ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5095

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PULPHUS and WILLIAM LACY CLAY, Representative, United States House of Representatives, *Appellants,*

v.

STEPHEN T. AYERS, in his official capacity as Architect of the Capitol, *Appellee.*

On appeal from the United States District Court for the District of Columbia

BRIEF OF AMICI CURIAE AMERICANS FOR THE ARTS, INC., ARTS & BUSINESS COUNCIL OF GREATER BOSTON, INC., CALIFORNIA LAWYERS FOR THE ARTS, INC., COLLEGE ART ASSOCIATION OF AMERICA, INC., COMIC BOOK LEGAL DEFENSE FUND, INC., THE FREE SPEECH COALITION, INC., GREATER PITTSBURGH ARTS COUNCIL, INDEX ON CENSORSHIP, LAWYERS FOR THE CREATIVE ARTS, MARYLAND LAWYERS FOR THE ARTS, INC., NATIONAL COALITION AGAINST CENSORSHIP, INC., OREGON VOLUNTEER LAWYERS FOR THE ARTS, PEN AMERICAN CENTER, INC., SPRINGBOARD FOR THE ARTS, ST. LOUIS VOLUNTEER LAWYERS AND ACCOUNTANTS FOR THE ARTS, VOLUNTEER LAWYERS FOR THE ARTS, INC., AND WASHINGTON AREA LAWYERS FOR THE ARTS, INC., IN SUPPORT OF APPELLANTS AND IN FAVOR OF REVERSAL

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The Amici are arts services, volunteer lawyers for the arts, and other nonprofit organizations that provide legal, educational, and other programs for artists and arts organizations as well as advocacy in defense of the freedom of expression.

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Amici curiae Americans for the Arts, Inc., Arts & Business Council of Greater Boston, Inc., California Lawyers for the Arts, Inc., College Art Association of America, Inc., Comic Book Legal Defense Fund, Inc., The Free Speech Coalition, Inc., Greater Pittsburgh Arts Council, Index on Censorship, Lawyers For The Creative Arts, Maryland Lawyers for the Arts, Inc., National Coalition Against Censorship, Inc., Oregon Volunteer Lawyers for the Arts, PEN American Center, Inc., Springboard for the Arts, St. Louis Volunteer Lawyers and Accountants for the Arts, Volunteer Lawyers for the Arts, Inc., and Washington Area Lawyers for the Arts, Inc., are arts services, volunteer lawyers for the arts, and other nonprofit organizations that provide legal, educational, and other programs for artists and arts organizations as well as advocacy in defense of the freedom of expression. These organizations all have interests in protecting artistic expression and have special concerns about the possibility of future viewpoint censorship of core political speech in customary art exhibition venues such as public libraries, universities, and government buildings (from village halls to the Capitol).

All parties to this case have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

In this case, the Architect of the Capitol ("Architect") removed David Pulphus's painting entitled "*Untitled #1*" from display in the Congressional Art Competition (the "Competition"), nearly seven months after the painting was first displayed in the Cannon Tunnel, for what the District Court found were viewpoint-discriminatory reasons. However, the District Court permitted this viewpoint censorship because it found that the Competition is "government speech." This was error. Because of the unique nature of art competitions as limited purpose public forums and the fact that the Architect did not exercise control over the message of the works in the Competition until he censored Mr. Pulphus's painting nearly seven months after it was first displayed, the Competition is not government speech, and the removal of Mr. Pulphus's painting for viewpoint-discriminatory reasons was improper. Art competitions convey artists' private speech, not the speech of those selecting the winners, and the techniques used by Mr. Pulphus fall within a long and distinguished tradition in this country in which art addresses current and controversial topics and at times depicts government officials with unusual and exaggerated features.

ARGUMENT

I. Art Competitions Are Limited Purpose Public Forums, Not Government Speech.

The initial issue in this case is whether the Congressional Art Competition is a "limited purpose public forum" or "government speech." In a limited purpose public forum, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983) (internal citations omitted). In the case of "government speech," the government is freer to control the message being expressed because the expression is the government's own, rather than the private expression of individuals. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015). Here, the District Court correctly found that "[t]here is little doubt that the removal of [Pulphus's] painting was based on its viewpoint." *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 240 (2017). But the District Court erroneously found that the Competition is "government speech" and thus Mr. Pulphus's painting could be removed from the Competition. This was fundamental error, because the government is not "speaking" when it creates and hosts an art competition to showcase the speech *of its citizens*.

The District Court's error directly undermines the missions of the *amici* and could potentially inhibit the creation and display of art across the nation. The visual arts are omnipresent in public libraries, universities, and government buildings. Particularly in the case of student artists, governments often sponsor or support such displays. If an artist's individual expression in his or her art "could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). That is precisely what happened here. Moreover, contests or public displays of art would likely become tantamount to contests to convey messages that curry favor with the government, which is more characteristic of totalitarian regimes than our democracy.

In analyzing the Congressional Art Competition, the District Court placed undue weight on the Congressional element without fully accounting for the nature of the Art Competition. Although Mr. Pulphus's painting might have qualified as government speech in a different context—for instance, if the government had commissioned it to adorn a wall in the Capitol—the Congressional Art Competition is a limited purpose public forum and not government speech, for two principal reasons. *First*, art competitions are limited purpose public forums in which the speech conveyed is that of the individual artists, not of the competitions'

sponsors or judges. *Second*, art competitions necessarily limit the sponsors' control over the messages expressed by the artwork.

