Nos. 26-1829 (L),

-1832 (CON), -1996 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 26-1829, 26-1996

AMERICAN COUNCIL OF LEARNED SOCIETIES, AMERICAN HISTORICAL ASSOCIATION, and MODERN LANGUAGE ASSOCIATION OF AMERICA,

Plaintiffs-Appellees-Cross-Appellants,

v.

MICHAEL MCDONALD, in his official capacity as Chairman of the National Endowment for the Humanities; NATIONAL ENDOWMENT FOR THE HUMANITIES, UNITED STATES DOGE SERVICE; AMY GLEASON, in her official capacity as Acting Administrator of the United States DOGE Service; NATE CAVANAUGH, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration; and JUSTIN FOX, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND KNIGHT FIRST AMENDMENT INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS, PLAINTIFFS-APPELLEES, AND AFFIRMANCE

CAPTION FOR NO. 26-1832 AND COUNSEL INFORMATION LISTED ON INSIDE COVER

No. 26-1832

THE AUTHORS GUILD, WILLIAM GOLDSTEIN, ELIZABETH KADETSKY, VALERIE ORLANDO, KATALIN BALOG, BENJAMIN HOLTZMAN, LEE JASPERSE, and NICOLE JENKINS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

NATIONAL ENDOWMENT FOR THE HUMANITIES, MICHAEL McDONALD, in his official capacity as Chairman of the National Endowment for the Humanities; UNITED STATES DOGE SERVICE; AMY GLEASON, in her official capacity as Acting Administrator of the United States DOGE Service; NATE CAVANAUGH, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration; and JUSTIN FOX, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae American Civil Liberties Union, New York Civil Liberties Union, and Knight First Amendment Institute state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Dated: November 16, 2026
New York, New York

/s/ Lauren J. Yu
Lauren J. Yu

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization devoted to protecting civil rights and liberties. The New York Civil Liberties Union ("NYCLU") is the ACLU's New York affiliate. For decades, the ACLU and NYCLU have participated as counsel or amici curiae in many consequential First Amendment cases, including those involving First Amendment rules in government support for private speech. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (ACLU as counsel); *Rust v. Sullivan*, 500 U.S. 173 (1991) (ACLU and NYCLU as counsel); *R.I. Latino Arts v. Nat'l Endowment for the Arts*, 800 F. Supp. 3d 351 (D.R.I. 2025), *appeal docketed*, No. 25-2113 (1st Cir. Nov. 17, 2025) (ACLU as counsel); *Schiff v. U.S. Off. of Pers. Mgmt.*, 784 F. Supp. 3d 380 (D. Mass. 2025) (ACLU as counsel); *Brooklyn Inst. of Arts & Scis. v. City of N.Y.*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (ACLU and NYCLU as amici).

The Knight First Amendment Institute at Columbia University is a nonpartisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, policy

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

development, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

INTRODUCTION

"The First Amendment 'envisions the United States as a rich and complex place' where all enjoy the 'freedom to think as you will and to speak as you think.'" *Chiles v. Salazar*, 607 U.S. 627, 640 (2026) (citation omitted). Central to the First Amendment's protection of free speech is that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019). Viewpoint discrimination "represents 'an egregious form' of content regulation, and governments in this country must nearly always 'abstain.'" *Chiles*, 607 U.S. at 641 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

That principle applies equally where the government is directly regulating speech and where, as here, it is discriminating in the provision (or through the termination) of government benefits for private expression. The Supreme Court reaffirmed in *National Endowment for the Arts v. Finley* that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" 524 U.S. 569, 587 (1998) (alteration in original) (quoting *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 550 (1983)).

