

Finley

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Arts Statements

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PRESERVATION

NEA STATEMENT ON FINLEY APPEAL

While the Justice Department has appealed the Finley decision, the Endowment's day-to-day operations are not affected by the decision or this appeal. As I have so often stated, I believe that artistic expression should enjoy full First Amendment protection.

BACKGROUND

Question: What did you tell Justice?

Answer: We told them that the decision would not affect our day-to-day operations in light of restructuring, administrative changes and other congressional restrictions.

Question: What did Justice say?

Answer: They take the position that they will defend the constitutionality of Congressional enactments if there is a reasonable basis to do so.

Question: What is the basis of the appeal?

Answer: The Endowment continues to believe that the "decency and respect" language does not require independent grant review standards. We continue to use artistic excellence and merit as the criteria on which applications are judged. The brief also argues that the provision is not unconstitutional.

Question: Do you support the decision to file this brief?

Answer: The usual practice of the Justice Department is to defend the constitutionality of congressional enactments if there is a credible legal argument to be made. As the NEA has interpreted this provision -- as not requiring independent grant review standards -- the Justice Department's believed that an appeal was appropriate. The case is now for the courts to decide. Either way, the decision will not affect the endowment's operations.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN FINLEY; JOHN FLECK; HOLLY
HUGHES; TIM MILLER; NATIONAL
ASSOCIATION OF ARTISTS'
ORGANIZATIONS,
Plaintiffs-Appellees.

v.

NATIONAL ENDOWMENT FOR THE
ARTS; JANE ALEXANDER,* in her
official capacity as Chairperson of
the National Endowment for the
Arts.

Defendants-Appellants.

No. 92-56028

D.C. No.
CV-90-5236-AWT
OPINION

KAREN FINLEY; JOHN FLECK; HOLLY
HUGHES; TIM MILLER; NATIONAL
ASSOCIATION OF ARTISTS'
ORGANIZATIONS,
Plaintiffs-Appellees.

v.

NATIONAL ENDOWMENT FOR THE
ARTS; JANE ALEXANDER, in her
official capacity as Chairperson of
the National Endowment for the
Arts.

Defendants-Appellants.

No. 92-56387

D.C. No.
CV-90-5236-AWT

*Pursuant to Fed. R. App. P. 43(c)(1), Jane Alexander has been substituted for her predecessor in office, Anne-Imelda Radice.

KAREN FINLEY; JOHN FLECK; HOLLY
 SHES; TIM MILLER; NATIONAL
 ASSOCIATION OF ARTISTS'
 ORGANIZATIONS,

Plaintiffs-Appellees.

v.

NATIONAL ENDOWMENT FOR THE
 ARTS; JANE ALEXANDER, in her
 official capacity as Chairperson of
 National Endowment for the
 Arts,

Defendants-Appellants.

No. 92-55089

D.C. No.
 CV-90-5236-AWT

Appeals from the United States District Court
 for the Central District of California
 A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
 February 3, 1994—Pasadena, California

Filed November 5, 1996

Before: James R. Browning, Warren J. Ferguson, and
 Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Browning; Dissent by Judge Kleinfeld

SUMMARY

Government Law/Grants

The court of appeals affirmed a district court judgment. The
 court held that a statutory standard for judging artists' grant

applications that required consideration of general standards
 of decency and respect for diverse beliefs and values is void
 for vagueness.

In 1990, Congress amended a provision of the governing
 statute of appellant National Endowment for the Arts (NEA)
 that identified the standard for approval of funding applica-
 tions. The amendment required the NEA to take into consider-
 ation general standards of decency and respect for the diverse
 beliefs and values of the American public.

Appellees Karen Finley and others were refused fellow-
 ships under the solo performance artists program of the NEA.
 Finley sued the NEA, alleging that the "decency and respect"
 provision violated the Fifth and First Amendments because it
 was impermissibly vague and imposed content-based restric-
 tions on protected speech. The district court granted summary
 judgment for Finley and certified the ruling for interlocutory
 appeal.

On appeal, the NEA contended that the vagueness of the
 "decency and respect" provision was not an issue because the
 NEA's regulations were not changed after the statute was
 amended. The NEA argued that the Chairperson still had the
 same broad discretion to establish the criteria for judging
 grant applications and could rely upon greater diversity in
 advisory panel membership in lieu of a change in the criteria
 for judging grant applications. Alternatively, the NEA con-
 tended that the standard could be implemented in a way that
 would obviate the vagueness problem.

[1] Congress added the "decency and respect" clause
 immediately after the clause specifying the criteria by which
 applications are to be judged: "artistic excellence and merit."
 Read together, these clauses instructed the Chairperson to
 ensure that standards of decency and respect for diverse val-
 ues were considered when judging the artistic merit and
 excellence of an application. [2] Congress spoke in mandatory

ms when it amended the criteria for judging grant applications. The "decency and respect" language actually restricted Chairperson's discretion by requiring him or her to judge applications according to standards of "decency and respect."

[3] If the "decency and respect" provision required nothing more than diverse advisory panels, it would be redundant. [4] And the legislative history made it clear that Congress intended to change the standard the NEA applied in judging applications for funding [5] to include the criteria of "decency and respect." [6] The NEA's construction of the statute as permitting the Chairperson to rely upon greater diversity in advisory panel membership was not a "permissible" or "reasonable" one to which deference was required.

[7] The NEA failed to present a narrowing construction that is consistent with the language and purpose of the statute as there was a separate prohibition against funding projects determined to be obscene [9] and Congress explicitly used to include the Federal Communications Commission's definition of indecency in the "decency and respect" provision. Nothing in the provision or its legislative history suggested that the NEA may choose to apply the decency and respect provision to some funding applications and not to others or that it may ignore the respect criterion when it does apply the provision.

[10] The Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms. [11] So construed, the "decency and respect" provision violated due process because no standard of conduct was specified at all and the statute thus provided no ascertainable standard for inclusion or exclusion. [12] Since it was not amenable to objective definition, the "decency and respect" standard gave rise to the danger of arbitrary and discriminatory application.

[13] While the holding that the "decency and respect" provision was unconstitutionally vague effectively disposed of the case, the First Amendment's prohibition on content- and viewpoint-based restrictions provided an alternate ground for the decision. [14] Even when the government is funding speech, it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise aim at the suppression of dangerous ideas. [15] The "decency and respect" provision does reflect viewpoint discrimination. [16] The "decency and respect" provision clearly focused on the content of the speech at issue and had a speech-based restriction as its sole rationale and operative principle.

Judge Kleinfeld dissented, writing that NEA funding was a prize rather than an entitlement and that so long as artists were free to perform, people were free to patronize their performances, and the artists were not deprived of government money to which artists were generally entitled, the artists' freedom of expression was not abridged by content- or viewpoint-based discrimination in the grant process.

COUNSEL

Alfred R. Mollin, United States Department of Justice, Washington, D.C., for the defendants-appellants.

David Cole, Center for Constitutional Rights, New York, New York, for the plaintiffs-appellees.

Gloria C. Phares and Victoria A. Kummer, Weil, Gotshal & Manges, New York, New York, for the amici curiae.

Len L. Munsil, Phoenix, Arizona, for the amicus curiae.

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WEDNESDAY, NOVEMBER 6, 1996

WASHINGTON EDITION / LOS ANGELES TIMES

**Outtakes**

'Decency' Remains Unconstitutional

The U.S. Court of Appeals for the 9th Circuit announced Tuesday that it has upheld a lower court ruling that found the National Endowment for the Arts' "decency" statute to be unconstitutional. The suit was originally filed by four performance artists—Karen Finley, John Fleck, Holly Hughes and Tim Miller—who were denied grants by the NEA, which had adopted a statute enacted by Congress in 1990 mandating that "general standards of decency" be considered when making funding decisions. David Cole, a member of the legal team that represented the artists and the National Assn. of Artists' Organizations, said: "This decision means that from now on the NEA must concern itself with art, not politics or decency." A spokesperson for the NEA said the endowment would have no comment until its staff could study the decision. The Justice Department has 90 days to decide whether to continue the appeal process.

The New York Times

NATIONAL WEDNESDAY, NOVEMBER 6, 1996

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Appeals Court Bars Decency Standards For U.S. Arts Grants

By TIM GOLDEN

SAN FRANCISCO, Nov. 5 — A Federal appeals court today ruled that the Government cannot not require the National Endowment for the Arts to consider prevailing standards of decency in making grants to artists.

Upholding an earlier decision by a Federal district court, the United States Court of Appeals for the Ninth Circuit here ruled by a 2-to-1 margin that the standards proposed by the Government were vague and potentially arbitrary. The imposition of these standards would amount to an unconstitutional restriction on freedom of speech, the court added. "Even when the Government is funding speech," the court wrote, "it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise aim at the suppression of dangerous ideas."

The decency standards were adopted by Congress in 1990 as a condition of the arts endowment's continued survival. Its passage followed a long campaign by conservatives who were outraged that public money was being spent on the work of sexually explicit artists like the late photographer Robert Mapplethorpe and the performance artist Karen Finley.

Ms. Finley and three other performance artists who were denied grants sued the endowment in 1990. The endowment later tried to apply the Congressional mandate simply by filtering applications for grants through panels of judges who were seen to represent a wider range of social values.

But in June 1992, a Federal judge in Los Angeles, A. Wallace Tashima, rejected the idea that applicants for the endowment's funding could be fairly judged on the basis of "general standards of decency and respect for the diverse beliefs and values of the American public."

F6 WEDNESDAY, NOVEMBER 6, 1996

THE WASHINGTON POST

Court Rules Against Endowment 'Decency Clause'

By Jacqueline Trescott
Washington Post Staff Writer

A federal appeals court yesterday upheld a lower court decision striking down the "general standards of decency" clause that has been part of the National Endowment for the Arts legislation since 1990.

A three-judge panel of the 9th U.S. Circuit Court of Appeals in San Francisco ruled 2-1 that imposing the decency standard on the NEA's funding decisions violated the First and Fifth amendments.

"The decency and respect provision violated due process because no standard of conduct was specified at all and the statute thus provided no ascertainable standard for inclusion or exclusion," the decision read.

The case was widely viewed in the artistic community as a rallying point for artists' freedom of speech. The dispute started in 1989 when four artists sued the NEA, arguing they had been denied grants because of political considerations. When Congress passed the decency language the next year, the suit was amended to challenge that provision. In June 1992, a federal court declared the decency clause unconstitutional. In the early weeks of the Clinton administration, the Justice Department decided to appeal that decision. That move caused an uproar among artists who had viewed the new administration as a friend.