A. Art Competitions Are Classic Venues for Private Speech.

The District Court found the evidence "inconclusive" as to whether art competitions are "traditionally used" by the government as a means of speaking to the public. *See Pulphus*, 249 F. Supp. 3d at 248. But the record contained no evidence of the government conveying messages to the public through art competitions. Nor could it; art competitions as a rule are understood, and indeed have for centuries been understood, as opportunities for the expression of private speech and not the speech of the competition organizers or judges, whether they are government officials or private gallery owners.

History and logic both make clear that the selection of particular works in art competitions does not constitute government speech. For instance, the art competitions organized by the Works Progress Administration ("WPA") functioned as forums for the private expression of the winning artists, not the speech of the competition judges. The WPA's Federal Art Project was an art competition in which government officials selected artists and artwork that would receive public subsidies and be rewarded by public display in government-owned "community art centers" throughout the country. *See generally* Roger Kennedy & David Larkin, When Art Worked: The New Deal, Art, and Democracy (2009).

Over a decade, the Federal Art Project awarded subsidies to roughly 10,000 artists. It seems a stretch, to say the least, to characterize this extraordinarily diverse range of private speech as government speech simply because at some point some government official had the opportunity to engage in content-based review of the artwork.

Indeed, a viewer perusing an exhibition of WPA art, like viewers of the Congressional Art Competition, would see a cacophony of artistic styles, subjects, themes, and ideas, each work the expression of the individual artist who created it. *Cf. Tam*, 137 S. Ct. at 1759. The WPA art did not express the government's message to its citizens: artists were free to determine the content of their artwork. That freedom accounts for the freshness and individuality of WPA art. The iconic WPA murals inside San Francisco's Coit Tower, for example, memorably depict an armed holdup in progress (on the right of the mural portion reproduced below):

Steve Moyer, *New Deal Murals*, 34 THE MAGAZINE OF THE NATIONAL ENDOWMENT FOR THE HUMANITIES 2 (March/April 2013), *available at* https://www.neh.gov/humanities/2013/marchapril/curio/new-deal-murals. Of course, the federal government does not endorse armed robbery, and no one would reasonably interpret the mural as suggesting such an endorsement. Although the work was selected by the government, it was not created by the government, nor did it express a government message.

Similarly, at the time of the founding of the United States, the most famous art competition in the West was the Paris Salon—which, like the Congressional Art Competition, was held in a government building (the Louvre). *See* Louvre Museum, *A History of the Louvre*, *available at*

http://www.louvre.fr/en/histoirelouvres/history-louvre/ (last visited Jan. 5, 2018). Although the works displayed were selected by government officials, those works were often the targets of fierce criticism from Church, State, and society. Yet at no point did these critics understand the works to be the speech of the French monarchy (or later the French Republic); the works were the private speech of the artists, and were criticized on that basis. *See generally* Michael Levy, Painting and Sculpture in France 1700–1789 (1993).

Art competitions contrast sharply with the facts presented in *Pleasant Grove City v. Summum*, 555 U.S. 460, 464-66 (2009), in which the town selected artwork to install in a 2.5-acre public park. Rather than seeking out and displaying the private speech of individual artists, the government in *Summum* limited the displays in the park to those which "(1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." *Id*. This was not a "competition" in which the private expression of artists was on display: it was an exhibition designed to showcase the "history of Pleasant Grove." This tightly planned, intimately programmatic public park in *Summum* conveyed the expression of the government. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (implicitly accepting that construction of a Christian crèche in collaboration with private parties constituted governmental speech for purposes of the Establishment Clause). Such expression seems a far cry from the situation

here, where the government displayed many different works on the crowded walls of an art competition. These works, like all works submitted in an art competition, convey artists' private speech, not the speech of the government.

B. The Congressional Art Competition Lacks the Governmental Control Over Message Characteristic of Government Speech.

As a practical matter, the Congressional Art Competition lacks the fine governmental control over the message of individual artwork characteristic of government speech. *See Pulphus*, 249 F. Supp. 3d at 252. Just as the Supreme Court found trademarks not to be government speech although the Patent and Trademark Office exercises "some" control over them, *see Matal*, 137 S. Ct. at 1758, the limited control exercised here does not transform the Competition into government speech. Because art competitions lack pervasive sponsor control over message, the Congressional Art Competition is not government speech, but instead a limited purpose public forum for private speech.

1. Unlike Competitions for a Commission, Art Competitions Feature No Practical Governmental Control Over the Private Artist's Expression.

There is a sharp distinction between an artist's own independent work and a work executed in response to exacting artistic direction, where the artist's speech is partially or wholly subordinated to the message of the sponsoring entity. These latter cases, which could broadly be characterized as "commissions," exist in a

very different world from the "art competition." *Cf.* 17 U.S.C. § 101[1] (distinguishing, for the purposes of copyright law, between work generated by an artist using his or her own resources and a "work made for hire").

Of course, like almost any human endeavor, a commission can be competitive. For instance, artists could compete for the opportunity to produce a particular piece of artwork that expresses a *previously announced governmental message*. Thus, in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005), artists competed for the right to become, in essence, the government's artist-for-hire, producing artwork that promoted the government's chosen message encouraging beef consumption. *Id*. But such competition for a commission contrasts with an art competition, in which artists compete simply to have their art displayed amidst other, usually unrelated works. The prize for winning an art competition includes the opportunity for the artist to display his or her *own* expression, not the expression of a patron or commissioner.