Yet that is what the Government has done in this case. Personnel from the so-called Department of Government Efficiency ("DOGE"), working within the National Endowment for the Humanities ("NEH"), used rudimentary keyword searches and ChatGPT prompts to single out grants they perceived as espousing "diversity, equity, and inclusion" ("DEI") viewpoints. *Am. Council of Learned Socs. v. Nat'l Endowment for the Humans.*, Nos. 25-cv-3657, 25-cv-3923, 2026 WL 1256545, at *8, *10–11 (S.D.N.Y. May 7, 2026). The Government terminated "more than 1,400 grants, representing over $100 million in congressionally appropriated funds awarded to scholars, writers, research institutions, and other humanities organizations"—the largest mass termination of grants in the NEH's history. *Id.* at *1. In doing so, the Government leveraged its power to award and terminate grants to suppress specific viewpoints in violation of the First Amendment.

As Plaintiffs explain, *see* Plaintiffs-Appellees' Br. at 35–46, the Government mischaracterizes Supreme Court precedent to incorrectly conclude that viewpoint discrimination is permitted in selective funding contexts. Amici write, *first*, to expand on Plaintiffs' discussion of the key authorities from the Supreme Court and this Court on this point. Specifically, in addition to *Finley*'s express admonition to the contrary, the Supreme Court has reiterated in other cases that the government cannot impose viewpoint-based restrictions when funding private speakers. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001). *Second*, amici write

to present an alternative argument in favor of affirmance. Nonpublic forum doctrine supports the same result, as it requires that even where the government has opened a forum for only a select group of speakers, it must not discriminate on the basis of viewpoint. *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 151 (2d Cir. 2004). And *third*, amici write to explain how the Government's reliance on its *perception* of the grants' viewpoint underscores the First Amendment violation.

Were it otherwise, the government could use its outsized financial authority to suppress private speech wherever it provides funding, from public universities to legal aid services. It could also leverage its discretionary authority over all kinds of government benefits—from broadcast licenses to trademark registration—to skew the marketplace of ideas in its preferred ideological direction. The First Amendment prevents the government from having such power, and for good reason.

ARGUMENT

I. The First Amendment Prohibits Viewpoint Discrimination Where the Government Creates a Program to Facilitate Private Speech.

When the government facilitates private speech, it cannot discriminate based on viewpoint. *Velazquez*, 531 U.S. at 541–42; *Rosenberger*, 515 U.S. at 834–35; *see also Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 101 (2d Cir. 2007) ("A funding decision based on the speaker's viewpoint is impermissible . . . ."). For example, in *Velazquez*, the Supreme Court held that, when funding legal representation, Congress could not prohibit lawyers who receive

federal funds from challenging existing welfare laws. *See* 531 U.S. at 536, 549. The Supreme Court explained that, though "Congress was not required to fund an . . . attorney to represent indigent clients" or even "to fund the whole range of legal representations," once it did, "Congress [could not] define the scope of the litigation it funds to exclude certain vital theories and ideas." *Id.* at 548. "The salient point," the Court wrote, was that the "program was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542. Because "[t]he lawyer is not the government's speaker" and "private speech is involved," "[n]either the latitude for government speech nor its rationale applies." *Id.* at 542, 548. Instead, the First Amendment's ban on viewpoint discrimination governs. *Id.*

In *Finley*, the Supreme Court considered this prohibition on viewpoint discrimination in the context of public arts funding. There, four artists and an arts organization challenged statutory language directing the NEA to administer grants based on "artistic excellence and artistic merit . . . , taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *See* 524 U.S. at 572 (quoting 20 U.S.C. § 954(d)(1)). The artists maintained that the "decency and respect" clause introduced impermissible viewpoint discrimination. The Court upheld the statute—but only by interpreting it *not* to authorize viewpoint discrimination. Concluding that "the legislation was aimed at reforming procedures rather than precluding speech," the Court detailed the NEA's

decision to implement the "decency and respect" clause "merely by ensuring that the members of the advisory panels that conduct the initial review of grant applications represent geographic, ethnic, and esthetic diversity." *Id.* at 577, 582. The Court also held that, even setting aside how the NEA had implemented the clause, the new criteria was unlikely, on its face, to "effectively preclude or punish the expression of particular views"—the artists themselves had acknowledged that "[o]ne would be hard-pressed to find two people in the United States who could agree on what the 'diverse beliefs and values of the American public' are, much less on whether a particular work of art 'respects' them," and that "decency" could likewise be interpreted multiple ways. *Id.* at 583 (alteration in original). Because the disfavored speech was so hard to define, the statute was not, the Court concluded, viewpoint based on its face.