Meanwhile, an out-of-court settlement on everything

but the decency clause was reached by the endowment and the four artists, Karen Finley, John Fleck, Holly Hughes and Tim Miller. The work of the four often dealt with sexual themes and in some cases involved nude performances.

David Cole, a Georgetown University law professor who argued the case, said the decision had broad implications.

"The end result is a happy one for artists across the country who may at some point seek NEA funding. It says they are free to create the best art they can create without worrying some NEA official is going to deem the work unacceptable," he said. "Ironically it is also a great decision for the NEA. It ought to provide the NEA protection from Congress. It insulates the NEA from political pressure."

The immediate impact at the endowment is murky. In the time this case has been winding through the courts, Congress ordered the NEA to stop funding individual artists. The only exception was literary fellowships. Republicans have promised to eliminate the NEA next year, though any realignment of Congress after yesterday's elections could change that.

Said NEA spokeswoman Cherie Simon: "We need to study the decision more closely before we make any comment."

PAGE A4 / WEDNESDAY, NOVEMBER 6, 1996 **

The Washington Times

Appeals court backs 1992 ruling throwing out NEA decency rules

SAN FRANCISCO (AP) — An appeals court ruled yesterday that a 1990 law tying decency standards to federal arts funding was unconstitutional.

The law was passed during a furor over the National Endowment for the Arts' role in funding such works as the homoerotic images of Robert Mapplethorpe. It required the NEA to consider "decency and respect" for American values when granting money to artists.

In a 2-1 ruling, the 9th U.S. Circuit Court of Appeals said the law was overly vague and discriminated on the basis of an artist's viewpoint.

"Government funding of the arts, in the circumstances of this case, must be viewpoint-neutral,"

Judge James Browning said.

Dissenting Judge Andrew

"Government funding of the arts, in the circumstances of this case, must be viewpoint-neutral."

— Judge James Browning,
9th Circuit Court of Appeals

Kleinfeld said the government is entitled to favor particular viewpoints when awarding grants. "NEA grants are prizes for the fortunate few, not entitlements," he

said.

The law has not been in effect since 1992, when a federal judge in Los Angeles ruled it invalid in a lawsuit by four noted performance artists whose NEA grants had been denied.

Their lawyer, David Cole, said the latest ruling means "artists are free to create works without having to guess about some unknown NEA bureaucrat's notion of what decency and respect mean."

Spokeswoman Cherie Simon said the NEA had no comment on the latest ruling. NEA General Counsel Karen Christensen said the Justice Department will decide whether to appeal after consulting with the NEA.

November 6, 1996

NINTH CIRCUIT OPINION IN FINLEY V. NEA

The Ninth Circuit Court of Appeals affirmed Judge Tashima's District Court opinion finding the "decency and respect" provision of the Endowment's statute unconstitutional on vagueness grounds and violative of First Amendment restrictions on content- and viewpoint-based discrimination. The opinion was a two-to-one decision with Judge Kleinfeld writing a dissent. ("Void for vagueness" is legal shorthand for saying that laws that do not give fair notice of what is lawful and unlawful offend guarantees of due process. There have to be rather explicit standards for those enforcing the law or it will be viewed as unconstitutional on the grounds of "vagueness.")

Some significant features of the majority opinion and dissent are:

* The court found that Congress intended the "decency and respect" language to actually restrict the authority of the Chairman, Council and advisory panels by requiring that each grant application be reviewed to determine if it comports with general standards of "decency and respect." The court rejected the argument that the provision was not mandatory and that the Chairman had discretion on how to implement it -- for example, by simply choosing diverse advisory panels which reflect the breadth of American cultural and aesthetic thought. The dissent disagreed and argued that "take into consideration" "means consideration, no more, no less."

* The court also found that the record showed that under Chairman Frohnmayer, the Endowment had given panels a charge to "bring their own definitions of these terms 'to the table' and make them a part of the deliberative process" so that the NEA did not in fact practice the interpretation of the decency provision that was advanced in the litigation.

* Disagreeing with the dissent view that NEA grants are "prizes" (due to the great selectivity in choosing the recipients), the majority found that while artists do not have property rights in grants, they are protected from arbitrary and discriminatory enforcement of vague standards.

* The court's view of the legislative history is that the "decency and respect" language "was enacted in direct response to [the Mapplethorpe and Serrano] controversy and was specifically designed to prevent the funding of similar art works."

* The court also rejected the suggestion that vagueness

problems could be avoided by adopting the FCC's definition of "indecent communication." The court found that Congress had expressly considered this definition and rejected it as inappropriate for the arts.

* Finding that both parts of the "decency and respect" provision are "not susceptible to objective definition," the court found that arbitrary and discriminatory enforcement of it could result in refusing funds because of the artist's "political and social message or because the art or the artist is too controversial."

* The alternative ground for rejecting the provision is the First Amendment prohibition on content- and viewpoint-based restrictions. The court adopted the district court's discussion of this issue (rejecting Rust v. Sullivan as a grounds for upholding the statute) and found that Government funding of the arts must be viewpoint and content neutral.

* The dissent articulates the position that the government does not have to fund the arts and while artists are free to be offensive or indecent, the government does not have to pay for that type of art. "This case is about whether the American people can require a government agency to consider, in giving grants to very few of the many artists in the country, "general standards of decency and respect for the diverse beliefs and values of the American public."

* The dissent points out that there is a conflict in the federal circuit courts on the issue of allowable content discrimination, citing the 1976 1st Circuit decision (Advocates for the Arts v. Thomson) which upheld a New Hampshire denial of a grant to a literary magazine due to a poem considered indecent by the governor and state arts commission and the 7th Circuit decision (Piarowski v. Illinois Community College) upholding a college's decision to move stained glass panels with sexual images from a heavily trafficked area to a more remote location.

* Reciting statistics provided in last year's supplemental brief concerning the number of awards versus the number of applications, the dissent characterized NEA grants as "prizes" and stated that "[w]hen the government gives a prize rather than an entitlement, it necessarily discriminates by content and viewpoint."

* Both opinions recognize that "artistic excellence" and "artistic merit" are vague statutory criteria. The majority finds that the vagueness of these criteria is acceptable. The dissent argues that none of the purposes of the law against vagueness "apply to prizes."

G.C. Copy

FOR PUBLICATION

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tuted for her predecessor in office, Anne-Imelda Radice.

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Opinion by Judge Browning; Dissent by Judge Kleinfeld

SUMMARY

The summary, which does not constitute a part of the opinion of
the court,
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Government Law/Grants

The court of appeals affirmed a district court judgment. The
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14502

applications that required consideration of general standards
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In 1990, Congress amended a provision of the governing
statute of appellant National Endowment for the Arts (NEA)
that identified the standard for approval of funding applica-

tions. The amendment required the NEA to take into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

Appellees Karen Finley and others were refused fellowships under the solo performance artists program of the NEA. Finley sued the NEA, alleging that the "decency and respect" provision violated the Fifth and First Amendments because it was impermissibly vague and imposed content-based restrictions on protected speech. The district court granted summary judgment for Finley and certified the ruling for interlocutory appeal.

On appeal, the NEA contended that the vagueness of the "decency and respect" provision was not an issue because the NEA's regulations were not changed after the statute was amended. The NEA argued that the Chairperson still had the same broad discretion to establish the criteria for judging grant applications and could rely upon greater diversity in advisory panel membership in lieu of a change in the criteria for judging grant applications. Alternatively, the NEA contended that the standard could be implemented in a way that would obviate the vagueness problem.

[1] Congress added the "decency and respect" clause immediately after the clause specifying the criteria by which applications are to be judged: "artistic excellence and merit." Read together, these clauses instructed the Chairperson to ensure that standards of decency and respect for diverse values were considered when judging the artistic merit and excellence of an application. [2] Congress spoke in mandatory

terms when it amended the criteria for judging grant applications. The "decency and respect" language actually restricted the Chairperson's discretion by requiring him or her to judge applications according to standards of "decency and respect."

[3] If the "decency and respect " provision required nothing more than diverse advisory panels, it would be redundant. [4] And the legislative history made it clear that Congress intended to change the standard the NEA applied in judging applications for funding [5] to include the criteria of "decency and respect." [6] The NEA's construction of the statute as permitting the Chairperson to rely upon greater diversity in advisory panel membership was not a "permissible " or "reasonable" one to which deference was required.

[7] The NEA failed to present a narrowing construction that was consistent with the language and purpose of the statute [8] as there was a separate prohibition against funding projects determined to be obscene [9] and Congress explicitly refused to include the Federal Communications Commission's definition of indecency in the "decency and respect" provision. Nothing in the provision or its legislative history suggested that the NEA may choose to apply the decency and respect provision to some funding applications and not to others or that it may ignore the respect criterion when it does apply the provision.

[10] The Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms. [11] So construed, the "decency and respect" provision violated due process because no standard of conduct was specified at all and the statute thus provided no ascertainable standard for inclusion or exclusion. [12] Since it was not susceptible to objective definition, the "decency and respect" standard gave rise to the danger of arbitrary and discriminatory application.

[13] While the holding that the "decency and respect" provision was unconstitutionally vague effectively disposed of the case, the First Amendment's prohibition on content- and viewpoint-based restrictions provided an alternate ground for the decision. [14] Even when the government is funding speech, it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise aim at the suppression of dangerous ideas. [15] The "decency and respect" provision does reflect viewpoint discrimination. [16] The "decency and respect" provision clearly focused on the content of the speech at issue and had a speech-based restriction as its sole rationale and operative principle.

Judge Kleinfeld dissented, writing that NEA funding was a prize rather than an entitlement and that so long as artists were free to perform, people were free to patronize their performances, and the artists were not deprived of government money to which artists were generally entitled, the artists' freedom of expression was not abridged by content- or viewpoint-based discrimination in the grant process.

COUNSEL

Alfred R. Mollin, United States Department of Justice, Washington, D.C., for the defendants-appellants.

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Len L. Munsil, Phoenix, Arizona, for the amicus curiae.

Robert M. O'Neil, Charlottesville, Virginia, for the amici curiae.

Ann H. Franke, Washington, D.C., for the amici curiae.

Elliot M. Minberg and Sonia Bacchus, People for the American Way, Washington, D.C., for the amici curiae.

