

# DOE ENFORCEMENT OF A “BALANCE OF PERSPECTIVES” AS A CONDITION OF FEDERAL FUNDING

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*In August 2019, the U.S. Department of Education threatened to terminate federal funding for programs of the Consortium for Middle East Studies, operated jointly by Duke University and the University of North Carolina, because they allegedly failed to comply with requirements of Title VI of the Higher Education Act of 1965, in part because of a lack of “balance of perspectives.” Although the dispute was subsequently resolved, DOE’s actions, and its rationale for them, pose a continuing threat to principles of academic freedom that the Supreme Court has long recognized as part of the Free Speech Clause of the First Amendment.*

## Introduction

In April 2019, Rep. George Holding, a Republican from Raleigh, North Carolina, asked the U.S. Department of Education (DOE) to investigate the Consortium for Middle East Studies (CMES) run by Duke University and the University of North Carolina at Chapel Hill (UNC) because he had seen reports of anti-Israel bias and anti-Semitic rhetoric at a conference on the conflict in Gaza run by CMES and funded by federal dollars. DOE agreed to conduct an investigation of the use of federal funds by CMES.<sup>1</sup> By letter dated August 29, 2019 (the DOE letter),

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<sup>1</sup> See Brian Murphy, *DeVos Opens Investigation into Duke–UNC Event with Alleged “Anti-Semitic Rhetoric,”* RALEIGH NEWS & OBSERVER (June 17, 2019), <https://www.newsobserver.com/news/politics-government/article231643588.html>. The conference was also the subject of a complaint by the Zionist Organization of America (ZOA) to DOE’s Office of Civil Rights (OCR), which focused on the allegedly anti-Israel bias of the conference and on a clearly anti-Semitic song performed by a rap singer who performed at the conference. OCR conducted an investigation of the complaint, which resulted in resolution agreement with both UNC and Duke. See ZOA Press Release, *ZOA’s Anti-Semitism Complaint Against UNC Triggers Resolution Agreement with OCR Ensuring University’s Protection of Jewish Students* (Nov. 7, 2019), <https://zoa.org/2019/11/10427656-zoas-anti-semitism-complaint-against-unc-triggers-resolution-agreement-with-ocr-ensuring-universitys-protection-of-jewish-students/>; ZOA Press Release, *Triggered by ZOA’s Complaint, Duke U.—Like UNC—Enters into Agreement with U.S. Govt to Address Campus Anti-Semitism* (Dec. 17, 2019), <https://zoa.org/2019/12/10431913-431913/>; Natalie Bey & Leah Boyd, *University Settles Discrimination Complaint on Gaza Conference*, DUKE CHRON. (Jan. 30, 2020), <https://www.dukechronicle.com/article/2020/01/duke-university-discrimination-complaint-gaza-conference-israel-anti-semitism>.

DOE reported on the conclusions of its review of the courses and programs offered by CMES and funded under Title VI of the Higher Education Act of 1965 (the Act).<sup>2</sup> In that letter, signed by Assistant Secretary Robert King, DOE makes no reference to the conference on Gaza but states that CMES’s other courses and programs failed to comply with certain requirements of the Act, including what DOE characterized as a lack of “balance of perspectives”—citing the absence of programs dealing with discrimination against non-Muslim communities or with positive aspects of Christianity, Judaism or other non-Islamic religions in the Middle East. The DOE letter threatens to cut off further federal funding under Title VI of the Act unless certain corrective actions are taken, including the development and implementation of “effective institutional controls ensuring all future Title VI-funded activities directly promote foreign language learning and advance the national security interests and economic stability of the United States, thereby meeting statutory requirements and meriting taxpayer funding.”<sup>3</sup>

A number of organizations immediately issued statements that the DOE letter was a threat to academic freedom arising from both administrative micromanagement and political interfer-

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<sup>2</sup> The letter was subsequently published in the *Federal Register* at 84 Fed. Reg. 48919 (Sept. 17, 2019) It was widely reported in the press. See, e.g., Erica L. Green, *U.S. Orders Duke and U.N.C. to Recast Tone in Mideast Studies*, N.Y. TIMES (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/us/politics/anti-israel-bias-higher-education.html>; Elizabeth Redden, *Education Department Probes Middle East Studies Program*, INSIDE HIGHER EDUC. (Sept. 17, 2019), <https://www.insidehighered.com/quicktakes/2019/09/17/education-department-probes-middle-east-studies-program>; Sara Brown, *Education Dept. Takes Aim at a Center on Middle East Studies. Scholars Say That Could Chill Academic Freedom*, CHRON. HIGHER EDUC. (Sept. 22, 2019), <https://www.chronicle.com/article/Education-Dept-Takes-Aim-at-a/247202>; Elizabeth Redden, *Middle East Studies Program Comes Under Federal Scrutiny*, INSIDE HIGHER EDUC. (Sept. 25, 2019), <https://www.insidehighered.com/news/2019/09/25/federal-inquiry-middle-east-studies-program-raises-academic-freedom-concerns>.