Critically, however, the Court cautioned that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints" or to impose a "burden calculated to drive 'certain ideas or viewpoints from the marketplace,'" "a more pressing constitutional question would arise." *Id.* at 587. The Court specifically emphasized that "the First Amendment certainly has application in the subsidy context," requiring that, "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" *Id.* (alteration in original) (quoting *Regan*, 461 U.S. at 550). The

Court warned that if the decency-and-respect clause were "applied in a manner that raises concern about the suppression of disfavored viewpoints," it could run afoul of that principle. *Id.*

Like the NEA grants at issue in *Finley*, NEH grants are subject to the general prohibition on viewpoint discrimination. But unlike the statute at issue in *Finley*, which the NEA found a way to implement without consideration of grant applicants' viewpoints, the terminations here were "based on opposition to the viewpoints of the DEI projects." Appellants' Br. at 28; *see also Thakur v. Trump*, 176 F.4th 1187, 1201 (9th Cir. 2026) (holding that, in the context of similar terminations, "the terms DEI, DEIA, and environmental justice are inherently directional; they reflect 'perspective[s],' rather than neutral topics" (alteration in original)). The Government did exactly what *Finley* cautioned against, "manipulat[ing]" the NEH grants to "ai[m] at the suppression of dangerous ideas." *Finley*, 524 U.S. at 587 (second alteration in original) (quoting *Regan*, 461 U.S. at 550); *Thakur*, 176 F.4th at 1202; *see also, e.g.*, *Brooklyn Inst. of Arts & Scis. v. City of N.Y.*, 64 F. Supp. 2d 184, 198 (E.D.N.Y. 1999) (holding that the city engaged in viewpoint discrimination when it decided to stop funding a museum because of a controversial exhibit); *Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 454–56 (W.D. Tex. 2001) (holding that the city violated the First Amendment in rescinding a grant

previously extended to a nonprofit because the group assertedly "advocat[ed] a gay and lesbian lifestyle").

Were the government free to discriminate on the basis of viewpoint in funding private speech, the government could prohibit public university professors from expressing officially disfavored views in their government-funded research and teaching. *But see Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (the government's funding of public universities does not give it *carte blanche* to regulate speech there). So, too, could it allocate subsidies to the press based on whether a media outlet parroted the administration's views on DEI or anything else. *But cf. Hannegan v. Esquire*, 327 U.S. 146, 151–53 (1946) (holding that "subsidy" in mailing costs cannot be withheld because a newspaper or periodical "failed to meet some standard of worth or value or propriety"). The government has unparalleled financial resources, and when it uses them not to express its own views, but to support private speech, it cannot leverage that funding to skew the marketplace of ideas and to suppress disfavored views.

II. The Government's Arguments Misconstrue Supreme Court Precedent.

The Government misconstrues Supreme Court precedent in arguing that viewpoint discrimination is permissible in the selective funding context. First and foremost, the Government misstates the holding of *Finley* in citing the case for the proposition that the government can choose what to fund. The Court in *Finley*

rejected the artists' claim that the "decency and respect" clause violated the First Amendment's prohibition on viewpoint discrimination—not because there is no such prohibition, but because it concluded there was no such discrimination. It instead found that the NEA had implemented the "decency and respect" clause by ensuring that diverse advisory panels review grant applications. *Finley*, 524 U.S. at 577. Contrary to the Government's assertion, the Court did not sanction viewpoint-based judgments on grant applications—instead, it specifically cautioned that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." *Id.* at 587. The Government's actions here, in terminating grants for their DEI viewpoints, present that "different case."