This Court's decision in *People for the Ethical Treatment of Animals v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005), presents a similarly instructive contrast between a competition for an artistic commission and an art competition. In *Gittens*, the D.C. government had organized an event known as "Party Animals," in which artists were invited to submit designs for painting and decorating models

[1] Statute included in addendum.

of either a donkey or an elephant, designs that were required to be, among other things, "dynamic and invite[] discovery." *Id.* at 25-27. As in *Johanns*, artists competed to convey the government's message, namely that D.C. had a "whimsical and imaginative side." *Id*. From the outset of the event in *Gittens*, the government, artists, and public knew that the resulting artwork would express the message of the government rather than of the individual artists. *Id*.

Competitive commissions serve an important role for the artists that *amici* represent: they can be a significant source of income and help publicize a previously unknown artist. An artist would not confuse such a commission with independently creating artwork and submitting it to an art competition, just as a lawyer would not confuse a brief she writes on behalf of her client with a novel she is penning in her spare time. In an art competition, the competition's organizer surrenders creative control over the content of the artwork precisely in order to solicit those private expressions that art commissions, in which artists speak on behalf of others, necessarily foreclose.

Here, the District Court failed to take into account the unique nature of art competitions, and the public perception of art competitions, when it assumed that the public perceived the Congressional Art Competition to be government speech. In almost any other part of the Capitol building, visitors could see art erected as government speech, where the artwork had been selected in service of a

government message. They might, for example, visit the Capitol Rotunda and gaze at the *Apotheosis of Washington*, the magnificent ceiling fresco that was commissioned by the Architect of the Capitol to convey the Government's views on patriotism, dignity, and the debt the Government owes to the Founders. *See* Architect of the Capitol, *Apotheosis of Washington*, *available at* https://www.aoc.gov/art/other-paintings-and-murals/apotheosis-washington (last visited Jan. 5, 2018). No such governmental message is conveyed by the hundreds of private artworks hanging in the Cannon Tunnel.

2. The Circumstances Here, Including the Late Removal of Mr. Pulphus's Painting, Illustrate the Absence of Advance Governmental Control.

The District Court likewise erred in determining that the level of control exercised over the Congressional Art Competition by the Architect of the Capitol staff constituted sufficient government control to render the entire Competition government speech. *See Pulphus*, 249 F. Supp. 3d at 253. The court's conclusion is particularly unsettling when the cited government control was, at best, an after-the-fact justification to remove artwork from an exhibition under political pressure. Mr. Pulphus's painting was removed *after* it had been selected as a winner and displayed for nearly seven months in the Cannon Tunnel. This manifests censorship, not government expression. In the world of art curation, editorial control in art exhibits is a highly-specialized activity with distinctive

characteristics set out under the industry's *Code of Ethics for Curators* established by the Curators Committee of the American Association of Museums. These characteristics include "integrity and objectivity of . . . scholarship and research projects" and establishing "intellectual control of the collection under their care." Am. Ass'n of Museums, *A Code of Ethics for Curators*, at 5 (2009), *available at* http://aam-us.org/docs/continuum/curcomethics.pdf.

In keeping with the standards of the profession, the Architect made a considered decision to relinquish the conventional curatorial role and open the Congressional Art Competition forum to artwork without regard to message. The Competition's Suitability Guidelines even provide, "it is not the intent to censor any artwork." [R.7-7 at B-2.] Before displaying Mr. Pulphus's painting, the Architect's staff limited its input to the size of the painting's frame. *See Pulphus*, 249 F. Supp. 3d at 242–43. Effectively, the Architect adopted a policy of not attempting to control the message of submitted works before they were exhibited in the Cannon Tunnel. From the point of view of artists, curators, and the public, the Architect gave up any pretense of the editorial control associated with "government speech." *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set.").

In previous cases in which the courts had found the presence of government speech, the government had exercised editorial control from the very start—a fact absent in the present case. *See Walker*, 135 S. Ct. at 2249 (noting that the government "must approve every specialty plate design *proposal* before the design can appear" and has "actively exercised this authority" (emphasis added)); *Summum*, 555 U.S. at 473 (noting that the government in that case "has now expressly set forth the criteria it will use in making future selections"); *Johanns*, 544 U.S. at 561 ("[T]he Secretary exercises final approval authority over every word used in every promotional campaign. . . . [S]ome proposals are rejected or rewritten by the Department. Nor is the Secretary's role limited to final approval or rejection[.]" (citations omitted)). Nothing of the sort occurred here.

In the instant case, the Architect appears to have exercised "editorial" control only in response to pressure from the public and certain members of Congress. This exceptional reversal of the Architect's practices in reviewing Competition entries, nearly seven months after Mr. Pulphus's painting was first displayed in the exhibition, is different from the exacting editorial control applied at the point of *receipt* of artwork in *Walker*, in which the government had rejected "at least a dozen proposed designs" at the time of suit. 135 S. Ct. at 2249. Unlike *Walker*, the facts of this case demonstrate censorship, not government speech through editorial control.

In the absence of a stated government message and without substantiated evidence of government control to shape that message, the Congressional Art Competition is a limited purpose public forum, not government speech. The District Court erred in holding otherwise.

II. Viewpoint-Based Objections to Core Political Speech Cannot Justify a Takedown of a Properly Selected Work, Regardless of the Context.

Even if the Architect's decision to remove Mr. Pulphus's painting could be properly classified as government speech—and it should not be—the government speech doctrine cannot be used as a pretext to engage in viewpoint-based censorship of core political speech.