<sup>3</sup> 84 Fed. Reg. at 48921.

ence in academic programs.<sup>4</sup> Then, by letter dated September 20, 2019, Dr. Terry Magnuson, Vice Chancellor for Research at UNC, responded on behalf of CMES.<sup>5</sup> His letter refutes virtually all of the factual bases for DOE's contention that CMES was not in compliance with the Act, including evidence that the array of offerings was much broader and more diverse than DOE claimed and that they included activities covering the plight of religious minorities in the Middle East as well as portrayals of the positive aspects of Christianity and Judaism; the letter also points out that two programs that had been singled out for criticism in the DOE letter were not federally funded. The letter concludes by noting that CMES would reexamine its numerous existing procedures to ensure that its activities would continue to comply with the Act and would establish an advisory board to add additional transparency as to the relationship of each expenditure to the purposes and requirements of the Act.

Soon thereafter, DOE advised CMES that it would continue to fund the activities of CMES after all.<sup>6</sup> On October 10, 2019, DOE publicly confirmed that and also released a letter to the Middle East Studies Association defending its review of CMES and reiterating its contention

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<sup>4</sup> E.g., ACLU Letter to Secretary DeVos Regarding Funding for the Duke-UNC Consortium for Middle East Studies (Sept. 27, 2019), <https://www.aclu.org/letter/aclu-letter-secretary-devos-regarding-funding-duke-unc-consortium-middle-east-studies>; FIRE Statement on Department of Education letter to Duke-UNC Consortium for Middle East Studies (Sept. 20, 2019), <https://www.thefire.org/fire-statement-on-department-of-education-letter-to-duke-unc-consortium-for-middle-east-studies>; 18 Major Scholarly Societies Join MESA in Expressing Concern About the Department of Education's Interpretation of Title VI (Sept. 25, 2019), <https://mesana.org/advocacy/letters-from-the-board/2019/09/25/18-major-scholarly-societies-join-mesa-in-expressing-concern-about-the-department-of-educations-interpretation-of-title-vi>.

<sup>5</sup> Brian Murphy, *Duke-UNC Program Defends Instruction on Religious Minorities, Aspects of Christianity*, RALEIGH NEWS & OBSERVER (Sept. 23, 2019), <https://www.newsobserver.com/news/politics-government/article235401502.html>.

<sup>6</sup> Stephanie Pousoulides, *Duke-UNC Consortium received '19-20 funding from the Education Department Amid Controversy*, DUKE CHRON. (Sept. 30, 2019), <https://www.dukechronicle.com/article/2019/09/duke-unc-consortium-middle-east-funding-education-department-controversy>.

that the Act required funded programs to provide “balanced perspectives.”<sup>7</sup> Although the dispute involving this one academic center has been resolved, the threat to academic freedom posed by the actions of DOE, and by the stated rationale for them, remains.<sup>8</sup> The DOE letter regarding CMES represents a heavy-handed and unprecedented intrusion by the federal government into the autonomy of colleges and university to establish curriculum and determine the contents of their courses and programs. For the reasons set forth below, DOE’s review appears to have some statutory support, although not in the provision cited by DOE and not under the standard it employed; and its enforcement of a standard of “balance of perspectives” constitutes a significant threat to the right of free speech and academic freedom protected by the First Amendment.

### **I. The Absence of Support for the Requirement of a “Balance of Perspectives”**

The explicit legislative purposes of Title VI of the Act are wide-ranging. Most relevant to the CMES matter, they include the purpose “to support centers, programs, and fellowships in institutions of higher education in the United States for producing increased numbers of trained personnel and research in foreign languages, area studies, and other international studies.”<sup>9</sup> To achieve these purposes, the Act authorizes the Secretary of Education “to make grants to institutions of higher education or consortia of such institutions for the purpose of establishing, strengthening and operating—(i) comprehensive foreign language and area or international stud-

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<sup>7</sup> Laura Meckler, *Education Department Reverses Stance and Says It Will Fund UNC–Duke Middle East Studies Program*, GREENSBORO NEWS & RECORD (Oct. 11, 2019), [https://www.greensboro.com/news/education/education-department-reverses-stance-and-says-it-will-fund-unc/article\\_fa6363a1-ad5c-5068-b459-e5ecd9413e55.html](https://www.greensboro.com/news/education/education-department-reverses-stance-and-says-it-will-fund-unc/article_fa6363a1-ad5c-5068-b459-e5ecd9413e55.html).