OPINION

BROWNING, Circuit Judge:

Plaintiffs Karen Finley, John Fleck, Holly Hughes, and Tim Miller were refused fellowships under the defendant National Endowment for the Arts' ("NEA") solo performance artists program. They filed suit, alleging, among other things, that a provision of the NEA's governing statute identifying the standard for approval of funding applications violated the Fifth and First Amendments because it was impermissibly vague and imposed content-based restrictions on protected speech. The district court agreed, granted summary judgment to the plaintiffs, and certified its ruling for interlocutory appeal. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992). We affirm, essentially for the reasons stated by the district court.¹

¹ We do not address the district court's ruling in favor of plaintiffs on their claim that the Chairperson violated the NEA's governing statute by obtaining the advice of the National Council on the Arts through a telephone poll before acting on plaintiffs' applications. The parties have settled this issue.

We also do not reach plaintiffs' claim that the statute imposes an unconstitutional condition in violation of *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). The district court denied summary judgment on the ground that there were disputed issues of fact bearing on the claim, and this denial of summary judgment is not appealable. Because the issue is not properly before us, we do not address the dissent's suggestion that *League of Women Voters* is distinguishable.

Congress gave the NEA authority "to establish and carry out a program of . . . grants-in-aid . . . to . . . individuals of exceptional talent engaged in or concerned with the arts." 20 U.S.C. S 954(c). The Chairperson of the NEA has ultimate authority to approve or disapprove grants. 20 U.S.C. SS 954(c), 955(f). Before making a decision on a particular grant application, however, the Chairperson must consult and receive the advice of the 26-member National Council on the Arts. 20 U.S.C. S 955(f). The Chairperson may not approve any application disapproved by the National Council. Id. The Chairperson must also utilize advisory panels to review applications and make recommendations to the National Council. 20 U.S.C. S 959(c).

An advisory panel recommended approval of plaintiffs' applications; a majority of the Council recommended disapproval; the Chairperson denied the applications. The district court concluded the statutory standard under which the applications were judged, which requires the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. S 954(d)(1), violated plaintiffs' due process and free speech rights.³

² The Chairperson and Council members are appointed by the President, by and with the advice and consent of the Senate. 20 U.S.C. SS 954(b)(1), 955(b).

³ 20 U.S.C. S 954(d), as amended in 1990, reads as follows:

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

(added language emphasized).

I.

The void-for-vagueness doctrine incorporates several important due process principles.⁴ It requires that a law give fair notice of its mandate. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The void-for-vagueness doctrine also requires that a law provide explicit standards for those who are to apply it.

⁴ Although the dissent argues the applicants have no property right in NEA grants and their liberty to express themselves is not regulated by the grants, the right to engage in free speech is a liberty interest protected by due process. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 418 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983) ("Freedom of speech is one of the liberties the due process clause has been held to protect."). Art is one of many protected forms of speech. See *Mil-ler v. California*, 413 U.S. 15, 34 (1973). While the artists do not have a property right in the grants, they are protected by the due process clause from arbitrary and discriminatory enforcement of vague standards that "abut[s] upon sensitive areas of basic First Amendment freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citation omitted).

The First Amendment, moreover, is an independent source of vagueness doctrine. See *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1266 (3d Cir. 1992) (explaining that "courts have transplanted this due process principle into the First Amendment setting"). Thus, we routinely consider whether speech-related statutes are impermissibly vague without specifying the liberty or property interest at stake. See *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-14

(9th Cir. 1988); *Planned Parenthood v. Arizona*, 718 F.2d 938, 946-49

(9th Cir. 1983). In this case, we ground our discussion of vagueness in both the Fifth and First Amendments.

In addition, we disagree with the dissent's suggestion that First Amend-

ment vagueness doctrine only applies if the government regulates speech

or places conditions on a generally available benefit. As the Court noted

in *Rosenberger*, the scarcity of a government benefit does not render it

immune from constitutional limitations. See *Rosenberger v. Rector & Visi-*

tors of the Univ. of Virginia, 115 S. Ct. 2510, 2519-20 (1995).

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09.

The twin dangers of a vague law -- lack of notice and arbitrary or discriminatory application -- may chill the exercise of important constitutional rights. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" Id. at 109 (citation omitted). Not surprisingly, therefore, courts apply a heightened vagueness standard to a law that could deter protected speech because of its uncertain meaning. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").⁵

A.

NEA's primary contention is that the vagueness of the "decency and respect" provision is not an issue. In its view, Congress did not compel NEA to add this element to the standard for judging grant applications, and the NEA elected not to add it. The standard therefore remains as it was before the amendment: the sole criteria for judging grant applications are "artistic excellence and artistic merit."

⁵ NEA contends that on review of a facial challenge, plaintiffs may prevail only if "there are no constitutional ways that the statute can be implemented." This standard applies only if the statute "implicates no constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982); *United States v. Wunsch* (In re Swan), 84 F.3d 1110, 1119 (9th Cir. 1996). When a law implicates free speech, a "more stringent vagueness test" should apply. *Hoffman*, 455 U.S. at 499; see also *Wunsch*, 84 F.3d at 1119.

NEA reads the "decency and respect" amendment as requiring only that the Chairperson "tak[e] into consideration general standards of decency and respect for diverse beliefs and values" when promulgating regulations and procedures for judging grant applications. 20 U.S.C. S 954(d)(1) (emphasis added). According to NEA, the Chairperson did address Congress's concern that decency and respect for diverse beliefs and values be considered in funding decisions, and concluded no change in the regulations was necessary because the NEA's governing statute requires advisory panels with diversified membership to review applications and make recommendations to the National Council.⁶ The Chairperson reasoned that because advisory panels were composed of members chosen to reflect a wide range of backgrounds and points of view, the decisions of these panels as to the artistic excellence and merit of individual applications would necessarily reflect general standards of decency and show respect for the diverse beliefs and values of the American public.

[1] This interpretation reads S 954(d) as if it had not been amended. Congress added the clause at issue -- "taking into consideration general standards of decency and respect" -- immediately after the clause specifying the criteria by which applications are to be judged -- "artistic excellence and artistic merit." Read together, these clauses instruct the Chairperson to ensure that standards of decency and respect for diverse values are considered when judging the artistic merit and excellence of an application.

[2] Congress spoke in mandatory terms when it amended the criteria for judging grant applications: "the Chairperson shall ensure that . . . artistic excellence and artistic merit are

⁶ The statute requires the Chairperson to: "issue regulations and establish procedures . . . to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view" 20 U.S.C. S 959(c).

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. " 20 U.S.C. S 954(d) (emphasis added). This language does not grant the Chairperson broad discretion in establishing criteria for judging grant applications, as NEA contends; it actually restricts the Chairperson's discretion by requiring him or her to judge applications according to standards of "decency and respect."7

[3] NEA's reading of S 954(d)(1) is also contrary to traditional canons of statutory construction. If S 954(d)(1) required nothing more than diverse advisory panels, the "decency and respect" provision would be redundant in view of S 959(c), also adopted as part of the 1990 amendments, which expressly requires that advisory panels reflect diversity. 8 See Freytag v. Commissioner, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.' ") (citation omitted). 9

[4] And turning to the legislative history, as we do to interpret an ambiguously worded statute, makes it clear that Congress intended to change the standard NEA applied in judging applications for funding, not simply to ask the NEA to con-

7 The dissent suggests this provision merely requires the NEA to think about standards of decency and respect rather than to act according to what thoughts of "decency and respect" might dictate. This suggestion is implausible on its face and belied by the record. During the period in which the plaintiffs' applications were being considered, Chairperson Frohnmayer told his staff that the NEA had to live in a "political world" and reject some grant applications to "reassure[the NEA's] constituency." (Supplemental Excerpts of Record 148).

8 See *supra* note 6.

9 NEA's argument that its interpretation of S 954(d)(1) does not render the "decency and respect" provision redundant because under NEA's interpretation the Chairman was not compelled to make any change in the standard at all, necessarily fails with our rejection of NEA's interpretation of S 954(d)(1).

sider the problem. NEA had been attacked for funding controversial artists and art works. Criticism had focused on a series of photographs by Robert Mapplethorpe objected to as homoerotic images, and on a photograph by Andres Serrano criticized as blasphemous. The "decency and respect " provision was enacted in direct response to this controversy and was specifically designed to prevent the funding of similar art works. Members of Congress noted that the "decency and respect" provision would prevent the funding of similar works in the future.¹⁰ 136 Cong. Rec. H9410-57 (Oct. 11, 1990).

In the words of Representative Henry, author of the provision: "[T]his substitute includes language in the heart of the grant making . . . process. We add to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account on behalf o[f] the American public" 136 Cong. Rec. H9417 (Oct. 11, 1990). Representative Henry described the provision as "new language now in the grant procedure itself which mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong. Rec. H9457 (Oct. 11, 1990). In the same vein, Representative Coleman, cosponsor of the bill, said: "[W]e have added language . . . which underscores that the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public. Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. H9410 (Oct. 11, 1990).

[5] In concluding that Congress intended to include the criteria of "decency and respect" in the standard for judging grant applications, we reject NEA's contention that S 954(d)(1) is to be read as a compromise between legislators

¹⁰ Mapplethorpe's and Serrano's works were also referred to during debates on NEA's budget. See, e.g., 135 Cong. Rec. H3637, H3640 (July 12, 1989).

who wanted to impose explicit content restrictions upon funding and those who wanted to impose no "decency and respect" restriction at all, and agreed simply to identify "decency and respect" as an area of concern but require no further action by NEA. No proposal submitted to Congress would have permitted funding with no content restriction at all. The dispute was not over whether NEA should be free to fund indecent or disrespectful art, but over the way in which the new limitation would be imposed: whether Congress should specify categories of art that could not be funded or instruct NEA to consider general standards of "decency and respect" in judging the artistic merit of a grant application. Congress settled on the latter approach.

[6] We also reject NEA's argument that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires deference to NEA's construction of its statutory mandate. NEA's construction of the statute as permitting the Chairperson to rely upon greater diversity in advisory panel membership in lieu of a change in the criteria for judging grant applications is not a "permissible" or "reasonable" one to which deference is required. *Id.* at 843-45. Moreover, NEA itself did not in practice adopt the interpretation of the "decency and respect" provision it advocates in this litigation. In a meeting held on December 14 and 15, 1990, the Chairperson and National Council considered a number of proposals to implement the "decency and respect" provision. They did not question their obligation under S 954(d)(1) to judge grant applications according to "general standards of decency and respect for the diverse beliefs and values of the American public." Instead, to satisfy this new obligation, NEA officials adopted the approach of having the Chairperson instruct advisory panel members to bring their own definitions of these terms "to the table" and make them "part of the deliberative process." Minutes of the December 1990 Retreat of the National Council on the Arts at 21, S.E.R. at 23.

B.

