SUPREME COURT OF THE UNITED STATES

No. 97–371

NATIONAL ENDOWMENT FOR THE ARTS, ET AL., PETITIONERS *v.* KAREN FINLEY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 1998]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

"The operation was a success, but the patient died." What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U. S. C. §954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more. I write separately because, unlike the Court, I think that §954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, it establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

I

THE STATUTE MEANS WHAT IT SAYS

Section 954(d)(1) provides:

> "No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

> "(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

The phrase "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached (unless one jumps out of paragraph (1) to press "Chairperson" into service). Even so, it is clear enough that the phrase is meant to apply to those who do the judging. The application reviewers must take into account "general standards of decency" and "respect for the diverse beliefs and values of the American public" when evaluating artistic excellence and merit. One can regard this as either suggesting that decency and respect are elements of what Congress regards as artistic excellence and merit, or as suggesting that decency and respect are factors to be taken into account *in addition to* artistic excellence and merit. But either way, it is entirely, 100% clear that decency and respect are to be taken into account in evaluating applications.

This is so apparent that I am at a loss to understand what the Court has in mind (other than the gutting of the statute) when it speculates that the statute is merely "advisory." *Ante*, at 10. General standards of decency and respect for Americans' beliefs and values *must* (for the statute says that the Chairperson "shall ensure" this result) be taken into account (see, *e.g.*, American Heritage Dictionary 402 (3d ed. 1992): "consider . . . [t]o take into account; bear in mind") in evaluating all applications. This does not mean that those factors must always be dispositive, but it *does* mean that they must always be considered. The method of compliance proposed by the

National Endowment for the Arts (NEA)— selecting diverse review panels of artists and nonartists that reflect a wide range of geographic and cultural perspectives— is so obviously inadequate that it insults the intelligence. A diverse panel membership increases the odds that, *if and when* the panel takes the factors into account, it will reach an accurate assessment of what they demand. But it in no way increases the odds that the panel *will* take the factors into consideration— much less *ensures* that the panel will do so, which is the Chairperson's duty under the statute. Moreover, the NEA's fanciful reading of §954(d)(1) would make it wholly superfluous. Section 959(c) already requires the Chairperson to "issue regulations and establish procedures . . . to ensure that all panels are composed, to the extent practicable, of individuals reflecting . . . diverse artistic and cultural points of view."

The statute requires the decency and respect factors to be considered in evaluating *all* applications— not, for example, just those applications relating to educational programs, *ante*, at 13, or intended for a particular audience, *ante*, at 14. Just as it would violate the statute to apply the artistic excellence and merit requirements to only select categories of applications, it would violate the statute to apply the decency and respect factors less than universally. A reviewer may, of course, give varying weight to the factors depending on the context, and in some categories of cases (such as the Court's example of funding for symphony orchestras, *ante*, at 12) the factors may rarely if ever affect the outcome; but §954(d)(1) requires the factors to be considered in every case.

I agree with the Court that §954(d)(1) "imposes no categorical requirement," *ante*, at 10, in the sense that it does not require the denial of all applications that violate general standards of decency or exhibit disrespect for the diverse beliefs and values of Americans. Compare §954(d)(2) ("[O]bscenity . . . shall not be funded"). But the

factors need not be conclusive to be discriminatory. To the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes. In other words, the presence of the "tak[e] into consideration" clause "cannot be regarded as mere surplusage; it means something," *Potter* v. *United States*, 155 U. S. 438, 446 (1894). And the "something" is that the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not.

This unquestionably constitutes viewpoint discrimination.[1] That conclusion is not altered by the fact that the statute does not "compe[l]" the denial of funding, *ante*, at 10, any more than a provision imposing a five-point handicap on all black applicants for civil service jobs is saved from being race discrimination by the fact that it does not compel the rejection of black applicants. If viewpoint discrimination in this context is unconstitutional (a point I shall address anon), the law is invalid unless there are some situations in which the decency and respect factors *do not constitute viewpoint discrimination*. And there is none. The applicant who displays "decency," that is, "[c]onformity to prevailing standards of propriety or modesty," American Heritage Dictionary 483 (3d ed. 1992) (def. 2), and the applicant who displays "respect," that is, "deferential regard," for the diverse beliefs and values of the American people, *id.*, at 1536 (def. 1), will *always* have an edge over an applicant who displays the opposite. And

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[1] If there is any uncertainty on the point, it relates only to the adjective, which is not at issue in the current discussion. That is, one might argue that the decency and respect factors constitute *content* discrimination rather than *viewpoint* discrimination, which would render them easier to uphold. Since I believe this statute must be upheld in either event, I pass over this conundrum and assume the worst.

finally, the conclusion of viewpoint discrimination is not affected by the fact that what constitutes "decency" or "the diverse beliefs and values of the American people" is difficult to pin down, *ante*, at 12— any more than a civil-service preference in favor of those who display "Republican-party values" would be rendered nondiscriminatory by the fact that there is plenty of room for argument as to what Republican-party values might be.