<sup>8</sup> See FIRE statement on Department of Education letter to Duke-UNC Consortium on Middle East Studies (Sept. 20, 2019), <https://www.thefire.org/fire-statement-on-department-of-education-letter-to-duke-unc-consortium-for-middle-east-studies/>.

<sup>9</sup> 20 U.S.C. § 1121(b) (2018)

ies centers and programs; and (ii) a diverse network of undergraduate foreign language and area or international studies centers and programs.”<sup>10</sup> The recipients of such grants are called “National Resource Centers.”

The program operates on a four-year grant cycle administered by DOE’s Office of International and Foreign Language Education (IFLE), which selects National Resource Centers based on a review of applications demonstrating compliance with statutory requirements concerning the purposes and subject matter priorities of the program as well as certain additional priorities implemented by IFLE. During the selection process in 2014 for the fiscal year 2014–17 cycle, DOE received 165 applications. Of these, 100 applications (60.6%) received new National Resource Center grant awards totaling \$22,743,107 per year for each of the four years.<sup>11</sup> In 2018, CMES received a four-year grant in the amount of \$235,000.<sup>12</sup>

The DOE letter alleges that CMES violated the Act on several grounds, including its failure to enroll many students in language courses, its collaboration with other departments that are not aligned with the requirement to help students in science, technology, engineering, and mathematics achieve foreign language fluency; its relative lack of placement of students in government or business positions as opposed to academic positions; and the inclusion of many topics and titles with little relevance to the mandates of the Act, rather than focusing on core subjects

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<sup>10</sup> *Id.*

<sup>11</sup> INT’L AND FOREIGN LANGUAGE EDUC. ANNUAL REPORT 2017 (Feb. 2019) at 10–14, <https://www2.ed.gov/about/offices/list/ope/iegps/2017ifleanualreport.pdf>.

<sup>12</sup> U.S. Department of Education, Office of Post-Secondary Education, International and Foreign Language Education —News, Announcement: IFLE Awards Over \$71 Million in FY 2018 Grants to Strengthen International Studies, World Language Training and Global Experiences for Educators and Students, <https://www2.ed.gov/about/offices/list/ope/iegps/2018news.html> (last visited May 13, 2020 at 2:29 p.m.).

that would prepare students to understand the geopolitical challenges to U.S. national security and economic needs.<sup>13</sup>

In one bullet point, the DOE letter contends that “CMES appears to lack balance as it offers very few, if any, programs focused on the historic discrimination faced by, and current circumstances of, religious minorities in the Middle East, including Christians, Jews, Baha’is, Yazidis [sic], Kurds, Druze, and others.”<sup>14</sup> Similarly, the letter states that in the “activities for elementary and secondary students and teachers, there is a considerable emphasis placed on the understanding [of] the positive aspects of Islam, while there is an absolute absence of any similar focus on the positive aspects of Christianity, Judaism, or any other religion or belief system in the Middle East.”<sup>15</sup> The letter argues that this “lack of balance of perspectives is troubling and strongly suggests that the Duke-UNC CMES is not meeting [the] legal requirement that National Resource Centers ‘provide *a full understanding* of the areas, regions, or countries’ in which the modern foreign languages taught is commonly used” (emphasis added by DOE).<sup>16</sup>

DOE’s argument that the contents of certain courses and programs (mostly concerning issues of race, gender, sexual orientation, art, and social change) advance ideological priorities unrelated to the mandate of the Act also relies on a citation to one of its legislative findings that

The security, stability and economic vitality of the United States in a complex global era depend upon American experts in and citizens knowledgeable about

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<sup>13</sup> 84 Fed. Reg. at 48920.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, quoting 20 U.S.C. § 1122(a)(1)(B)(ii) (2018).

world regions, foreign languages, and international affairs, as well as upon a strong research based in these areas.<sup>17</sup>

DOE cites no regulation, adjudicatory decision, or long-standing practice of the agency to support its interpretation that the Act requires grant recipients to offer programs and courses that reflect a “balance of perspectives” or that focus solely on national security, geopolitics, and economics. Accordingly, DOE’s interpretation of the Act would be entitled to no substantial judicial deference but only such respect as is due according to its persuasiveness.<sup>18</sup> As demonstrated below, DOE’s interpretation of the Act is unpersuasive.

To begin with, the DOE letter relies on the first of four legislative findings and ignores the very next one in which Congress finds that

Advances in communications technology and the growth of regional and global problems make knowledge of other countries and the ability to communicate in other languages more essential to the promotion of mutual understanding and cooperation among nations and their peoples.<sup>19</sup>

In light of that finding, it is clear that Congress intended to support courses and programs to increase knowledge of other countries and promote mutual understanding and cooperation among

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<sup>17</sup> *Id.*, citing 20 U.S.C. § 1121(a)(1).