This case illustrates vividly the reasons why this is and ought to be so. The government created a competition, invited submissions, and fully accepted Mr. Pulphus's painting. Then, several elected officials who were not part of the group that organized the Competition acted on their own personal objections to what they perceived as the message of the painting to pressure the Architect of the Capitol to remove the work. This cannot fairly be characterized as the creation or reconsideration of government expression of a civic viewpoint, as, for example, occurs with civic monuments (such as the process many local governments have undertaken recently with respect to Confederate monuments). Indeed, the decision to remove the painting conforms with almost *none* of the standards set by art curators themselves, in collaboration with amicus National Coalition Against

Censorship, Inc., to manage controversy over the display of art. *See* Nat'l Coalition Against Censorship, Inc., *Museum Best Practices for Managing Controversy*, http://ncac.org/resource/museum-best-practices-for-managing-controversy (last visited Jan. 5, 2018). It is an instance of after-the-fact selective censorship of core political speech.

Viewpoint censorship of core political speech is forbidden not only in limited purpose public forums but also in some government operations. Indeed, the Supreme Court has avoided heavy-handed application of the government speech doctrine in a manner that would impinge on central free expression principles, such as journalistic and artistic freedom. *See, e.g.*, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) (applying First Amendment to publicly owned television station when station management, which ordinarily exercised editorial control over message, hosted debate between candidates for public office); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–89 (1998) (implicitly accepting idea that even when government is acting "as patron," the "First Amendment certainly has application in the subsidy context"); *see generally* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 90, 96-97 (1998) (cited in *Gittens*, 414 F.3d at 29) (concluding that the outcomes in *Forbes* and *Finley* were determined, respectively, by the nature of journalism and "the nature of art, the culture of art, and the practice of arts

funding"). The government speech doctrine should not be applied in a manner that would sacrifice classic First Amendment freedoms to a heckler's veto.

The Supreme Court's decision in *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), underlines the stakes in this case and the limitations applicable even to actions that appear to be "government speech." In *Pico*, a public school library contained books exclusively selected by the government, books which were selected to promote a host of governmental messages consistent with the government-set curriculum of the public school. Yet the plurality in *Pico* understood that the government's power to remove library books, if part of an effort to censor core political speech, was subject to limitations—even when the government picked the books in the first place. *See Pico*, 457 U.S. at 870 (plurality op.); *id.* at 876 (Blackmun, J., concurring). The mere fact that the government owned the library and had selected the books initially did not permit the government to withdraw them, when the facts of the case plainly showed that their withdrawal was intended solely to suppress disfavored viewpoints. *Cf. Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999) (viewpoint-based retaliatory decision to withhold museum's funding and eject it from City-owned building held unconstitutional as an indirect suppression of ideas).

As the *Pico* plurality noted, in a passage that anticipated the censorship that occurred in this case:

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. . . . Our Constitution does not permit the official suppression of ideas.

457 U.S. at 870–71 (plurality op.). In this critical moment, when officials across the country are being pressed to censor speech from all parts of the political spectrum when it momentarily attracts the Internet's ire, it is essential that the government speech doctrine not be allowed to serve as a justification for the chilling of free expression. *See Summum*, 555 U.S. at 473 ("Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."); *cf. Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 768-70 (1995) (holding that government could not prohibit private religious display in public plaza and rejecting government's argument that prohibition was justified because some viewers might misperceive display as government endorsement).

After all, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). If Congress may "make no law . . . abridging

the freedom of speech," U.S. Const. Amend. I, it surely may not create an art competition that does so, regardless of whether it is Congress that is "speaking."

The particular facts of this case, in which officials engaged in efforts to censor core political speech solely on the basis of viewpoint, are so inconsistent with our basic constitutional principles, including educational and artistic freedom, that the removal of Mr. Pulphus's painting should be prohibited no matter the context—even, as in *Pico*, a governmental context. In order for our democracy to continue to reap the benefits of free artistic expression, and free political expression more broadly, the government speech doctrine must be kept within its proper bounds.

III. Permitting Government Viewpoint Discrimination Here Would Chill Artistic Expression and Restrict the Ability of the Public to See Art.

A. Public Art Displays Bring Many Benefits and Should Be Shielded from Governmental Censorship.

Visual art is a powerful form of communication that has a unique ability to transmit messages not articulable through linguistic or written expression. It often gives voice to issues of social or political importance, including controversial or unpopular viewpoints. The ability to freely express and debate these ideas is one of the foundations of democratic vitality and civil society, as enshrined in the First Amendment. *See* Owen M. Fiss, The Irony of Free Speech 27-29 (1996) (explaining that the First Amendment is designed to protect robust public debate

and to bring to light diverse and controversial viewpoints of public importance). The protection of artistic expression is therefore critical to our democracy.

Protecting artistic expression would be a hollow promise, however, without robust protections for the public display of artwork. Such displays of art help distribute the ideas expressed in the works and allow the art to inspire public debate and reflection. Protecting public art displays is thus essential to "affording the public access to discussion, debate, and the dissemination of information and ideas." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). Free speech jurisprudence has accordingly emphasized the importance of the public display of art and the need to protect controversial ideas from censorship. *See, e.g., Nelson v. Streeter*, 16 F.3d 145, 148 (7th Cir. 1994) ("the visual arts have been a medium of political and social commentary," and therefore require First Amendment protection)*; cf. Cohen v. California*, 403 U.S. 15, 18-19 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion.").

B. Unconventional Public Art Displays, Including Depictions of Government Officials with Animalistic Features, Are Part of a Long American Tradition of Robust and Thought-Provoking Art.