The "political context surrounding the adoption of the 'decency and respect' clause," which the Court discusses at some length, *ante*, at 10, does not change its meaning or affect its constitutionality. All that is proved by the various statements that the Court quotes from the Report of the Independent Commission and the floor debates is (1) that the provision was not meant categorically to exclude any particular viewpoint (which I have conceded, and which is plain from the text), and (2) that the language was not meant to do anything that is unconstitutional. That in no way propels the Court's leap to the countertextual conclusion that the provision was merely "aimed at reforming procedures," and cannot be "utilized as a tool for invidious viewpoint discrimination," *ante*, at 11. It is evident in the legislative history that §954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as Serrano's "Piss Christ," the portrayal of a crucifix immersed in urine, and Mapplethorpe's show of lurid homoerotic photographs. Thus, even if one strays beyond the plain text it is perfectly clear that the statute was meant to disfavor— that is, to discriminate against— such productions. Not to ban their funding absolutely, to be sure (though as I shall discuss, that also would not have been unconstitutional); but to make their funding more difficult.

More fundamentally, of course, all this legislative history has no valid claim upon our attention at all. It is a virtual certainty that very few of the Members of Congress

who voted for this language both (1) knew of, and (2) agreed with, the various statements that the Court has culled from the Report of the Independent Commission and the floor debate (probably conducted on an almost empty floor). And it is wholly irrelevant that the statute was a "bipartisan proposal introduced as a counterweight" to an alternative proposal that would directly restrict funding on the basis of viewpoint. See *ante*, at 10–11. We do not judge statutes as if we are surveying the scene of an accident; each one is reviewed, not on the basis of how much worse it could have been, but on the basis of what it says. See *United States* v. *Estate of Romani*, 523 U. S. ___ (1998) (slip op., at 2) (SCALIA, J., concurring in part and concurring in judgment). It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, "The more we get together, the happier we'll be." It is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). The law at issue in this case is to be found in the text of §954(d)(1), which passed both Houses and was signed by the President, U. S. Const., Art. I, §7. And that law unquestionably disfavors– discriminates against– indecency and disrespect for the diverse beliefs and values of the American people. I turn, then, to whether such viewpoint discrimination violates the Constitution.

II

WHAT THE STATUTE SAYS IS CONSTITUTIONAL

The Court devotes so much of its opinion to explaining why this statute means something other than what it says that it neglects to cite the constitutional text governing our analysis. The First Amendment reads: "Congress shall make no law . . . *abridging* the freedom of speech." U. S. Const., Amdt. 1 (emphasis added). To abridge is "to

contract, to diminish; to deprive of." T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). With the enactment of §954(d)(1), Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. *Avant-garde artistes* such as respondents remain entirely free to *épater les bourgeois*;[2] they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures "'"aimed at the *suppression* of dangerous ideas."'" *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 550 (1983) (emphasis added) (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959), in turn quoting *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958)). "The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that— unlike direct restriction or prohibi-

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[2] Which they do quite well. The *oeuvres d'art* for which the four individual plaintiffs in this case sought funding have been described as follows:

"Finley's controversial show, 'We Keep Our Victims Ready,' contains three segments. In the second segment, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. Holly Hughes' monologue 'World Without End' is a somewhat graphic recollection of the artist's realization of her lesbianism and reminiscence of her mother's sexuality. John Fleck, in his stage performance 'Blessed Are All the Little Fishes,' confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance 'Some Golden States' from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols." Note, 48 Wash. & Lee L. Rev. 1545, 1546, n. 2 (1991) (citations omitted).

tion— such a denial does not, as a general rule, have any significant coercive effect." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 237 (1987) (SCALIA, J., dissenting).