<sup>18</sup> See *United States v. Mead Corp.*, 533 U.S. 218 (2001). Thus, DOE’s interpretation is not entitled to *Chevron* deference but at most to *Skidmore* deference. Compare *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984) with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore* the Court held, “We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140. Here, DOE can point to no evidence of thoroughness in its consideration or to any earlier pronouncements on the subject of “balance of perspectives” under the Act; on the contrary, the DOE letter contains the sole expression of its interpretation, and it was issued without any public notice or comment following a four-month review of the activities of CMES. Moreover, as demonstrated below, there is no validity to its reasoning.

<sup>19</sup> 20 U.S.C. § 1121(a)(2).

nations and their peoples—not solely courses and programs that further the national security, stability, and economic vitality of the United States, as the DOE letter contends. Similarly, courses and programs in political economy and social and cultural issues, including those dealing with race and gender, comply with the mandate of Title VI—not only courses and programs in geography, geopolitics, history, and language, as DOE asserts.

Nor does the Act support DOE’s contention that the Act requires a “balance of perspectives.” The fourth legislative finding of the Act, which the DOE letter also ignores, provides that “[s]ystematic efforts are necessary to enhance the capacity of institutions of higher education in the United States for—(A) producing graduates with international and foreign language expertise and knowledge; and (B) research regarding such expertise and knowledge.”<sup>20</sup> Then, following the findings, the Act provides that the centers and programs to which grants are made shall be “national resources” for certain activities. Although DOE quotes and relies on a single phrase (“provide a full understanding”) from that list, the full list of those activities reveals the flaw in DOE’s position:

- (i) teaching of any modern foreign language;
- (ii) instruction in fields needed to provide full understanding of areas, regions, or countries in which such language is commonly used;
- (iii) research and training in international studies, and the international and foreign language aspects of professional and other fields of study; and
- (iv) instruction and research on issues in world affairs that concern one or more countries.<sup>21</sup>

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<sup>20</sup> *Id.*, § 1121(a)(4).

<sup>21</sup> *Id.*, § 1122(a)(1)(B).

In light of the overall purposes of the Act and the fourth finding as to the need for “systematic efforts,” the phrase “instruction in fields needed to provide full understanding” in paragraph (ii) above clearly means that a National Resource Center should provide instruction in the broad array of fields necessary to fully understand an area, region, or country. There is nothing in that language to suggest it was intended to impose upon a National Resource Center the obligation to achieve “balance” among or within all of its courses and programs. Not surprisingly, in the fifty-four years since Congress passed the Act, it had never before been suggested that Title VI gave DOE authority to monitor the content of programs and courses to ensure what it regards as a proper “balance” of topics or viewpoints until the DOE letter in 2019.

In sum, DOE’s interpretation of the Act as requiring a “balance of perspectives” is unreasonable. It should also be rejected because, as demonstrated below, DOE’s interpretation of the Act raises significant constitutional issues that can be readily avoided by not conjuring up that requirement.<sup>22</sup>

DOE itself seems to grasp the weakness in its own argument. As noted above, the letter “strongly suggests” that the alleged lack of balance violates the Act; however, it does not explicitly say that CMES does so. Moreover, the letter ends with a series of directives to CMES by which it is to formulate a plan to demonstrate compliance with the Act. While quite detailed with respect to the other issues raised in the letter, not one of those directives refers to the issue of “balance.” Thus, the paragraph of the letter dealing with “balance” appears to have been intended as a shot across the bow of the university community. The paragraph asserts the authority of DOE to evaluate whether the programs of grantees under Title VI are sufficiently balanced, but it

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<sup>22</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S.678, 689 (2001).

embeds that assertion in the context of other criticisms of CMES's programs and requires no specific corrective action regarding the alleged imbalance. Then, DOE subsequently agreed to continue its funding without CMES having promised to make any changes in its programming.

## **II. An Alternative Statutory Standard: “Diverse Perspectives and a Wide Range of Views”**

An interesting and surprising aspect of DOE's position in this matter is that there is, in fact, language in the Act that provides support for DOE's review of the funded activities of CMES but that DOE chose not to rely on. The Act specifically requires colleges and universities to include in their applications for grants “an explanation of how the activities funded by the grant will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs.”<sup>23</sup> The DOE letter omits any reference to that provision and cites only the Act's reference to “a full understanding of areas, regions or countries” as the source of the purported requirement of a “balance of perspectives.” One can only speculate as to why DOE adopted this approach.<sup>24</sup> What is clear, however, is that the standard of review applied by DOE is different from the one set forth in the Act and has no support in any other provision of the Act. Nevertheless, the question remains whether that statutory provision is constitutional on its face or as (mis)applied by DOE through a standard of “balance.”

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<sup>23</sup> 20 U.S.C. §1122(e)(1) (2018).

