

National Coalition Against Censorship

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NCAC PARTICIPATING ORGANIZATIONS

Actors' Equity Association
American Association of
School Administrators
American Association of
University Professors
American Association of
University Women
American Booksellers Foundation
for Free Expression
American Civil Liberties Union
American Ethical Union
American Federation of Teachers
American Federation of Television
& Radio Artists
American Jewish Committee
American Jewish Congress
American Library Association
American Literary Translators
Association
American Orthopsychiatric Association
American Society of Journalists
& Authors
Americans United for Separation of
Church & State
Association of American Publishers
Authors Guild
Catholics for Choice
Children's Literature Association
College Art Association
The Creative Coalition
Directors Guild of America
The Dramatists Guild of America
First Amendment Lawyers Association
International Reading Association
Lambda Legal
Modern Language Association
National Center for Science Education
National Communication Association
National Council for the Social Studies
National Council of the Churches
of Christ
National Council of Jewish Women
National Council of Teachers of English
National Education Association
The Newspaper Guild/CWA
Office of Communication,
United Church of Christ
PEN American Center
People for the American Way
Planned Parenthood Federation
of America
Screen Actors Guild
Sexuality Information & Education
Council of the U.S.
Society of Children's Book Writers
& Illustrators
Student Press Law Center
Union for Reform Judaism
Union of Democratic Intellectuals
Unitarian Universalist Association
United Methodist Communications,
United Methodist Church
Women's American ORT
Writers Guild of America, East
Writers Guild of America, West

Jeff Comerchero
Mayor
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Dear Mr. Comerchero:

Thank you for addressing the important task of creating exhibition policies for public spaces in Temecula, CA. The development of good policies is the best way to avoid divisive controversies and meet constitutional standards. We hope that we can assist in this effort. Our comments are made in that spirit.

First, we are concerned about the wisdom, and ultimately the constitutionality, of the effort to strike a balance between artistic merit and "appropriateness." The recent history of art censorship in Temecula – not only of Jeff Hebron's nude, but of two paintings of country scenes by Lora Sanders depicting a man smoking and another holding a brown bottle – provides evidence of the wide range of plainly protected artistic expression that some in the community may consider "inappropriate." Appropriateness is not a standard recognized by the First Amendment, which protects virtually all artistic expression unless it meets the legal definition of obscenity.

Our concerns are further heightened by language in the Temecula Art League's prospectus for its upcoming Western show: "The Merc is a facility owned by the City of Temecula and the City controls the art to be displayed in the Merc. ... The City will select, in its sole discretion, [20-25__] pieces of art to be displayed at the Merc from the Judge's recommendations. The City reserves the right to cancel the exhibition at any time in its sole discretion."

Under the First Amendment, selection of art in a public gallery must be based on viewpoint - neutral criteria such as creative excellence, cultural significance and intellectual richness. The arbitrary, subjective, and vague determination of what is "appropriate" granting city officials "sole discretion" to decide what the public would be allowed to see is almost guaranteed to lead to the impermissible imposition of some individual's viewpoint on the selection process, in violation of First Amendment principles.

As you are now aware, simple nudity is not sufficient ground for excluding artwork from public exhibition. As the Supreme Court has noted multiple times, "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mount Ephraim* (1981), *Jenkins v. Georgia* (1974), *Osborne v. Ohio* (1990). Neither does the presence of children provide a basis for refusing to exhibit art work: "[R]egardless of the

strength of the government's interest in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Ashcroft v. ACLU* (2002), and cases cited therein.

Our courts have time and again reaffirmed that the First Amendment prohibits public officials from censoring art they find offensive or provocative. The case of *Hopper v. City of Pasco* (2001) in the Ninth Circuit Court of Appeals, which encompasses California, is a case in point. There, the plaintiff artists who had been invited to display their work at the City Hall were precluded from doing so because the work provoked controversy and public officials considered it "sexually suggestive." The Court noted that Pasco, by opening its display space to expressive activity has evinced "an intent to create a designated public forum." In such a forum, the court concluded, the content based removal of work would only be justifiable if there is a "compelling state interest and is narrowly drawn to achieve that end."

While the Constitution accords substantial leeway for exercise of artistic judgment, it prohibits government action designed solely to avoid controversy or suppress unpopular views. It is critical for city officials and employees involved in the selection and display of artwork to understand that their discretion is not unlimited, and that they must respect constitutional standards in carrying out these functions.

NCAC strongly encourages Temecula to develop policies recognizing the free expression rights of artists and patrons. We suggest that these policies declare:

- * That the selection of artwork for display in public spaces is based on viewpoint-neutral criteria, such as artistic merit.
- * That the gallery is not necessarily endorsing the ideas reflected in a particular piece. This permits the exhibition of a work containing a wide diversity of ideas, some of which might contradict each other.
- * That the criterion "inappropriate for children" is not a valid basis for exclusion of work. An art institution cannot act *in loco parentis* to determine what may be suitable or unsuitable for minors. This is the sole responsibility of parents.
- * That selection may not be based on whether the work is deemed to express unpopular or controversial ideas, or whether it is thought to be offensive or objectionable.

Please do not hesitate to contact me for further information.

Sincerely,

Svetlana Mintcheva
Director of Programs
National Coalition Against Censorship

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