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# **FIGHTING CHINESE CENSORSHIP OF U.S. FILMS BY DENYING FILMMAKERS U.S. GOVERNMENT ASSISTANCE: An Examination of the Proposed SCRIPT Act**

Dr. Joel Timmer\*

## **ABSTRACT**

In order to distribute their films in China, U.S. filmmakers must submit them to Chinese censors for approval, which frequently require changes to films to portray China and the Chinese in a more favorable light. Given the millions of dollars to potentially be made in the large Chinese market, filmmakers have been willing to comply with Chinese censors, and have even begun to censor themselves by anticipating China’s concerns and tailoring their films appropriately. In this way, China is able to influence the way it is portrayed in films not just for audiences in China, but in the United States and around the world. To combat the spread of Chinese propaganda in this way, Senator Ted Cruz introduced a bill, dubbed the SCRIPT Act, that would prohibit filmmakers from obtaining government assistance with their films unless they refrain from making changes to film content to accommodate the Chinese government. This Article examines whether the SCRIPT Act, by denying government support to filmmakers based on the content of their films, violates the First Amendment. While a bill might be crafted to do this in a way consistent with constitutional requirements, certain aspects of the SCRIPT Act make it likely to be unconstitutional.

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## INTRODUCTION

In recent years, China's theatrical film market has grown to the second largest in the world, just behind the United States.<sup>1</sup> Accordingly, U.S. filmmakers seek to release their films in China, in hopes of increasing their potential profitability. However, China limits the annual number of foreign films that may play in its theaters to thirty-four. To earn one of these coveted spots, films seeking to be released in China must first be approved by Chinese censors. These censors often require filmmakers to make changes to their films to address Chinese concerns about content, such as ensuring that China itself is portrayed positively, as a condition of gaining approval.<sup>2</sup> Filmmakers have even begun censoring themselves in anticipation of the concerns of Chinese censors. China is thus able to influence its portrayal in U.S. films to audiences not only in China, but to all audiences consuming the self-censored film. In an effort to stem the spread of this form of Chinese propaganda, U.S. Senator Ted Cruz recently introduced a bill that would prohibit the U.S. government from providing its assistance to filmmakers who make changes to their films to accommodate Chinese censors.<sup>3</sup>

The U.S. military alongside other branches of the federal government has long facilitated programs aiding filmmakers in the production process, often in the form of access to military resources, such as military bases and equipment.<sup>4</sup> Filmmakers who receive this assistance can potentially save significant amounts of money by not having to recreate these assets for depiction in their films and gain a level of authority that may otherwise be difficult to achieve without the use of actual military resources. However, this assistance is not available to just any film. Rather, the Department of Defense (DoD),

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1. See MOTION PICTURE ASS'N, 2019 THEME REPORT 13, 18 (2019), <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf> [<https://perma.cc/8PU4-H2HN>]. Revenue figures for the United States also include Canada. See *id.*
  2. SEAN O'CONNOR & NICHOLAS ARMSTRONG, U.S.–CHINA ECON. & SEC. REV. COMM'N, DIRECTED BY HOLLYWOOD, EDITED BY CHINA: HOW CHINA'S CENSORSHIP AND INFLUENCE AFFECT FILMS WORLDWIDE 4, 8–9 (2015), <https://www.uscc.gov/sites/default/files/Research/Directed%20by%20Hollywood%20Edited%20by%20China.pdf> [<https://perma.cc/X4UL-4JSG>].
  3. Stopping Censorship, Restoring Integrity, and Protecting Talkies Act, S. 3835, 116th Cong. (2020); 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).
  4. See, e.g., U.S. DEP'T OF DEF., INSTRUCTION NO. 5410.16, DoD ASSISTANCE TO NON-GOVERNMENT, ENTERTAINMENT-ORIENTED MEDIA PRODUCTIONS § 3(d), at 2 (2015).

for example, typically only provides assistance to films that portray the military in a favorable light. It is believed that by supporting positive portrayals, audiences are more likely to be supportive of the U.S. military.<sup>5</sup>

In May 2020, Senator Ted Cruz introduced a bill that would prohibit U.S. filmmakers who obtain military support from making any changes to the content of their films to accommodate the concerns of Chinese authorities with the goal of being granted a release for their film in China. Changing films to accommodate the Chinese government is a practice that has become increasingly prevalent in recent years, particularly as the Chinese theatrical film market has rapidly grown into the second-largest in the world, behind only the domestic U.S. market.<sup>6</sup> Thus, securing a release in China for a film has become vital to a film's profitability.

The Stopping Censorship, Restoring Integrity, and Protecting Talkies Act, dubbed the SCRIPT Act, would prohibit any federal agency, such as the DoD, the Coast Guard, or NASA, from providing technical assistance or the use of government assets to U.S. companies that censor or make changes to their films to accommodate the concerns of Chinese censors. More specifically, filmmakers seeking government assistance must sign a written agreement promising not to make any changes to that film at the request of Chinese authorities, or even in anticipation of such a request.<sup>7</sup> Furthermore, filmmakers must provide the government with a list of its recent films submitted to Chinese authorities in an attempt to get approval for distribution in China. If the government determines that the filmmaker had made changes to any of its films in the last three years to accommodate Chinese concerns, that filmmaker would be disqualified from obtaining government assistance for a subsequent film.<sup>8</sup>

The purpose behind the bill is to limit the influence the Chinese government has over the content of American films. Introducing the bill, Cruz accused the Chinese government of attempting "to spread propaganda . . . by leveraging their enormous market access to coerce Americans into self-censorship."<sup>9</sup> China only allows thirty-four foreign films to be released theatrically within the country each year, and those films must be approved by Chinese authorities before they can be distributed in China.<sup>10</sup> To earn this approval, China's

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5. See *id.* § 3(a), at 1–2.

6. The domestic U.S. market includes Canada. *Glossary of Movie Business Terms*, NUMBERS, <https://www.the-numbers.com/glossary> [<https://perma.cc/X2X7-8TPT>] (“[T]he ‘domestic market’ . . . is defined as the United States, Canada, Puerto Rico and Guam.”).

7. S. 3835 § 2(a)(2).

8. *Id.* § 2(b)(2), (c)(2)(C). The SCRIPT Act would also prohibit government assistance to U.S. companies that coproduce films with Chinese companies that are subject to Chinese censorship, *id.* § 2(b)(1), or if the company had violated an agreement not to make changes to a film in order to receive U.S. government assistance within the past ten years, or since the law had been in effect, whichever is shorter, *id.* § 2(c)(2)(D).

9. 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).

10. O’CONNOR & ARMSTRONG, *supra* note 2, at 4.

censors will often require changes to be made to the films, changes which frequently demand filmmakers depict China or the Chinese in a more positive light.<sup>11</sup> Aware of this possibility, U.S. filmmakers will often make changes to the content of their films before submitting them to China for approval in anticipation of China's concerns about content.<sup>12</sup> Cruz provided examples of several films that U.S. filmmakers changed to accommodate the Chinese government, including the James Bond film *Skyfall*, the Freddie Mercury biopic *Bohemian Rhapsody*, and the sequel to the Tom Cruise film *Top Gun*. Regarding the latter, Cruz noted that the flags of Taiwan and Japan have been digitally removed from the back of Tom Cruise's flight jacket to appease Beijing. This led Cruz to ask: "What message does it send that [Tom Cruise's character in *Top Gun*] Maverick, an American icon, is apparently afraid of the Chinese Communists?"<sup>13</sup>

Cruz said that this ability to force U.S. filmmakers to change the content of their film allowed China to "control not just what audiences see in China but also what Americans see."<sup>14</sup> He also accused Hollywood of being "complicit in China's censorship and propaganda in the name of bigger profits."<sup>15</sup> Cruz is not alone in raising this concern. Secretary of State Mike Pompeo, in a private speech to the Motion Picture Association in 2019, asked film industry executives to "'stop bowing to Chinese censors,' which he said limited the ability of Americans to understand the nature of the Chinese regime."<sup>16</sup> Others have observed that "many Hollywood movies now show American audiences a version of China and its government that is far removed from reality—one expunged of the suppression of basic freedoms, corruption at high levels, the questionable wealth of the princeling class, the bullying of Hong Kong, and the threatening behavior against China's neighbors."<sup>17</sup> Chinese censorship of U.S. films has resulted in U.S. audiences being presented with "a sanitized version

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11. *See id.* at 11–12.

12. *See* 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).

13. Rebecca Davis, *Ted Cruz Takes Aim at U.S. Studios and Chinese Censorship with New Bill*, VARIETY (May 27, 2020, 11:15 AM), <https://variety.com/2020/politics/news/ted-cruz-china-script-act-1234617344> [<https://perma.cc/YES3-4TRM>].

14. 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).

15. Press Release, Off. of Sen. Ted Cruz, Sen. Cruz to Introduce Legislation Cutting Off Hollywood Studios over Complicity in Chinese Censorship (Apr. 28, 2020), [https://www.cruz.senate.gov/?p=press\\_release&id=5083](https://www.cruz.senate.gov/?p=press_release&id=5083) [<https://perma.cc/6PZT-29LQ>].

16. Helle C. Dale & Mike Gonzalez, *Sen. Cruz Seeks to Flip the SCRIPT on Hollywood's Kowtowing to Chinese Censors*, HERITAGE FOUND. (May 4, 2020), <https://www.heritage.org/global-politics/commentary/sen-cruz-seeks-flip-the-script-hollywoods-kowtowing-chinese-censors> [<https://perma.cc/5F3S-A2GB>].