[7] NEA contends that even if S 954(d)(1) requires it to judge grant applications according to general standards of decency and respect, the Chairperson could by regulation implement this standard in a way that would obviate the vagueness problem. However, the NEA has failed to present a narrowing construction that is consistent with the language and purpose of the statute, and "we will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 397 (1988); see also *Heckler v. Mathews*, 465 U.S. 728, 741 (1984) ("The canon favoring constructions of statutes to avoid constitutional questions does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives.").

[8] NEA suggests the Chairperson could apply S 954(d)(1) by rejecting applications for funding of projects that are obscene under the standard announced in *Miller v. California*, 413 U.S. 15, 24-25 (1973) - a standard that passed the vagueness test in *Hamling v. United States*, 418 U.S. 87, 110-16 (1974). However, the proposed construction would render redundant a separate prohibition against funding projects determined to be obscene, subsection (2) of section 954(d).¹¹ See *Freytag*, 501 U.S. at 877. Congress adopted the "decency

¹¹ 20 U.S.C. S 954(d)(2) reads:

Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.

NEA argues the suggested regulation would not render section 954(d)(2) redundant because the latter applies only to material "determined to be obscene" by a court. This argument does not affect the other reasons stated in the text for the invalidity of the hypothetical regulation.

and respect" provision because it was broader and had a different meaning than the provision prohibiting the funding of obscene art.¹² Moreover, the NEA's proposed construction would be contrary to the express intent of Congress that determinations of obscenity be made by the courts and not by NEA.¹³

[9] NEA also seems to suggest the Chairperson might avoid the vagueness problem by adopting the definition of "indecent communication" promulgated by the Federal Communication Commission and applying the standard only to works intended for children.¹⁴ This construction is precluded by

12 See 136 Cong. Rec. H9457 (Oct. 11, 1990) (Statement of Rep. Henry)

("[The decency and respect provision] is much broader than all the

obscenity language which we have been debating about. . . .

[G]iven the

Miller versus California standard, anything that has artistic merit is not by

legal definition obscene. So, how can we seek to address the problem that

we heard from our constituents? We put general decency requirements

into the act.").

13 "The term 'determined to be obscene' means determined, in a final

judgment of a court of record and of competent jurisdiction in the United

States, to be obscene." 20 U.S.C. S 952(j). See 136 Cong. Rec. H9676

(Oct. 15, 1990) (statement of Rep. Weiss) ("Is not one of the problems

also that whereas the Williams/Coleman [amendment] provides for the

obscenity determination to be made by the courts, in the Regular amend-

ment the determination would have to be made by NEA and that in itself

would be unconstitutional, an abrogation of first amendment rights."); 136

Cong. Rec. H9411 (Oct. 11, 1990) (statement of Rep. Richardson) ("The

legislation that we have in front of us says very clearly that the NEA may

not fund obscenity and the determination of obscenity is left to the courts

not politicians, not bureaucrats. But the courts, among juries of average people.").

14 The NEA refers to a 1989 statute that prohibits any person from

knowingly using the telephone to make "any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent" 47 U.S.C. S 223(b)(2)(A). The FCC defined "indecent communication" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary standards for the telephone medium." Information Providers' Coalition v. F.C.C., 928 F.2d 866, 874 (9th Cir. 1991) (holding regulation is not unconstitutionally vague).

Congress's explicit refusal to include the FCC's definition of indecency in S 954(d)(1).¹⁵ Congress considered the definition inappropriate for the arts, even if appropriate for broadcasting.¹⁶

Moreover, unlike the statute implemented by the FCC's regulation, S 954(d)(1) is not aimed solely at indecent speech harmful to minors, but requires the NEA to judge all grant applications according to both "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. S 954(d)(1) (emphasis added). Nothing in S 954(d)(1) or its legislative history suggests the NEA may choose to apply the "decency and respect" provision to some funding applications and not to others or that it may ignore the "respect" criterion when it does apply the provision.

C.

NEA and the dissent argue the "decency and respect" provision is not subject to a vagueness challenge because it does not regulate conduct directly but merely subsidizes speech. Although the need for fair warning may be less when a statute does not directly regulate conduct, the need for specific standards to prevent arbitrary and discriminatory application of provisions that touch upon speech may be even greater when a statute subsidizes speech and the risk that the provision on its face will inhibit speech remains. See *Grayned*, 408 U.S. at

¹⁵ When Congress enacted the "decency and respect" provision, it rejected a rival amendment, the Regula amendment. The Regula amendment would have required the NEA to judge grant applications according to the decency standard articulated in *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 731-32 (1978) -- the same standard adopted by the FCC in the "dial-a-porn" context. See *Information Providers' Coalition*, 928 F.2d at 874 (noting that the FCC's definition of "indecent communication" was lifted from the broadcast regulation at issue in *Pacifica*).

¹⁶ 136 Cong. Rec. H9680 (Oct. 15, 1990) (statement of Rep. Coleman)

("[T]he Regula amendment is in fact imposing a standard created by the Supreme Court to protect children listening to the radio, and he is applying it to everyone, including adults, by his amendment. . . . Coming out over the airwaves is one thing. Going to a theater performance is another.").

108; Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 514 (9th Cir. 1988) (holding void for vagueness a regulatory provision exempting from import duties certain types of written materials); Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1039 (D.C. Cir. 1980) (holding void for vagueness a tax exemption for educational and charitable organizations).¹⁷

NEA also argues that the decency provision is not subject to a vagueness challenge because it merely directs the Chairperson to promulgate regulations and establish procedures to govern applications for funding; such regulations and procedures may be subject to the void-for-vagueness test, but the direction to the Chairperson to establish them is not. This argument rests on the interpretation of S 954(d)(1) rejected earlier. Section 954(d)(1) is not a broad grant of regulatory authority which the Chairperson may implement in a discretionary manner, but a directive to the NEA to judge grant applications according to standards of "decency and respect."

* * *

[10] The "decency and respect" provision was enacted to prevent the funding of particular types of art. To that end, it places a mandatory duty on the Chairperson to ensure that grant applications are judged according to "general standards

¹⁷ Our conclusion is not affected by Rust v. Sullivan, 500 U.S. 173

(1991) and Regan v. Taxation with Representation, 461 U.S. 540 (1983).

Neither case involved a vagueness challenge. Moreover, in Bullfrog Films

we held a duty exemption void for vagueness while recognizing the general principles announced in Regan. And, as we discuss more fully in Part

II, Rust is of limited applicability in light of the reasoning of Rosenberg

v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995), dif-

ferentiating government programs that encourage private speech from

government programs that use private speakers "to transmit specific infor-

mation pertaining to [government] program[s]." Id. at 2519. The NEA is

a quintessential example of a government program designed to encourage

private speech, rather than one that seeks to use private individuals for a

particular government purpose, such as the dissent's example of commis-

sioning an artist to create a bust of Lincoln for display in a public building.

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of decency and respect for the diverse beliefs and values of the American public." The Chairperson has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction. Rather, the Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values " as they subjectively understand these terms. The record indicates this is exactly how the Chairperson and Council interpreted the provision prior to this litigation.

[11] So construed, the "decency and respect" provision violates due process because "no standard of conduct is specified at all," *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), and the statute thus provides no "ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). Without doubt, persons "of common intelligence must necessarily guess at [the] meaning and differ as to [the] application" of the terms "decency" and "respect." See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). These terms are inherently ambiguous, varying in meaning from individual to individual. See *Smith*, 415 U.S. at 573 ("[W]hat is contemptuous to one . . . may be a work of art to another."); *Coates*, 402 U.S. at 614 ("Conduct that annoys some people does not annoy others."); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne['s] vulgarity is another's lyric."). The content of the term "diverse beliefs and values of the American public" is also impossible to define. The individual members of a pluralistic society, and particularly our own, have a great variety of beliefs and values, largely unascertainable. See *Bullfrog Films*, 847 F.2d at 513.

[12] Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application.¹⁸ It grants govern-

¹⁸ The dissent suggests that it is untenable to find the "decency" and "respect" criteria impermissibly vague without also holding unconstitu-

ment officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view. Under such a grant of authority, funding may be refused because of the artist's political or social message or because the art or the artist is too controver-

tional the statute's provision that "artistic excellence and artistic merit are the criteria by which applications are judged." 20 U.S.C. S 954(d)(1). The short answer is that appellants have challenged only the "decency" and "respect" criteria, and therefore only these criteria are before us. The application of the "void for vagueness" doctrine to the criteria of "artistic excellence and artistic merit" may present quite different considerations.

One obvious difference may be the extent to which the two sets of criteria implicate the policy concerns underlying the "void for vagueness" doctrine. See generally *Bullfrog Films*, 847 F.2d at 512 (vague laws are objectionable because they "trap the innocent by not providing fair warning," invite arbitrary and discriminatory enforcement, and discourage the exercise of constitutional rights). A second difference that may affect the outcome is the context in which the criteria are applied and the characteristics of the decision makers. Funding applications are reviewed by advisory panels composed of artists and "lay individuals who are knowledgeable about the arts." 20 U.S.C. S 959(c)(2). Recommendations of the advisory panels are reviewed by the National Council of the Arts, which is composed of persons to be selected "from among the private citizens of the United States who (A) are widely recognized for their broad knowledge of, or expertise in, or for their profound interest in, the arts and (B) have established records of distinguished service, or achieved eminence, in the arts." 20 U.S.C. S 955(b).

Such decision makers possess an expertise in determining "artistic excellence and artistic merit" that will guide their application of these criteria; they have no corresponding expertise in applying such free-floating concepts as "decency" and "respect." As then-NEA Chairperson Frank Hodsoll testified, "I don't see any way for a Federal panel . . . expert in the arts, not expert in community standards . . . to make determinations for the entire Nation as to what is acceptable or what is not going to be patently offensive." Reauthorization of Foundation on the Arts and the Humanities Act of 1965, Joint Hearings Before the Subcomm. on Select Education & the Subcomm. on Post-secondary Education of the Comm. on Education and Labor, 99th Cong., 1st Sess. 552 (1985).

sial. This danger is especially pronounced because a vague statute effectively shields decisions from review. Where First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process.

II.

[13] Our holding that S 954(d)(1) is unconstitutionally vague effectively disposes of this case. However, in view of the dissent's argument that the government may restrict the content of speech it funds, we briefly explain why the First Amendment's¹⁹ prohibition on content- and viewpoint-based restrictions provides an alternate ground for our decision.

"It is axiomatic" that under the First Amendment, "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 115 S. Ct. at 2516; see also *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995). A content-based restriction on speech is therefore presumed unconstitutional, *Rosenberger*, 115 S. Ct. at 2516, and must be subjected to " 'the most exacting scrutiny.' " *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). To survive this scrutiny, the government must advance a compelling interest served by its regulation of the content of protected speech, and the regulation must be narrowly tailored to serve that interest. *Sable Communications v. F.C.C.*, 492 U.S. 115, 126 (1989); *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 116 S. Ct. 2374, 2385 (1996) (government may directly regulate speech "to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *Action for Children's Television*, 58 F.3d at 659.

