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Denis Doyon
New Mexico Media Literacy Project
6400 Wyoming Blvd. NE
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RE: Legal opinion on Smoke Free Movies proposal on state film subsidies

Dear Mr. Doyon:

At your request, I furnish the following legal opinion.

In 2009, forty-one states in the U.S. have motion picture subsidy programs to lure film production to their states as part of a broader economic development effort.¹ The Smoke Free Movies project proposes that states make ineligible for such subsidies any film with tobacco imagery targeted at the youth market (G, PG and PG-13 MPAA ratings) because viewing on-screen tobacco use has been proven to increase the likelihood of youth tobacco use initiation.

ISSUE: Would such ineligibility criteria violate film-makers' First Amendment rights?

ANSWER: No, the U.S. Supreme Court has repeatedly held that governments are entitled to refuse to fund activities, including speech, without violating the First Amendment. There is nothing in the Smoke Free Movies proposal to limit state film subsidies that prohibits the film-maker from portraying smoking in any film, even one targeted at the youth market; it simply proposes that the government should not subsidize such films.

In general, a legislature's decision not to subsidize the exercise of a First Amendment right does not infringe the right (*Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546-549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)), and one who wishes to exercise a First Amendment

¹ Jonathan R. Polansky, & Stanton A. Glantz. (2009). Taxpayer Subsidies for US Films with Tobacco Imagery. UC San Francisco: Center for Tobacco Control Research and Education. Retrieved from: <http://escholarship.org/uc/item/8nc8422j>

right is not entitled to a subsidy from the government to make that right fully realized (*Cammarano v. U.S.*, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959)).

The disqualification of specific film content in the context of government program funding is also permissible under the First Amendment. In *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1990), petitioners challenged on First and Fifth Amendment grounds a requirement that recipients of federal Title X (Public Health Service Act, 42 U.S.C.S. §§300-300a-6) funding could not engage in abortion-related activities, including counseling women about abortions, using the Title X funds. The petitioners relied on an earlier Supreme Court decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) which invalidated under the First Amendment a state sales tax that applied to a small group of publishers while exempting all others. The Court in *Rust* rejected *Arkansas Writers' Project* as applicable to the Title X funding restrictions because Title X was “a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.” *Rust v. Sullivan*, 500 U.S. at 194, 111 S.Ct. at 1773, 114 L.Ed.2d. at 256. “Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *Rust, supra*. States have the same power. *Regan, supra*, *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d. 484 (1977) and *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d. 784 (1980).

The Supreme Court came to the same conclusion in rejecting a First Amendment argument in the context of public funding of the arts in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d. 500 (1997). The National Foundation on the Arts and the Humanities Act (20 U.S.C.S. §§951 *et seq.*) imposes some limits on what the National Endowment for the Arts can fund. The Court held that Congress has wide latitude to set spending priorities: “Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.” *National Endowment for the Arts v. Finley*, 524 U.S. at 587-588, 118 S.Ct. at 2179, 141 L.Ed.2d. at 516, citing *Regan, supra*, *Rust, supra* and *Maher, supra*.

Thirty-one of the states that subsidize films have statutory criteria, related to content, for disqualifying films from receiving the subsidy. Of those, eight have criteria that are very broad, such as the film reflects badly on the state or is not in the state's best interests. It would not be difficult or unconstitutional to add tobacco imagery as a disqualifier for films marketed to youth.

Sincerely,



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