17. Mike Gonzalez, *China's Public Opinion Warfare: How Our Culture Industry Learned to Stop Worrying and Love the PRC*, HERITAGE FOUND. (Feb. 5, 2015), <https://www.heritage.org/asia/report/chinas-public-opinion-warfare-how-our-culture-industry-learned-stop-worrying-and-love> [<https://perma.cc/DU9D-7UVA>].

of China that jibes with President Xi Jinping's vision of a harmonious, moral, rejuvenated China whose people are happy to be guided by party leaders."<sup>18</sup>

In response, Cruz's bill attempts to provide U.S. filmmakers with an incentive to resist making changes to their films to accommodate the Chinese government by denying government assistance to those filmmakers. Consequently, the U.S. government is both placing restrictions on the content of films in order to receive assistance and denying government assistance based on the content. As this would infringe on filmmakers' free speech rights, "studios immediately wondered about the bill's legality in the face of First Amendment rights."<sup>19</sup> Whether these restrictions in the SCRIPT Act would be constitutional is analyzed in Part V. Before that, Part I will cover the growing importance of the Chinese film market, followed by a discussion of the Chinese system of censorship and its effect on U.S. filmmakers in Part II. Then, Part III will discuss the current operation of the government's filmmaker assistance program, and Part IV will examine the constitutionality of that program.

## I. IMPORTANCE OF THE CHINESE MARKET

With a market of 1.3 billion potential moviegoers coupled with a large, expanding economy, China has become uniquely important to the movie industry.<sup>20</sup> Theatrical box office revenues in China have steadily risen in recent years to \$9.3 billion in 2019, making it the second-largest market outside the United States,<sup>21</sup> which had box office revenues of \$11.4 billion in 2019.<sup>22</sup> It has been predicted that China may soon overtake the United States to become the world's largest film market.<sup>23</sup> This large market of potential moviegoers is

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18. *Id.*

19. Matt Donnelly, *Ted Cruz Expands Hollywood-Targeted Bill to Threaten Ties with All Federal Agencies*, VARIETY (May 21, 2020, 12:19 PM), <https://variety.com/2020/film/news/ted-cruz-expands-hollywood-targeted-bill-to-threaten-ties-with-all-federal-agencies-1234613229> [https://perma.cc/F2QB-63NG].

20. See Betsy Woodruff Swan, *Cruz Bill Aims to Block Pentagon Help to Studios that Censor Films for China*, POLITICO (Apr. 28, 2020, 5:07 PM), <https://www.politico.com/news/2020/04/28/cruz-bill-pentagon-china-film-215942> [https://perma.cc/3DNR-ZVY5]; Dale & Gonzalez, *supra* note 16.

21. MOTION PICTURE ASS'N, *supra* note 1, at 13. An expanding middle class with growing incomes has provided the Chinese with more money to spend on luxury goods, including trips to the movies. This growth in consumer demand has led China to go on "a movie theater construction spree," with the number of movie screens in China increasing by a factor of nearly twenty, from 3,527 screens in 2007 to 75,581 screens in 2020. O'CONNOR & ARMSTRONG, *supra* note 2, at 5–6; Lai Lin Thomala, *Number of Cinema Screens in China from 2009 to 2020*, STATISTA (Jan. 15, 2021), <https://www.statista.com/statistics/279111/number-of-cinema-screens-in-china/#:~:text=China%20is%20one%20of%20the,thousand%20cinema%20screens%20in%20China> [https://perma.cc/R42S-BGTS].

22. MOTION PICTURE ASS'N, *supra* note 1, at 18.

23. E.g., Jesse Rifkin, *SCRIPT Act Would Ban Government from Assisting American Movies that Change or Censor for the Chinese Market*, GOVTRACK INSIDER (June 5, 2020), <https://>

obviously attractive to U.S. filmmakers and is made even more desirable by the fact that the size of the domestic marketplace has “remained stagnant” for the past several years,<sup>24</sup> fluctuating between \$10.2 billion and \$11.9 billion per year from 2010 to 2019.<sup>25</sup>

At the same time, the cost of making American films has risen substantially. In 2013, the average cost of making a big studio blockbuster was around \$200 million, with an additional \$50–\$100 million spent to market the film. “This is a significant increase from 1996, when the . . . cost of making and marketing . . . [studio] blockbuster[s] was less than \$60 million.”<sup>26</sup> With revenues from domestic theatrical release relatively flat, studios have turned to international markets to help offset these “ballooning production costs.”<sup>27</sup> In fact, the international market has become more important than the domestic market to the major Hollywood studios that comprise the Motion Picture Association. Since 2015, those studios have earned over 70 percent of their box office revenues from markets outside the United States and Canada.<sup>28</sup> Because of this, “[i]nternational box-office revenue is the driving force behind many of Hollywood’s biggest films, and often plays a deciding role in whether a movie is made.”<sup>29</sup>

The importance of the Chinese market is also highlighted by the fact that a number of U.S. films make a significant portion of their box office revenues there, with several even earning more in China than in the United States. These include Steven Spielberg’s *Ready Player One*, *Transformers: The Last Knight*, *Godzilla: King of the Monsters*, *Alita: Battle Angel*, *Venom*, and *Tomb Raider*.<sup>30</sup> The 2016 video game adaptation *Warcraft* earned \$225 million in China, compared to a relatively measly \$47 million in the United States.<sup>31</sup> In 2017, *The Fast and the Furious 8* made over \$100 million more in China than in the United States, while 2018’s *Aquaman* made a quarter of its \$1.1 billion in global box office revenues from China.<sup>32</sup>

govtrackinsider.com/script-act-would-ban-government-from-assisting-american-movies-that-change-or-censor-for-the-cb3f6ae666a2 [https://perma.cc/LC44-Q4ZS].

24. O’CONNOR & ARMSTRONG, *supra* note 2, at 7.

25. MOTION PICTURE ASS’N, *supra* note 1, at 18.

26. O’CONNOR & ARMSTRONG, *supra* note 2, at 7.

27. *Id.*

28. MOTION PICTURE ASS’N, *supra* note 1, at 11.

29. Michael Cieply & Brooks Barnes, *To Get Movies into China, Hollywood Gives Censors a Preview*, N.Y. TIMES (Jan. 14, 2013), [https://www.nytimes.com/2013/01/15/business/media/in-hollywood-movies-for-china-bureaucrats-want-a-say.html?pagewanted=all&\\_r=0](https://www.nytimes.com/2013/01/15/business/media/in-hollywood-movies-for-china-bureaucrats-want-a-say.html?pagewanted=all&_r=0) [https://perma.cc/CNJ5-KBGN].

30. Rifkin, *supra* note 23.

31. Jennifer Bisset, *Marvel Is Censoring Films for China, and You Probably Didn’t Even Notice*, CNET (Nov. 1, 2019), <https://www.cnet.com/features/marvel-is-censoring-films-for-china-and-you-probably-didnt-even-notice> [https://perma.cc/M8WL-94Z7].

32. *Id.*

## II. ACCESSING THE CHINESE MARKET AND CHINESE CENSORSHIP

For U.S. filmmakers, accessing the Chinese market comes with a series of challenges. The country limits the number of foreign films that can play in its theaters each year and requires each of those films to be approved by Chinese censors. Under a deal reached in 2012 between the United States and China, China allows thirty-four “revenue-sharing” foreign films to be released there each year. For those films, foreign studios receive 25 percent of box office revenues in China, an increase from the 13 percent they received previously. In addition, at least fourteen of those thirty-four films must be in the premium IMAX or 3D formats.<sup>33</sup> To gain one of these thirty-four slots, a film must be approved by Chinese censorship authorities. Until 2018, film censorship in China was overseen by the State Administration of Press, Publication, Radio, Film, and Television (SAPPRFT), which succeeded the State Administration of Radio, Film, and Television (SARFT) in 2013.<sup>34</sup> In 2018, the Communist Party of China’s Central Committee’s Propaganda Department, also referred to as the Publicity Department, took over the powers and duties of SAPPRFT.<sup>35</sup> It is apparent that films cannot be distributed in China without the approval of Chinese censorship authorities.<sup>36</sup>

To gain this approval, the filmmaker must submit the screenplay or finished film to Chinese censors for review. China’s censors provide the filmmaker with comments and suggestions for altering the film’s content to conform with censorship requirements. Filmmakers then have the opportunity to alter the

33. O’CONNOR & ARMSTRONG, *supra* note 2, at 4. There is another alternative to revenue-sharing films:

[S]tudios can allow their movies to be purchased by China at a flat rate, though most filmmakers elect not to pursue this option. Flat-fee films have a separate quota from revenue-sharing films, but are less valuable to American studios than revenue-sharing films because they are sold for a fraction of their worth and studios do not receive additional revenue from the film’s gross in China. *Id.*

34. See, e.g., Josh Rudolph, *Word of the Week: State of Anxiety on Radio, Film, TV*, CHINA DIGIT. TIMES (Mar. 14, 2018), <https://chinadigitaltimes.net/2018/03/word-of-the-week-state-of-anxiety-on-film-radio-and-television> [<https://perma.cc/2DTV-SJZK>].