¹⁹ Art is protected by the First Amendment. As the Supreme Court noted in *Miller v. California*, "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value." 413 U.S. at 34.

The presence of government funding alters this framework somewhat. The government may make content-based choices "when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 115 S. Ct. at 2518. Thus, the Supreme Court has upheld regulations that granted tax deductions for veterans' groups but not for other charitable groups engaged in lobbying, see *Regan v. Taxation With Representation*, 461 U.S. 540, 545-48 (1983), and barred recipients of federal family planning funds from providing information on abortion. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). As the Court explained in *Rust*, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.

Government funding does not invariably justify government control of the content of speech, however. In *Rust*, the Court cautioned that its holding would not apply to public fora or to universities, which occupied "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." *Rust*, 500 U.S. at 200.

In addition, *Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral. Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, 115 S. Ct. at 2519. Both approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint-neutral.

As the district court explained, the arts, no less than the university, are "at the core of a democratic society's cultural and political vitality," *Finley*, 795 F. Supp. at 1473. The district court's analysis is full and cogent, and we need not repeat

it here.²⁰ Similarly, Congress has clearly indicated the NEA's purpose is to support a diverse array of artistic expression. Even the most cursory review of the NEA's enabling statute reveals this intent. In its findings, Congress emphasized that a democracy must "honor and preserve its multicultural artistic heritage as well as support new ideas" and declared its intent "to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry." 20 U.S.C. S 951(10), (7). The Senate Report accompanying the legislation emphasized that "freedom of artistic and humanistic expression" was to be given "the fullest attention" and that "[c]onformity for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression." See S. Rep. No. 300, 89th Cong., 1st Sess. 4 (1965). The House reaffirmed this view in adopting the 1985 amendments to the NEA's governing legislation, urging NEA to be "more responsive to funding programs that represent the many traditions in our heritage and the full cultural diversity of our citizens. . . . [T]he [funded] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free." H. R. Rep. No. 274, 99th Cong., 1st Sess. 13, reprinted in 1985 U.S.C.C.A.N. 1055, 1058. The NEA and its programs were created to encourage diverse private speech and not, as the dissent suggests, to engage in "speech for hire."

[14] The First Amendment prohibits the government from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 115 S. Ct. at 2516 (citing *Perry*

²⁰ NEA contends the district court erred by extending *Rust* to the arts funding context, arguing the *Rust* exceptions are limited to "special places" and "special relationships." This argument is foreclosed by *Rosenberger*, which took a much broader view of the First Amendment's applicability to subsidized speech. See *Rosenberger*, 115 S. Ct. at 2517 (university's student activities fund, while not a traditional physical forum, was subject to First Amendment constraints).

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)); see Johnson, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Even when the government is funding speech, it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise "at the suppression of dangerous ideas." Regan, 461 U.S. at 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)); see Hannegan v. Esquire, Inc., 327 U.S. 146, 158-59 (1946).

[15] Therefore, we cannot agree with NEA's assertion that the "decency and respect" provision does not reflect viewpoint discrimination.²¹ In *Rosenberger*, the Supreme Court found viewpoint discrimination in a university regulation that "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 115 S. Ct. at 2517. Central to the court's decision was the fact that under the regulation, any topic treated from a religious perspective would be denied funding. See *id.* ("Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments."). Here too, it is the treatment of a subject, not the subject itself, that is disfavored.

Two depictions of the same subject matter -- an American flag, for example -- could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public," and the other did not.

²¹ NEA and the dissent rely on two cases, *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976), and *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir. 1985). Both cases are distinguishable. Moreover, both were decided before *Rosenberger*, and to the extent they conflict with this most recent teaching on viewpoint discrimination, are not persuasive.

The dissent argues we have erred in applying the body of law for regulation of speech and generally available entitlements to prizes. According to the dissent, since the NEA grants are a prize given to a select few, rather than a generally available benefit, the government can choose to support only a certain viewpoint. The Supreme Court explicitly rejected a similar argument by the University in *Rosenberger*. As the Court explained, "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 115 S. Ct. at 2519. Although NEA awarded only 88 grants from an applicant pool of 5,168, it cannot provide those scarce grants to favor a particular viewpoint. See *id.* at 2519-20 (rejecting the University's argument that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible").

[16] NEA contends the "decency and respect" provision is permissible because it can be implemented in a viewpoint- and content-neutral way.²² As we have explained, however, S 954(d)(1) on its face requires NEA to take "decency" and "respect" into account in considering grant applications. Like the funding restriction at issue in *Rosenberger*, the "decency and respect" provision clearly focuses on the content of the speech at issue; it "has a speech-based restriction as its sole

²² On similar grounds, NEA urges us not to reach plaintiffs' First Amendment claims. However, we disagree with NEA's assertion that the district court's First Amendment decision was "obviously premature" because it rested on assumptions about how the Chairperson would implement S 954(d)(1)'s "decency and respect" provision. Under the interpretation originally proposed by NEA, the statute was implemented when the Chairperson, taking "decency and respect" into consideration, decided no changes in the application process were needed. We rejected this interpretation in Part I(A), *supra*, and NEA now argues we should avoid the First Amendment issues because "there is no way to predict what the Chairperson's new manner of implementing the statute would be." Plaintiffs bring a facial challenge, however. Although NEA is entitled to promulgate regulations interpreting the statute, we are not obligated to withhold judgment while the agency does so.

rationale and operative principle." *Rosenberger*, 115 S. Ct. at 2519.

The "decency and respect" provision authorizes viewpoint discrimination, an "egregious form of content discrimination." *Rosenberger*, 115 S. Ct. at 2516. Because the government has made no attempt to articulate a compelling interest served by the provision, 23 S 954(d)(1) cannot survive strict scrutiny.²⁴

III.

The "decency and respect" provision of S 954(d)(1) is void for vagueness under the Fifth Amendment, and impermissibly restricts plaintiffs' First Amendment rights as well.

AFFIRMED.

²³ Amici suggest Congress may have wished to avoid requiring taxpayers to fund work they found offensive. However, neither protecting people from offensive and indecent speech nor protecting the taxpayer from unwanted expenditures is a compelling interest sufficient to justify content-based restrictions on speech. See *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Sable*, 492 U.S. at 126 (First Amendment protects speech that is "indecent but not obscene"); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 385 n.16 (1984) (taxpayers' opposition to expenditure of government funds cannot "be invoked to justify a congressional decision to suppress speech").

²⁴ The district court concluded S 954(d)(1) was unconstitutionally overbroad because it was a content-based restriction that "swe[pt] within its ambit speech and artistic expression which is protected by the First Amendment." *Finley*, 795 F. Supp. at 1476. Although we frame our discussion in terms of strict scrutiny, we agree with the district court's conclusion.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

First Amendment law has taken some odd turns lately. We now live in a legal context prohibiting display of a cross or menorah on government property. *American Jewish Congress v. City of Beverly Hills*, 1996 WL 409164, *1 (9th Cir. 7/19/96), *Separation of Church and State Committee v. City of Eugene*, 93-35094 (9th Cir. 8/20/96). But if a cross is immersed in urine, a government grant cannot be withheld on the ground that the art would offend general standards of decency and respect for the religious beliefs of most Americans. The government, under today's decision, cannot even consider "general standards of decency and respect for the diverse beliefs and values of the American public" when it gives artists grants. Yet we penalize private employers for slowness in firing employees who do not show decency and respect for other employees. See *Steiner v. Showboat Operating Company*, 25 F.3d 1459 (9th Cir. 1994). This self-contradictory silliness is not built into the Bill of Rights. The First Amendment does not prohibit the free exercise of common sense.

Artists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully toward the beliefs and values of as much of the American public as they like. Indecency sometimes helps to communicate an idea effectively, and it is constitutionally protected. See *Cohen v. California*, 403 U.S. 15 (1971). Lenny Bruce's monologues needed offensive indecency to accomplish their legitimate artistic objective. The same language that gave rise to liability in *Steiner* was essential to Allen Ginsberg's artistic expression in *Howl* and *Kaddish*. The great Modigliani nudes are frankly erotic and focus on the models' pubic hair; our Constitution unquestionably protects them from censorship. Less artistically distinguished attempts to communicate by means of offensiveness and indecency are also entitled to

First Amendment protection. Molly Bloom's soliloquy, Aristophanes' jokes about passing gas, Shakespeare's double entendres, the indecent kiss in Chaucer's Miller's Tale, and countless works by lesser artists, such as Samuel Clemens' 1601 and Vladimir Nabakov's Lolita, are all part of the ancient artistic tradition of using the impolite or indecent in art. Every general art history textbook reproduces and discusses Edouard Manet's Luncheon On the Grass, a painting of a nude woman looking at the artist while two fully clothed men sit next to her and talk to each other. The content and viewpoint doubtless offend, but the art history books are constitutionally protected regardless. There can be no constitutional excuse for allowing the government to censor art on grounds of indecency or offensiveness. I hope that it is still as clear as it was when Cohen came down that anyone in America, artist or not, has a constitutional right to express himself indecently and offensively.

That offensive or indecent expression cannot be censored does not mean that the government has to pay for it. By drawing the line between private expression and government conduct, we preserve liberty for individual expression, while preserving democracy for governmental decisions. Any time government enters a previously private sphere of conduct, the line becomes blurred, and the issues difficult. Government subsidy of art was an easy issue when the Medicis hired artists -- the Medicis could freely impose their preferences. But when a democratic government pays artists to stick their thumbs in the public's eye, the public naturally becomes annoyed, and attempts to exercise its ordinary authority in a democracy to control through Congress how tax monies are spent.

Whether government can consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few. Only 88 out of 5168 applicants for Visual Artists Fellowships won grants in fiscal year 1994.

1994 Annual Report, National Endowment for the Arts 10.
Applying for an NEA arts grant is not like applying for welfare, social security, a tax exemption, or a student activity grant. NEA grants are prizes for the fortunate few, not entitlements.

The case at bar does not involve government censorship. If Congress had prohibited artists from expressing themselves indecently or disrespectfully, the Constitution would make such a law null and void. The NEA statute before us is not such a law. It does not restrict what artists do. It restricts what

the NEA can do. This case is about whether the American people can require a government agency to consider, in giving grants to very few of the many artists in the country, "general standards of decency and respect for the diverse beliefs and values of the American public."