Public art displays and competitions have historically afforded the public access to thought-provoking, counter-majoritarian messages that have informed public opinion and policy. For example, as discussed above, the federal

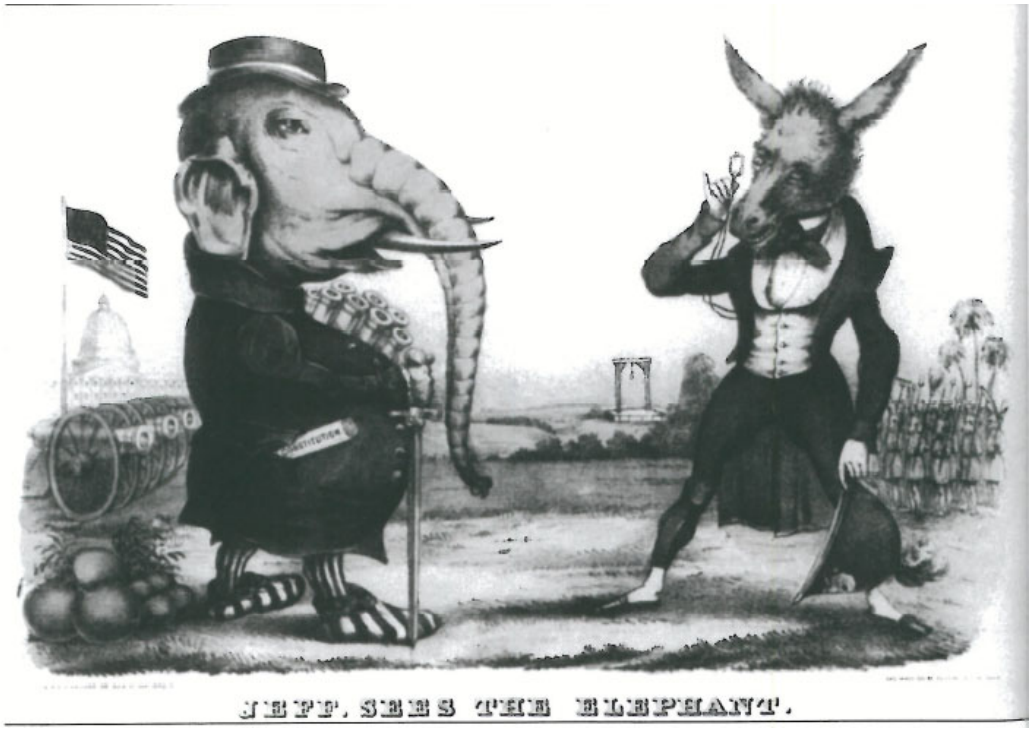
government sponsored and displayed thousands of works as part of the WPA. *See* Eric Arnesen, Encyclopedia of U.S. Labor and Working-Class History at 1540 (2007). The WPA funded many pieces of controversial and influential art, such as unconventional depictions of American life, unorthodox paintings from Jackson Pollock, and works with subversive political messages, over the objections of some government officials. *See 1934: The Art of the New Deal*, THE SMITHSONIAN MAGAZINE, *available at* https://www.smithsonianmag.com/arts-culture/1934-the-art-of-the-new-deal-132242698/ (last visited Jan. 5, 2018).

Similarly, in 1999, the Brooklyn Museum exhibited Chris Ofili's controversial painting, *The Holy Virgin of Mary*, which depicted a black Madonna decorated with elephant manure. Although Mayor Rudolph Giuliani attempted to remove the painting and cut off the City of New York's funding of the Museum, this classic retaliation against officially disfavored art did not succeed. *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999).

In Mr. Pulphus's painting, several police officers are depicted with animalistic features. But the demonstrator the police are confronting also receives this treatment, contributing to the allegorical nature of the painting as a whole. Mr. Pulphus's use of this common technique does not necessarily convey any disrespect or condemnation of the police. The Architect's removal of Mr.

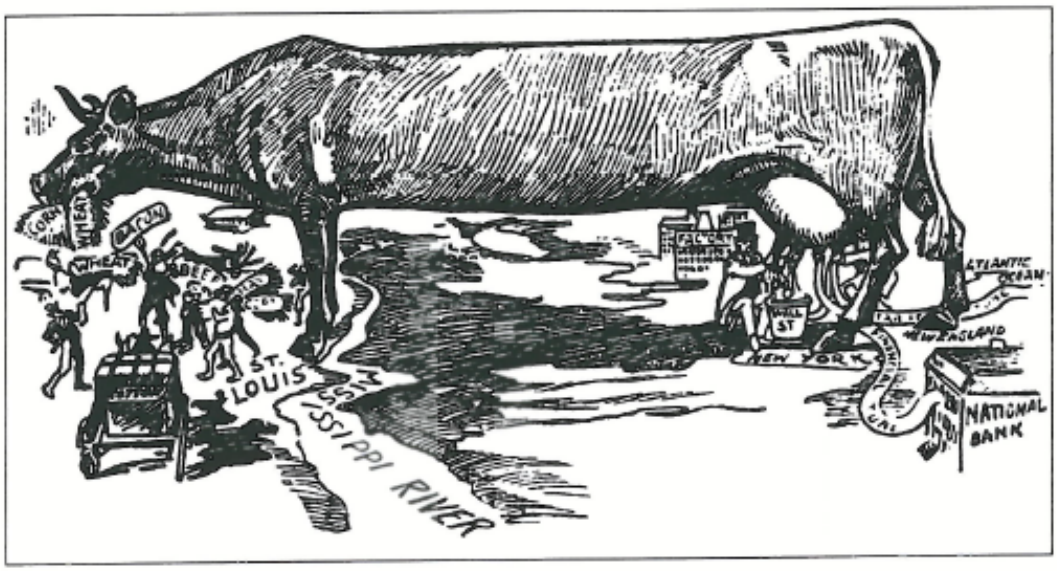
Pulphus's painting based on one of many possible interpretations of its meaning highlights the impermissible viewpoint censorship that occurred in this case.