35. See, e.g., Sophie Beach, *Media, Film, Publishing Put Under Direct CCP Control*, CHINA DIGIT. TIMES (Mar. 21, 2018), <https://chinadigitaltimes.net/2018/03/MEDIA-FILM-AND-PUBLISHING-PUT-UNDER-DIRECT-CONTROL-OF-PARTY> [<https://perma.cc/U8MG-5BBA>]; Pei Li & Christian Shepherd, *China Tightens Grip on Media with Regulator Reshuffle*, REUTERS (Mar. 21, 2018, 12:05 AM), <https://www.reuters.com/article/us-china-parliament-media/china-tightens-grip-on-media-with-regulator-reshuffle-idUSKB-N1GX0JG> [<https://perma.cc/WFY4-TJCB>]; Nancy Tartaglione, *China Film Industry to Be Regulated by Communist Party Propaganda Department*, DEADLINE (Mar. 21, 2018, 12:40 AM), <https://deadline.com/2018/03/china-film-industry-regulation-communist-party-propaganda-department-1202350328> [<https://perma.cc/P978-XXWN>]. Collectively, SARFT, SAPPRFT, and the Chinese Communist Party’s Propaganda Department will be referred to as “China’s censors,” “Chinese censorship authorities,” or variations thereof.

36. See O’CONNOR & ARMSTRONG, *supra* note 2, at 4.



film to address the censors' concerns. Following the alterations, the film is resubmitted to Chinese authorities for an approval decision.<sup>37</sup>

There are two primary methods by which foreign studios seek to access China's theatrical market: (1) as a revenue-sharing film under the quota system just described, or (2) by partnering with a Chinese film company to coproduce a film.<sup>38</sup> Foreign filmmakers have traditionally sought Chinese theatrical releases under the quota system.<sup>39</sup> Alternatively, by coproducing a film with a Chinese film company, U.S. filmmakers can bypass the quota system because coproduced films do not count as foreign films subject to the quota.<sup>40</sup> In addition, the foreign film company is entitled to 43 percent of box office revenues, as opposed to 25 percent under the quota method.<sup>41</sup> However, the coproduction method is not without its drawbacks, as the Chinese government exercises strict censorship over the content of coproduced films.<sup>42</sup> Even so, this does not guarantee a coproduced film will be approved for release in China, as the film must still be approved by China's censors.<sup>43</sup>

Regardless of the method chosen, all films must first be approved by Chinese censorship authorities before they can be distributed in China. Chinese regulations provide that all foreign films distributed in China "must adhere to the principles of the Chinese Constitution and maintain social morality."<sup>44</sup> To achieve this, censors have the authority to issue mandatory guidelines for film content and to prohibit types of content in films distributed in China.<sup>45</sup> A circular released by the censorship authorities in 2008 specifies and describes two categories of film content as prohibited content and content that must be cut or altered.<sup>46</sup> The circular lists prohibited film content as that which:

- (1) Violates the basic principles of the Constitution;
- (2) Threatens the unity, sovereignty and territorial integrity of the state;
- (3) Divulges state secrets, threatens national security, harms the reputation and interests of the state;
- (4) Instigates national hatred and discrimination, undermines the harmony among ethnic groups, or harms ethnic customs and practices;

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37. Robert Cain, *Hey, You've Got to Hide Your @#!\* Away: The Rules of Film Censorship in China*, CHINA FILM BIZ (Nov. 27, 2011), <http://chinafilmbiz.com/2011/11/28/hey-youve-got-to-hide-your-away-the-rules-of-film-censorship-in-china> [https://perma.cc/PK9H-QRRS].

38. Tiffany Kwong, *China's Film Censorship Program and How Hollywood Can Enter China's Film Market*, 5 ARIZ. ST. SPORTS & ENT. L.J. 163, 176 (2015).

39. *Id.* at 177.

40. O'CONNOR & ARMSTRONG, *supra* note 2, at 8.

41. *Id.*

42. Kwong, *supra* note 38, at 177.

43. *Id.* at 198–99; O'CONNOR & ARMSTRONG, *supra* note 2, at 9.

44. O'CONNOR & ARMSTRONG, *supra* note 2, at 9.

45. Kwong, *supra* note 38, at 173.

46. SARFT *Reiterates Film Censor Criteria*, H.K. TRADE DEV. COUNCIL (Apr. 1, 2008), <http://info.hktdc.com/alert/cba-e0804c-2.htm> [https://perma.cc/K623-E86W].

- (5) Violates state policies on religion, and propagates cult religion or superstition;
- (6) Disrupts social order or social stability;
- (7) Propagates obscenity, gambling, violence, or abets criminal activities;
- (8) Insults or defames others, or infringes upon others' legitimate rights and interests;
- (9) Corrupts social morality, or defames the superiority of national culture;
- (10) Other contents prohibited by state laws and regulations.<sup>47</sup>

In addition, the circular requires that films be cut or altered if found to be containing any of the following content:

- (1) Distorting Chinese civilization and history, seriously departing from historical truth; distorting the history of other countries, disrespecting other civilizations and customs; disparaging the image of revolutionary leaders, heroes and important historical figures; tampering with Chinese or foreign classics and distorting the image of the important figures portrayed therein;
- (2) Disparaging the image of the people's army, armed police, public security organ or judiciary;
- (3) Showing obscene and vulgar content, exposing scenes of promiscuity, rape, prostitution, sexual acts, perversion, homosexuality, masturbation and private body parts including the male or female genitalia; containing dirty and vulgar dialogues, songs, background music and sound effects;
- (4) Showing contents of murder, violence, terror, ghosts and the supernatural; distorting value judgment between truth and lies, good and evil, beauty and ugliness, righteous and unrighteous; showing deliberate expressions of remorselessness in committing crimes; showing specific details of criminal behaviours; exposing special investigation methods; showing content which evokes excitement from murder, bloodiness, violence, drug abuse and gambling; showing scenes of mistreating prisoners, torturing criminals or suspects; containing excessively horror [sic] scenes, dialogues, background music and sound effects;
- (5) Propagating passive or negative outlook on life, world view and value system; deliberately exaggerating the ignorance of ethnic groups or the dark side of society;
- (6) Advertising religious extremism, stirring up ambivalence and conflicts between different religions or sects, and between believers and non-believers, causing disharmony in the community;
- (7) Advocating harm to the ecological environment, animal cruelty, killing or consuming nationally protected animals;
- (8) Showing excessive drinking, smoking and other bad habits;
- (9) Opposing the spirit of law.<sup>48</sup>

Even with these long lists of prohibited and restricted content, "their descriptions are broad and rather vague, offering overarching categories with

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47. *Id.*

48. *Id.*

no concrete details.”<sup>49</sup> This leaves filmmakers with “a fair amount of uncertainty” as to what content will pass the censors’ scrutiny and what content will not.<sup>50</sup> This is compounded by the fact that Chinese censors are “notorious for providing vague feedback,” leaving filmmakers to navigate a largely informal process to secure censorship approval.<sup>51</sup> Consequently, gaining approval to distribute U.S. films in China is “a difficult and unpredictable process.”<sup>52</sup>

As a result, filmmakers producing big-budget blockbusters increasingly consider their appeal to Chinese audiences and their ability to secure a release in China.<sup>53</sup> This has resulted in a shift in Hollywood towards producing China-friendly films and an avoidance of film content that is likely to cause problems with Chinese censors.<sup>54</sup> The big Hollywood studios thus avoid “storylines, characters or even visual elements that could conceivably cause offense to either Beijing authorities or nationalistic segments of the Chinese audience,” and filmmakers are “careful to portray China in an unflinchingly positive, or neutral, light.”<sup>55</sup> Films critical of China, such as *Seven Years in Tibet*, or Richard Gere’s *Red Corner*, which criticized China’s legal system, have not been made by the major studios since the 1990s. Instead, U.S. studio films have tended to portray China “as a thoroughly stabilizing and technologically advanced partner, as in the finale of Ridley Scott’s *The Martian* or Roland Emmerich’s *2012*.”<sup>56</sup>

Regardless of all this, “due to the limit on foreign films and the size of the market, U.S. filmmakers have significant motivation to work with Chinese regulators, even if they have to remove important scenes or themes from their movies to do so.”<sup>57</sup> For example, in order to be shown in Chinese theaters, *Bohemian Rhapsody* had to eliminate mentions of Queen lead singer Freddie Mercury’s homosexuality by deleting scenes of a same-sex kiss and Mercury’s revelation that he is not heterosexual. In a scene in which Mercury tells his bandmates he has AIDS, the dialogue goes silent.<sup>58</sup>

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49. Jessica Grimm, Note, *The Import of Hollywood Films in China: Censorship and Quotas*, 43 SYRACUSE J. INT’L L. & COM. 155, 178 (2015).

50. *Id.* at 175.

51. O’CONNOR & ARMSTRONG, *supra* note 2, at 9.

52. *Id.* at 11.

53. See Kwong, *supra* note 38, at 165.

54. Cieply & Barnes, *supra* note 29.

55. Patrick Brzeski, “Top Gun: Maverick’ Trailer Sparks Controversy as Fans Notice Taiwanese Flag Missing from Tom Cruise’s Jacket,” HOLLYWOOD REP. (July 22, 2019, 5:13 AM), <https://www.hollywoodreporter.com/heat-vision/top-gun-maverick-trailer-sparks-controversy-tom-cruise-jacket-1225993> [<https://perma.cc/PJE4-QSL8>].

56. *Id.*

57. O’CONNOR & ARMSTRONG, *supra* note 2, at 11.

58. Yanan Wang & Shanshan Wang, *Chinese Viewers Balk at ‘Bohemian Rhapsody’ Film Censorship*, AP NEWS (Mar. 27, 2019), <https://apnews.com/06d1503ff9454014abae-cae7743ebda8> [<https://perma.cc/9BXQ-3SHB>].