The Government's reliance on *Rust v. Sullivan* and *Agency for International Development v. Alliance for Open Society International, Inc.* is also misplaced. These cases held that the government cannot regulate or compel speech outside of a government program as a condition of receiving government funding. *Rust*, 500 U.S. at 196–97; *Open Soc'y*, 570 U.S. 205, 214–15 (2013). But neither case held that that is the *only* First Amendment rule when it comes to government funding. Indeed, neither concerns government support for private speech at all—at most, the programs at issue funded government speech, *see Velazquez*, 531 U.S. at 541 (describing *Rust* as a government speech case)—and so neither can stand for the

proposition that the government may discriminate on the basis of viewpoint in its decisions to fund private speech. As the Ninth Circuit recently held in rejecting this blinkered reading of *Rust* and *Open Society*, "[t]o be sure, the government may violate unconstitutional-conditions principles when it imposes restrictions on speech outside the contours of a program, but the government offers no support for the assertion that this is the *only* constraint on the government's funding decisions." *Thakur*, 176 F.4th at 1204. To the contrary, "Supreme Court precedent defeats [it]." *Id.*

In *Open Society*, the Supreme Court struck down a requirement that organizations adopt "a policy explicitly opposing prostitution and sex trafficking" in order to receive federal funds. 570 U.S. at 210. Though the Court explained that, "[*i*]*n the present context*, the relevant distinction . . . is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside," it nowhere limited the First Amendment's reach to only those kinds of conditions. *Id.* at 214–15 (emphasis added).

Similarly, in *Rust*, the Court upheld a restriction on speech within a government speech program. The challenged regulations prohibited doctors receiving Title X funds from providing abortion-related advice, as Title X "preconceptional services" were designed to "support preventive family planning

services, population research, [and] infertility services," not advice about what to do postconception. 500 U.S. at 178–79. As the Court subsequently explained, *Rust* rested "on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech." *Velazquez*, 531 U.S. at 541; *see also Rosenberger*, 515 U.S. at 833 ("[In *Rust*], the government . . . used private speakers to transmit specific information pertaining to its own program.").

But *Rust* expressly rejected the proposition that the *only* First Amendment limit on government funding involves restrictions on a recipient's own speech outside the program. It held 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 [not] invariably sufficient to justify Government control over the content of expression." 500 U.S. at 199. Where, as here, a program is "expressly dedicated to speech activity," additional First Amendment doctrines govern. *Id.* at 200 (quoting *United States v. Kokinda*, 497 U.S. 720, 726 (1990)). The ability to set spending priorities may afford latitude in considering content, but it still does not permit the Government to consider viewpoint. *See Finley*, 524 U.S. at 587–88.

III. Nonpublic Forum Doctrine Also Prohibits Viewpoint Discrimination.

While the district court did not focus its analysis on forum doctrine, the Government's summary assertion that "this case plainly does not involve any public

forum," Appellants' Br. at 33, ignores that *non*public forum doctrine also requires affirmance. Forum doctrine holds that, even in a "nonpublic forum"—namely, one the government has *not* opened for indiscriminate access by all or even particular types of speakers—the government may not discriminate on the basis of viewpoint.

Nonpublic forums involve government support of private speech that is selective, not indiscriminate. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 282 (1984) (explaining that "[n]onpublic forum[s]" refer to "assistance" the government offers "to certain persons in communicating with . . . listeners [who are not] acting for the government"). And the rules governing nonpublic forums insist that even when the government "is dangling the carrot of subsidy, not wielding the stick of prohibition," it still must not discriminate on the basis of viewpoint. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 683 (2010); *see also Velazquez*, 531 U.S. at 544 ("As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction."); *cf. Rosenberger*, 515 U.S. at 835 (applying forum doctrine to "funding of speech").