Our decision today creates a conflict with the only other circuits to have confronted a similar issue. *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894 (1976). In *Advocates*, New Hampshire denied an NEA grant to a literary magazine because the governor and state arts commission thought a poem it published was indecent. The First Circuit, rejecting the First Amendment challenge, explained that denial of a grant was not suppression of speech, and the grant selection process necessarily discriminated based on content:

[P]ublic funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts

is that decisions will be made according to the literary or artistic worth of competing applicants.

Id. at 795.

Advocates suggests that every disappointed grant applicant has the same First Amendment right of self-expression, but that does not mean that every disappointed grant applicant has a First Amendment claim. Id. at 795-96. Suppose the NEA arts panel discriminates by viewpoint against an excellent artist whose work is too conventional for the panel's tastes -- an artist with the superb technique of a Robert Mapplethorpe and the vision of a Norman Rockwell. And suppose it discriminates against another whose art is too indecent and offensive. And another, whose viewpoint is interesting but whose technique is less than excellent. Do all have First Amendment claims under the majority decision? Only the one who creates indecent art? Only the ones with excellent technique? It is impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression, decent and indecent.

The Seventh Circuit ruled similarly to the First Circuit, in *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985). The chairman of the art department hung his stained glass panels of such subjects as "the naked rump of a brown woman, and sticking out from (or into) it a white cylinder" in the college's gallery near the main entrance to a heavily trafficked building. The college told him to move three panels to a less heavily trafficked fourth floor display space, after receiving "complaints from students, cleaning women, and black clergymen." Id. at 628. The main entrance space was especially desirable, but not a public forum, and not available to all. The artist lost his case.

The Seventh Circuit distinguished between what an artist is free to create, and what the government must display.

If Claes Oldenberg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare.

Id. at 630.

Advocates points out the resemblance of a government grant program to a government auditorium providing space for artistic performances. If it is a public forum, then neutrality is required by the First Amendment. Advocates, 532 F.2d at 796. But if the space is available only to a select few invited exhibitors as in *Piarowski*, then the government, already excluding much constitutionally protected art, need not be neutral toward offensive or indecent art. That is why, in the *Piarowski* example, Chicago would be free to discriminate in favor of baseball bats and against phalluses in the hypothetical display.

The majority tries to distinguish the First Circuit and Seventh Circuit cases on the ground that they came down before *Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510 (1995), and *Rosenberger* now prohibits the content or viewpoint discrimination they allowed. That misreads *Rosenberger*. The university which lost *Rosenberger* paid expenses for virtually all student organizations, but denied the money to plaintiffs because they expressed a Christian viewpoint. In its zeal to steer clear of the establishment clause, the university, like the school district in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993), overlooked the free speech clause.

Rosenberger holds that a university which makes money generally available for student groups' expenses, to encourage a diversity of views rather than to express its own, cannot discriminate against an applicant based on that applicant's viewpoint. *Rosenberger* teaches that when government makes a

benefit generally available to all within a diverse class, it can-
not make an exception based on what a particular applicant wishes to say. This extends *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993), from space to money, thereby preventing discrimination against speech on the ground that it was religious. A public forum can be created by money, not just real estate. This is because speech is often disseminated by print and electronics, rather than by standing in front of people and talking to them. Cf. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

We and the District of Columbia Circuit had decided, before *Rosenberger*, what might be classified as money-as-a-public-forum cases. In *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1980), we held that customs duties exemptions for any educational or cultural materials could not exclude propaganda films based on their content and viewpoint. In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), the District of Columbia Circuit held that a tax exemption generally available to educational organizations could not be denied based on a regulation requiring full and fair exposition of facts enabling a reader to draw an independent conclusion. Under these cases, all applicants in the class were entitled to the financial benefit from the government, unless the content of their speech was contrary to government standards. By contrast, in the case at bar, no applicant is entitled to the financial benefit.

The case at bar would be analogous to *Rosenberger* (and I would join the majority in rejecting the "decency and respect" clause as unconstitutional), if the NEA gave out grants to virtually all artists except for those whose work violated "general standards of decency and respect for the diverse beliefs and values of the American public." Arts grants would then be the financial equivalent of a tax credit for all artists, and under *Rosenberger*, *Big Mama Rag* and *Bullfrog*, the financial benefit could not be conditioned on a vague and content- or viewpoint-based criterion like the "decency and

respect" formula. Much as parade permits may be allocated on a first come first served principle, but not to favor particular viewpoints, arts grants would have to be allocated on some neutral principle, such as first come first served, or random selection. Cf. *Rosenberger*, 115 S.Ct. at 2519.

It is not the case that whenever the government gives money to someone for talking, the recipient may say, with the government's money, whatever he or she likes. The government can hire people to say what it wants, and require them to say it.

[W]hen government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Rosenberger, 115 S.Ct. at 2519 (explaining *Rust v. Sullivan*, 500 U.S. 173 (1991)). But when the government gives money to encourage a diversity of views from private speakers in a class not defined by what they say, such as university students, it "may not silence the expression of selected viewpoints." *Id.*

The majority misreads *Rosenberger's* rejection of the University of Virginia's argument that scarcity of money justified viewpoint discrimination. *Rosenberger*, 115 S. Ct. at 2519-20. The context was a program in which grants went to virtually all speakers but those with a Christian viewpoint, not to everyone except for a few prizewinners. The Court explained that the Student Activities Fund at the University of Virginia "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at 2517. This is the concept which I have expressed perhaps more crudely, as teaching us that a public forum can be cre-

ated by money, not just real estate. Had the University of Virginia set up a prize fund, for student groups which contributed the most to the betterment of secular civic life in Charlottesville, the Christian student groups would have had no constitutional claim of discrimination had they lost. Had the NEA grant program been structured to award grants to virtually all artists, then the plaintiffs in the case at bar would be entitled to prevail under Rosenberger. The majority uses principles for entitlement and regulation cases in a prize case. The principles are by and large right, the application wrong.

When the government gives a prize rather than an entitlement, it necessarily discriminates by content and viewpoint. Congress decided to foster the arts, but many Congressmen were doubtless aware of artists' tendency since the romantic period to challenge the conventional. Thus Congress imposed several content and viewpoint criteria for arts grants. These include "artistic excellence," promoting cultural diversity, and reflecting the culture of inner cities, rural areas, and tribal communities.¹ Congress thereby discriminated against non-
(Text continued on page 14535)

¹ (c) Program of contracts, grants-in-aid, or loans to groups and individuals for projects and productions; traditionally underrepresented recipients of financial assistance. The Chairperson, with advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support --

(1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

(2) projects [and] productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographical or economic reasons;

(3) projects [and] productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in resi-

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dence at an educational or cultural institution, or standards of professional excellence;

(4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;

(5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) programs that enhance managerial and organizational skills and capacities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purposes of broadening public access to the arts; and,

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

. . . .

(d) Application for payment; regulations and procedures. 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 the regulations 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; and

(2) applications are consistent with the purpose of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this Act from the National Endowment for the Arts.

The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the projects, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.

artistic expressions of opinion, artistic expression favoring cultural homogeneity, and art reflecting suburban culture. Norman Rockwell and Ansel Adams could reasonably complain, were they applying for grants, that the statute constitutes viewpoint discrimination against their artistic expression.

Of course the statutory criteria are vague. "Decency and respect for the diverse beliefs and values of the American people" is vague. "Artistic excellence" and "artistic merit" are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program. The constitution would not allow the government to censor expression on the ground that it was not art, or though art, was not excellent art. But this does not mean that the government cannot condition prizes on the excellence of art.

Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify "artistic excellence":

in certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like romantic, plastic, values, human, dead, sentimental, natural, vitality, as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader. When one critic writes, "The outstanding feature of Mr. X's work is its living quality," while another writes, "The immediately striking thing about Mr. X's works is its peculiar

20 U.S.C. S 954(d) (emphasis added). The 1990 amendment added the emphasized language to 20 U.S.C. S 954(d).

deadness," the reader accepts this as a simple difference of opinion. If words like black and white were involved, instead of the jargon words dead and living, he would see at once that the language was being used in an improper way.

George Orwell, Politics and the English Language, in A Collection of Essays 156, 161-162 (emphasis in original) (essay dated 1946).

The most used art history text points out the vagueness of the entire NEA grant scheme:

But if we must give up any hope of a trustworthy rating scale for artistic quality, can we not at least expect to find a reliable, objective way to tell art from non-art? Unfortunately, even this rather more modest goal proves so difficult as to be almost beyond our powers.

H. W. Janson, History of Art 9 (1962). It took a century and a half for most critics to agree that photography could be art. Some have not yet admitted jazz to the pantheon, many, rock and roll. Some disagree on whether Bernstein's West Side Story is art or mere entertainment, let alone excellent art. If the constitutional law principle prohibiting vague laws relating to speech applied to NEA grants, then we could no more let the government give out grants for excellent art, than let it censor literary and artistic expressions which in the opinion of some customs agent or policeman (or art critic) were bad art.

The majority says that the vagueness of "artistic " and "excellence" are constitutionally permissible, unlike "decency" and "respect," because the people making the decisions are experts. Maj. op. at 14518-19, n.18. By that principle, it would be permissible to let the government censor speech with vague laws, so long as the censors were experts

in the field being censored. The argument is wrong, because the panel members' purported expertise does not give fair warning to artists of what will get them grants and what will not. Nor are the purported experts' choices sufficiently constrained by "artistic" and "excellence" to prevent arbitrariness. Quite a few NEA grants have gone to activities which many experts would deem not excellent, or not art. There is no principled way to keep the arts grants but strike the decency and respect clause. Either Congress can provide for arts grants with vague criteria, or it cannot provide for them at all.

Artists seeking grants have no property right to them, and their liberty to express themselves as they choose is not regulated by the grants. Vagueness law has been developed under the Fifth Amendment to protect people from the taking of liberty or property without fair notice of what they may not do, and without protection against arbitrary enforcement. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the content of speech. See *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("conditions attached to expenditures of Government funds"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("prohibition against vague regulations of speech"). An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant. None of the purposes of vagueness law apply to prizes.

The majority construes the statute as though it prohibited the NEA from awarding grants to offensive or indecent art. I doubt it would matter if the statute said that. Congress may be free to condition these scarce NEA grants on content. If Congress hired a sculptor to create a bust for the Capitol, it could tell him to do a bust of Abraham Lincoln, and prohibit him from doing a bust of John Wilkes Booth. Or it could tell the sculptor to make busts only of people who had served in the

Senate, or perhaps only of "great" Senators, despite the vagueness of that criterion. That much is clear under Rust. Just as Fulbright grants to foreign students may be conditioned on "directing their talents and initiative into channels which will make them more effective leaders," 22 U.S.C. S 2454(e)(3), prizes for only a few applicants, to which no one is entitled, may be conditioned on vague criteria designed to serve particular congressional objectives.