Content also needed to be eliminated from the James Bond film *Skyfall*. A scene in which a Chinese security guard was shot was edited out, as was the movie villain's backstory of being subjected to extreme torture while in the custody of Chinese authorities.<sup>59</sup> The translation for a scene set in Macau was changed as well. In that scene, Bond questions a woman about her tattoo, asking if it came from being forced into prostitution at an early age. While the actual dialogue remained unchanged, the Chinese subtitles had Bond asking if she had been forced into a criminal mob instead.<sup>60</sup>

To help it secure a Chinese release, one-third of *Mission: Impossible III* was shot in Shanghai. Nevertheless, scenes that Chinese authorities found insulting had to be eliminated before it could be released in China. One such scene involved "old people playing mahjong."<sup>61</sup> The other showed "clothes drying on a clothesline in Shanghai," a place "where many people do not own dryers."<sup>62</sup> While these depictions seem relatively innocuous, the Chinese government felt these scenes portrayed China in a negative light.<sup>63</sup>

Coproductions between U.S. and Chinese film companies have been forced to alter their films, even when the scripts had been preapproved by Chinese authorities.<sup>64</sup> The 2010 film *The Karate Kid* was a coproduction between Columbia Pictures and the state-run China Film Group.<sup>65</sup> It starred popular Chinese actor Jackie Chan as a Chinese kung fu master training an African American boy in the martial arts in China. Producers tailored parts of the story to suit the concerns of Chinese censorship authorities and submitted the script to them for preapproval.<sup>66</sup> The film depicted China in a very positive light, and the prospects for the film's release in China seemed positive. Nevertheless, Chinese authorities had objections to the portrayal of Chinese villains in the film. This forced producers to delete twelve minutes from the film before being allowed to play in China, which resulted in severe alterations to the film's plot.<sup>67</sup>

Although not unique to China, films featuring excessive violence or nudity have also required cuts.<sup>68</sup> About forty minutes' worth of scenes of sex and violence were cut from *Cloud Atlas* before it was allowed to play in China, and Kate Winslet's nude scene was cut from *Titanic 3D*.<sup>69</sup> The X-Men film

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59. Grimm, *supra* note 49, at 172.

60. *Id.*

61. Kwong, *supra* note 38, at 199.

62. O'CONNOR & ARMSTRONG, *supra* note 2, at 11.

63. Kwong, *supra* note 38, at 199.

64. O'CONNOR & ARMSTRONG, *supra* note 2, at 11.

65. Gonzalez, *supra* note 17, at 9–10.

66. Kwong, *supra* note 38, at 197–98.

67. O'CONNOR & ARMSTRONG, *supra* note 2, at 11; Kwong, *supra* note 38, at 197–98.

68. O'CONNOR & ARMSTRONG, *supra* note 2, at 9.

69. Todd Cunningham, *7 Movies That Hollywood Changed for China*, WRAP (Apr. 1, 2013, 10:26 AM), <https://www.thewrap.com/movies-hollywood-changed-china-photos-83336>

*Logan* had to cut some violent scenes to be released in China, while *Deadpool* “was deemed so graphically violent that no amount of alterations could save its release.”<sup>70</sup>

The examples discussed so far involve changes made to completed films submitted to Chinese authorities for approval to be distributed in China. In these cases, Chinese authorities raised specific concerns, to which filmmakers responded by making the described changes. But filmmakers often preemptively tailor their films during the production process in an attempt to avoid having to make changes to completed films, and to enhance the prospects of being approved for release in China.<sup>71</sup> For example, the producers of the Brad Pitt zombie film *World War Z* took the initiative to change a reference to a zombie apocalypse originating in China to another country in order to help secure it a release in China.<sup>72</sup>

More significant changes were made to the 2012 remake of *Red Dawn*. The 1984 original featured a group of high school students fighting back against a Soviet invasion of the United States. Needing to update the film’s villains, the producers substituted the Chinese in place of the Soviets. Potential distributors, however, became concerned that this would prevent the film from being distributed in China. As a result, the filmmakers spent around \$1 million to change dialogue, digitally erase Chinese flags and military symbols from the film, and alter the invaders to being predominantly North Korean.<sup>73</sup> Similar changes were made to the 2015 Adam Sandler fantasy comedy *Pixels* to help it secure a release in China, including changing a scene of an explosion at the Great Wall of China to the Taj Mahal.<sup>74</sup> Producers also eliminated references to an email hack having a “Communist” source, and to the film’s antagonist having a connection to the Chinese government.<sup>75</sup>

In addition to eliminating certain content likely to be problematic to the Chinese government, U.S. producers have also learned that adding certain content to their films can enhance their prospects of being distributed in

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[<https://perma.cc/W8TC-MFCV>].

70. Bisset, *supra* note 31.

71. See O’CONNOR & ARMSTRONG, *supra* note 2, at 10, 12.

72. Lucas Shaw, *Fearing Chinese Censors, Paramount Changes ‘World War Z,’* WRAP (Apr. 1, 2013, 10:38 PM), <https://www.thewrap.com/fearing-chinese-censors-paramount-changes-world-war-z-exclusive-83316> [<https://perma.cc/99J6-DBAB>].

73. Ben Fritz & John Horn, *Reel China: Hollywood Tries to Stay on China’s Good Side*, L.A. TIMES (Mar. 16, 2011, 12:00 AM), <https://www.latimes.com/entertainment/la-xpm-2011-mar-16-la-et-china-red-dawn-20110316-story.html> [<https://perma.cc/3XQF-T2QV>]; Kevin Jagernauth, *Villains in ‘Red Dawn’ Remake to Be Changed to North Koreans Instead of Chinese so MGM Can Sell It*, INDIEWIRE (Mar. 16, 2011, 4:20 AM), <https://www.indiewire.com/2011/03/villains-in-red-dawn-remake-to-be-changed-to-north-koreans-instead-of-chinese-so-mgm-can-sell-it-119745> [<https://perma.cc/JQ26-SUUC>].

74. Rifkin, *supra* note 23.

75. O’CONNOR & ARMSTRONG, *supra* note 2, at 12.

China. These additions include the use of Chinese actors, locations, storylines, and products.<sup>76</sup> For example, in *Captain America*, producers choose to depict the title character using “a Chinese-made Vivo phone, rather than an iPhone from US-based Apple.”<sup>77</sup> Similarly, filmmakers for *X-Men: Days of Future Past* chose to include “lengthy scenes set in Hong Kong” and “a cameo by a Chinese boy band.”<sup>78</sup> Producers of the space drama *Gravity* portrayed the Chinese space program in a positive light by having “a stranded astronaut save[] herself by utilizing a fictional state-of-the-art Chinese space station and land[] on Earth in a Chinese space capsule.”<sup>79</sup>

The producers of *Iron Man 3*, however, probably took this strategy the furthest, including four minutes of extra footage in the film exclusively for the Chinese market. These extra four minutes contain:

- (1) product placement for Gu Li Duo, a milk drink from an Inner Mongolia-based dairy company;
- (2) Chinese actress Fan Bingbing playing a nameless assistant to Dr. Wu, the doctor who uses Chinese medicine to help Iron Man;
- (3) more product placement appearances by two Chinese electronics makers, TCL and Zoomlion; and
- (4) a shot of cheering, happy Chinese schoolchildren on TV with Iron Man.<sup>80</sup>

As these examples illustrate, U.S. filmmakers are thus often faced with a choice: “ignore Chinese sensitivities and potentially lose billions of dollars in revenue, or tailor content for China at the expense of the free expression of a filmmaker’s vision.”<sup>81</sup> China’s large film market, and the dependence of U.S. studios on it, allows China to exercise “disproportionate leverage over the production of American film.”<sup>82</sup> Big budget blockbusters, in particular, are unlikely to include content that would cause them to be rejected by China, even without direct pressure from Chinese censors.<sup>83</sup> China’s censorship, then, not only restrict what Chinese citizens see, but also what audiences in the United States and the rest of the world see. On this point, Professor Ying Zhu expressed concern that “Chinese censors can act as world film police on how China can be depicted [and] how China’s government can be depicted . . . in Hollywood films.” As a result, she fears that “films critical of the Chinese government will

76. *Id.* at 10; *see also* Cieply & Barnes, *supra* note 29 (discussing changes U.S. filmmakers make to their films to help secure a release for those films in China).

77. Bisset, *supra* note 31.

78. O’CONNOR & ARMSTRONG, *supra* note 2, at 10.

79. *Id.*

80. Grimm, *supra* note 49, at 156.

81. O’CONNOR & ARMSTRONG, *supra* note 2, at 12.

82. *Id.* at 13.

83. *See id.* at 11–12. “Peter Shiao, chief executive officer of an independent Hollywood-Chinese coproduction studio, emphasized this impact, saying, ‘For a type of movie, particularly the global blockbusters, they are not going to go and make something that the Chinese would reject for social or political reasons. That is already a truism.’” *Id.* at 11.

be absolutely taboo.”<sup>84</sup> Cruz’s proposed SCRIPT Act is an attempt to counter this influence by withholding U.S. government assistance to filmmakers who are so influenced. Before delving into the SCRIPT Act, it is helpful to understand the mechanisms of similar filmmaker assistance programs historically facilitated by the U.S. government.