The rule for nonpublic forums parallels the lesson of *Finley* and *Velazquez*: "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998); *Make the Rd. by Walking*,

378 F.3d at 151 ("[W]here the government allows private parties to express their personal views in a nonpublic forum[, it is] required to avoid viewpoint discrimination."); *see also Peck ex. rel Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 630 (2d Cir. 2005) (recognizing that viewpoint discrimination "traditionally has been prohibited *even* in non-public fora").

The Government argues that forum doctrine is inapposite here because *Finley* declined to apply *Rosenberger*, which held that a university could not deny funding to religious publications on the basis of viewpoint when funding student groups. But in distinguishing *Rosenberger*, *Finley* merely rejected the idea that NEA grantmaking is akin to a *designated* forum for *all speech* by a particular class of speakers. 524 U.S. at 586. It explained that *Rosenberger* did not govern because the student funds in that case were designed to "indiscriminately 'encourage a diversity of views from private speakers,'" while the NEA grantmaking in *Finley* was a "competitive process" that rests on "esthetic" judgments. *Id.* This difference might matter for what kinds of restrictions qualify as "reasonable" under the nonpublic forum standard—allowing, for example, content-based determinations of "excellence" in *Finley* but not in *Rosenberger*, *id.*—but it does not absolve the government of its duty not to discriminate based on viewpoint. Indeed, the paragraphs that immediately follow *Finley*'s distinction from *Rosenberger* are the

ones in which the Supreme Court cautions against viewpoint discrimination in NEA funding. *Id.* at 586–87.

Moreover, the distinction between the "indiscriminate" support for student speech in *Rosenberger* and "competitive" allocation of funds in *Finley* only highlights the fact that the rules for nonpublic forums apply to selective grant funding. *See Velazquez*, 531 U.S. at 544; *Make the Rd. by Walking*, 378 F.3d at 144–45. In *Perry Education Association v. Perry Local Educators' Association*, for example, the Supreme Court held that an in-school mailing system was a nonpublic forum because "[p]ermission to use" it had to "be secured from the individual building principal," and was not "granted as a matter of course to all." 460 U.S. 37, 47 (1983). Similarly, in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, the Court held that a charity drive for federal employees was a nonpublic forum because the government "limit[ed] participation" to "'appropriate' voluntary agencies," as defined by "extensive admission criteria," and "require[d] . . . permission from federal and local Campaign officials." 473 U.S. 788, 804 (1985). And in *Arkansas Education Television Commission*, the Court held that candidate entry in a debate on public broadcast was a nonpublic forum because the government "made candidate-by-candidate determinations as to which of the eligible candidates would participate." 523 U.S. at 680. Notwithstanding that selectivity, the

government is not permitted to discriminate on the basis of viewpoint. *Peck*, 426 F.3d at 630.

IV. The Government's Decision to Terminate Grants Based on Its Perception of the Grants' Viewpoints Further Demonstrates How It Sought to Skew the Marketplace of Ideas.

That the Government's terminations were based on its *perception* of the grants' viewpoints does not excuse the First Amendment violation; to the contrary, it reflects the central vice of viewpoint discrimination—the Government's intent to skew the marketplace of ideas. Some of the terminated grants arguably had no "DEI component," *see Am. Council of Learned Socs.*, 2026 WL 1256545, at *13–14, but that does not negate the fact that the Government sought to target specific viewpoints, *see id.* at *8–9.

The government's intent to suppress specific viewpoints is unconstitutional, even if the government's understanding of the expressed view does not perfectly align with the speaker's intended message. For example, in *Matal v. Tam*, the Supreme Court found that the government had engaged in viewpoint discrimination when it denied a trademark registration application pursuant to the Disparagement Clause of the Lanham Act because of the government's perception of the trademark. 582 U.S. 218, 228–29, 246–47 (2017). The mark at issue was the name of a rock band, "The Slants," which the government interpreted as a racial slur and found to be a derogatory and offensive term. *Id.* at 228–29. However, the lead singer of the

band "chose this moniker in order to 'reclaim' and 'take ownership' of stereotypes about people of Asian ethnicity." *Id.* at 228 (quoting *In re Tam*, 808 F.3d 1321, 1331 (Fed. Cir. 2015) (en banc)). Even though the government had acted on its incorrect perception of the band's viewpoint, the Court still found that the government had impermissibly discriminated based on viewpoint.

