] (providing that “[t]he Pennsylvania Film Office may consider,” among other criteria, “whether the project will tend to foster a positive image of Pennsylvania”).

93. See Ahmad, *supra* note 57, at 418 (2009) (citations omitted) (identifying four categories of content restrictions in state film incentive programs: “(1) categorical; (2) negative image; (3) implicit; and (4) carte blanche”). Ahmad also provides a comprehensive listing of the content restrictions found in the various state incentive programs. See *id.* at 410–19.

94. See *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 285 (5th Cir. 2015) (explaining that the Music, Film, Television and Multimedia Office assigned Incentive Program administration to one of its divisions, the Texas Film Commission).

95. See *Texas Moving Image Industry Incentive Program*, TEX. FILM COMM’N, <https://gov.texas.gov/film/page/miip> [http://perma.cc/88HL-FCBU].

and economic activity in [Texas]; and (2) the amount of a production company's in-state spending for a moving image project."<sup>96</sup> The Texas Administrative Code provides that "[n]ot every project will qualify for a grant," and that the Commission "is not required to act on any grant application."<sup>97</sup> In considering applications, "the Commission will review the [production's content] and advise the potential Applicant on whether the content will preclude the project from receiving a grant."<sup>98</sup> The Commission "may deny an application or eventual payment on an application because of [a project's] inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the Commission."<sup>99</sup> Furthermore, "[i]n determining whether to act on or deny [a grant] application, the Commission shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas."<sup>100</sup>

Finally, "the Commission will review the final content . . . to determine if any substantial changes occurred during production" which would lead to the grant's denial.<sup>101</sup> If the Commission denies an

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96. TEX. GOV'T CODE ANN. § 485.024(a) (West 2017). The Commission's rules require it to consider "the following criteria to assess, in the aggregate," the project's potential economic impact on the State of Texas:

- (A) The financial viability of the Applicant and the likelihood of successful project execution and planned spending in the State of Texas;
- (B) Proposed spending on existing state production infrastructure (such as soundstages and industry vendors);
- (C) The number of Texas jobs estimated to be created by the project;
- (D) The ability to promote Texas as a tourist destination through the conduct of the project and planned expenditure of funds;
- (E) The magnitude of estimated expenditures in Texas; and
- (F) Whether the project will be directed or produced by an individual who is a Texas Resident (where the term 'produced by' is intended to encompass a non-honorary producer with direct involvement in the day to day production of the project, but above the level of line producer).

13 TEX. ADMIN. CODE §121.9(c)(3) (2017).

97. 1 TEX. ADMIN. CODE § 121.4(b) (2017).

98. *Id.*

99. *Id.*

100. *Id.*

101. 1 TEX. ADMIN. CODE § 121.4(c) (2017).

application, it will notify the applicant of the denial and “whether the denial is based on failure to meet the minimum program requirements, insufficient economic impact, or inappropriate content.”<sup>102</sup> “Neither the approval of the Qualifying Application nor any award of funds shall obligate the Commission in any way to make any additional award of funds.”<sup>103</sup> Additionally, “all funding decisions made by the Commission are final and are not subject to appeal.”<sup>104</sup>

With provisions such as these, Texas’ Incentive Program is perhaps the most restrictive among all state incentive programs.<sup>105</sup> Texas statutes require a project script to be reviewed twice: a preliminary review before production begins,<sup>106</sup> and a final review once production is complete.<sup>107</sup> Notably, “Texas has the strongest script-review component because it is the only state with the requirement in statute.”<sup>108</sup> Also, by withholding incentives until after the Commission completes its second review, Texas differs from many other states which typically pay incentives upfront to filmmakers.<sup>109</sup> For these reasons, filmmakers denied the incentives have challenged the Incentive Program’s constitutionality in court.<sup>110</sup> Although the cases dealt with Texas’ Incentive Program, their reasoning and conclusions, as discussed below, could also apply to other states’ programs. Before analyzing

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102. 13 TEX. ADMIN. CODE § 121.9(c)(5) (2017).

103. *Id.*

104. 13 TEX. ADMIN. CODE § 121.9(c)(6) (2017).

105. See Brice Wallace, *The Screening Process: A Form of Censorship or a Way to Safeguard Taxpayer Money?*, DESERET NEWS (Nov. 16, 2008, 12:00 AM), [http://www.deseretnews.com/article/705263109/The-screening-process-A-form-of-censorship-or-a-way-to-safeguard-taxpayer-money.html? \[http://perma.cc/6V7F-SG27\]](http://www.deseretnews.com/article/705263109/The-screening-process-A-form-of-censorship-or-a-way-to-safeguard-taxpayer-money.html? [http://perma.cc/6V7F-SG27]).

106. 13 TEX. ADMIN. CODE § 121.9(c) (2017).

107. See 1 TEX. ADMIN. CODE § 121.4(b) (2017); TEX. GOV’T CODE ANN. § 485.022(f) (West 2017).

108. Wallace, *supra* note 105.

109. Reeve Hamilton, *Robert Rodriguez Film at Issue in Incentive Debate*, TEXAS TRIBUNE (Sept. 3, 2010, 5:00 AM), [https://www.texastribune.org/2010/09/03/robert-rodriguez-film-at-issue-in-incentive-debate/ \[http://perma.cc/3E5U-MDD2\]](https://www.texastribune.org/2010/09/03/robert-rodriguez-film-at-issue-in-incentive-debate/ [http://perma.cc/3E5U-MDD2]).

110. *Machete’s Chop Shop, Inc., v. Tex. Film Comm’n*, 483 S.W.3d 272, 276 (Tex. Ct. App. 2016); *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 286 (5th Cir. 2015).

whether such provisions violate the First Amendment, however, this article first outlines the relevant First Amendment doctrines and precedents.

## V. FIRST AMENDMENT PROTECTION FOR FILM: A BRIEF OVERVIEW

In *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court noted:

[M]otion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.<sup>111</sup>

The Court went on to hold that the First Amendment protects motion pictures.<sup>112</sup> Such protection prohibits the government from censoring or “restrict[ing] expression because of its message, ideas, subject matter, or content.”<sup>113</sup> As a result, “[d]iscrimination against speech because of its message is presumed to be unconstitutional.”<sup>114</sup>

Does this protection prohibit states from denying incentives to filmmakers because of an objection to their film’s content? To help answer that question, the following two parts examine two relevant First Amendment doctrines: public forum and unconstitutional conditions.

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111. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

112. *Id.*

113. Alicia M. Choi, *National Endowment for the Arts v. Finley: A Dispute over the “Decency and Respect” Provision*, 32 AKRON L. REV. 327, 336 (1999); see also U.S. CONST. amend. I; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

114. *Rosenberger* 515 U.S. at 828 (citing *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 641–643 (1994)).

## VI. THE PUBLIC FORUM DOCTRINE

### A. *Classifications of Public Fora*

The Supreme Court uses forum analysis “to determine when a governmental entity, in regulating property in its charge, may place limitations on free speech.”<sup>115</sup> There are three “types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic [or limited] forum.”<sup>116</sup> In each forum, certain standards limit government restrictions on free speech.<sup>117</sup>

A traditional public forum is one, like a street or park, that “‘by long tradition or by government fiat’ . . . has been ‘devoted to assembly and debate.’”<sup>118</sup> Courts apply strict scrutiny when the government seeks to restrict speech in such a forum.<sup>119</sup> The government must show that the restriction is necessary to serve a compelling government interest and is narrowly tailored to serve that interest.<sup>120</sup>

Next, a designated public forum is one the government “‘intentionally open[s] . . . for public discourse.’”<sup>121</sup> The government may allow “‘for expressive activity by part or all of the public.’”<sup>122</sup> However, if the government seeks to restrict speech in this forum, courts apply strict scrutiny, just as with a traditional public forum.<sup>123</sup>

Finally, a nonpublic or limited public forum is one the government opens “‘limited to use by certain groups or dedicated solely to the discussion of certain subjects.’”<sup>124</sup> Here, the government may impose

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115. *Christian Legal Soc’y Chapter v. Martinez*, 561 U.S. 661, 679 (2010).

116. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

117. *Id.* at 800.

118. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 667 (1988) (quotation omitted).

119. *Cornelius*, 473 U.S. at 800.

120. *Id.*

121. *Id.* (citation omitted).

122. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

123. *Id.* at 678.

124. *Christian Legal Soc’y*, 561 U.S. at 679 n.11 (citation omitted).

restrictions provided “the restrictions are ‘reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.’”<sup>125</sup> Furthermore, restrictions must be “reasonable in light of the purpose served by the forum.”<sup>126</sup> Thus, speech restrictions in a limited public forum are valid, so long as they are “reasonable and viewpoint-neutral.”<sup>127</sup>

Although forums often consist of spaces where speakers may gather to address others, not all forums involve physical property.<sup>128</sup> Speakers may, for instance, “seek access to some government-controlled ‘channel[s] of communication.’”<sup>129</sup> When determining the scope of a forum, the Court has held that the “focus [is] on the precise ‘access sought by the speaker.’”<sup>130</sup> Thus, “any government-controlled means of communication can qualify” as a forum, including “a charity drive, a candidate debate, an internal mail system, and even the expenditure of money to support private speech.”<sup>131</sup> The fact that “[a] public forum can be created by money, not just real estate”<sup>132</sup> is significant to state film incentive programs, as discussed *infra*.

## B. Cases Involving Government Funding of Private Speech and Forum Creation

### 1. Rosenberger v. Rector and Visitors of the University of Virginia

*Rosenberger v. Rector and Visitors of the University of Virginia* provides an example of a public forum created by the government’s

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125. *Cornelius*, 473 U.S. at 800 (alteration in original).

126. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

127. *Christian Legal Soc’y*, 561 U.S. at 679 n.11 (citation omitted).

128. Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN’S L. REV. 107, 119–120 (2008).

129. *Id.* at 119 (quoting *Cornelius*, 473 U.S. at 801).

130. *Id.* (quoting *Cornelius*, 473 U.S. at 801).

131. *Id.* at 120 (citations omitted).

132. *Finley v. Nat’l Endowment for the Arts*, 100 F.3d 671, 686 (9th Cir. 1996) (Kleinfeld, J., dissenting) (discussing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)).

disbursement of funds to certain groups.<sup>133</sup> In *Rosenberger*, the University of Virginia provided reimbursement funds to certain student groups for the printing of their publications.<sup>134</sup> These funds were intended “to support a broad range of extracurricular student activities . . . ‘related to the educational purposes of the University.’”<sup>135</sup> However, the university denied fund payments to student groups engaged in religious activities.<sup>136</sup> The case involved a constitutional challenge to this denial.<sup>137</sup> The Supreme Court found that the government’s purpose for providing these payments was “to encourage a diversity of views from private speakers.”<sup>138</sup> As a result, it created a limited public forum.<sup>139</sup> Even though the payments were made from a fund that was “a forum more in a metaphysical than in a spatial or geographic sense, . . . the same principles [were] applicable.”<sup>140</sup> Thus, the Court held that the university’s denial of funding to religious groups constituted impermissible viewpoint-discrimination and, therefore, violated the First Amendment.<sup>141</sup>

## 2. National Endowment of the Arts v. Finley

Not all government funding of private speech creates a forum, however.<sup>142</sup> When, unlike in *Rosenberger*, the government funds private speech for a purpose other than encouraging viewpoint diversity, courts have declined to apply the public forum doctrine.<sup>143</sup> For

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133. See generally *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

134. *Id.* at 822–23.

135. *Id.* at 824.

136. *Id.* at 822–23.

137. *Id.*

138. *Id.* at 834.

139. *Id.* at 830.

140. *Id.*

141. *Id.* at 837.

142. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 569 (1998).

143. See generally *id.*

example, in *National Endowment of the Arts v. Finley*, the Court considered the constitutionality of a statutory provision mandating that the National Endowment for the Arts (“NEA”) use certain criteria in assessing applications for government grants.<sup>144</sup> The provision specified that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>145</sup>

Congress enacted the above provision in response to public concern that arose in 1989 over the NEA’s funding of two controversial works.<sup>146</sup> The first work, entitled “*The Perfect Moment*,” was “a 1989 retrospective of photographer Robert Mapplethorpe’s work” that “included homoerotic photographs that several Members of Congress condemned as pornographic.”<sup>147</sup> To fund the project, the University of Pennsylvania’s Institute of Contemporary Art used \$30,000 of its NEA-awarded visual arts grant.<sup>148</sup> The second controversial piece of art, Andres Serrano’s “*Piss Christ*”—“a photograph of a crucifix immersed in urine”—was also funded by an NEA-supported organization’s grant.<sup>149</sup>

In 1990, to address the concerns these controversies raised, Congress amended the NEA provision to provide that “no NEA funds ‘may be used to promote, disseminate, or produce materials, which in the judgment of [the NEA] may be considered obscene.’”<sup>150</sup> Congress also adopted “[section] 954(d)(1), which directs the [NEA] Chairperson, in establishing procedures to judge the artistic merit of grant applications, ‘to tak[e] into consideration general standards of decency

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144. *Id.* at 572.

145. *Id.* (quoting 20 U.S.C. § 954(d)(1) (1990)).

146. *Id.* at 574 (citing 135 CONG. REC. 22372).

147. *Id.* (citing 135 CONG. REC. 22372).

148. *Id.* (citing 135 CONG. REC. 22372).

149. *Id.* (citing 135 CONG. REC. 22372).

150. *Id.* at 575 (citing Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 701, 738–42 (1989)).

and respect for the diverse beliefs and values of the American public.”<sup>151</sup>

*National Endowment of the Arts v. Finley* involved four artists denied NEA grants in accordance with the new standards.<sup>152</sup> Joined by the National Association of Artists’ Organizations, the artists brought a facial challenge to section 954(d)(1), calling it “void for vagueness and impermissibly viewpoint based.”<sup>153</sup> On appeal to the Supreme Court, after the district court and court of appeals both found the provision to violate the First Amendment,<sup>154</sup> respondents argued that the provision amounts to “viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency.”<sup>155</sup> In his dissent, Justice Souter stated:

The NEA, like the student activities fund in *Rosenberger*, is a subsidy scheme created to encourage expression of a diversity of views from private speakers. . . . Given this congressional choice to sustain freedom of expression, *Rosenberger* teaches that the First Amendment forbids decisions based on viewpoint popularity. So long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their “freedom of thought, imagination, and inquiry” to defying our tastes, our beliefs, or our values. It may not use the NEA’s purse to “suppres[s] . . . dangerous ideas.”<sup>156</sup>

The *Finley* majority, however, disagreed with Justice Souter on this point and determined that *Rosenberger* did not apply.<sup>157</sup> Instead, it held that the NEA’s disbursements of funds required the organization to

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151. *Id.* at 577 (citing 20 U.S.C. § 954(d)(1) (1990)).

152. *Id.* at 569.

153. *Id.*

154. *Id.* at 578.

155. *Id.* at 580.

156. *Id.* at 613–14 (Souter, J., dissenting) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

157. *Id.* at 586.

make “esthetic judgments” in applying its “inherently content-based ‘excellence’ threshold for NEA support.”<sup>158</sup> This threshold, the Court noted, distinguished *Finley*

from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were “related to the educational purpose of the University”—and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to “all newspapers and other periodical publications.”<sup>159</sup>

Furthermore, the Court noted, NEA grants are limited, requiring the NEA to fund only “the worthiest projects submitted for grants.”<sup>160</sup> The Court made clear, however, that it was not the scarcity of NEA funding that distinguished the case from *Rosenberger*, but “the competitive process according to which the grants are allocated.”<sup>161</sup> This process required NEA panelists to make subjective decisions about which projects “deserve funding compared to the proposals of other grant seekers.”<sup>162</sup> As the Court saw it, “[i]n the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately ‘encourage a diversity of views from private speakers.’”<sup>163</sup>

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158. *Id.*

159. *Id.* (citations and quotations omitted).

160. David Hungerford, Note, *The Fallacy of Finley: Public Fora, Viewpoint Discrimination, and the NEA*, 33 U.C. DAVIS L. REV. 249, 276 (1999) (citing *Finley v. Nat’l Endowment for the Arts*, 795 F. Supp. 1457, 1575 (C.D. Cal. 1992), *aff’d*, 100 F.3d 671 (9th Cir. 1996), *rev’d*, 118 S. Ct. 2168 (1998) (observing that NEA funds are a limited resource)).

161. *Finley*, 524 U.S. at 586.

162. Hungerford, *supra* note 160, at 276 (citing *Finley*, 524 U.S. at 586 (noting that NEA makes funding decisions through the use of the competitive process)).

163. *Finley*, 524 U.S. at 586 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834–35 (1995)). According to one commentator, “the Court seemed to suggest that the point of the program is to encourage good art regardless of whether it leads to a public forum-like environment. Thus, for the majority, diversity of viewpoint in NEA funded art would seem to be more of a happy by-product of the program than its intended goal.” Lackland H. Bloom, Jr., *NEA v. Finley: A Decision in Search of a Rationale*, 77 WASH. U. L.Q. 1, 14 (1999).

The Court also found it significant that the NEA interpreted the “decency and respect” provision as not an “absolute restriction,” but instead, “as merely hortatory.”<sup>164</sup> According to the NEA, the provision “adds ‘considerations’ to the grant-making process; it does not preclude awards to projects that might be deemed ‘indecent’ or ‘disrespectful,’ nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application.”<sup>165</sup> The Court agreed with the NEA, observing that “the text of [section] 954(d)(1) imposes no categorical requirement.”<sup>166</sup> Instead, the text operates as “advisory language” that warns the NEA to take “decency and respect” into consideration.<sup>167</sup> This “advisory language,” the Court observed, “stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA’s grant-making authority, it has done so in no uncertain terms.”<sup>168</sup> As an example, the Court pointed to Congress’ prohibition on the NEA’s funding of obscenity in which Congress clearly states that obscenity “shall not be funded.”<sup>169</sup> The Court concluded that “the ‘decency and respect’ criteria do not silence speakers by expressly ‘threatening censorship of ideas.’”<sup>170</sup>

In a later case, the Court characterized its *Finley* decision, stating:

[In *Finley*], we upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions. We explained that “any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.” In particular, “[t]he very assumption of the NEA is that grants will be awarded according to the ‘artistic worth of competing applicants,’ and absolute neutrality is simply inconceivable.” We expressly declined to apply forum analysis, reasoning that it would

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164. *Finley*, 524 U.S. at 580.

165. *Id.* at 580–81.

166. *Id.* at 581.

167. *Id.* at 582.

168. *Id.* at 581.

169. *Id.* (discussing 20 U.S.C. § 954(d)(2)).