### III. THE U.S. GOVERNMENT’S FILMMAKER ASSISTANCE PROGRAMS

Several U.S. government agencies, namely the DoD, the Central Intelligence Agency, the Federal Bureau of Investigation, the Secret Service, and even the White House, have programs that offer assistance to film and television producers.<sup>85</sup> It is estimated that the DoD provided assistance to “more than 800 movies since 1917, including blockbusters like *Iron Man* and *The Terminator*.”<sup>86</sup> Through these assistance programs, the government allows filmmakers to use government resources, such as tanks or jets, or shoot their productions on government property, like aircraft carriers or Army bases. This assistance helps producers achieve a level of authenticity in their productions that may otherwise be difficult to accomplish and reduces production costs because elaborate sets no longer need to be constructed to recreate the government sites.<sup>87</sup>

This assistance is not provided to just any film, however. The DoD policy, for example, stipulates that assistance will be provided when it would benefit the DoD or would be in the national interest because the production: “(1) Presents a reasonably realistic depiction of the Military Services and the DoD, including Service members, civilian personnel, events, missions, assets, and policies; (2) Is informational and considered likely to contribute to public understanding of the Military Services and the DoD; or (3) May benefit Military Service recruiting and retention programs.”<sup>88</sup>

84. *Id.* at 12 (second alteration in original).

85. DAVID L. ROBB, *OPERATION HOLLYWOOD: HOW THE PENTAGON SHAPES AND CENSORS THE MOVIES* 149 (2004); *see also* TRICIA JENKINS, *THE CIA IN HOLLYWOOD: HOW THE AGENCY SHAPES FILM AND TELEVISION* (2012) (discussing how the CIA’s filmmaker assistance program operates to help promote a positive image of the CIA).

86. Swan, *supra* note 20.

87. *See, e.g.*, Matthew Alford, *Washington DC’s Role Behind the Scenes in Hollywood Goes Deeper than You Think*, *INDEPENDENT* (Sept. 3, 2017, 6:33 PM), <https://www.independent.co.uk/voices/hollywood-cia-washington-dc-films-fbi-24-intervening-close-relationship-a7918191.html> [<https://perma.cc/YM2A-ZVUD>]. This assistance does not come free, however. The guidelines for the Department of Defense program state that “the support and assistance to non-government entertainment media productions will be at no additional cost to the government and taxpayers,” and that any “costs incurred by DoD (collectively) as a direct consequence of providing support will be reimbursed by the non-government entertainment production company.” DoD Assistance to Non-Government, Entertainment-Oriented Media Productions, 80 Fed. Reg. 47834, 47835 (Aug. 10, 2015) (codified at 32 C.F.R. pt. 238).

88. U.S. DEP’T OF DEF., *supra* note 4, § 3(a), at 1–2.

Producers seeking assistance from the DoD must submit a completed script for the film, along with a list of the support they are seeking from the government.<sup>89</sup> The DoD is authorized at this point, as well as prior to a producer's formal request for assistance, to provide "guidance and suggestions for changes that might resolve problems that would prevent DoD assistance."<sup>90</sup> In other words, the DoD can advise filmmakers on how to alter their film's portrayal of the military to help ensure the film fulfills the military's requirements for providing assistance. In his 2004 book examining the operation of the Pentagon's filmmaker assistance program, David L. Robb documents numerous instances of the military refusing to provide support to producers because of film content, or requiring changes to the script to be made before full support would be provided. One common objection by the military is that the military or military personnel are depicted in a negative light,<sup>91</sup> even when such portrayals are based on actual persons or are otherwise accurate.<sup>92</sup> The military has also required changes to films that failed to provide a positive impression of the military to the audience,<sup>93</sup> or that did not sufficiently emphasize positive actions by the military,<sup>94</sup> as a condition of providing support. Thus, productions seeking government assistance are judged by whether they would benefit the DoD, be in the best national interest, aid in retention and recruiting, or portray the military in a positive light. Projects deemed not to meet these standards are denied assistance, at least until changes are made to the scripts that satisfy the military's objections.

Once assistance has been approved, producers must enter into a Production Assistance Agreement with the DoD. The agreement makes it clear that the DoD is providing its assistance because doing so was found to be "in the best interest of DoD" based on the approved script. The agreement requires producers to obtain advance DoD approval for any changes to the film's depictions of the military before those changes can be made.<sup>95</sup> If producers fail to receive approval for such changes or otherwise fail to comply with the terms of the production agreement, the DoD may revoke the agreement and permanently withdraw the use of military resources for the production.<sup>96</sup> Finally, producers are required to provide a screening of the production to the

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89. *Id.* enclosure 2, § 2(a)(2), at 7.

90. *Id.* enclosure 2, § 2(a)(1), (3), at 7.

91. *See, e.g.,* ROBB, *supra* note 85, at 31 (*Goldeneye*); *id.* at 33–38 (*Clear and Present Danger*); *id.* at 67–70 (*Independence Day*); *id.* at 81–88 (*Renaissance Man*); *id.* at 96–100 (*Crimson Tide*); *id.* at 119 (*Outbreak*); *id.* at 153–60 (*The Presidio*); *id.* at 163–70 (*Star Trek IV*); *id.* at 191–95 (*Stripes*).

92. *See, e.g., id.* at 53–57 (*Thirteen Days*); *id.* at 59–66 (*Windtalkers*); *id.* at 77–80 (*Forrest Gump*); *id.* at 91–94 (*Black Hawk Down*); *id.* at 125–30 (*Fields of Fire*).

93. *See, e.g., id.* at 68–70 (*Independence Day*); *id.* at 119 (*Mars Attacks*).

94. *See, e.g., id.* at 73–75 (*Jurassic Park III*).

95. U.S. DEP'T OF DEF., *supra* note 4, enclosure 2, fig. 1 § 3, at 14.

96. *Id.* enclosure 2, fig. 1, at 13.



DoD before it is released to the public. The screening must take place at a time when changes can still be made to the production, as the purpose of this screening is to allow the DoD to confirm that the military sequences conform to the agreed-upon script.<sup>97</sup>

The government's refusal to assist productions that portray the military negatively would seem to constitute viewpoint discrimination and thus violate the First Amendment's free speech rights.<sup>98</sup> Generally speaking, the First Amendment prohibits the government from censoring or restricting speech because it disfavors the views of the speaker.<sup>99</sup> The military's refusal to assist producers whose productions contain viewpoints or other elements disfavored by the military would seem to violate this principle. However, as examined below, courts have found such refusals do not necessarily violate the principle when made in the context of government assistance programs that provide subsidies to program participants. By looking at the constitutionality of these assistance programs, we will be better able to assess the constitutionality of the SCRIPT Act.

#### IV. CONSTITUTIONALITY OF THE U.S. GOVERNMENT'S FILMMAKER ASSISTANCE PROGRAMS

The constitutionality of the military assistance program has been thoroughly analyzed in my other works,<sup>100</sup> so it will be briefly summarized here. Generally speaking, the First Amendment of the U.S. Constitution prohibits the government from censoring or restricting speech because of objections to what a speaker says,<sup>101</sup> or because of the "substantive content or the message it conveys."<sup>102</sup> As a result, "[d]iscrimination against speech because of its message is presumed to be unconstitutional."<sup>103</sup> Accordingly, the First Amendment prohibits the government from censoring or restricting speech because of some opposition to the views of the speaker.<sup>104</sup> This is the general rule when the government attempts to regulate speech by law.

A different standard may apply when the government has a program that subsidizes speech, particularly when that program does so to promote a particular purpose. The military assistance program can be viewed as a subsidy

97. *Id.* enclosure 2, § 3(a), at 9–10.

98. *E.g.*, ROBB, *supra* note 85, at 47–48.

99. *See* U.S. CONST. amend. I.

100. Joel Timmer, *Viewpoint Discrimination in the Military's Filmmaker Assistance Program and the First Amendment*, 19 COMM'N L. & POL'Y 327 (2014); Joel Timmer, *The First Amendment and Content Restrictions in State Film Incentive Programs*, 38 LOY. L.A. ENT. L. REV. 39 (2018).

101. *See* U.S. CONST. amend. I; *see also, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (discussing the general ban against viewpoint discrimination).

102. *Rosenberger*, 515 U.S. at 828 (citing *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)).

103. *Id.* at 828 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994)).

104. *See, e.g., id.* at 828–29.

for filmmakers, as it provides them with an opportunity to use government resources in their productions that would otherwise be unavailable, or potentially difficult and expensive to reproduce. Because the assistance program provides filmmakers with a form of government benefit, the unconstitutional conditions doctrine may be appropriate to apply here. Under the unconstitutional conditions doctrine, “the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.”<sup>105</sup> Thus, “even though a person has no ‘right’ to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.”<sup>106</sup> In particular, the denial of a government benefit may not be on a basis that infringes on a person’s constitutionally protected free speech rights because that person’s “exercise of those freedoms would in effect be penalized and inhibited . . . [which] would allow the government to ‘produce a result which [it] could not command directly.’”<sup>107</sup>

*Rust v. Sullivan* is a significant case illustrating the U.S. Supreme Court’s application of the unconstitutional conditions doctrine.<sup>108</sup> *Rust* involved a challenge to a prohibition on government funding of family planning clinics that advocated, counseled about, or made referrals for abortions.<sup>109</sup> Specifically, Title X of the Public Health Service Act provided federal funding for family-planning services, but prohibited that funding from being used in programs that included abortion as a method of family planning.<sup>110</sup> Title X grantees and doctors who supervised Title X-funded projects challenged these restrictions, arguing they were unconstitutional “because they condition the receipt of a benefit, in [this case government] funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling.”<sup>111</sup> The restrictions, challengers argued, constituted impermissible viewpoint discrimination since “all discussion about abortion as a lawful option” was prohibited in the Title X program.<sup>112</sup>

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105. *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (alteration in original) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

106. *Perry*, 408 U.S. at 597.

107. *Id.* (final alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The unconstitutional conditions doctrine has been applied to the denial of a variety of government benefits: tax exemptions, unemployment benefits, welfare payments, and, most often, government employment. *See, e.g., id.* at 597.