<sup>24</sup> One possibility is that the above-quoted language, in referring to what must be included in the grant application, is intended only as a requirement during the selection process and cannot serve to justify a termination of funding in the midst of a four-year grant. It may also be that DOE concluded that the requirement that funded activities “will reflect diverse perspectives and a wide range of views and generate of debate on regions and international affairs” is too general and easy to satisfy and might point in a direction that favored the actual programs of CMES. Indeed, in responding to the DOE letter, Vice Chancellor Magnuson points out that the courses and programs of CMES represent diverse perspectives, citing that very section of the Act. *See supra* note 5.

### III. The Constitutionality of the Act on Its Face: Vagueness

The statutory requirement that funded activities “will reflect diverse perspectives and a wide range of views, and generate debate on world regions and international affairs” clearly suffers from a degree of vagueness. DOE has issued no regulations or even informal guidance regarding what it means. Nor can one find a history of adjudicated cases or resolution agreements on this issue. As far as can be gleaned from the public record, this provision of the Act has not previously been applied to deny or terminate a grant. This leaves colleges and universities in the dark as to how to comply and makes them vulnerable to selective enforcement based on political or ideological preferences. This, in turn, may tend to create a chilling effect on what colleges and universities teach as they seek to avoid controversial issues. These are, of course, the types of harm that the First Amendment vagueness doctrine is intended to prevent.<sup>25</sup> However, the Act is a funding statute, not a criminal or regulatory law, and the constitutional analysis must take that difference into account.

The Supreme Court long ago rejected the broad principle that government funding is a privilege for which the benefit may be conditioned on the surrender of First Amendment rights.<sup>26</sup> However, for decades the Court has struggled with the issue of how and where to draw the line between an unconstitutional penalty on the exercise of free speech and a proper limitation of a

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<sup>25</sup> See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1971).

<sup>26</sup> *Speiser v. Randall*, 357 U.S. 513 (1958).

government benefit to a particular, legitimate purpose.<sup>27</sup> Regarding a facial challenge to the constitutionality of the Act on the ground of vagueness, the most relevant case is *National Endowment for the Arts v. Finley*. In that case, the criteria for grants were “artistic excellence and artistic merit . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>28</sup> The Court upheld the constitutionality of the statute on its face because the National Endowment for the Arts interprets that provision as merely hortatory and because any “content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding,” which necessarily involves the exercise of aesthetic judgment in which “absolute neutrality is simply ‘inconceivable.’”<sup>29</sup>

The situation here is somewhat different from *National Endowment for the Arts*. The DOE letter makes clear that it does not regard the purported requirement of a “balance of perspectives” as merely hortatory. Moreover, this is not a case involving aesthetic judgment. Nevertheless, grant applications under the Act involve a competitive process, and the decision as to which projects to fund or terminate involves the application of an array of standards that involve some subjective judgment (even if to a lesser degree than with artistic grants). Thus, it would seem that a challenge to the Act on its face would likely fail unless supported by considerations of academic freedom (which will be considered below). However, while rejecting the facial chal-

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<sup>27</sup> In addition to *Speiser*, cited above, see, e.g., *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *U.S. v. American Library Ass’n*, 539 U.S. 194 (2003); *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013).

<sup>28</sup> *National Endowment for the Arts*, 524 U.S. at 576.

<sup>29</sup> *Id.* at 585.

lence to the statutory criteria, the Court’s opinion in *National Endowment for the Arts* noted that particular applications of them might violate the Free Speech Clause if the denial of a grant were shown to be based on invidious viewpoint discrimination.<sup>30</sup>

#### **IV. The Constitutionality of the Act as Applied: Viewpoint Discrimination**

That *dictum* in *National Endowment for the Arts* is consistent with the clearly established principle that laws that discriminate against a particular viewpoint violate the Free Speech Clause of the First Amendment even in the context of a funding case, unless the funding is intended to convey a government message.<sup>31</sup> For example, in *Rosenberger v. Rector & Visitors of University of Virginia*,<sup>32</sup> a public university rejected a request for funding out of its Student Activities Fund for the printing of a Christian student newspaper because of its policy excluding all publications with religious editorial content. The Court held that the university’s action violated the First Amendment because it constituted viewpoint discrimination.<sup>33</sup>

The Court in *Rosenberger* recognized the principle that when the government creates a program not to encourage private speech, but rather to enlist private entities to convey a government message, it may enforce adherence to that message.<sup>34</sup> However, Title VI of the Higher Edu-

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<sup>30</sup> *Id.* at 587.

<sup>31</sup> That principle is even more deeply rooted in the context of government regulation where funding is not involved. In the famous words of Justice Jackson, “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.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>32</sup> 515 U.S. 819 (1995).