170. *Id.* at 583 (citation omitted).

conflict with “NEA’s mandate . . . to make esthetic judgments, and the inherently content-based ‘excellence’ threshold for NEA support.”<sup>171</sup>

### C. Forum Analysis and Film Incentive Program Restrictions

The Supreme Court decisions in *Rosenberger* and *Finley* suggest that forum analysis is likely inappropriate when considering film incentive program restrictions. In *Rosenberger*, the funding program’s purpose was to encourage a diversity of views from private speakers.<sup>172</sup> State film incentive programs, on the other hand, serve to encourage economic activity and growth in the state.<sup>173</sup> This is accomplished, in part, by providing grants to films that will attract tourism and other economic activity by presenting the state in a positive light.<sup>174</sup> Thus, a state may require its film incentive program to determine funding based on how the film portrays the state.<sup>175</sup> This closely parallels *Finley*, where the statutory provision required the NEA to make subjective, content-based decisions when awarding funding.<sup>176</sup> Because film incentive programs resemble the funding guidelines in *Finley*, as opposed to those in *Rosenberger*, the public forum doctrine and its prohibitions against discrimination would seem inapplicable in challenges to film incentive program restrictions.

## VII. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

In considering incentive programs as a form of government benefit, the unconstitutional conditions doctrine may be more applicable here than forum doctrine. Under the unconstitutional conditions

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171. *United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003) (quoting *Finley*, 524 U.S. at 586).

172. *Rosenberger*, 515 U.S. at 821.

173. Zach Huitink, *An Update on State Film Industry Incentives*, THE COUNCIL OF STATE GOV’TS (June 15, 2011, 12:02 PM), <http://knowledgecenter.csg.org/kc/content/update-state-film-industry-incentives> [https://perma.cc/K5R8-H9V6].

174. *Id.*

175. *See* TEX. GOV’T CODE ANN. § 485.024(a) (West 2017).

176. *Finley*, 524 U.S. at 586.

doctrine, “the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.”<sup>177</sup> The Supreme Court has “made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.”<sup>178</sup> For example, the government may not rely on a reason that infringes upon a person’s constitutionally-protected free speech right.<sup>179</sup> If the government were able to deny a person benefits based on that person’s speech, then that person’s “exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’”<sup>180</sup>

#### A. *The Supreme Court Addresses Government Funding and Unconstitutional Conditions*

In *Rust v. Sullivan*, the Supreme Court applied the unconstitutional conditions doctrine.<sup>181</sup> *Rust* involved a challenge to a prohibition on government funding of family-planning clinics that advocated for, counseled about, or made referrals for abortions.<sup>182</sup> Title X of the Public Health Services Act provides federal funding for family-planning services, but prohibits that funding from going to programs that included abortion as a family-planning method.<sup>183</sup> Fund recipients are

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177. *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

178. *Perry*, 408 U.S. at 597.

179. *Id.*

180. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (noting that the Supreme Court has applied the unconstitutional conditions doctrine to the denial of a variety of government benefits, including tax exemptions, unemployment benefits, welfare payments, and government employment).

181. *Rust v. Sullivan*, 500 U.S. 173, 173 (1991).

182. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 684 (1992) (citing 42 C.F.R. § 59.10(a) (1991)).

183. *Rust*, 500 U.S. at 173.

expressly prohibited from referring clients to an abortion provider, even if the client requested the referral.<sup>184</sup> The statute also prohibits recipients from engaging in activities that “encourage, promote or advocate abortion as a method of family planning.”<sup>185</sup>

Title X recipients and doctors, who supervised Title X-funded projects, challenged these restrictions. They contended that the restrictions are unconstitutional “because they condition the receipt of a benefit, in [this case government] funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling.”<sup>186</sup> The restrictions constitute impermissible viewpoint discrimination, they argued, because Title X prohibits “all discussion about abortion as a lawful option.”<sup>187</sup>

In upholding Title X’s restrictions on abortion-related speech, the Supreme Court observed that “when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program.”<sup>188</sup> The Court explained:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>189</sup>

Consequently, the Court held, a provision requiring “that federal funds will be used only to further the purposes of a grant does not violate constitutional rights.”<sup>190</sup>

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184. *Id.* at 180.

185. *Id.*

186. *Id.* at 196.

187. *Id.* at 192 (quotation omitted).

188. *Id.* at 194.

189. *Id.* at 193.

190. *Id.* at 198.

The *Rust* Court found it significant that the restriction only applies to speech within the government-funded program and not to speech by program participants outside of that program.<sup>191</sup> Finding the unconstitutional conditions doctrine inapplicable here, the Court observed that “the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”<sup>192</sup> “[U]nconstitutional conditions’ cases,” the Court explained, “involve situations in which the Government has placed 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.”<sup>193</sup> It is true, the Court continued, that “employees’ freedom of expression is limited during the time that they actually work for the [government-funded] project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.”<sup>194</sup> In other words, “while family planning counselors may have a constitutional right to talk about abortion, they have no constitutional right to do so while being funded by the government.”<sup>195</sup>

*Rust* established that when the government subsidizes speech, it may favor one viewpoint over another, provided subsidy recipients are allowed to espouse the disfavored viewpoint outside the subsidized program.<sup>196</sup> As the Court observed, “[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”<sup>197</sup> Likewise, “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”<sup>198</sup> “The reasoning of these decisions is simple: ‘although

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191. *Id.* at 199 n.5.

192. *Id.* at 196.

193. *Id.*

194. *Id.* at 199.

195. *Cole*, *supra* note 182, at 676 n.172.

196. *See generally Rust*, 500 U.S. at 193–200.

197. *Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)).

198. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983).

government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."<sup>199</sup> Therefore, it is "well established that the government can make content-based distinctions when it subsidizes speech,"<sup>200</sup> as "subsidies, by definition . . . do not restrict any speech."<sup>201</sup>

### B. *The Rust Holding and Film Incentive Program Restrictions*

Applying the reasoning in *Rust* to film incentive program restrictions, it would seem that such restrictions would be found valid under the First Amendment. Film incentive programs are created for specific purposes: to spur employment and economic activity, to build and strengthen the production industry within a state, and to attract tourism.<sup>202</sup> They are not created to support private speakers.<sup>203</sup> The Texas statute, for example, provides that the Texas Film Commission's method for determining grants must, at a minimum, consider: "(1) the current and likely future effect a moving image project will have on employment, tourism, and economic activity in [Texas]; and (2) the amount of a production company's in-state spending for a moving image project."<sup>204</sup> The statute also provides that the office "may deny an application because of [a film's] inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the office."<sup>205</sup> Much of this standard focuses on economic criteria, such as the amount of money a production will spend in the state, how many

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199. *Id.* at 549–50 (citation omitted).

200. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188–89 (2007).

201. *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 765 (2011) (Kagan, J., dissenting).

202. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (quoting 20 U.S.C. § 951(5) (1990)).

203. The purpose of the program was also a relevant factor in *Finley*. There the majority observed that "[i]n the 1990 Amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should 'contribute to public support and confidence in the use of taxpayer funds,' and that 'public funds . . . must ultimately serve public purposes the Congress defines.'" *Id.* (quoting 20 U.S.C. § 951(5)). This could have been an additional factor in the Court's decision to uphold the "decency and respect" provision at issue in that case.

204. TEX. GOV'T CODE ANN. § 485.024(a) (West 2017).

205. TEX. GOV'T CODE ANN. § 485.022(e) (West 2017).

people it will employ, and the types of jobs it will create.<sup>206</sup> The way the film depicts the state and its residents and the production's tourism and economic impact are merely additional factors to be considered.<sup>207</sup>

As *Rust* illustrates, the government may impose viewpoint-based restrictions on the granting of subsidies provided recipients remain free to say what they wish outside the confines of the program.<sup>208</sup> Such is the case here. Filmmakers remain free to make their films even if denied an incentive program grant. Thus, Texas' exercise of viewpoint discrimination in the granting of film incentives, to carry out the purposes of its subsidy program, does not necessarily violate the First Amendment. This is not to say that film incentive program administrators may engage in all types of viewpoint discrimination. In his dissenting opinion in *Finley*, Justice Souter criticized the Court's application of *Rust* to the facts before it: Although the Court in *Rust* "recognized that when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes."<sup>209</sup> The Court, Souter continues,

added the important qualifying language that "this is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." Indeed, outside of the contexts of government-as-buyer and government-as-speaker, [the Court has] held time and time again that Congress may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of . . . ideas."<sup>210</sup>

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206. See 13 TEX. ADMIN. CODE §121.9(c)(3) (2017).

207. See *id.*

208. See *Rust*, 500 U.S. at 198–99.

209. *Finley*, 524 U.S. at 612 n.7 (Souter, J., dissenting) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (citing *Rust*, 500 U.S. at 194)).

210. *Id.* (citing *Regan*, 461 U.S. at 548)); see also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 384 (1993) (holding that when the government subsidizes private speech, it may not "favor some viewpoints or ideas at the expense of others"); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149 (1946) (holding that the Postmaster General may not deny subsidies to certain periodicals on the ground that they are "morally improper and not for the public welfare and the public good").

While the government has considerable leeway to restrict to whom it issues subsidies, as Justice Souter and *Rust* indicate, that leeway is not unlimited. Part VIII considers where that limit lies.