108. *Rust v. Sullivan*, 500 U.S. 173 (1991).

109. *See* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 684 (1992) (discussing 42 C.F.R. § 59.10(a) (1991)).

110. *See Rust*, 500 U.S. at 177–79.

111. *Id.* at 196.

112. *Id.* at 192.

The Court held that the Title X restrictions on abortion-related speech were constitutional, observing that “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”<sup>113</sup> The Court elaborated:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>114</sup>

Consequently, the “condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights.”<sup>115</sup>

It was significant to the Court in *Rust* that the restriction applied only to speech within the government-funded program, but not speech by participants outside of that program.<sup>116</sup> Finding the unconstitutional conditions doctrine inapplicable here, the Court observed that “the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”<sup>117</sup> The Court explained that “‘unconstitutional conditions’ cases 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 federally funded program.”<sup>118</sup> Here, the Court observed, Title X employees’ freedom of speech is limited during the time they are working for the government-funded project, “but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.”<sup>119</sup> Thus, the implication of the Court’s holding in *Rust* was that “while family planning counselors may have a constitutional right to talk about abortion, they have no constitutional right to do so while being funded by the government.”<sup>120</sup>

Consequently, *Rust* establishes that when the government subsidizes speech, it may favor one viewpoint over another, so long as recipients of the subsidy are not restricted in espousing the disfavored viewpoint outside of the subsidized program. As the Court has observed, “[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’

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113. *Id.* at 194.

114. *Id.* at 193.

115. *Id.* at 198.

116. *See id.* at 199 n.5.

117. *Id.* at 196.

118. *Id.* at 197 (emphasis omitted).

119. *Id.* at 199.

120. Cole, *supra* note 109, at 676.

on that activity,”<sup>121</sup> and “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”<sup>122</sup> For the Court, “[t]he reasoning of these decisions is simple: ‘although government may not place obstacles in the path of a [person’s] exercise of . . . freedom of [speech], it need not remove those not of its own creation.’”<sup>123</sup> Therefore, it is “well established that the government can make content-based distinctions when it subsidizes speech,”<sup>124</sup> as “subsidies, by definition . . . do not restrict any speech.”<sup>125</sup>

Accordingly, the viewpoint discrimination that occurs within the military’s production assistance program does not violate producers’ First Amendment rights. Because the purpose of the program is to fund speech that promotes a favorable image of the military, the government is free to require that the program’s benefits only be provided to those productions that would promote the purposes of the program. Additionally, the program must allow producers to engage in such speech outside of the program. This is the case here, as producers are free to make productions that are critical of the military or portray it in a negative light, just without the government assistance provided to producers who portray the military more positively. For there to be a violation of the unconstitutional conditions doctrine, the government must place a condition or restriction on a filmmaker’s speech that occurs outside of the government program.<sup>126</sup> Whether the SCRIPT Act would do this, or whether the bill otherwise violates filmmakers’ First Amendment rights, is analyzed next.

## V. CONSTITUTIONALITY OF THE SCRIPT ACT

The previous discussion demonstrates that the U.S. military’s film assistance program, as it currently operates, is likely constitutional. If the SCRIPT Act were to become law, would this alter that analysis? The key to this inquiry, as well as a broader First Amendment analysis, revolves around the differences between the assistance program’s historical operation and its likely future operation should the SCRIPT Act become law. There are two preliminary issues, however, that may affect the level of First Amendment protection implicated by the SCRIPT act: (1) whether the Act’s targeted content might qualify as political propaganda,<sup>127</sup> and (2) whether changes made to films to accommodate Chinese censors might result in false or inaccurate portrayals of China.

121. *Rust*, 500 U.S. at 193 (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)).

122. *Regan v. Tax’n with Representation of Wash.*, 461 U.S. 540, 549 (1983).

123. *Id.* at 549–50 (alterations in original) (quoting *Harris*, 448 U.S. at 316).

124. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188–89 (2007).

125. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 765 (2011) (Kagan, J., dissenting).

126. *Rust*, 500 U.S. at 197.

127. Propaganda is defined as:

[C]ommunication that is used primarily to influence an audience and further an agenda, which may not be objective and may be presenting facts selectively to encourage a particular synthesis or perception . . . . Propaganda is often

### A. *Political Propaganda*

Films are protected by the First Amendment,<sup>128</sup> shielding filmmakers from government interference in the content of their films, including how they portray China and the Chinese. Even political propaganda, as a form of political speech, would seem to be fully protected by the First Amendment. The U.S. Supreme Court “often makes a point to say that it affords political speech the highest level of Constitutional protection.”<sup>129</sup> In fact, the “discussion of political affairs lies at the heart of the First Amendment.”<sup>130</sup>

*Meese v. Keene* involved government regulation of foreign political propaganda.<sup>131</sup> The law at issue was a portion of the Foreign Agents Registration Act.<sup>132</sup> The Act required foreign agents who disseminated political propaganda in the United States to provide the attorney general with a copy of the material and a report on the extent of its dissemination.<sup>133</sup> The material was also required to be labeled with certain information about the agent and the principal for whom the agent was acting.<sup>134</sup> Content was considered “political propaganda” under the act if it contained “political material intended to influence the foreign policies of the United States, or may reasonably be adapted to be so used.”<sup>135</sup>

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associated with material prepared by governments, but activist groups, companies, religious organizations, the media, and individuals can also produce propaganda.

*Propaganda*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Propaganda> [<https://perma.cc/HWV2-5DVN>]. Introducing the SCRIPT Act, Cruz said: “In the United States, the Chinese Government attempts to spread propaganda by two ways: by leveraging their enormous market access to coerce Americans into self-censorship, especially . . . Hollywood . . .” 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).

128. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . . The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.” (second alteration in original) (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948))).
129. See Leigh Ellen Gray, Note, *Thumb War: The Facebook “Like” Button and Free Speech in the Era of Social Networking*, 7 CHARLESTON L. REV. 447, 475 & n.148 (2013) (collecting cases).
130. William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 298 (2004).
131. *Meese v. Keene*, 481 U.S. 465 (1987).
132. *Id.* at 467–69.
133. *Id.* at 470.
134. *Id.* at 470–71.
135. *Id.* at 470.

While not directly addressing the level of First Amendment protection for political propaganda, the *Meese* court provided no indication that political propaganda was entitled to anything less than full First Amendment protection, observing that “the term ‘political propaganda’ does nothing to place regulated expressive materials ‘beyond the pale of legitimate discourse.’”<sup>136</sup> The Court also distinguished the law at issue from that in *Lamont v. Postmaster General of the United States*, in which the Court struck down a requirement that the Postmaster General detain foreign communist propaganda mailed to persons in the United States, and to only deliver that propaganda after the addressee provided a written notification that he or she wished to receive the propaganda.<sup>137</sup> Unlike the *Lamont* law, the Court observed, the law at issue in *Meese* placed “no burden on protected expression” as it did not prohibit or restrain the distribution of political propaganda.<sup>138</sup>

#### B. *False or Inaccurate Portrayals*

While *Meese* indicates that speech does not lose First Amendment protection simply because it is propaganda, is this analysis altered if the speech or propaganda is demonstrably false? When introducing the SCRIPT Act, Cruz raised concerns about the Chinese government suppressing accurate portrayals of China and the Chinese in U.S. films seeking distribution in China, accusing Chinese censors of seeking “to edit anything to do with Tibet, with Taiwan, with Tiananmen Square, with human rights, with democracy, with religion, or with any criticism of communism, particularly the Chinese Communist Party.”<sup>139</sup> In other words, Cruz accuses the Chinese government of seeking to suppress certain truthful, accurate portrayals of China. Does the false or inaccurate nature of changes to films required by the Chinese government, as a condition of distributing films in that country, alter the level of First Amendment protection provided to those films and those portrayals? The short answer to that question is “no.”

The potential falsity of political propaganda would not alter the level of First Amendment protection provided to it, as the Supreme Court has made clear that false speech is protected by the First Amendment.<sup>140</sup> Specifically, the “First Amendment is a value-free provision whose protection is not dependent on ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”<sup>141</sup> In fact, “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing

136. *Id.* at 480.

137. *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 302–03 (1965).

138. *Meese*, 481 U.S. at 480.

139. 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).

140. *See United States v. Alvarez*, 567 U.S. 709, 721–22 (2012).

141. *Grant v. Meyer*, 828 F.2d 1446, 1455 (10th Cir. 1987) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

space’ that they ‘need . . . to survive.’”<sup>142</sup> As Supreme Court Justice Oliver Wendell Holmes famously observed, “the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.”<sup>143</sup> As a result, “[i]n the free marketplace of ideas, true ideas are supposed to compete with false ones until the truth wins.”<sup>144</sup> Moreover, in crafting the First Amendment, the founding fathers “did not trust any government to separate the true from the false for us.”<sup>145</sup>

The First Amendment protects speech—both true and false—to promote the public’s ability to engage in “uninhibited, robust, and wide-open” debate on public issues.<sup>146</sup> Punishing false speech could limit and harm public debate on important issues due to the chilling effect such a law could cause. Under a chilling effect, people refrain from making certain statements, even some that are believed to be true, for fear of having to defend those statements in court, or be punished for them.<sup>147</sup> This chilling effect is not eliminated by allowing speakers to escape punishment by establishing the truth of their statements, due to concerns about the difficulty, time, and expense for speakers having to prove all the particulars of their statements in court. Consequently, speakers play it safe, chilling both true and false speech, which harms the vigorosity and openness of debate on public issues. As the Supreme Court has said, “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”<sup>148</sup>

Furthermore, U.S. filmmakers do not lose First Amendment protection for their films when distributing those films outside U.S. borders. While the Supreme Court has never directly addressed the issue of First Amendment protection for speech by U.S. citizens or companies outside the United States,<sup>149</sup> it did assume in

142. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Button*, 371 U.S. at 433).

143. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *N.Y. Times Co.*, 376 U.S. at 270 (“The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

144. Noah Feldman, *Fake News May Not Be Protected Speech*, BLOOMBERG OP. (Nov. 23, 2016, 10:22 AM), <https://www.bloomberg.com/opinion/articles/2016-11-23/fake-news-may-not-be-protected-speech> [<https://perma.cc/HUP8-KT25>].

145. *Grant*, 828 F.2d at 1455 (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

146. *N.Y. Times Co.*, 376 U.S. at 270.

147. See *id.* at 279.

148. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

149. See Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1592 (2010).

one case “that First Amendment protections reach beyond our national boundaries.”<sup>150</sup> Other courts have made a similar assumption.<sup>151</sup> Moreover:

[The Supreme Court has] reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States . . . can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.<sup>152</sup>

This indicates that filmmakers distributing their films in China, or in other foreign countries, would still enjoy the protection of the First Amendment if the U.S. government attempted to prohibit or infringe on their speech in those countries. Certainly, U.S. filmmakers distributing their films in the United States would be protected by the First Amendment, even if they made changes to those films to accommodate the Chinese government.<sup>153</sup> Therefore, under a preliminary analysis, the fact that the SCRIPT Act is aimed at content which might be considered propaganda and at speech which might be deemed false does not reduce or eliminate the First Amendment protection for that content. The constitutionality of the SCRIPT Act under the First Amendment thus rests on an examination of the Act’s specific provisions and their likely effect on the future governance of filmmaker assistance programs.

### C. *Overall Constitutionality*

As discussed, the purpose of the U.S. military’s current filmmaker assistance program is to support portrayals of the U.S. military in order to bolster the military’s public image and to aid in recruiting. The bill does not alter these purposes of the program. Instead, the bill seemingly adds another government purpose to be promoted with the program: to reduce the impact of Chinese authorities on the content of U.S. films.

Thus, the thrust of the restrictions is to discourage filmmakers from making changes to films to appease Chinese officials, which presumably would present the Chinese in a more positive but potentially less accurate light. While Cruz’s statements make clear that these are the types of changes are the main concerns behind the bill,<sup>154</sup> the bill’s text is not so limited in its effects. Instead, the bill refers to any changes made to films to address Chinese concerns about

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150. *Haig v. Agee*, 453 U.S. 280, 308 (1981).

151. *See Zick*, *supra* note 149, at 1592 n.287 (collecting cases).

152. *Reid v. Covert*, 354 U.S. 1, 6 (1957) (footnotes omitted).

153. *Cf., e.g., Miller v. California*, 413 U.S. 15, 34 (1973) (providing a standard for defining obscene content that could be regulated by the government consistent with the First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (finding a state statute that permitted the banning of motion picture films on the ground that they were “sacrilegious” unconstitutional).

154. 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz).



film content, or even in anticipation of such concerns. The bill seeks to achieve this in two ways. First, a filmmaker who seeks government assistance with a film must agree “not to alter the content of the film in response to, or in anticipation of, a request by an official of the Government of the People’s Republic of China or the Chinese Communist Party.”<sup>155</sup> Thus, filmmakers receiving government assistance with a film must agree not to make any changes to that film to accommodate Chinese concerns about content.

Second, the bill disqualifies filmmakers who have made such changes to any of their recent films from receiving government assistance with a subsequent film. The SCRIPT Act would require filmmakers, as a condition of government support, to provide the government with a list of all films produced or funded by the company which have been submitted to Chinese authorities for evaluation for screening in China during the past ten years, or since the enactment of the SCRIPT Act, whichever time period is shorter.<sup>156</sup> If the government determines that the film company altered the content of any of its films within the past three years in response to, or in anticipation of, a request by Chinese authorities, the film company would be prohibited from receiving support for a subsequent film.<sup>157</sup> Presumably, this would discourage a filmmaker who believed it might want government assistance with an upcoming film from making changes to accommodate the Chinese government in earlier films. This is a significant change to the government’s assistance programs. Currently, only the content of the film for which a filmmaker is seeking military assistance is considered by the government in determining whether it should grant the filmmaker assistance. Under the SCRIPT Act, however, the government would further consider the content of the filmmaker’s other recent films.

The Cruz bill, then, not only adds a new purpose to be served by the programs (the reduction of Chinese influence over U.S. film content), it also

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155. Stopping Censorship, Restoring Integrity, and Protecting Talkies Act, S. 3835, 116th Cong. § 2(a)(2) (2020).

156. *Id.* § 2(a)(1).

157. *Id.* § 2(b)(2); (c)(2)(C). There are two other significant conditions placed on filmmakers by the SCRIPT Act. One is that they may not partner with a Chinese company to coproduce a film subject to Chinese censorship. *Id.* § 2(b)(1). Since coproductions are subject to regulation and censorship by Chinese censorship authorities, a U.S. filmmaker in a coproduction arrangement would be unable to agree not to make changes to the film to accommodate Chinese concerns. See O’CONNOR & ARMSTRONG, *supra* note 2, at 8, 11; see also Kwong, *supra* note 38, at 197–98 (describing the travails of the 2010 coproduction *The Karate Kid*); Gonzalez, *supra* note 17 (cataloging censorship in coproductions). The other condition is that a filmmaker who previously violated an agreement not to make changes to their films to accommodate Chinese censors in order to receive government assistance may not receive assistance for a period of ten years. S. 3835, § 2(b)(2), (c)(2)(D). With the latter condition, it is the filmmaker’s violation of its agreement with the government that causes it to be disqualified, which on its own may be a sufficient basis for the government to deny its assistance. That question, however, is beyond the scope of this Article.

adds significant qualifying requirements well beyond providing positive portrayals of the U.S. military. The restrictions denying assistance to filmmakers that make or have made changes for the Chinese censors—even in self-generated anticipation of censors’ concerns—substantially expands the conditions filmmakers must satisfy to receive government assistance and thus significantly alters the analysis of the program’s constitutionality.

In *Rust*, the Court observed, “our ‘unconstitutional conditions’ cases 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 federally funded program.”<sup>158</sup> The requirement that filmmakers agree not to make changes to the film that is receiving support from the government assistance program to accommodate the Chinese government would not violate the unconstitutional conditions doctrine under this reasoning, as that requirement would still allow filmmakers to make such changes to other films, allowing them to engage in the protected conduct outside the scope of the assistance program.

However, the SCRIPT Act’s requirement that a filmmaker not have made changes to any of its films to accommodate the Chinese government within the last three years to be eligible for government assistance would prohibit a filmmaker from engaging in the protected conduct outside the confines of the assistance program. In *Rust*, fund recipients were able to engage in abortion-related activities outside the scope of the government-funded program, which was a significant factor in the Court’s decision to uphold the constitutionality of the restriction. With the SCRIPT Act, however, engaging in the specified activities outside the program could result in a filmmaker’s disqualification from the program, rather than only being restricted from making changes to accommodate the Chinese government for the specific film for which the filmmaker sought assistance. Because the same penalty applies to any of the filmmaker’s films within the prior three years, even if it had not sought government assistance for any of those films, the filmmaker’s freedom of expression is not limited only during the time they actually participate in the program; in other words, filmmakers could be penalized for speech that took place outside the confines of the program. This would seem to violate the unconstitutional conditions doctrine.<sup>159</sup>

In the unconstitutional conditions case *Elrod v. Burns*, the Court outlined the standard that conditions on government benefits must meet to survive a constitutional challenge, stating that such “a significant impairment of First Amendment rights must survive exacting scrutiny.”<sup>160</sup> The Court said

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158. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis omitted).

159. *See id.*

160. *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion) (first citing *Buckley v. Valeo*, 424 U.S. 1, 64–65 (1976)); and then citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S.

that showing that the restraint furthers a legitimate government interest via a means that is rationally related to that interest is not sufficient.<sup>161</sup> Rather, the interest to be served by the government restraint on speech “must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.”<sup>162</sup>

In addition, the means used to achieve the government interest must be narrowly drawn to avoid unnecessarily infringing on First Amendment rights.<sup>163</sup> The Court stated: “‘Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.’ If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.”<sup>164</sup> To survive constitutional challenge, then, the condition on a government benefit “must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.”<sup>165</sup>

The SCRIPT Act seems to serve the interest of reducing the influence of the Chinese government on the content of U.S. films, and in particular, the incorporation of arguably propagandistic pro-Chinese messages in U.S. films. The Chinese government has been able to leverage its large film market to get U.S. filmmakers to remove or alter content in their films that the Chinese government believes portrays China in an unfavorable light, regardless of whether that portrayal is accurate. This gives China the ability to control not just what audiences in China see, but what audiences in the United States see as well.<sup>166</sup> The SCRIPT Act, then, is aimed, at least in part, at protecting U.S. audiences from films that are shaped by the Chinese government for its own ends. Cruz’s concerns thus seem to be with Hollywood films presenting China as it would like to be seen rather than as it actually is, which could contribute to audiences in the United States and elsewhere holding favorable views of China shaped by misleading information.

This interest to be achieved by the SCRIPT Act to protect Americans from the potential negative impact Chinese propaganda on them may be impermissible under the First Amendment. In *Meese v. Keene*, the case involving registration and disclosure requirements for foreign propaganda disseminated

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449, 460–61 (1958)).