One might contend, I suppose, that a threat of rejection by the only available source of free money would constitute coercion and hence "abridgment" within the meaning of the First Amendment. Cf. *Norwood* v. *Harrison*, 413 U. S. 455, 465 (1973). I would not agree with such a contention, which would make the NEA the mandatory patron of all art too indecent, too disrespectful, or even too *kitsch* to attract private support. But even if one accepts the contention, it would have no application here. The NEA is far from the sole source of funding for art— even indecent, disrespectful, or just plain bad art. Accordingly, the Government may earmark NEA funds for projects it deems to be in the public interest without thereby abridging speech. *Regan* v. *Taxation with Representation of Wash.*, *supra*, at 549.

Section 954(d)(1) is no more discriminatory, and no less constitutional, than virtually every other piece of funding legislation enacted by Congress. "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 . . . ." *Rust* v. *Sullivan*, 500 U. S. 173, 193 (1991). As we noted in *Rust*, when Congress chose to establish the National Endowment for Democracy it was not constitutionally required to fund programs encouraging competing philosophies of government— an example of funding discrimination that cuts much closer than this one to the core of *political* speech which is the primary concern of the First Amendment. See *id.*, at 194. It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates— and is required by law to discriminate— in favor of

artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, "Adams denounced all Frenchmen, but most especially 'schoolmasters, painters, poets, &C.' He warned Marshall that the fine arts were like germs that infected healthy constitutions." J. Ellis, After the Revolution: Profiles of Early American Culture 36 (1979). Surely the NEA itself is nothing less than an institutionalized discrimination against that point of view. Nonetheless it is constitutional, as is the congressional determination to favor decency and respect for beliefs and values over the opposite. Because such favoritism does not "abridge" anyone's freedom of speech.

Respondents, relying on *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995), argue that viewpoint-based discrimination is impermissible unless the government is the speaker or the government is "disburs[ing] public funds to private entities to convey a governmental message." *Ibid.* It is impossible to imagine why that should be so; one would think that directly involving the government itself in the viewpoint discrimination (if it is unconstitutional) would make the situation even worse. Respondents are mistaken. It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doc-

tors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood).[3] None of this has anything to do with abridging anyone's speech. *Rosenberger*, as the Court explains, *ante*, at 15, found the viewpoint discrimination unconstitutional, not because funding of "private" speech was involved, but because the government had established a limited public forum— to which the NEA's granting of highly selective (if not highly discriminating) awards bears no resemblance.

The nub of the difference between me and the Court is that I regard the distinction between "abridging" speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable. The Court, by contrast, seems to believe that the First Amendment, despite its words, has some ineffable effect upon funding, imposing constraints of an indeterminate nature which it announces (without troubling to enunciate any particular test) are not violated by the statute here— or, more accurately, are not violated by the quite different, emasculated statute that it imagines. "[T]he Government," it says, "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake," *ante*, at 17. The government, *I* think, may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned.

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[3] I suppose it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican party— but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican party, and I do not think that that unconstitutionality has anything to do with the First Amendment.

Finally, what is true of the First Amendment is also true of the constitutional rule against vague legislation: it has no application to funding. Insofar as it bears upon First Amendment concerns, the vagueness doctrine addresses the problems that arise from government *regulation* of expressive conduct, see *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972), not government grant programs. In the former context, vagueness produces an abridgment of lawful speech; in the latter it produces, at worst, a waste of money. I cannot refrain from observing, however, that if the vagueness doctrine *were* applicable, the agency charged with making grants under a statutory standard of "artistic excellence"– and which has itself thought that standard met by everything from the playing of Beethoven to a depiction of a crucifix immersed in urine– would be of more dubious constitutional validity than the "decency" and "respect" limitations that respondents (who demand to be judged on the same strict standard of "artistic excellence") have the humorlessness to call too vague.

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In its laudatory description of the accomplishments of the NEA, *ante*, at 2–3, the Court notes with satisfaction that "only a handful of the agency's roughly 100,000 awards have generated formal complaints," *ante*, at 3. The Congress that felt it necessary to enact §954(d)(1) evidently thought it much *more* noteworthy that *any* money exacted from American taxpayers had been used to produce a crucifix immersed in urine, or a display of homoerotic photographs. It is no secret that the provision was prompted by, and directed at, the funding of such offensive productions. Instead of banning the funding of such productions absolutely, which I think would have been entirely constitutional, Congress took the lesser step of requiring them to be disfavored in the evaluation of

grant applications. The Court's opinion today renders even that lesser step a nullity. For that reason, I concur only in the judgment.