#### VIII. THE FIRST AMENDMENT'S APPLICABILITY TO GOVERNMENT SUBSIDIES

In his dissent in the *Finley* appellate court decision, Justice Kleinfeld discussed two cases that provide some guidance here.<sup>211</sup> In one of those cases, *Bullfrog Films, Inc. v. Wick*,<sup>212</sup> the Ninth Circuit Court of Appeals “held that customs duties exemptions for any educational or cultural materials could not exclude propaganda films based on their content and viewpoint.”<sup>213</sup> In the other case, *Big Mama Rag, Inc. v. United States*,<sup>214</sup> the D.C. Circuit held that “a tax exemption generally available to educational organizations could not be denied based on a regulation requiring full and fair exposition of facts enabling a reader to draw an independent conclusion.”<sup>215</sup> According to Justice Kleinfeld, the reason that the denials of benefits in these cases were found to be unconstitutional was because, “[u]nder these cases, all applicants in the class were entitled to the financial benefit from the government, unless the content of their speech was contrary to government standards.”<sup>216</sup> Justice Kleinfeld contrasted this with the arts subsidies in *Finley*, in which “no applicant is entitled to the financial benefit.”<sup>217</sup> Thus, where a government benefit is available to all of a class or category’s members, it may be unconstitutional to deny the benefit based on the content of one’s speech. This is consistent with

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211. *Finley v. Nat’l Endowment for the Arts*, 100 F.3d 671, 684 (9th Cir. 1996) (Kleinfeld, J., dissenting).

212. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988).

213. *Finley*, 100 F.3d at 686 (Kleinfeld, J., dissenting) (citing *Bullfrog Films*, 847 F.2d 502).

214. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).

215. *Finley*, 100 F.3d at 686 (citing *Big Mama Rag*, 631 F.2d 1030).

216. *Id.*

217. *Id.*

*Rosenberger*'s holding.<sup>218</sup> On the other hand, consistent with *Finley*, when the benefit is only available to a limited number of a class or category's members, then denial of the benefit based on content may be constitutional.

The opinion in *Advocates for the Arts v. Thomson* elaborated on this point.<sup>219</sup> There, the issue was the denial of "an NEA grant to a literary magazine because the governor and state arts commission thought a poem it published was indecent."<sup>220</sup> In its rejection of the First Amendment challenge, the First Circuit explained that "denial of a grant was not suppression of speech, and the grant selection process necessarily discriminated based on content."<sup>221</sup> The court explained:

Public funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.<sup>222</sup>

In summarizing this decision's significance, Justice Kleinfield noted that just because all denied grant applicants have the same freedom of expression right, that does not mean that all denied grant applicants can properly bring suit alleging First Amendment violations.<sup>223</sup>

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218. See generally *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

219. See generally *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976).

220. *Finley*, 100 F.3d at 685 (Kleinfield, J., dissenting) (citing *Advocates for the Arts*, 532 F.2d at 795).

221. *Id.*

222. *Id.*

223. *Id.*

Thus, the requirement of “absolute neutrality” does not apply to public grants for speech-related activities as it does in a public forum.<sup>224</sup> The Supreme Court offered guidance on this point:

[W]hile it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants’ productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote “art,” the very definition of which requires an exercise of judgment from case to case. . . . Solutions that may work for an auditorium, such as scheduling on a first-come-first-served basis or upon a prescribed showing of likely box-office success (if that is a solution), are simply not available to a program for funding the arts. If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.<sup>225</sup>

Different constitutional standards, then, apply to speech subsidies than to speech regulation.<sup>226</sup> The justification for this is that “[r]egulations directly restrict speech; subsidies do not. Subsidies, it is true, may indirectly abridge speech, but only if the funding scheme is ‘manipulated’ to have a ‘coercive effect’ on those who do not hold the subsidized position.”<sup>227</sup> However, proving a “coercive effect” by a limited spending program that does not constitute a public forum,

is virtually impossible, because simply denying a subsidy “does not ‘coerce’ belief,” and because the criterion of unconstitutionality is whether denial of the subsidy threatens “to drive certain ideas or viewpoints from the marketplace.” Absent such a threat, “the Government may allocate . . . funding according to criteria that

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224. *Advocates for the Arts*, 532 F.2d at 796.

225. *Id.*

226. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552 (2001) (Scalia, J., dissenting) (citations omitted).

227. *Id.* at 552–53 (Scalia, J., dissenting) (citations omitted).

would be impermissible were direct regulation of speech or a criminal penalty at stake.”<sup>228</sup>

### A. *Vagueness*

This leniency for speech subsidies, that is prohibited for speech regulation, also applies to vagueness concerns regarding subsidy-award standards.<sup>229</sup> Generally speaking, vague laws—those that do not clearly articulate their application’s standards or the speech to be restricted—are void.<sup>230</sup> This is so for several reasons. First, a vague law “may ‘trap the innocent by not providing fair warning’” about what the law forbids.<sup>231</sup> Additionally, a vague law allows law enforcement to interpret it subjectively, leading to the “‘arbitrary and discriminatory application’” of the law.<sup>232</sup> A vague law can also chill speech for fear that the speech may violate the law: “[u]ncertain meanings inevitably lead citizens to “‘steer far wider of the unlawful zone’” . . . than if the boundaries of the forbidden areas were clearly marked.”<sup>233</sup>

Even though vagueness is generally not permitted in a regulation, some vagueness may be permitted in the creation of subsidies.<sup>234</sup> For example, in *Finley*, the “decency and respect” provision was challenged for vagueness.<sup>235</sup> In his dissent in the *Finley* appellate court decision, Justice Kleinfeld, who seemingly would have upheld the provisions’ constitutionality, remarked:

Artists seeking grants have no property right to them, and their liberty to express themselves as they choose is not regulated by the

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228. *Id.* (alteration in original).

229. *See id.*

230. *Bullfrog Films*, 847 F.2d at 512 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

231. *Id.* (quoting *Grayned*, 408 U.S. at 108).

232. *Id.* (quoting *Grayned*, 408 U.S. at 108–09).

233. *Id.* (quoting *Grayned*, 408 U.S. at 109).

234. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 588–89 (1998).

235. *Id.* at 589.

grants. Vagueness law has been developed under the Fifth Amendment to protect people from the taking of liberty or property without fair notice of what they may not do, and without protection against arbitrary enforcement. First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the content of speech. An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant. None of the purposes of vagueness law apply to prizes.<sup>236</sup>

Although such provisions' terms would likely raise vagueness concerns in a regulatory framework or criminal statute context, the Supreme Court in *Finley* concluded that the provision was not unconstitutionally vague.<sup>237</sup> The Court reasoned that, in the context of these arts grants, speakers likely would not be deterred from engaging in particular speech.<sup>238</sup> Despite the Court's recognition of such criteria' potential chilling effect, it determined that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."<sup>239</sup> Thus, "although the First Amendment certainly has application in the subsidy context, . . . the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."<sup>240</sup> This applies to both vagueness and viewpoint discrimination.<sup>241</sup>

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236. *Finley*, 100 F.3d at 689 (Kleinfeld, J., dissenting) (citations omitted).

237. *Finley*, 524 U.S. at 588–89 (citing *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)) (noting that "[u]nder the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards").

238. *Id.* at 588 (citations omitted).

239. *Id.* at 589–90 (citations omitted) (noting that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity," and that "[s]ection 954(d)(1) merely adds some imprecise considerations to an already subjective selection process[;] [i]t does not, on its face, impermissibly infringe on First or Fifth Amendment rights").

240. *Id.* at 587–88 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 587–88 (1983)).

241. *See id.* at 588–89.

### B. Viewpoint Discrimination

In *Finley*, there was no allegation of “discrimination in any particular funding decision.”<sup>242</sup> Thus, the Court had “no occasion . . . to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination.”<sup>243</sup> The Court therefore upheld the constitutionality of the provision, “[u]nless and until § 954(d)(1) [the ‘decency and respect provision’] is applied in a manner that raises concern about the suppression of disfavored viewpoints.”<sup>244</sup> “If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints,” the Court explained, “then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not ‘aim at the suppression of dangerous ideas,’ and if a subsidy were ‘manipulated’ to have a ‘coercive effect,’ then relief could be appropriate.”<sup>245</sup>

In what situation, then, does the denial of a subsidy “aim at the suppression of dangerous ideas,” such that it is “manipulated” to have a “coercive effect?” The following two cases, which found this effect to have occurred, may provide the answer.

## IX. FIRST AMENDMENT VIOLATIONS IN ARTS FUNDING CASES

### A. *New York City Withholds Funds as a Result of an Objectionable Art Exhibit*

In *Brooklyn Institute of Arts and Sciences v. City of New York*, an art exhibit generated controversy when it was first shown in London.<sup>246</sup> Entitled “Sensation: Young British Artists from the Saatchi Collection,” the exhibit featured “90 works from the collection of British advertising magnate Charles Saatchi,” including:

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242. *Id.* at 586 (noting that, “[i]n fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants”).

243. *Id.* at 587.

244. *Id.*

245. *Id.* (citing *Regan*, 461 U.S. at 550); *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting).

246. *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 190 (E.D.N.Y. 1999).

Damien Hirst's "A Thousand Years," composed of flies, maggots, a cow's head, sugar, and water[;] another Hirst work, "This Little Piggy went to Market, This Little Piggy Stayed Home," a split pig carcass floating in formaldehyde; Marc Quinn's[] "Self," a bust of the artist made from nine pints of his frozen blood; and, most controversial, artist Chris Ofili's work, titled "The Holy Virgin Mary[]" . . . —a depiction of a black Madonna adorned with elephant dung and sexually-explicit photos.<sup>247</sup>

In 1999, the controversy followed the exhibit to the United States when the Brooklyn Museum prepared to showcase it on a temporary basis.<sup>248</sup>

The City of New York provided funding to the Brooklyn Museum for operational purposes, but generally not "for direct curatorial or artistic services" or for the exhibit at issue.<sup>249</sup> Nevertheless, the city threatened to terminate all the museum's funding "unless it canceled the Exhibit."<sup>250</sup> The city found particularly objectionable Chris Ofili's "The Holy Virgin Mary," made of elephant dung, among other materials, and containing "small photographs of buttocks and female genitalia scattered on the background."<sup>251</sup> New York City Mayor Rudy Giuliani, speaking publicly, called the exhibit "sick" and "disgusting."<sup>252</sup> Giuliani singled out "The Holy Virgin Mary" as being "offensive to Catholics" and "an attack on religion."<sup>253</sup> Explaining the city's threat to terminate the museum's funding, Giuliani declared:

You don't have a right to a government subsidy to desecrate someone else's religion. And therefore we will do everything that we can to remove funding from the [Museum] until the [Museum] director comes to his senses. And realizes that if you are a

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247. *The Art of Controversy*, PBS (Oct. 8, 1999, 12:00 AM), [http://www.pbs.org/newshour/bb/entertainment-july-dec99-art\\_10-8/](http://www.pbs.org/newshour/bb/entertainment-july-dec99-art_10-8/) [<http://perma.cc/Z7F3-DJGR>].