<sup>33</sup> *Id.* at 829–34.

<sup>34</sup> *Id.* at 833.

cation Act does not involve the funding of a government message, but rather is intended to subsidize private speech (that is, university courses and programs) that furthers the broad public purpose of training personnel and increasing research in foreign languages, area studies, and other international studies.<sup>35</sup> Indeed, as noted above, the Act specifically requires colleges and universities to include in their applications “an explanation of how the activities funded by the grant will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs.”<sup>36</sup>

Nor is viewpoint discrimination necessarily justified on the ground that institutions of higher education remain free to offer whatever courses or programs they wish to outside of their Title VI project. In *Rust v. Sullivan*, the Supreme Court upheld the “gag rule” prohibiting projects receiving federal funding under Title X of the Public Health Services Act from counseling or referring women for abortion and from encouraging, promoting, or advocating abortion. Central to the Court’s holding was the fact the challenged regulations “did not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.”<sup>37</sup> In the Court’s view, the cases that have found funding conditions to be unconstitutional “involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the

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<sup>35</sup> See *supra* text accompanying notes 9-10.

<sup>36</sup> 20 U.S.C. § 1122(e)(1).

<sup>37</sup> 500 U.S. at 196.

federally funded program.”<sup>38</sup> However, the Court went on to caution that its holding was not intended “to suggest that funding by the Government, even when coupled with the freedom of the fund-recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression.”<sup>39</sup> As noted above, in *Rosenberger* and *National Endowment for the Arts*, which were both decided after *Rust*, the Court treated viewpoint discrimination as an independent and sufficient ground for striking down a funding condition in situations like this one that do not involve government speech.<sup>40</sup>

In sum, if the DOE letter applies the Act in a way that discriminates on the basis of viewpoint, it would violate the First Amendment, notwithstanding the fact that the activities are funded by the government.<sup>41</sup> An argument can certainly be made that the DOE letter involves viewpoint discrimination. It criticizes the courses and programs of CMES for not focusing on historic

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<sup>38</sup> *Id.* at 197. Consistent with that view, in *Agency for International Development v. Alliance for Open Society International, Inc.*, the Supreme Court struck down a provision of the United States Leadership Against HIV/AIDS Act of 2003, which provided “that no funds could be made available to any organization that does not have a policy explicitly opposing prostitution and sex trafficking.” The Court distinguished *Rust* on the ground that “[b]y demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the scope of the federally funded program.” 570 U.S. at 218.

<sup>39</sup> *Rust*, 500 U.S. at 199.

<sup>40</sup> In *Rosenberger*, 515 U.S. at 833, the Court interpreted *Rust* as a case involving government speech in which viewpoint discrimination was therefore justified. *See also Legal Services Corp.*, 531 U.S. at 541, where the Court struck down as an impermissible viewpoint-based restriction a federal appropriations law barring the Legal Services Corporation from funding any organization representing indigent clients that seeks to amend or otherwise challenge existing welfare law. That decision, however, appeared to turn on the unique circumstances of that law, which involved a limitation on the arguments that attorneys could make, a resulting impairment of the judicial function, a lack of alternative channels for expression of the advocacy the statute sought to restrict, and an apparent congressional purpose to insulate the government’s interpretation of the Constitution from judicial challenge.

<sup>41</sup> A different conclusion would be warranted with respect to funding limitations on subject matter. In the same way that government can reserve a limited public forum for the discussion of certain topics, *Rosenberger*, 515 U.S. at 829, it can presumably limit grants to specific subject matter areas. However, Title VI of the Act provides funding for a wide array of subject matters relating to foreign languages, area studies, and international affairs, and there is no statutory authority for the attempt by DOE to give preference to certain categories of programs over others when all fall within the broad purposes of the Act.

discrimination of certain religious and ethnic groups in the Middle East and for ignoring the positive aspects of certain religions in the Middle East. In short, DOE objects that CMES portrays the Middle Eastern Islamic world in too favorable a light by ignoring or downplaying certain aspects of that world and threatens to withhold funding on that basis. However, DOE justified its actions in its letter to the Middle East Studies Association on the ground that it merely seeks to increase the diversity of views, not to prohibit any.<sup>42</sup> Unstated, but implicit in that argument, is the proposition that it would act similarly with respect to funded activities that presented a consistently anti-Islamic (or other one-sided) perspective. Although that argument may seem implausible in the current political situation, it is difficult to make a legally convincing case for viewpoint discrimination on the basis of a single event without discovery as to the actual motivations of DOE. For now, colleges and universities must live with a real if unproven concern that DOE review of their programs funded under the Act may be motivated and affected by its disapproval of the contents of those programs.