The techniques used by Mr. Pulphus are not new or controversial. Indeed, there is a long and distinguished tradition of using animal caricatures to criticize the government, as Mr. Pulphus did in *Untitled #1*. For instance, the symbols of our major political parties derive from a cartoon that lampooned those parties by portraying them as a donkey and elephant, shown below:

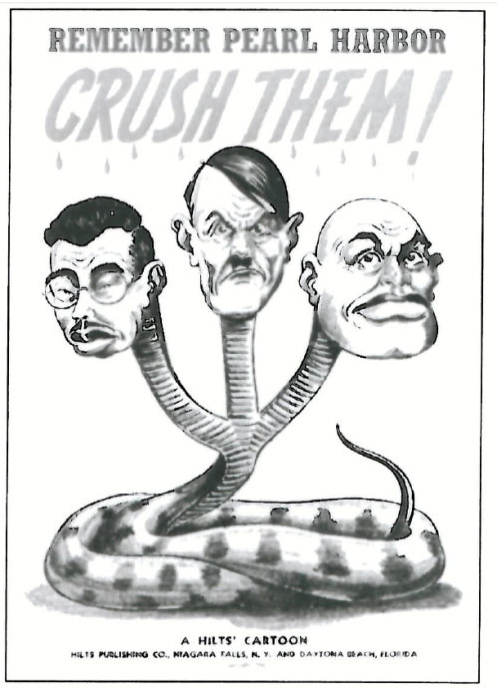


Tony Husband (ed.), *America in Cartoons: A History in Pictures* 8 (2015).

The first cartoon ever entered in the Congressional Record portrayed the domestic economy using an animal image, with workers in the Midwest exploited for the benefit of Wall Street financiers:



Id. at 82. At the height of World War II, Hilt's Publishing Co. in New York published a three-headed snake with the faces of Hirohito, Adolf Hitler, and Benito Mussolini titled *Remember Pearl Harbor—Crush them!* to criticize the Axis Powers:



Id. at 158. As the Supreme Court observed in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), "graphic depictions and satirical cartoons have played a prominent role in public and political debate," and "[f]rom the viewpoint of history it is clear that our political discourse would have been considerably poorer without them." *Id.* at 54-55.

The Supreme Court respected these artistic traditions in *Hustler*, and Mr. Pulphus's use of animalistic caricatures to express his viewpoint on a pressing civic problem in American life, race relations, should similarly be protected from viewpoint censorship. The Architect's censorship of *Untitled #1* based on its message is repugnant to the constitutionally protected and socially essential tradition of political satire.

IV. The Suitability Guidelines Are Unconstitutionally Vague.

As explained above, the Architect's application of the Suitability Guidelines impermissibly restricted Pulphus's speech under the First Amendment. In addition, the Suitability Guidelines themselves, which prohibit artwork "depicting subjects of contemporary political controversy or a sensationalistic or gruesome nature" [R.7-7 at B-3], are unconstitutionally vague under the Fifth Amendment's Due Process Clause.

The vagueness of the Suitability Guidelines is most relevant in the limited purpose public forum context, because it prevents the Architect from justifying a

viewpoint-neutral rationale for the decision to remove Mr. Pulphus's art. But the vagueness concern should be considered in any circumstance, because vague and pliable guidelines are classic tools for abuse and censorship. Amici are particularly concerned with the problems of applying the vague Suitability Guidelines to works of art.

A law is unconstitutionally vague if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). When speech is implicated, the Supreme Court requires "rigorous adherence" to the void-for-vagueness doctrine "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54. Here, the void-for-vagueness doctrine must be "rigorous[ly] adhere[d]" to, *id.*, because the Suitability Guidelines restrict artists' freedom of speech.

The Suitability Guidelines are impermissibly vague because they are "so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement," and they fail to provide sufficient "precision and guidance" so that "those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

A. The Guidelines Require Subjective Judgments.

The Suitability Guidelines are arbitrary and susceptible to discrimination because they cannot be enforced without the exercise of subjective judgments on the part of government officials. *See City of Chicago v. Morales*, 527 U.S. 41, 62

(1999) (loitering ordinance impermissibly vague because it prescribed an "inherently subjective" standard that turned on what was "'apparent' to the officer on the scene"); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

Here, the Suitability Guidelines require the Architect to determine whether works of art "depict[] subjects of contemporary political controversy or a sensationalistic or gruesome nature." [R.7-7 at B-3.] Similarly phrased standards have been found unconstitutionally vague. *See United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) ("We have no doubt that standing alone, the term 'controversial' vests the decision-maker with an impermissible degree of discretion."); *see also Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (bar on "annoying" conduct was unconstitutionally vague); *Clary v. City of Cape Girardeau*, 165 F. Supp. 3d 808, 822 (E.D. Mo. 2016) (holding ordinance void for vagueness where it prohibited conduct that results in a third party's "subjective annoyance or disturbance"); *cf. Matal*, 137 S. Ct. at 1756 (noting, without considering vagueness doctrine *per se*, "[t]he admitted vagueness" of statute prohibiting trademarks that "disparage[]" any

person). Like the standards addressed in these decisions, the Suitability Guidelines are unconstitutionally vague and should be invalidated on this ground.

B. The Guidelines Require Resolving Several Layers of Indeterminacy, Especially in Evaluating Art that Employs Symbolism, Metaphor, or Allegory.