248. *See generally Brooklyn Inst. of Arts.*, 64 F. Supp. 2d at 184.

249. *Id.* at 184, 189 (quotation omitted).

250. *Id.* at 191.

251. *Id.*

252. *Id.* at 186.

253. *Id.*

government subsidized enterprise then you can't do things that desecrate the most personal and deeply held views of the people in society.<sup>254</sup>

The museum refused to cancel the exhibit, leading the city to withhold “funds already appropriated to the Museum for operating expenses and maintenance and [file suit seeking] to eject the Museum from the City-owned land and building in which the Museum’s collections [had] been housed for over one hundred years.”<sup>255</sup> In response, the museum filed suit against both the city and the mayor “seeking declaratory and injunctive relief, to prevent the defendants from punishing or retaliating against the Museum for displaying the Exhibit, in violation of the Museum’s rights under the First and Fourteenth Amendments.”<sup>256</sup>

In reviewing the case, the district court found that “the facts establish[ed] an ongoing effort by the Mayor and the City to coerce the Museum into relinquishing its First Amendment rights.”<sup>257</sup> The court referred to the Supreme Court’s “unconstitutional conditions” principle, noting that although a person is not entitled to a government benefit, the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”<sup>258</sup> Here, the City of New York had forced the museum to choose between obtaining a financial benefit and enjoying its First Amendment rights.<sup>259</sup> In condemning the city’s actions, the court held that by removing the Museum’s funding, the city “discriminate[d] invidiously in its subsidies in such a way as to ‘aim at the suppression of dangerous ideas.’”<sup>260</sup> The court recognized that the government’s purpose is the determining factor in deciding whether

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254. *Id.* at 191 (quoting New York City Mayor Rudy Giuliani).

255. *Id.* at 186.

256. *Id.* at 191–92.

257. *Id.* at 198.

258. *Id.* at 199 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

259. *Id.* at 200.

260. *Id.* (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

speech restrictions constitute viewpoint discrimination.<sup>261</sup> Here, the government's purpose was clear; the City of New York confirmed that its purpose for removing the museum's funding was directly related to the viewpoints expressed in "The Holy Virgin Mary."<sup>262</sup> Accordingly, the city's conduct unequivocally violated the First Amendment.<sup>263</sup>

The court distinguished its present situation from that in *Finley*, where the Court found a provision adding "decency and respect" considerations to be constitutional.<sup>264</sup> In doing so, the Court "did 'not perceive a realistic danger' that [the provision would] be used 'to effectively preclude or punish the expression of particular views.'"<sup>265</sup> According to the *Brooklyn Institute* court, the difference was that *Finley* involved "considerations" contemplated when deciding whether to award a grant, which did not facially constitute viewpoint discrimination.<sup>266</sup> The provisions in *Finley* also "[did] not preclude awards to projects that might be deemed "indecent" or "disrespectful" nor place conditions on grants."<sup>267</sup> In *Brooklyn Institute*, however, the City of New York had already appropriated the museum's funding and withdrew it because it objected to an exhibit's content.<sup>268</sup>

### B. *San Antonio Defunds Community Arts Center Due to Objectionable Programming*

Similar to *Brooklyn Institute*, *Esperanza Peace and Justice Center v. City of San Antonio* involved a public campaign protesting the City of San Antonio's funding of a community arts center that produced gay

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261. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

262. *Id.* at 191, 200.

263. *Id.* at 200.

264. *Id.* at 202.

265. *Id.* (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 569 (1998)).

266. *Id.*

267. *Id.* (quoting *Finley*, 524 U.S. at 569).

268. *Id.*

and lesbian-oriented programming.<sup>269</sup> Under public pressure, the San Antonio City Council voted to eliminate the city's funding of the arts center.<sup>270</sup> Known as the Esperanza Peace and Justice Center ("Esperanza"), the center offered a wide variety of programming and provided assistance and workspace to various local artists and organizations.<sup>271</sup> The city funded Esperanza from 1990 to 1997 through a program that provided assistance to various arts organizations.<sup>272</sup> As part of that program, the city encouraged participants to merge art with social issues.<sup>273</sup>

During 1997 and 1998, as the city council focused on its yearly budgets, lobbyists sought to eliminate Esperanza's funding due to its "perceived advocacy of the 'gay and lesbian lifestyle.'"<sup>274</sup> Lobbyists also targeted the San Antonio Lesbian & Gay Media Project ("Media Project"), which, together with Esperanza, co-sponsored "Out at the Movies," an annual lesbian and gay film festival.<sup>275</sup> Adam McManus, a Christian talk-radio host who took a prominent role in the campaign against Esperanza, interviewed several city council members on his show.<sup>276</sup> McManus, his listeners, and his interviewees displayed negative attitudes towards Esperanza and its funding, mainly due to Esperanza's support of the "Out at the Movies" festival.<sup>277</sup>

The Christian Pro-Life Foundation also took part in the campaign against Esperanza, sending flyers—singling out Esperanza by name and calling for opposition to city funding of similar programs—to 1,200 of

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269. *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001).

270. *Id.* at 440–44.

271. *Id.* at 436–37.

272. *Id.* at 439.

273. *Id.*

274. *Id.* at 440, 443–44.

275. *Id.* at 437, 440.

276. *Id.* at 440–41 (citation omitted).

277. *Id.* (citation omitted).

its supporters, including city council members.<sup>278</sup> Council members also received various communications opposing funding of Esperanza, largely due to Esperanza's promotion of the "homosexual agenda."<sup>279</sup> Aside from these communications, "[t]he majority of the eleven council members had no personal knowledge regarding Esperanza or its programming beyond what they were told by constituents or gathered from news reports."<sup>280</sup>

In 1997, the San Antonio Department of Art and Cultural Affairs ("DACA") recommended funding for Esperanza and Media Project, but the city council nevertheless eliminated both groups' funding.<sup>281</sup> The city also cut funding to a third organization affiliated with Esperanza.<sup>282</sup> This was the first time the city had entirely eliminated funding to an organization for which DACA had recommended funds appropriation.<sup>283</sup> In 1998, the city again denied Esperanza and Media Project's funding requests.<sup>284</sup> Esperanza and Media Project challenged the city's funding denials as "viewpoint discrimination in violation of their free speech rights under the First Amendment," and a "violation of their equal protection rights under the Fourteenth Amendment."<sup>285</sup>

The district court began its analysis by articulating a "fundamental First Amendment principle—that government may not proscribe speech or expressive conduct because it disapproves of the ideas expressed."<sup>286</sup> The court pointed to *Finley* where "the Supreme Court made clear that the First Amendment forbids 'invidious viewpoint discrimination' in the

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278. *Id.* (citation omitted).

279. *Id.* (citation omitted).

280. *Id.* at 441 (citations omitted).

281. *Id.* at 442.

282. *Id.* at 438–39 (explaining that the 1997 budget also eliminated funding for VĀN, an organization whose purpose was to "bring[] national and international artists who are visiting or working in other parts of Texas to San Antonio for programs and networking," and that Esperanza had acted as a sponsor and fiscal agent for VĀN in its grant applications with the city).

283. *Id.* at 442.

284. *Id.* at 443–44.

285. *Id.* at 436. VĀN also joined the challenge. *Id.* at 433.

286. *Id.* at 444 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943)).

arts subsidy context” and that “[e]ven in the provision of subsidies, the government may not aim at the suppression of dangerous ideas.”<sup>287</sup> Turning to the case before it, the court observed that “[t]he clearest example of viewpoint discrimination is that alleged here: the denial of government funding because the applicant espouses an unpopular, controversial, or uncommon viewpoint.”<sup>288</sup> The court held that the city’s “decision to refuse all funding to an applicant because of disapproval of one program or presentation [was] a form of viewpoint discrimination.”<sup>289</sup>

San Antonio attempted to justify its decision to deny funding on grounds that Esperanza was either a political organization or simply “too political,” arguing that “arts funds should be reserved for arts groups, not political groups.”<sup>290</sup> The court rejected this argument: “We should be most vigilant whenever a government official undertakes to restrict speech because it is too ‘political.’ Labeling expression as ‘political’ can often serve as proxy for suppression of unfavored ideas.”<sup>291</sup> Applying that vigilance, the court found the city’s argument to be a pretext, observing that Esperanza’s political nature had never before been a factor in all the years the city had provided it funding.<sup>292</sup> Besides, the court observed, one of the grant program’s goals was to support programs addressing social and political concerns.<sup>293</sup>

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287. *Id.* at 446 (quoting *Finley*, 524 U.S. at 586).

288. *Id.* at 447 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (defining “viewpoint” as “the specific motivating ideology or the opinion or perspective of the speaker”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (finding viewpoint discrimination where school “permitted school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint”); *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 384 (1992) (holding that the government may not “proscribe only libel critical of the government”)).