Even if we were to suppose that a specific prohibition of NEA grants based on content or viewpoint would be unconstitutional, the majority has found prohibitions in the statute which are not there. We should not read a statute as though it prohibited what it does not, and then hold it unconstitutional for the imaginary prohibition. The statute does not say that artists must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." It says "the Chairperson " of the National Endowment of the Arts must use "artistic excellence" and "merit" as criteria, "taking into consideration," etc.

The words "take into consideration" mean take into consideration, no more, no less. The word "consider " in its ordinary usage means "to reflect on" or "think about with a degree of care or caution." See Webster's Third New International Dictionary 483 (1981). In deciding whether to buy a new car, one takes into consideration the expense, but that does not mean one always decides against buying a new car. A requirement that "due consideration and weight shall be given " to something does not make the thing an absolute requirement. See *Heirens v. Mizell*, 729 F.2d 449, 460 (7th Cir. 1984) (parole board had to consider a prisoner's record but could decide against parole despite a good record). A court of appeals appoints a federal public defender "after considering recommendations from the district court." 18 U.S.C.S 3006A(g)(2)(A). That means that we must give serious thought to the district court's recommendations, but we are not required to follow them.

Likewise, the NEA might think seriously about Ginsberg's extensive use of vulgar language in Howl and Kaddish, and decide against funding readings of his poems in junior high schools. But after considering the indecency and offensiveness, the NEA could lawfully fund readings in colleges. It might likewise decide for or against funding showings of artistically excellent but highly offensive works such as Leni Riefenstahl's Nazi propaganda movie, Triumph of the Will, or D.W. Griffith's artistically important movie Birth of a Nation, which glorified the Ku Klux Klan. If someone on an advisory panel said "I don't think we can consider the indecency or disrespect for American values of the art - we should fund the grants because the presentations will be of excellent art, and that is all we should consider," another panel member could persuasively reply, "we can and must consider decency and respect - Congress said we should." That is what the "decency and respect" language means, and that is all it means. Chairman Frohnmayer and the members of NEA grants panels probably would have figured out that they lived in a "political world," see maj. op. at p. 14511, n. 7, and that the NEA budget might be affected by what it did with the money, even if Congress had not given them the decency and respect criterion.

By contrast with the "take into consideration" language, Congress said that obscenity "shall not be funded." 20 U.S.C. S 954(d)(2). That language, unlike "taking into consideration," prohibits funding. The language we now hold unconstitutional tells the Council and panels to think seriously about "general standards of decency and respect for the diverse beliefs of the American public" when they give away the public's money.

The artists in the program before us are not affected by the statutory grant criterion in their use of indecency or disrespect in their art done independently of their NEA grants. If the NEA were restricted from giving grants to artists who, outside the grants, had ever done indecent or offensive work, the con-

siderations would be different, possibly leading to a different result. Cf. Federal Communications Commission v. League of Women Voters, 468 U.S. 364, 399-400 (1984) (acceptance of the government's money unconstitutionally required the recipient to conform to government speech requirements outside the time paid for by the government). The government cannot use its power to condition subsidies as a means of enforcing orthodoxy in areas traditionally open to the public for expressive activity. Rust, 111 S.Ct. at 1776; Regan, 461 U.S. at 548.

A prize for some art naturally encourages other artists to try to produce art of the sort which they think will get them the prize, including conformity to the content and viewpoint preferences of those who award the prizes. The members of the grant committees will probably balance their personal tastes against what they fear might lead Congress to cut NEA funding. If government selects a few artists and gives them money, it will unavoidably influence the work of many more:

I can seldom do positive good to another person without limiting him. I can, it is true, simply give him money, but even in this extreme case, where I seem to place no bonds on him, he inevitably faces the question of what conduct on his part will lead me to give money to him again.

George J. Stigler, *The Intellectual and the Market Place* 95 (1963). This is a problem of governmental involvement in what used to be a private activity, not a problem of censorship. The United States government has so much money and power that its slightest intervention to do good has the unfortunate effect of changing the entire context in which people act. But unless we are to blind ourselves to the distinction between a relatively few arts prizes, and socializing the art industry, we cannot treat the incentive afforded by a prize as the equivalent of censorship.

The artists who brought this lawsuit may have difficulty (the record does not say) attracting enough patrons to support their art. Finley alleges in her complaint that she is a "performance artist whose performances address such issues as the sexual stereotyping and objectification of women, rape and other forms of violence against women, and the powerlessness and victimization of women and others in our society." Fleck alleges that his performances "openly challenge traditional notions of gender and sexuality " and "address AIDS, birth, death, religion, consumption in a capitalist society, and the environment." Hughes alleges that her work "addresses issues of women's power in society and women's sexuality, including lesbian relationships. " Miller alleges that his "often autobiographical work addresses the relation between the individual and society, and particularly concerns social activism on issues affecting gay people, including AIDS." These works may lack the mass market of art appealing to more broadly shared sentiments.

There is no constitutional principle, however, which requires the government to replace the market and pump up the incomes of less popular artists. Government support of the arts is a policy choice, and perhaps a good one, but it is not constitutionally compelled. Lack of market appeal is an obstacle "not of [the government's] own creation." *Regan v. Taxation with Representation Wash.*, 461 U.S. 540, 549-50 (1983). So long as the artists are free to perform, people are free to patronize their performances, and the artists are not deprived of government money to which artists generally are entitled, the artists' freedom of expression is not abridged by content or viewpoint discrimination in the grant process.

The only practical guarantee of artistic freedom is private money.

The leadership of individuals or groups who can back their beliefs financially is particularly essential in the field of cultural amenities, [and] in the fine

arts If minority views are to have a chance to become majority views, it is necessary not only that men who are already highly esteemed by the majority should be able to initiate action but that representatives of all divergent views and tastes should be in a position to support with their means and their energy ideals which are not yet shared by the majority.

Friedrich A. Hayek, *The Constitution of Liberty* 125 (1960, 1978). With diverse sources of private money, majority preferences need not affect an artist's freedom or fortune, because only one or a few patrons or purchasers may suffice.

First Amendment law protects individual liberty from government, not the government from the people. The error in today's decision comes from forgetting what the First Amendment is for. The NEA "decency and respect" criterion controls, not artists, but rather a government department, the NEA. By treating legislative control over a part of government as though it were an attempt to control artists' expression, we confound the distinction between popular control of government, and government control of individuals. Majorities do not have the right to control free expression by individuals. They most certainly do have the right to control their government. Today's decision does not protect artists from government. It protects the government from control by the elected representatives of the people.

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visual, literary and
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Literature

Local Arts Agencies

Media Arts

Museum

Music

Opera/Musical
Theater

Presenting &
Commissioning

State & Regional

Theater

Visual Arts

PRIVILEGED AND CONFIDENTIAL

DATE: August 9, 1995

TO: Alfred Mollin
Senior Appellate Counsel

FROM: Karen Christensen *KC*
General Counsel

Hope O'Keeffe *HO*
Deputy General Counsel

RE: Finley v. NEA, 9th Cir. No. 92-56028

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: DLR DATE: 04/25/13
2013-0534-S

At last Friday's meeting, you requested a summary of our thoughts on the supplemental brief requested by the Ninth Circuit.

1. The Court need not reach the constitutional issue.

We believe that the primary argument should continue to be that the Court need not reach the constitutional issue in response to this facial challenge.

2. There is a continuum between Rosenberger and Rust.

We concur in the reading of Rosenberger as substantially narrowing Rust. However, we disagree with the "two box" theory advanced by the amici. (We also note Justice O'Connor's caution against inferring "categorical answers" from Rosenberger's 5-4 decision.) We believe that there is a continuum between Rosenberger -- government-funded private speech -- and Rust -- government-funded government speech conducted by private individuals. The Endowment does not, as in Rust, fund speech by the government. Accordingly, we believe that the Arts Endowment is closer to the Rosenberger side of this continuum. However, the Endowment does -- unlike in Rosenberger -- fund diverse private speech that serves government purposes beyond simple diversity. Accordingly, we also believe that principled distinctions can be drawn between Finley and Rosenberger.

3. Finley (NEA) is distinguishable from Rosenberger (UVa).

The UVa program at issue in Rosenberger was pure "funding of diverse speech," which fell squarely within the "university" exemption discussed in Rust and reaffirmed in Rosenberger as a classic free speech arena. By contrast, funding diverse speech -- "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions

facilitating release of this creative talent" -- is only one of a broad range of purposes that Congress set forth in the Endowment's statutory Declaration of Findings and Purposes. Congress has directed the Endowment to address multiple other objectives -- and has specifically cautioned that "Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines":

- "the encouragement and support of national progress in the . . . arts,"
- "to achieve a better understanding of the past, a better analysis of the present, and a better view of the future,"
- to "foster and support a form of education, and access to the arts . . . designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants,"
- to "be sensitive to the nature of public sponsorship . . . [and] contribute to public support and confidence in the use of taxpayer funds,"
- to "reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups,"
- to serve "as a leader in the realm of ideas and of the spirit,"
- to assure that "Americans . . . receive in school, background and preparation in the arts . . . to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic . . . expression,"
- "to honor and preserve its multicultural artistic heritage as well as support new ideas, " and
- "to fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people [by] transmit[ing] the achievement and values of civilization from the past via the present to the future, and mak[ing] widely available the greatest achievements of art."

20 U.S.C. § 951. Other purposes are reflected in the programs created in the legislation. From these purposes, the Endowment derives the specific mission "to foster the excellence, diversity, and vitality of the arts in the United States" and "to help broaden the availability and appreciation of such excellence, diversity, and vitality."

In Rosenberger, the University's program did not generally turn on the content of the funded speech. By contrast, in the Endowment Congress has set up a program that turns almost entirely on content. At present, the Endowment funds less than one in four applications. In some program categories, the Endowment funds fewer than 2% of applications. We expect that funding ratio to decrease even further in the near future due to budget reductions. This level of selectivity necessarily requires close examination of the content of artwork proposed for funding. At the core of the Endowment's structure is the notion of funding artistically excellent artwork by application of a rigorous process of judgment of content based upon artistic merit and excellence and other review criteria that differ slightly for each of the Endowment's over 100 categories.

Finally, Justice O'Connor was careful to note that the student activities fee at issue in Rosenberger "represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students." By contrast, the Endowment is funded almost exclusively by public monies.