161. *Id.* at 362.

162. *Id.* at 362 (citing *Buckley*, 424 U.S. at 94; then citing *Williams v. Rhodes*, 393 U.S. 23, 31–33 (1968); then citing *NAACP v. Button*, 371 U.S. 415, 438, 444 (1963); then citing *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); then citing *Patterson*, 357 U.S. at 464–66; and then citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

163. *See id.* at 362–63.

164. *Id.* at 363 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)).

165. *Id.*

166. *See* 166 CONG. REC. S2591 (daily ed. May 21, 2020) (statement of Sen. Ted Cruz); Press Release, Off. of Sen. Ted Cruz, *supra* note 15.

in the United States, the Court observed that “[a] similar paternalistic strategy of protecting the public from information was followed by the Virginia Assembly, which enacted a ban on the advertising of prescription drug prices by pharmacists.”<sup>167</sup> In that case, the state argued that without the ban there would be aggressive price competition, which would cause pharmacists to reduce the level of service they provided their customers, due to the cost-cutting that would be necessary for them to remain competitive.<sup>168</sup> The Court rejected the state’s justification for the law, “finding that the ban was predicated upon assumptions about the reactions the public would have if they obtained the ‘wrong’ kind of information.”<sup>169</sup> The *Meese* Court then found that the rationale in *Virginia State Board of Pharmacy* “applies equally to information that the Congress considers certain expressive materials to be ‘propaganda.’”<sup>170</sup>

About its decision in *Virginia State Board of Pharmacy*, the *Meese* Court also said: “[W]e squarely held that a zeal to protect the public from ‘too much information’ could not withstand First Amendment scrutiny.”<sup>171</sup> In *Virginia State Board of Pharmacy*, the Court said:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers from its misuse if it is freely available, that the First Amendment makes for us.<sup>172</sup>

As with false speech, the Court is saying that more speech is to be preferred over government restrictions on speech as a remedy to the government’s concern about the impact of particular speech on the public.

Thus, it is questionable whether the SCRIPT Act serves a legitimate government interest at all, let alone a vital one. Regardless of the categorization of the interest, however, the SCRIPT Act encompasses substantially more speech than necessary to achieve its objective. The means used in the bill to achieve that interest are not narrowly drawn, and there are less restrictive means of achieving the government’s interest. This violates the standards for government requirements in unconstitutional conditions cases laid out in *Elrod v. Burns*.<sup>173</sup>

A similarly broad restriction on speech was at issue in *FCC v. League of Women Voters*.<sup>174</sup> That case involved a prohibition Congress imposed on non-

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167. *Meese v. Keene*, 481 U.S. 465, 481 (1987) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

168. *Va. State Bd. of Pharmacy*, 425 U.S. at 767–68.

169. *Meese*, 481 U.S. at 482.

170. *Id.* (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 769).

171. *Id.* (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 770).

172. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

173. See *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

174. *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

commercial television and radio stations that forbade editorializing by any such station that received a grant from the Corporation for Public Broadcasting, “a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming.”<sup>175</sup> This meant that station licensees, station management, or those speaking on their behalf were prohibited from using the station to propagate their own views.<sup>176</sup> The government argued the ban on editorializing was necessary “to protect noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for Government propagandizing or the objects of governmental influence.”<sup>177</sup>

The Court found that underlying the restriction on editorializing was an assumption “that individual noncommercial stations are likely to speak so forcefully on particular issues that Congress, the ultimate source of the stations’ federal funding, will be tempted to retaliate against these individual stations by restricting appropriations for all of public broadcasting.”<sup>178</sup> The Court found this risk to be “speculative at best.”<sup>179</sup> The Court then found the blanket ban on editorializing to cover much more speech than necessary to achieve its interest. The Court observed:

[The ban] includes within its grip a potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidacies, or elections. Indeed, the breadth of editorial commentary is as wide as human imagination . . . . [T]he Government never explains how, say, an editorial by local station management urging improvements in a town’s parks or museums will so infuriate Congress or other federal officials that the future of public broadcasting will be imperiled . . . .<sup>180</sup>

The Court also observed that “[t]he regulation impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state, or local government.”<sup>181</sup> This led the Court to conclude that the law was “not narrowly tailored to address any of the Government’s suggested goals.”<sup>182</sup> Accordingly, “the ‘sacrifice [of] First Amendment protections for so speculative a gain is not warranted.’”<sup>183</sup>

175. *Id.* at 366.

176. *Id.* at 381. As interpreted by the FCC, however, the prohibition on editorializing did not prevent stations from airing “any other presentations on controversial issues of public importance.” *Id.*

177. *Id.* at 384–85.

178. *Id.* at 390.

179. *Id.* at 391.

180. *Id.* at 393.

181. *Id.* at 395.

182. *Id.* at 399.

183. *Id.* at 397 (alteration in original) (quoting *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 127 (1973)).

The breadth of the restriction in the SCRIPT Act seems similar to that of the complete ban on political editorializing in *League of Women Voters*. Under the SCRIPT Act, filmmakers are prevented from making any changes to film content, both in recent films and in those for which they are seeking assistance, to appease the Chinese government. Some of those changes may have nothing to do with inaccurately portraying China or the Chinese government in a favorable light, or otherwise providing audiences with an inaccurate impression of China, which is the main concern behind the bill. While the purpose behind the bill is to reduce the spread of Chinese propaganda through U.S. films, there is nothing in the bill to limit its reach to propagandistic changes to film content. The bill instead bans any change to a film's content to address any actual or potential concern of the Chinese government.

The bill, then, would prohibit changes to films that had nothing to do with China or Chinese propaganda. For example, unlike the MPA rating system for films used in the United States, which rates films on their appropriateness for different age groups,<sup>184</sup> films in China are to be appropriate for all audiences. Thus, the Chinese government is concerned with things such as portrayals of sex, violence, smoking, and drinking.<sup>185</sup> Eliminating such portrayals in films, or making them less explicit or prominent, might be viewed as desirable for U.S. audiences as well, and has little or nothing to do with the impression a film would give audiences about China. However, a filmmaker participating in the government's assistance program would not be allowed to make such changes to accommodate the Chinese government, even though the subject falls outside the U.S. government's objectives with the SCRIPT Act. In this case, the restrictions could be impermissibly overbroad, and ought to be crafted less restrictively by focusing more on the types of content that led Cruz to introduce the bill.

In *Elrod*, the Court said that for a condition on government benefit to be valid, "the benefit gained must outweigh the loss of constitutionally protected rights."<sup>186</sup> There are reasons to believe that the SCRIPT Act would fail to meet this standard. For example, only a small number of films seek U.S. government assistance, but filmmakers increasingly rely on the Chinese market for profitability.<sup>187</sup> In addition, the benefits a filmmaker may obtain from U.S. government assistance may not outweigh millions of dollars the filmmaker potentially stands to make from China. Accordingly, the SCRIPT Act is likely to be effective with "select military-focused titles—like 'Top Gun 2' or 2013's 'Lone Survivor'—that bank on the military connections and access to assets like fighter planes for credibility with their target audience," but not with other

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184. See *The Film Rating System*, FILM RATINGS.COM, <https://www.filmratings.com> [<https://perma.cc/X9BS-MGRT>].

185. See H.K. TRADE DEV. COUNCIL, *supra* note 46 and accompanying text.

186. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

187. Rifkin, *supra* note 23.

films.<sup>188</sup> Philip Fang, a sociologist at Northwestern University studying United States–China film cooperation, observes: “If you force Hollywood studios to choose between U.S. government support and Chinese money, of course they will choose the latter. And that means in the future, there will be more movies made with Chinese money and without U.S. government involvement.”<sup>189</sup> As a result, the SCRIPT Act may be “counterproductively likely to increase China’s influence on American media.”<sup>190</sup> This means that the benefit to be gained by the SCRIPT Act would not “outweigh the loss of constitutionally protected rights,” violating the standard laid out by the Court in *Elrod*.<sup>191</sup>

### CONCLUSION

As currently written, Cruz’s SCRIPT Act is likely unconstitutional for a number of reasons. First, and most significantly, it seems to violate the unconstitutional conditions doctrine by attempting to restrict the speech of filmmakers outside the confines of the government’s filmmaker assistance programs. Second, the interest to be served by the Act—protecting U.S. audiences from speech which could negatively affect them—is also impermissible. Third, the means used to achieve this government interest are not narrowly drawn to target just the types of potentially harmful speech with which the government is concerned. Finally, it is likely that any benefits of the bill would be small in comparison to the burden it places on filmmakers’ First Amendment rights.

While the bill might be revised to address some of these legal issues, it still would not be effective in practice because only a small number of films seek government assistance in the first place. Furthermore, for the few films that do seek government assistance, the millions to be made from a Chinese release may be more attractive than the benefits to be obtained through the U.S. government’s assistance. In this case, the bill could actually cause filmmakers to more readily forego the government’s assistance because of the restrictions that come with it.

The concern behind the SCRIPT Act is certainly a real one. We should be concerned about the ability of Chinese censors to shape the content of U.S. films, by requiring U.S. filmmakers to make changes favorable to the Chinese government in order secure a release for their films in China, and even by getting filmmakers to censor themselves in anticipation of Chinese concerns. However, even if the SCRIPT Act were revised to be able to withstand constitutional scrutiny, its approach is not one that shows much promise in lessening China’s influence on American films.

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188. Davis, *supra* note 13.

189. *Id.*

190. Rifkin, *supra* note 23.

191. *Elrod*, 427 U.S. at 363.