289. *Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 447 (citing *Brooklyn Inst. of Arts*, 64 F. Supp. 2d at 184); *Cuban Museum of Arts & Culture v. City of Miami*, 766 F. Supp. 1121, 1129 (S.D. Fla. 1991).

290. *Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 456.

291. *Id.*

292. *See id.* at 458, 465.

293. *Id.* at 457–58 (citations omitted).

As another justification, the city pointed to its constituents' opposition to the funding of "groups 'advocating a gay and lesbian lifestyle,'"<sup>294</sup> and its council's "right and . . . obligation to listen to constituent opinion in making arts funding decisions."<sup>295</sup> While the court acknowledged this to be "true," it noted that the city's "voters cannot require the council to deny funding to an arts group merely because that group promotes a social or political viewpoint those voters find objectionable."<sup>296</sup> Pointing to certain council members' public statements about Esperanza's gay-themed programming and the decision to defund it, the court found that seven out of eleven council members were motivated, at least in part, "to defund Esperanza because of its constitutionally-protected conduct."<sup>297</sup> With the city unable "to show that it would have made the same decision absent [Esperanza's and Media Project's] viewpoints,"<sup>298</sup> the court determined that Esperanza was defunded "because of [their] constitutionally-protected expressions of viewpoint."<sup>299</sup> The court therefore held that the city engaged in impermissible viewpoint discrimination in contravention of the First Amendment.<sup>300</sup> It concluded:

The public funding of art remains within the complete discretion of the city council. . . . Once a governing body chooses to fund art, however, the Constitution requires that it be funded in a viewpoint-neutral manner, that is, without discriminating among recipients on the basis of their ideology. . . . It should be remembered, however, that First Amendment principles also protect the right of those

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294. *Id.* at 454 (citations omitted).

295. *Id.* at 455 (citation omitted).

296. *Id.* (citation omitted).

297. *Id.* at 441, 461.

298. *Id.* at 461.

299. *Id.* at 463. Additionally, the court found that "the evidence in [the] case [did not] support a conclusion that the council would have defunded the plaintiffs in the absence of Esperanza's expressions of viewpoint," and that, to the contrary, "the overwhelming evidence suggest[ed] that absent the constitutionally protected conduct, most city council members would never have heard of Esperanza." *Id.* at 462.

300. *Id.* at 479.

citizens who oppose funding for the plaintiffs to freely make their own views known.<sup>301</sup>

In both *Brooklyn Institute* and *Esperanza*, the government terminated, or sought to terminate, funding for arts organizations because of its objections to their exhibits or programming.<sup>302</sup> In both cases, it was clear that the government's objections to the organization's speech was the root of its decision to terminate funding.<sup>303</sup> Additionally, the government had initially provided the funding and only terminated (or sought to terminate) the funding once it discovered that the organization's speech was objectionable.<sup>304</sup> This is similar to the facts of the *Machete* case, discussed *infra*, where the Texas Film Commission approved the preliminary grant application for the film but subsequently withdrew its approval after film's content caused controversy. That case is discussed next.

## X. MACHETE AND MACHETE KILLS

### A. *The Texas Film Commission Kills Funding for Machete*

As previously discussed, Chop Shop, the production company responsible for *Machete*, applied for and received initial grant approval for the film from the Texas Film Commission.<sup>305</sup> When the Commission notified Chop Shop of its initial approval, it also notified it that the initial approval "'pertain[ed] only to the qualification of the application' and that '[i]f the final content is determined to be in violation of the rules and regulations of the incentive program, the project [would] not be eligible to receive funds' from the Program."<sup>306</sup>

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301. *Id.*

302. *See id.* at 461–63; *Brooklyn Inst. of Arts.*, 64 F. Supp. 2d at 191.

303. *See Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 459–63; *Brooklyn Inst. of Arts.*, 64 F. Supp. 2d at 191.

304. *See Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 459–63; *Brooklyn Inst. of Arts.*, 64 F. Supp. 2d at 191.

305. *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 286 (5th Cir. 2015).

306. *Machete's Chop Shop, Inc. v. Tex. Film Comm'n*, 483 S.W.3d 272, 276 (Tex. Ct. App. 2016).

The Commission also informed Chop Shop “that ‘approval of an incentive application does not guarantee payment of incentive funds.’”<sup>307</sup>

After Chop Shop released a trailer for the film referencing a divisive Arizona anti-immigration law, viewers criticized the film for promoting a race war.<sup>308</sup> This controversy led to public pressure on the Texas Film Commission to withdraw its support for the film.<sup>309</sup> Following the film’s release in September 2010, Chop Shop provided the Commission with its final documentation, including the film’s final script, as required by the Incentive Program guidelines.<sup>310</sup> The Commission subsequently informed Chop Shop that “[b]ased on the final review of content, the feature *Machete* does not qualify for a grant from the Texas Moving Image Industry Incentive Program.”<sup>311</sup> As the basis for its denial, the Commission cited Texas Government Code section 485.022(e), “which provides that the Commission ‘may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the [Commission].’”<sup>312</sup>

Chop Shop challenged the denial in court (“*Machete P*”).<sup>313</sup> It contended that once the Commission approved its initial application—in essence “verif[ying] that ‘the [film’s] content is in compliance with the rules and regulations governing the application process’”—the Commission could not then deny Chop Shop an Incentive Program grant unless “‘substantial changes’” had occurred during production of the film to include “‘inappropriate content or content that portrays

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307. *Id.*

308. Richard Whittaker, *Is that a Wrap for Incentives?*, AUSTIN CHRONICLE (Jan. 28, 2011), <https://www.austinchronicle.com/screens/2011-01-28/is-that-a-wrap-for-incentives> [<https://perma.cc/3D4B-5RQP>].

309. *Machete Prods., L.L.C.*, 809 F.3d at 286.

310. *Machete’s Chop Shop, Inc.*, 483 S.W.3d at 276–77.

311. *Id.* at 277.

312. *Id.* (specifying that the determination be made by the Music, Film, Television, and Multimedia Office, which, in turn, assigned the Incentive Program’s administration to the Film Commission).

313. *See id.* at 279.

Texas or Texans in a negative fashion.”<sup>314</sup> This was not the case here, as the *Machete* script’s final version did not materially differ from the original submission.<sup>315</sup> Chop Shop argued that without such changes, the Commission was bound by its initial determination that Chop Shop qualified for the Incentive Program grant.<sup>316</sup>

The court’s analysis focused on the construction of the statute and regulations that created the Incentive Program and detailed the manner of its operation.<sup>317</sup> It found that the statute’s requirement that the Commission conduct a final script review before awarding any grant

cannot be read to create a “standard” for either awarding or denying a grant application. The statute does not direct the Commission to take any particular action based on its final content review. It does not require that a grant be awarded if no substantial changes occurred during production, nor does it require that the Commission deny a grant if substantial changes occurred during production that caused the film to include content that portrays Texas or Texans in a negative fashion. The decision to award or deny a grant remains within the Commission’s discretion. Indeed, the only constraint on the Commission’s authority is the mandate that “the [Commission] shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas” when determining whether to act on or deny a grant application.<sup>318</sup>

The court also noted that the Texas legislature “undoubtedly intended to provide the Commission with discretion throughout the entire grant approval process.”<sup>319</sup> It based this conclusion on the fact that the statute “specified that the Commission ‘is not required to act on any grant application and may deny an application because of inappropriate content or content that portrays Texas or Texans in a

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314. *Id.* (quoting TEX. GOV’T CODE ANN. § 485.022(e)–(f) (West 2017)).

315. *Id.*

316. *Id.*

317. *See id.* at 282–83.

318. *Id.*

319. *Id.* at 283.

negative fashion.”<sup>320</sup> Thus, the Commission’s “denial of *Machete*’s grant application, even post-production, was authorized by the statute” and “not beyond its statutory authority.”<sup>321</sup> To the court, the Commission was therefore free to deny Chop Shop’s application at any point in the application process, even if it had previously determined that the application qualified for a grant.<sup>322</sup> Because *Machete I* did not raise a First Amendment challenge to the Commission’s application denial, the court did not address the issue. The decision therefore provided little guidance regarding First Amendment protection for state film incentive programs.

Nevertheless, *Machete I* is distinguishable from *Brooklyn Institute* and *Esperanza*. Unlike the plaintiffs in *Brooklyn Institute* and *Esperanza*, the plaintiff in *Machete I* did not receive government funding.<sup>323</sup> In fact, the plaintiff was not even guaranteed any funds; it was merely notified that its preliminary application was approved.<sup>324</sup> Moreover, unlike the funding denial in *Brooklyn Institute* and *Esperanza*, the grant denial in *Machete I* was pursuant to a Texas statute that gave the government discretionary power.<sup>325</sup> That statute, similar to the standard in *Finley*, required the Commission to consider certain factors, including inappropriate content or content portraying Texas or Texans in a negative way, but did not require that incentives be denied to films containing such content.<sup>326</sup> Finally, unlike *Brooklyn Institute* and *Esperanza*, *Machete I* did not note any Texas government officials’ public criticism of the film’s content. Protests by members of the public would not raise First Amendment issues.<sup>327</sup>

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320. *Id.* (citing GOV’T § 485.022(e)) (explaining that “the absence of an applicant’s right to judicial review of the Commission’s decision on a grant application confirms the Legislature’s intent to delegate broad discretion to the Commission to determine which projects will receive Program grant funds”).

321. *Id.* at 282–83.

322. *Id.* at 283.

323. *Id.* at 276.

324. *Id.*

325. *Id.* at 278.

326. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 569 (1998).

327. First Amendment issues are only raised when the government is objecting to or restricting speech. *See Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139

*Machete* opened nationwide on September 3, 2010 in 2,670 theaters, earning \$11.4 million during its opening weekend (on an estimated \$10.5 million budget).<sup>328</sup> It was that weekend's second-highest grossing film, just below the George Clooney-starring film, *The American*.<sup>329</sup> During 2010, *Machete* grossed over \$26.5 million in the U.S. alone,<sup>330</sup> making it the 100th largest domestic-grossing film that year.<sup>331</sup> The film's success led to a *Machete* sequel, *Machete Kills*.<sup>332</sup>

### B. Funding for *Machete Kills* Meets the Same Fate as *Machete*

Production of *Machete Kills* began in Texas in 2012.<sup>333</sup> Despite the Commission's denial of the original film's application, Machete Productions sought an Incentive Program grant for the sequel.<sup>334</sup> Before submitting its application, however, Machete Productions was informed that "the film would never receive an Incentive Program grant due to the perceived political nature and content of the film."<sup>335</sup> Undeterred, Machete Productions filed an application.<sup>336</sup> True to form, the Commission denied the application due to "inappropriate content."<sup>337</sup>

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(1973) (Stewart, J., concurring) (noting that "[t]he First Amendment protects the press from governmental interference").

328. *Weekend Box Office Results for September 3–5, 2010*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/weekend/chart/?view=&yr=2010&wknd=36&p=.htm> [<http://perma.cc/8C5T-2FB9>].

329. *Id.*

330. *Machete (2010)*, IMDB <http://www.imdb.com/title/tt0985694/> [<https://perma.cc/EYT9-FSBU>].

331. *2010 Yearly Box Office Results*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/yearly/chart/?yr=2010&p=.htm> [<http://perma.cc/SUA9-5KDK>].

332. *Machete Prods., L.L.C.*, 809 F.3d at 286.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

However, the Commission failed to explain what content was inappropriate.<sup>338</sup>

Machete Productions filed suit challenging the denial (“*Machete II*”).<sup>339</sup> It alleged that the Commission “applied the Incentive Program to it in a way that discriminated against it on the basis of viewpoint, thus violating its First Amendment rights.”<sup>340</sup> Machete Productions contended that “[t]he real reason for the Commission’s denial [was] that the Commission was concerned with the political fallout from providing public money to a film perceived as glorifying the role of a Mexican Federale (Mexican Federal Police Officer) and sympathizing with immigrants.”<sup>341</sup>

Addressing Machete Productions’ viewpoint-discrimination claim, the court cited *Rust* for the proposition that the government may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”<sup>342</sup> Thus, the court explained, there is no viewpoint discrimination, just the government’s choice “to fund one activity at the exclusion of the other.”<sup>343</sup> Such a government funding provision, the court continued, does not violate the First Amendment “as long as it ‘[does] not silence speakers by expressly threaten[ing] censorship of ideas,’ or ‘introduce considerations that, in practice, would effectively preclude or punish the expression of particular views.’”<sup>344</sup>

Acknowledging that First Amendment protections apply to subsidy grants, the court observed that the government—here, the Texas Film

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338. *Id.*; Muriel Perkins, ‘*Machete Kills*’ Producer Sues Texas Officials, COURTHOUSE NEWS SERV. (Mar. 17, 2014), <http://www.courthousenews.com/machete-kills-producer-sues-texas-officials/> [<http://perma.cc/E7JR-KYTX>].

339. *Machete Prods., L.L.C.*, 809 F.3d at 286.

340. *Id.*

341. Plaintiff’s Original Petition at 2, *Machete Prods. L.L.C. v. Page*, 809 F.3d 281, 289 (5th Cir. 2015) (No. D-1-GN-14-000744).

342. *Machete Prods., L.L.C.*, 809 F.3d at 289 (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

343. *Id.* (quoting *Rust*, 500 U.S. at 193).

344. *Id.* (quoting *Finley*, 524 U.S. at 583).

Commission—”“may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty [at] stake.””<sup>345</sup> Nevertheless, the court cautioned, “[g]overnment funding provisions can become unconstitutional conditions if they ‘effectively prohibit the recipient from engaging in the protected conduct outside the scope of the [government] funded program,’ or if the subsidy is ‘manipulated to have a coercive effect.’”<sup>346</sup>

Applying these principles to the case before it, the court concluded that the grant denial did not “‘effectively preclude or punish’ Machete [Productions] from or for holding particular viewpoints in *Machete Kills*.”<sup>347</sup> Likewise, the court held, the denial did not effectively prohibit Machete Productions from producing the film.<sup>348</sup> After all, it reasoned, “[d]espite the denial of an Incentive Program grant, *Machete Kills* was still filmed in Texas, produced, and released.”<sup>349</sup> The court therefore rejected Machete Productions’ contention that “the First Amendment requires a state which has an incentive program like this one to fund films casting the state in a negative light.”<sup>350</sup> In other words, the court held that because Machete Productions remained free to produce its film outside the Incentive Program’s context, the Commission acted lawfully within its discretion by denying funding for the film.

Machete Productions also attacked the “vagueness” of the standards used to award and deny grants.<sup>351</sup> In its explanation for rejecting the vagueness claim, the court noted that the “Due Process Clause does protect speakers ‘from arbitrary and discriminatory enforcement of vague standards,’ but ‘when the [g]overnment is acting as a patron rather than as sovereign, the consequences of imprecision

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345. *Id.* at 290 (quoting *Finley*, 524 U.S. at 587–88).

346. *Id.* (first quoting *Rust*, 500 U.S. at 197; and then quoting *Finley*, 524 U.S. at 587).

347. *Id.* (quoting *Finley*, 524 U.S. at 583).

348. *Id.*

349. *Id.*

350. *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

351. *Id.* at 291.

are not constitutionally severe.”<sup>352</sup> In the present case, the court observed, “the Incentive Program’s funding criteria are not any more imprecise than the criteria found to pass constitutional muster in *Finley*.”<sup>353</sup>

Accordingly, the court held that the Commission’s denial of Machete Productions’ grant application did not violate the company’s First Amendment rights.<sup>354</sup> In other words, the *Machete II* court relied on *Rust* and *Finley* to allow the Commission to deny Machete Productions’ grant application because of the film’s content,<sup>355</sup> reasoning that Machete Productions was free to, and did, make the film despite its application’s denial.<sup>356</sup>

## XI. DISCUSSION AND CONCLUSION

Can states refuse to provide film incentive program funding for films whose content the state finds objectionable because, for example, the content is “inappropriate” or portrays the state or its residents in a negative way? As the foregoing analysis indicates, the answer is likely “yes.” This is largely due to the wide latitude courts give the government to designate subsidies’ purposes<sup>357</sup> (provided they are not designed to encourage viewpoint diversity),<sup>358</sup> as well as courts’ sanctioning of the use of criteria in granting those subsidies that would be impermissible in a speech-regulation context.<sup>359</sup> So long as the funding denial does not “effectively prohibit” the filmmaker from making the film outside the incentive program’s scope, the denial is

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352. *Id.* (quoting *Finley*, 524 U.S. at 588–89).

353. *Id.* (observing that “[b]oth provisions require that the relevant agency consider the ‘general standards of decency and respect for the diverse beliefs and values’ of citizens,” and that “[t]he Incentive Program’s statute . . . adds that the Commission may also deny an application due to ‘inappropriate content or content that portrays Texas or Texans in a negative fashion’”).

354. *Id.*

355. *Id.* at 289.

356. *Id.* at 290–92.

357. *See supra* Part VI.

358. *See supra* Part VI.

359. *See supra* Part VI.

likely within the state's authority and not a violation of the applicant's First Amendment rights.<sup>360</sup>

The decisions in *Rosenberger* and *Finley* indicate that film incentive programs likely do not constitute a public forum, as the programs are not intended "to encourage a diversity of views from private speakers."<sup>361</sup> Instead, film incentive programs' typical purpose is to encourage economic activity within a state.<sup>362</sup> The economic benefit derives not only from the film production, but also from the increased tourism likely to result from a production painting the state favorably.<sup>363</sup> A film's content is therefore relevant to a state's decision to support productions that best achieve these results. And because film incentive programs likely do not constitute public forums,<sup>364</sup> viewpoint-discrimination prohibitions do not apply here.<sup>365</sup> This does not mean that courts will uphold any type of government discrimination. If the incentive awards are designed to have a coercive effect or are aimed at the suppression of unpopular ideas, then courts will likely find those government actions unconstitutional.<sup>366</sup> However, laws and regulations allowing states to *consider* a film's content, rather than *prohibiting* certain types of content, will likely be found constitutional.<sup>367</sup>

The Texas statute, for example, provides that the Texas Film Commission "may deny an application because of [a film's] inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the [Commission]."<sup>368</sup> It further provides that, "[i]n determining whether to act on or deny a grant

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360. *See supra* Part VII.

361. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

362. *See supra* Part III.

363. *See supra* Part III.

364. *See supra* Part VI.

365. *See supra* Part VI.

366. *See supra* Part VIII.

367. However, if those laws or regulations are applied in a coercive or suppressive manner, an affected filmmaker may be able to mount a successful First Amendment challenge in court. *See supra* Part VIII.