## **V. The Significance of the University Context: The Threat to Academic Freedom**

The discussion has so far ignored any considerations relating to the fact that the activities funded by the Act take place within the context of institutions of higher education and their tradition of academic freedom. However, one of the core principles of academic freedom is the autonomy of colleges and universities to determine, on academic grounds and through their faculty, the content of their courses and programs. This principle derives from the earliest and most au-

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<sup>42</sup> *See supra* note 7.

thoritative statements on academic freedom<sup>43</sup> and has received recognition from the Supreme Court as part of its more general recognition of academic freedom as a special concern of the First Amendment. In the famous words of Justice Frankfurter, in *Sweezy v. New Hampshire*,

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>44</sup>

The statutory provision requiring that funded activities “will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs” threatens this principle of academic freedom in several distinct ways. First, that standard is vague and therefore may have a chilling effect on a university’s willingness to teach controversial subjects.<sup>45</sup> Second, what constitutes such diversity is a subjective judgment that can easily slide from one based on academic criteria to one based on political or ideological criteria and thereby

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<sup>43</sup> See the 1915 Declaration of Principles on Academic Freedom and Academic Tenure and the 1940 Statement of Principles on Academic Freedom and Tenure, AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 3–7, 291–301 (10th ed. 2006), <https://www.aaup.org/AAUP/pubsres/policy-docus/contents>.

<sup>44</sup> 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *Sweezy* is only one in a long line of cases in which the Court has recognized that academic freedom is entitled to a degree of protection by the First Amendment. See, e.g., *Wieman v. Updegraff*, 344 U.S. 183, 196–98 (1952) (Frankfurter, J., concurring); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225–26 (1985) *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003). See generally Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 827 (2010). The courts and commentators, however, have not always agreed about the nature of and reasons for the connection between academic freedom and the First Amendment. See, e.g., ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 967 (2009); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 257 (1989).

<sup>45</sup> It might be argued that the Act has contained this provision from the outset without having caused such a chilling effect. However, as noted above, there is no record of DOE ever having applied that provision to the denial or termination of funding. Furthermore, as discussed below, DOE’s application of the standard of “balance of perspectives,” in place of the statutory provision, appears to involve a greater intrusion into academic freedom.

lead to selective enforcement. Third, as a legal requirement enforceable by DOE, the concept of “diverse perspectives” places final authority over academic content in the hands of government bureaucrats rather than college and university faculty.

These problems are exacerbated by DOE’s decision not to enforce the statutory requirement as written, but instead to impose its own standard of a “balance of perspectives.” The latter standard points toward a more detailed and specific inquiry into the contents and viewpoints of each and every course and program to determine if *all* perspectives and counter-perspectives have been covered (rather than just a diversity of perspectives). That is, in any case, how DOE applied the standard here in concluding that CMES had failed to meet it because its courses and programs allegedly did not cover the conditions of certain non-Muslim minorities in the Middle East or present the positive aspects of religions other than Islam. That alleged lack of “balance” presumably can be cured only by offering funded activities that include those subjects. Thus, the DOE letter does not merely seek to interfere with the freedom of universities to determine the contents of their own courses and programs; it seeks to impose a particular viewpoint on those courses as a condition of funding.

Putting to one side for a moment the funding aspect of this matter, it is clear that such a direct infringement on the academic judgment of a university and its faculty would violate the First Amendment. In *Regents of University of Michigan v. Ewing*,<sup>46</sup> the Supreme Court unanimously rejected a student’s challenge to his dismissal from a joint undergraduate and medical program on the ground that it violated his right to due process. The decision to dismiss the student had been made after careful review by the faculty Promotion and Review Board and af-

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<sup>46</sup> 474 U.S. 214 (1985).

firmed by the Executive Committee of the Medical School. Writing for the Court, Justice Stevens emphasized the Court’s “reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom.”<sup>47</sup> Furthermore, the opinion relied specifically on the role of the faculty:

The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. [Footnote omitted.] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.<sup>48</sup>

Similarly, DOE’s attempt to enforce a standard of “balance of perspectives” regarding the courses and programs of CMES would trench on the academic freedom of UNC and Duke and their faculty without any showing that their selection involved a departure from accepted academic norms or the absence of the exercise of professional judgment.

Turning now to the funding issue, none of the cases discussed above involved the issue of academic freedom. However, there is language in *Rust* suggesting a different analysis would be appropriate in such a case. As noted, the Court there cautioned that its holding was not intended “to suggest that funding by the Government, even when coupled with the freedom of the fund-

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<sup>47</sup> *Id.* at 225.