The Suitability Guidelines involve several layers of indeterminacy. Beyond their subjective terms, the meaning of the artwork subject to the Guidelines is inherently ambiguous and dependent on viewers' subjective reactions, especially with respect to symbolism, metaphor, or allegory.

The Supreme Court invalidated part of a penalty enhancement statute in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the clause at issue (the "residual clause") involved multiple layers of indeterminacy. The residual clause allowed enhanced penalties based on the court's judgment as to whether a defendant's prior "violent felony" convictions "involve[] conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555–56. The Court held that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558. "Each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us

which at best could be only guesswork." *Id.* at 2560 (internal citations and quotations omitted).

Here, not only are the Guidelines vague in prohibiting, among other elements, "subjects of contemporary political controversy or a sensationalistic or gruesome nature." [R.7-7 at B-3], but they are vague again in their requirement that these rules be applied to art, the meaning of which "is often uncertain, fluid, and subjective." *Sefick v. Gardner*, 990 F. Supp. 587, 597 (N.D. Ill.), *aff'd,* 164 F.3d 370 (7th Cir. 1998). After all, "[e]ven when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Summum*, 555 U.S. at 474. More broadly, art is inherently ambiguous and subject to multiple interpretations. *See generally* Laura Cohen, *Beyond* Silberman v. Georges*: Shielding the Artist from Claims of Libel*, 17 Colum. Hum. Rts. L. Rev. 235, 254 (1986) ("Visual imagery's unique ability to fuse physical, emotional, and intellectual elements in a manner that resists linguistic description or translation further accentuates its imprecision"). A still further layer of ambiguity is added when symbols, metaphor, and allegory are involved. Indeed, "artists employ symbols and allegory precisely because of their ability to impart multiple meanings." *Id.* at 253.

The meaning and message of *Untitled #1* is particularly ambiguous, thus highlighting the dangers of applying the vague Suitability Guidelines to it. The

painting used symbols, metaphor, and allegory, for instance, in its depiction of two police officers with the heads of warthogs and a young man with the head of a wolf, opening up multiple interpretations. Thus, whether *Untitled #1* "depict[s] subjects of contemporary political controversy or a sensationalistic or gruesome nature" [R.7-7 at B-3], depends not only on the Architect's subjective interpretation of these terms in the Guidelines, but also on the Architect's subjective interpretation of the painting. To add a final layer of indeterminacy, the Architect did nothing to explain how he applied the Suitability Guidelines to *Untitled #1*: he stated merely that "the artwork in question does not comply" with the Suitability Guidelines, without explaining why. [R.7-13 at H-1.]

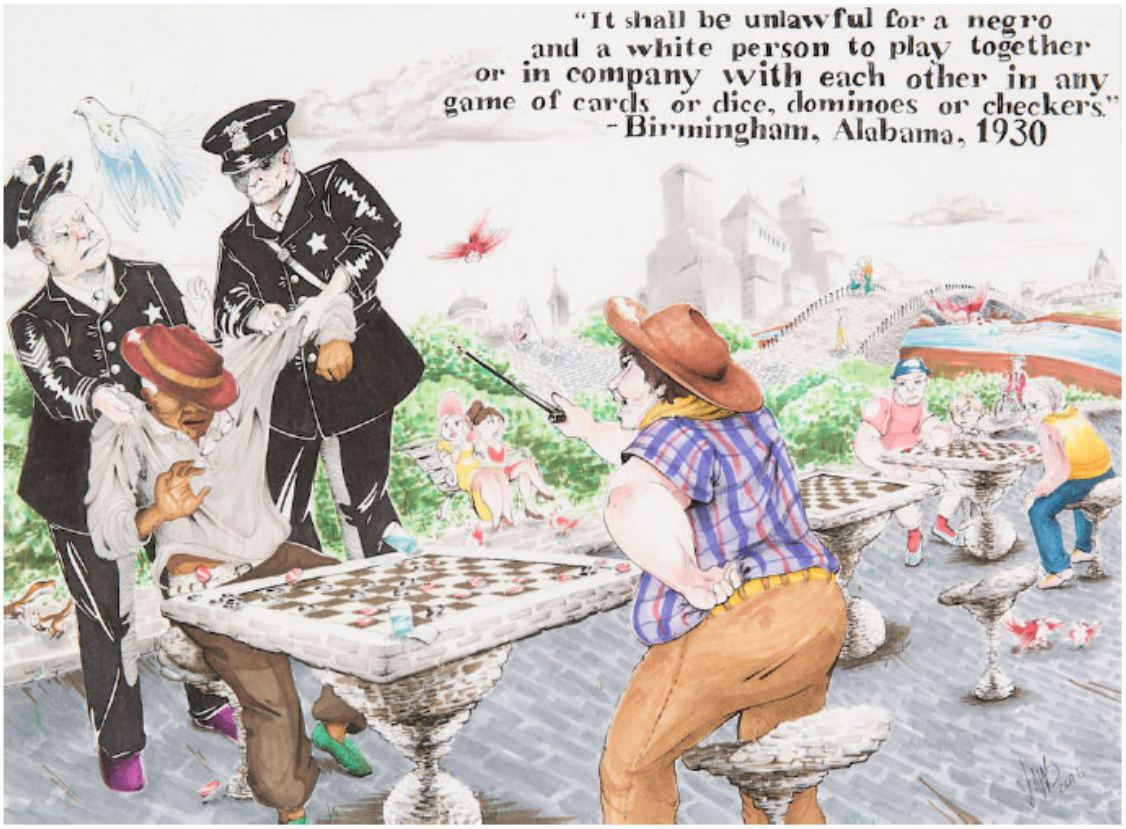
Under *Johnson*, the Suitability Guidelines' multiple layers of indeterminacy render them void for vagueness.[2]