368. TEX. GOV'T CODE ANN. § 485.022(e) (West 2017).

application, the [Commission] shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas.”<sup>369</sup> The first part of this provision—dealing with inappropriate content or negative portrayals of Texas or Texans<sup>370</sup>—seems consistent with the program’s purpose to attract economic activity and tourism to the state. Thus, as the *Machete II* court held, it is permissible under *Rust*.<sup>371</sup>

The second part—dealing with “decency and respect for the diverse beliefs and values of the citizens of Texas”<sup>372</sup>—is, with the exception of its focus on Texas residents, the same language that was upheld in *Finley*.<sup>373</sup> Furthermore, as in *Finley*, these provisions are not written as prohibitions. Instead, the Commission “may” deny an application because of inappropriate content or negative portrayals of Texas or Texans.<sup>374</sup> The Commission is not *required* to deny applications for productions that contain these types of content.<sup>375</sup> In fact, the Commission *may provide* funding to such productions.<sup>376</sup> The same is true of the second half of the provision, which simply requires the Commission to *consider* the values of decency and respect.<sup>377</sup> The Commission may still fund productions it finds indecent or disrespectful.<sup>378</sup> As the court observed in *Machete I*, Texas law gives the Commission great discretion to approve or deny applications and even permits the Commission to take no action at all.<sup>379</sup>

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369. *Id.*

370. *Id.*

371. *See supra* Part X.

372. GOV’T § 485.022(e).

373. *See supra* Part VI.

374. GOV’T § 485.022(e).

375. *See id.*

376. *See id.*

377. *See id.*

378. *See id.*

379. *Machete’s Chop Shop, Inc. v. Tex. Film Comm’n*, 483 S.W.3d 272, 281, 283–84 (Tex. Ct. App. 2016) (citing GOV’T § 485.022(e)).

Indeed, the Texas film incentive program provisions were challenged and upheld in *Machete I* and *Machete II* (collectively, “Machete Cases”), even though the government funding-denials appeared to be, at least in part, a result of the states’ objection to the films’ content.<sup>380</sup> These cases had key differences from *Brooklyn Institute* and *Esperanza*, where First Amendment violations were found.<sup>381</sup> In both *Brooklyn Institute* and *Esperanza*, the government was already providing funding to the arts organizations and subsequently terminated (or sought to terminate) that funding when it learned the organizations were displaying “offensive” art.<sup>382</sup> In the Machete Cases, however, the Texas Film Commission had yet to distribute any funds when it made its determination.<sup>383</sup>

As a result, the Machete Cases determined that the Texas Film Commission has great discretionary authority to approve or deny applications.<sup>384</sup> And relying heavily on *Rust*, *Machete II* also determined that the government did not violate the filmmaker’s First Amendment rights, provided the incentives-denial did not effectively prevent the filmmaker from making the film, which it did not.<sup>385</sup> These cases suggest that, in denying a film funding based on its content, the government may have more leeway before it issues the funding than after it has already done so.

Another significant difference between these cases is the governments’ reasons for refusals or withdrawals of funding. In both *Brooklyn Institute* and *Esperanza*, government officials made numerous public statements expressing their objection to the speech the recipients

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380. See generally *Machete Prods., L.L.C. v. Page*, 809 F.3d 281 (5th Cir. 2015); *Machete’s Chop Shop, Inc.*, 483 S.W.3d at 272.

381. See generally *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001); *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

382. See *Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 459–63; *Brooklyn Inst. of Arts.*, 64 F. Supp. 2d at 191.

383. See generally *Machete Prods., L.L.C.*, 809 F.3d at 281; *Machete’s Chop Shop, Inc.*, 483 S.W.3d at 272.

384. See generally *Machete Prods., L.L.C.*, 809 F.3d at 281; *Machete’s Chop Shop, Inc.*, 483 S.W.3d at 272.

385. See generally *Machete Prods., L.L.C.*, 809 F.3d at 281.

provided, allowing courts to easily connect those objections with the decisions to deny funding.<sup>386</sup> These kinds of statements by government officials were lacking in the *Machete* Cases: While there was a significant public outcry against the first *Machete* film, government officials were much more restrained about expressing any objections they might have had to the film's content than were the officials in *Brooklyn Institute* and *Esperanza*. The Texas Film Commission provided the *Machete* films' producers little reason for their applications' rejection, other than the cursory explanation that the films contained inappropriate content and/or depicted the state or its residents in a negative light.<sup>387</sup> This language is found in the statute itself, and for reasons discussed above, does not violate the First Amendment on its face.

Some commentators have suggested that the Court's holding in *Finley*—the case most relevant here because of its standards' similarity to the Texas film incentive program's provisions—presents disturbing implications. Karen M. Kowalski observed:

The majority opinion [in *Finley*] . . . took the stance that the decency [and respect] clause was constitutional because it was advisory and not a direct restriction on the content or viewpoint of the artistic expression. There are arguably two effects on First Amendment doctrine because of the new "advisory language" category for government regulation of expression. First, the Court's conclusion that the clause is constitutional because it is "advisory" encourages the deceptive drafting of future legislation. The Court sends the message to future legislators that the constitutionality of any legislation will depend not on what type of expression they seek to prohibit, but rather whether they include enough prepositions. If by including certain jargon, the legislation can be read to consider factors rather than require the presence of certain factors, the legislation will be constitutional. . . . [W]hether legislation is phrased to consider or require the consideration of certain values is inconsequential because the decision maker will

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386. See generally *Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 433; *Brooklyn Inst. of Arts*, 64 F. Supp. 2d at 184.

387. See *supra* Part X.

regard the factors as a mandate from Congress rather than merely a helpful hint.<sup>388</sup>

Harold B. Walther also found the holding in *Finley* “problematic because by holding that only those acts of Congress that expressly threaten the censorship of ideas will be deemed unconstitutional, the Court implicitly afforded Congress the power to discriminate against an individual group or an individual viewpoint.”<sup>389</sup> As Walther sees it, *Finley* gives “Congress a ‘violate the First Amendment free’ card, provided that Congress is inventive enough to reach their desired ends implicitly, rather than expressly.”<sup>390</sup>

It is true, the *Finley* opinion provides legislatures with guidance on how to avoid funding disfavored content without violating the First Amendment. For example, Congress may indirectly prohibit funding to disfavored content by requiring the decisionmaker to consider such content rather than directly prohibiting the funding of that content. The Texas Legislature used this approach when it created the Texas Film Incentive Program, as its content provisions are only considerations for the Commission, not actual prohibitions,<sup>391</sup> and the language used in the statute closely follows that of the provision upheld in *Finley*.<sup>392</sup>

The Machete Cases may also guide government officials on how to avoid funding objectionable artistic speech without violating the First Amendment. A significant problem for the government in both *Brooklyn Institute* and *Esperanza* was that government officials made their motivations clear.<sup>393</sup> As Sarah F. Warren observed:

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388. Karen M. Kowalski, *National Endowment for the Arts v. Finley: Painting a Grim Picture for Federally-Funded Art*, 49 DEPAUL L. REV. 217, 268 (1999) (citations omitted).

389. Harold B. Walther, Note, *National Endowment for the Arts v. Finley: Sinking Deeper into the Abyss of the Supreme Court’s Unintelligible Modern Unconstitutional Conditions Doctrine*, 59 MD. L. REV. 225, 250 (2000).

390. *Id.*

391. GOV’T §485.002(e).

392. *See supra* Part VI.

393. *Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 459–61; *Brooklyn Inst. of Arts*, 64 F. Supp. 2d at 186.

The difficulty with *Esperanza* [arose] only because the City Council was not savvy enough to deny funding to the Esperanza Center without admitting that they were doing so based on the particular views expressed. In fact, the City did little to conceal its motives behind the budget cut. Indeed, they were quite honest about their dislike for the Esperanza Center's views.<sup>394</sup>

On the other hand, in the *Machete* Cases, it appears the government did little more than cite the statute as the reason for its funding denial.<sup>395</sup> It did not add their voices to the public campaign against the first *Machete* film, considered objectionable by members of the public.<sup>396</sup> And while it is possible that this restraint helped the Texas Film Commission's case, it certainly did not hurt it.

These lessons, while potentially instructive for legislators and other government officials, likely give little comfort to filmmakers. As discussed above, courts allow the government wide latitude to deny subsidies, even permitting it to use criteria in the subsidy context that would clearly be forbidden in a regulatory context.<sup>397</sup> Moreover, proving prohibited discrimination in these contexts is near impossible, as the Supreme Court has recognized:

When the limited spending program does not create a public forum, proving coercion is virtually impossible, because simply denying a subsidy "does not 'coerce' belief," and because the criterion of unconstitutionality is whether denial of the subsidy threatens "to drive certain ideas or viewpoints from the marketplace." Absent such a threat, "the Government may allocate . . . funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."<sup>398</sup>

*Finley* seems to grant legislators even more latitude to craft subsidy programs to include otherwise impermissible criteria, provided

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394. See Sarah F. Warren, Note, *Art: To Fund or Not to Fund? That Is Still the Question*, 19 CARDOZO ARTS & ENT. L.J. 149, 171 (2001) (citations omitted).

395. See *supra* Part X.

396. See *supra* Part X.

397. See *supra* Part VI.

398. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552-53 (2001) (Scalia, J., dissenting) (alteration in original) (citations omitted).

those criteria are mere considerations rather than outright prohibitions.<sup>399</sup> Furthermore, the denial of a subsidy only eliminates a potential source of funding for filmmakers, leaving filmmakers in no worse a position than before applying for the subsidy. The key factor for the government, in avoiding the application of the unconstitutional conditions doctrine, is that filmmakers remain free to produce their films with objectionable content outside the incentive program. Using Texas as an example—although this observation applies to other states’ incentive programs as well—while filmmakers are free to make films that portray Texas negatively, they are not entitled to have Texas pay for those films.

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399. *See supra* Part VI.