In his concurrence, Justice Kennedy acknowledged that the band disagreed with the government's interpretation of the band name, and pointed to that disagreement as further reason to question the constitutionality of the Disparagement Clause. *Id.* at 250–51 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute."). "The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message," and "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Id.* at 250; *see also Chiles*, 607 U.S. at 641 ("When the government seeks . . . to dictate what particular 'opinion or perspective' individuals may express on that subject, 'the violation of the First Amendment is all the more blatant.'" (quoting *Rosenberger*, 515 U.S. at 829)).

This Court reached a similar conclusion in *Wandering Dago, Inc. v. Destito*, finding that a state agency violated the First Amendment when it denied a food truck

permit because it found the truck's branding to be offensive. 879 F.3d 20, 33 (2d Cir. 2018). Mirroring the facts of *Matal*, the food truck operators in *Wandering Dago* used ethnic slurs as a "nod to [their] Italian heritage," and as a way to "'weaken the derogatory force' of the slur or 'convey affiliation with . . . members of that minority group.'" *Id.* at 25 (alteration and omission in original). Applying *Matal*, this Court noted that the state agency "engaged in viewpoint discrimination here even if the denial of [the food truck's] application resulted from an across-the-board prohibition applicable to all speakers without regard to their *intended* messages." *Id.* at 33 (emphasis added). Indeed, the Court explicitly noted that "we need not delineate the full extent of the message that [the food truck operators] were trying to convey." *Id.* It was the government's perception, not the speaker's intention, that mattered.

Similarly, in addressing the termination of other "DEI" grants, the Ninth Circuit noted that "the record shows the agencies made the decisions to terminate based only on the recipients' *perceived* expression of DEI, DEIA, or environmental justice viewpoints." *Thakur*, 176 F.4th at 1203 (emphasis added). And other courts have also found unconstitutional viewpoint discrimination where the government acted based on what *it* deemed to be "gender ideology." *See Schiff v. U.S. Off. of Pers. Mgmt.*, 784 F. Supp. 3d 380, 384, 393–94 (D. Mass. 2025) (noting that the government's treatment of "[e]ven passing references to people who identify themselves as transgender" as a reason to remove research articles was viewpoint

based); *R.I. Latino Arts v. Nat'l Endowment for the Arts*, 800 F. Supp. 3d 351, 368–69 (D.R.I. 2025), *appeal docketed*, No. 25-2113 (1st Cir. Nov. 17, 2025) (holding that the NEA's policy of disfavoring projects if the NEA Chair "conclude[d] that a proposed project 'promotes gender ideology'" was viewpoint based); *cf., e.g.*, *Brooklyn Inst. of Arts & Scis.*, 64 F. Supp. 2d at 202 (holding that the city was not permitted to stop funding for a museum "because of the *perceived* viewpoint of the works in the [museum's] Exhibit" (emphasis added)).

Where the government attempts to "dictate what particular 'opinion or perspective' individuals may express," the First Amendment offers protection. *Chiles*, 607 U.S. at 640–41 ("In this Nation, no official—'high or petty'—may command our tongues or silence our voices." (quoting *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). That protection warrants affirmance here.

CONCLUSION

For these reasons, this Court should affirm the court below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Brief of Amici Curiae in Support of Plaintiffs-Appellants-Cross-Appellees and Affirmance complies with the type-volume limitation, typeface requirements, and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6), and 29(5) because it contains 4235 words, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f), and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system used to prepare the document.

Dated: November 16, 2026
New York, New York

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2026, I electronically filed the foregoing document with the Clerk of the Court using the ACMS system, which will send notification of such filing to all counsel of record.

Dated: November 16, 2026
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