C. In the 2016 Competition, the Suitability Guidelines Were Applied Arbitrarily.

The standardless and potentially discriminatory nature of the Guidelines is confirmed by the fact that, in the 2016 Competition, the Architect applied the

[2] The Court need not find that *all* regulation of art is unconstitutionally vague in order to find that the *Suitability Guidelines* are unconstitutionally vague. Although the meaning of all artwork is indeterminate, that indeterminacy is compounded here by the indeterminacy of the Guidelines' terms. Regardless of whether the Guidelines would have been unconstitutionally vague if they had been limited to more objective requirements (e.g., prohibiting any depictions of police officers), they are unconstitutionally vague as currently drafted.

Guidelines inconsistently, failing to disqualify other works of art, two of which are reproduced below, that would seem to violate the Guidelines at least as much as *Untitled #1*.



"THE RULES"
Salve V. Black
Hon. John Lewis
GA-05

[R.7-23 at H-1.]

"BEAUTY IN THE STRUGGLE"
Christian Jegbadai
Hon. Alma Adams
NC-12

[R.7-23 at H-10]; *see also Johnson*, 135 S. Ct. at 2559–60 (that residual clause in sentencing statute "ha[d] proved 'nearly impossible to apply consistently'" demonstrated its vagueness). The fact that *Untitled #1* was displayed for nearly seven months and removed only after several Members of Congress complained also suggests that the subjective Guidelines were used as a pretext for arbitrary, viewpoint-based discrimination with the aim of chilling core political speech—one of the principal harms that the void-for-vagueness doctrine is intended to prevent.

See Fox, 567 U.S. at 253-54 ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.").

Arbitrary and discriminatory removals of art from public display, enabled by vague guidelines, hurt all artists and art viewers. In particular, student artists, wary that any artwork they submit to the Competition might be rejected for viewpoint-discriminatory reasons, will be less likely to create or submit works, and viewers will have fewer opportunities to see diverse and truly original works.

V. CONCLUSION

The censorship in the Capitol was a terrible civics lesson. "Punishing students for their speech robs our public debate of needed voices, and it teaches our children—who, of course, one day become adults—that censorship, even broad and sometimes arbitrary censorship, is acceptable." Sonja West, "Censorship 101," SLATE (Dec. 6, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/when_you_censor_student_speech_you_re_mostly_teaching_kids_to_live_with.html (last visited Jan. 5, 2018). It also violated the First and Fifth Amendments. For the foregoing reasons, Amici respectfully request that this Court reverse the District Court's denial of Appellants' motion for a preliminary injunction.

Dated: January 5, 2018

Respectfully submitted,

/s/ Isaac Belfer

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6379 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: January 5, 2018

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CERTIFICATE OF SERVICE

I certify that on January 5, 2018, I electronically filed the foregoing Brief of Amici Curiae in Support of Appellants with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF Document Filing System. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system by sending notification of such filing to all parties of record.

Dated: January 5, 2018

/s/ Isaac Belfer
Isaac Belfer

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§ 101. Definitions

Effective: December 9, 2010
Currentness

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with

the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A "Copyright Royalty Judge" is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is--

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) the WIPO Copyright Treaty;

(6) the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

The term "motion picture exhibition facility" means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means--

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a "United States work" only if--

(1) in the case of a published work, the work is first published--

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The "WIPO Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A "work of visual art" is--

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include--

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is--

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment--

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2541; Pub.L. 96-517, § 10(a), Dec. 12, 1980, 94 Stat. 3028; Pub.L. 100-568, § 4(a)(1), Oct. 31, 1988, 102 Stat. 2854; Pub.L. 101-650, Title VI, § 602, Title VII, § 702, Dec. 1, 1990, 104 Stat. 5128, 5133; Pub.L. 102-307, Title I, § 102(b)(2), June 26, 1992, 106 Stat. 266; Pub.L. 102-563, § 3(b), Oct. 28, 1992, 106 Stat. 4248; Pub.L. 104-39, § 5(a), Nov. 1, 1995, 109 Stat. 348; Pub.L. 105-80, § 12(a)(3), Nov. 13, 1997, 111 Stat. 1534; Pub.L. 105-147, § 2(a), Dec. 16, 1997, 111 Stat. 2678; Pub.L. 105-298, Title II, § 205, Oct. 27, 1998, 112 Stat. 2833; Pub.L. 105-304, Title I, § 102(a), Oct. 28, 1998, 112 Stat. 2861; Pub.L. 106-44, § 1(g)(1), Aug. 5, 1999, 113 Stat. 222; Pub.L. 106-113, Div. B, § 1000(a)(9) [Title I, § 1011(d)], Nov. 29, 1999, 113 Stat. 1536, 1501A-544; Pub.L. 106-379, § 2(a), Oct. 27, 2000, 114 Stat. 1444; Pub.L. 107-273, Div. C, Title III, § 13210(5), Nov. 2, 2002, 116 Stat. 1909; Pub.L. 108-419, § 4, Nov. 30, 2004, 118 Stat. 2361; Pub.L. 109-9, Title I, § 102(c), Apr. 27, 2005, 119 Stat. 220; Pub.L. 111-295, § 6(a), Dec. 9, 2010, 124 Stat. 3181.)

Notes of Decisions (408)

17 U.S.C.A. § 101, 17 USCA § 101
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

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