<sup>48</sup> *Id.* at 225–26. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 182, 197–98 (1990), where the Supreme Court held that the Equal Employment Opportunity Commission did not violate academic freedom in requiring a university to turn over confidential peer-review materials pursuant to a subpoena issued in its investigation of a Title VII claim filed by a faculty member who had been denied tenure because the subpoena did not involve a “direct” infringement regarding the content of academic speech or the right to determine who may teach. Here, there is such a direct interference with the content of academic speech in determining what courses and programs to offer.

recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression.”<sup>49</sup> In discussing contexts in which its holding would *not* apply, the Court mentioned public forums and universities.<sup>50</sup> With respect to the latter, the Court stated that “the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”<sup>51</sup> That language suggests a willingness to take a harder look at the vagueness issue raised by a statute involving grants to universities than the Court subsequently did in *National Endowment for the Arts* with regard to grants to artists.

Indeed, the above-quoted language in *Rust* cites to *Keyishian v. Board of Regents of the State University of N.Y.*<sup>52</sup> In that case the Supreme Court struck down a New York State statute and implementing regulations that prevented state employment of “subversive persons,” including as faculty members at a state university, on the ground that they violated the First Amendment. The Court’s reasoning with respect to the vagueness of the law rested in part on a well-established line of cases concerning the chilling effect of vague laws on the exercise of First Amendment rights in general.<sup>53</sup> However, before reaching that conclusion, the opinion boldly affirmed the connection of the First Amendment to academic freedom:

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<sup>49</sup> *Rust*, 500 U.S. at 199.

<sup>50</sup> *Id.* at 199–200.

<sup>51</sup> *Id.* at 200.

<sup>52</sup> 385 U.S. 589 (1967).

<sup>53</sup> *Id.* at 604.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>54</sup>

Thus, *Keyishian* supports the proposition that vague laws are a particular problem in the university context because of their chilling effect on the exercise of academic freedom. In citing to *Keyishian*, the Court in *Rust* recognized that proposition even where the law in question involves government funding.

Moreover, it is significant that the Court in *Rust* paired public forums and universities as two contexts that are exceptions to its holding that government funding, taken together with the freedom of fund recipients to speak outside the scope of the funded project, would justify government control of the content of expression. What public forums and universities have in common is that both are recognized zones in which it is especially important for their occupants to be free to exercise their First Amendment rights without governmental interference—and regardless of their ability to do so in other venues not owned by the government or in connection with other activities not funded by the government.

These considerations militate in favor of distinguishing *National Endowment for the Arts* from this matter and support a facial challenge to the constitutionality of the provision of the Act that makes grants subject to the condition that funded activities “will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs.” Even if such a challenge might not be successful, however, the analysis set forth in *Rust* strongly supports the conclusion that the substitute standard of “balance of perspectives,” as applied by DOE

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<sup>54</sup> *Id.* at 603.

here, violates the First Amendment protection for academic freedom recognized by the Supreme Court.

### **Conclusion**

The threat to academic freedom involved in DOE’s enforcement of a standard of “balance of perspectives” to the funded activities of CMES is not new. DOE’s position in this matter appears to be a direct descendant of the so-called Academic Bill of Rights that was proposed to, but never enacted by, Congress and several state legislatures in the early years of this century.<sup>55</sup> Like DOE’s action in this matter, those bills sought, among other things, to require a balance of perspectives within the curriculum (as well as in the hiring of faculty). The issue there, as here, was not whether a diversity of perspectives is a desirable goal. Rather, it was whether the achievement of that goal should be left to the academic judgment of universities and their faculty or whether it should be defined, imposed, and enforced by administrators (or courts), with the attendant risk that academic judgment would be replaced by political criteria. Accordingly, the Academic Bill of Rights was successfully opposed on the ground that it would result in infringements on academic freedom.<sup>56</sup> That effort, however, at least sought to achieve its purpose through legislation in an open and deliberative process—a context in which principled arguments could be made in opposition.

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<sup>55</sup> See Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005). Those bills were based on a proposal by David Horowitz that can be found at <http://la.utexas.edu/users/hcleaver/330T/350kPEEHorowitzAcadBillTable.pdf> (last visited May 13, 2020 at 3:33 p.m.).

<sup>56</sup> See, e.g., Statement on the Academic Bill of Rights of Committee A of the American Association of University Professors (posted December 2003), <http://www.aaup.org/AAUP/comm/rep/A/abor.htm>.

Here, by contrast, an executive agency, relying on a standard not found in the statute, without engaging in rulemaking procedures, and in the absence of any prior consistent practice, used an investigative procedure, accompanied by a threatened loss of federal funding, to try to impose its views of what should be taught at two institutions of higher education. Under those circumstances, it is understandable that those universities would feel constrained to respond with a factual refutation rather than a legal challenge to the agency’s statutory or constitutional authority—especially where, as here, such a factual refutation was available and convincing. However, in light of DOE’s subsequent claim that it acted appropriately in this matter, it is important to make clear that its actions represent a troubling and ongoing threat to academic freedom.