4. Rosenberger does not address content-based, non-viewpoint-based, regulation.

We agree that Rosenberger leaves open the question of whether content-based regulation, as opposed to viewpoint-based regulation, is permissible in the context where the government is funding private speech. We believe that the Endowment's decency clause is content-based rather than viewpoint-based. The key caselaw on decency -- for example, Sable Communications -- speaks of decency restrictions as content-based. We believe that this brief need not address at length the link between decency and viewpoint, and indeed found this section of the August 3 memorandum somewhat strained. We find the argument in section 5 of the memorandum regarding "anti-establishment" art to be unhelpful. We are particularly uncomfortable with the singling out of particular work -- in the August 3 memorandum, Karen Finley's -- and we strongly disagree with any link between decency and simple nudity.

5. Some content regulation by the Endowment is permissible.

In Rosenberger, the Court observed that "It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle." The August 3 memorandum derives from the case the principle that "subject matter discrimination reasonably related to the purpose of the government program is permissible." While we believe that the August 3 memorandum may understate the standard of review, we agree that Rosenberger would permit some forms of content regulation, based upon neutral principles.

For example, it is undisputed that the Endowment -- either by statute or administratively -- could determine not to fund poetry, or opera, or pastels. This is the "medium" argument made in the August 3 memorandum. However, we believe that it is very difficult to shoehorn decency into the "medium" category.

We do not, however, believe that "medium" restrictions are the only permissible content restrictions under Rosenberger. As discussed above, Congress and the Endowment have set inherently content-based programmatic parameters within which the Endowment will fund diverse private speech: parameters such as artistic excellence, service to the community, and increased audience access. Where decency restrictions belong -- if at all -- is in this category of programmatic parameters based on "neutral principles."

6. Decency restrictions can only be justified based on neutral principles.

We believe that decency restrictions can only be justified by governmental purposes that are more neutral than some of those reflected in the August 3 memorandum. We believe that the court will

not be comfortable with the notion that decency restrictions are justified by the desire not to give offense. At a minimum, decency restrictions must be supported by positive purposes, such as "the fostering of mutual respect for the diverse beliefs and values of all persons and groups" or "funding art that is representative of the best of American culture." The negative purpose of avoiding offensiveness necessarily implicates concerns about viewpoint discrimination and the establishment of a "baseline standard of secular orthodoxy."

We also remain uncomfortable with "subject matter" regulation -- as opposed to content regulation -- of Endowment grants. We believe that content regulation that is tied to particular subject matter such as sexuality, religious speech, or violence, whether based upon "decency" or other principles such as "respect for the diverse beliefs and values of the American people," may step over the boundary separating content regulation based upon neutral principles from the "suppression of dangerous ideas." We also agree with footnote 1 of the August 3 memorandum, that certain interpretations of the decency regulation might be clearly viewpoint-based and presumably unconstitutional under Rosenberger.

We note that in another recently issued opinion, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, the Court emphasized that "the Constitution looks beyond written or spoken words as mediums of expression," reaffirming the constitutional protection of artwork: "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll."

Accordingly, we would oppose any statement or suggestion in the brief that all content-based, non-viewpoint-based regulation is permissible, if consonant with Congressional intent, when the Government funds diverse private speech. Our preference would be for the brief to suggest, as in the August 3 memorandum, that the Court afford the Endowment an opportunity properly to implement the decency criterion should the panel determine that the Endowment's present interpretation is impermissible.

PRESS ADVISORY ON THE FINLEY CASE

In early February, the 9th Circuit heard oral arguments on the Clinton Administration's appeal in the Finley case. This case challenges the constitutionality of portions of amendments to the National Endowment for the Arts' charter. The issue before the Court is whether the government can attach speech restrictions when it makes grants to the arts, through the National Endowment for the Arts (NEA) or by other means. A decision is not expected for at least several months.

Government support for the arts, as is the case with other government supported activities for other functions, must be consistent with our basic freedoms that are articulated in the Bill of Rights. These freedoms include speech, assembly and religion. Freedom of speech is inherently challenging, but a necessary first freedom which, as a bedrock of our democracy, is the characteristic that distinguishes us from other nations.

An underlying issue is whether government should support the arts. We believe that the arts serve multiple national purposes and thus merit government support. Studies show that the arts help to achieve the following national goals: instill values by helping people reconnect to their spirituality; bring people together to develop community through a universality that transcends deep differences and divisions in an increasingly diverse society; improve education by helping to impart knowledge, enhance cognitive development, improve analytical thinking and motivation, inspire teamwork, and help create self-esteem; and stimulate the economy through their positive impact on job creation, tax base enhancement, increased tourism, improved community development, and growth of auxiliary service jobs. All of these goals have been cited consistently as national priorities by both Republicans and Democrats alike. Government support for the arts effectively serves these goals.

American Arts Alliance
American Association of Museums
The American Federation of Arts
Arts Action Coalition
Arts Wire
Association of Art Museum Directors
Association of Performing Arts Presenters
College Art Association
Council of Literary Magazines and Presses
Dance/USA
The Drawing Legion/CSPS
Illinois Arts Alliance
International Sculpture Center, Washington, DC
The Literary Network
National Assembly of Local Arts Agencies
New York City Arts Coalition
New York Foundation for the Arts
People for the American Way
Theatre Communications Group

For addition information, please contact any of the organizations listed above.

February 2, 1994

September 26, 1995

VIA TELECOPYMEMORANDUM

TO: Melanne Verveer
FROM: James F. Fitzpatrick
RE: Finley v. NEA



I'm concerned that the Justice view on limiting Rust might come out against the free speech position. Walter is very positive. I spoke earlier today with Ab about our concerns and sent the attached to him. I think that Jamie might make the final call. Anything that can be done from your side has to help.

ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Telex: 892733 ARFOPO WSH
TELEFAX: (202) 942-5999

COPY

TELEFAX TRANSMISSION SHEET
We Are Sending 3 Pages
(Including This Cover Sheet)

DATE: 09/26/95

TO: Judge Abner Mikva

FROM: James F. Fitzpatrick

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MESSAGE:

Ab:

Here is a very short paragraph which I gave earlier to Justice which captures, I believe, the essential point that Rosenberger clarifies and limits Rust.

I'm also enclosing the page from Rosenberger (115 S.Ct. 2510, 2518) that spells out the basis of this paragraph.

Jim

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Recipient's Telefax No. <u>456-6279</u>	Return To: <u>Sharon Seeley</u>
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Timekeeper No. <u>3093</u>	

Rosenberger squarely rejects the proposition that whenever a governmental entity provides funds, it is the government itself that is speaking and the governmental entity can control the content of speech. Rather, Rosenberger clarifies Rust by distinguishing the situation where the government is in fact the speaker or is pressing a specific message from the situation where it is expending funds to encourage a diversity of viewpoints from private speakers. In the latter circumstance, the governmental entity cannot "silence the expression of selected viewpoints."

However, as we pointed out in our Reply Brief, the Court need not at this point decide the applicability of the Rust/Rosenberger standard in this facial challenge to the statute.

case the University justifies its denial of SAF participation to WAP on the ground that the contents of Wide Awake reveal an avowed religious perspective. See *supra*, at 2515. It bears only passing mention that the dissent's attempt to distinguish Lamb's Chapel is entirely without support in the law. Relying on the transcript of oral argument, the dissent seems to argue that we found viewpoint discrimination in that case because the government excluded Christian, but not atheistic, viewpoints from being expressed in the forum there. *Post*, at 2550-2551, and n. 13. The Court relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint. There is no indication in the opinion of the Court (which, unlike an advocate's statements at oral argument, is the law) that exclusion or inclusion of other religious or antireligious voices from that forum had any bearing on its decision.

The University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities. The University begins with the unremarkable proposition that the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission. Citing our decisions in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), and *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the University argues that content-based funding decisions are both inevitable and lawful. Were the reasoning of *Lamb's Chapel* to apply to funding decisions as well as to those involving access to facilities, it is urged, its holding "would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions that schools, colleges, and other government entities routinely make in the allocation of public funds." Brief for Respondents 16.

To this end the University relies on our assurance in *Widmar v. Vincent*, *supra*.

There, in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups, we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." 454 U.S., at 276, 102 S.Ct., at 277. The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan*, *2519 *supra*, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S., at 194, 111 S.Ct., at 1773. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id.*, at 196-200, 111 S.Ct., at 1774-1776.

It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. See, e.g., *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Hazelwood School Dist. v.*



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 1995

MEMORANDUM

TO: Karen Christiansen
Hope O'Keefe

FROM: John Rogovin *JR*

RE: Finley

Attached is a draft of the Finley supplemental brief. The Ninth Circuit, which has been considering this matter since it was argued in the summer of 1994, has asked for our response to two questions, and our brief is due September 29.

Please let me have your comments no later than Noon, Wednesday, September 20. If necessary, I will convene a meeting to discuss any major disagreements about our approach. Please note that the Court has imposed a ten-page limit.

Thank you.

Attachment

Nos. 92-56028, 92-56387, 93-55089

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN FINLEY, JOHN FLECK, HOLLY HUGHES, TIM MILLER and
NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS,

Plaintiffs/Appellees,

v.

NATIONAL ENDOWMENT FOR THE ARTS and JANE ALEXANDER,
in her official capacity as Chairperson of the
National Endowment for the Arts,

Defendants/Appellants.

ON APPEAL FROM THE
FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE APPELLANTS

OF COUNSEL:

KAREN CHRISTIANSEN
General Counsel

HOPE O'KEEFE
Assistant General Counsel
National Endowment for
the Arts

FRANK W. HUNGER
Assistant Attorney General

NORA M. MANELLA
United States Attorney

WILLIAM KANTER
(202) 514-4575
ALFRED MOLLIN
(202) 514-0236
Attorneys, Appellate Staff,
Civil Division, Room 3332
Department of Justice,
Washington, D.C. 20530-0001

QUESTIONS PRESENTED

1. What liberty or property interest is implicated by 20 U.S.C. 954(d)(1) that would be protected by the fifth amendment?

2. In view of Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995), what is the applicability, if any, of Rust v. Sullivan, 500 U.S. 173 (1991), to this case?

I. APPLICANTS FOR NEA GRANTS HAVE NO PROTECTED LIBERTY OR PROPERTY INTERESTS UNDER 20 U.S.C. 954(d)(1).

To hold a property interest in a government benefit, an applicant must "have a legitimate claim of entitlement to it."¹ Plaintiffs have no such claim because the Chairperson has "final authority to approve each application." 20 U.S.C. 955(f). If the NEA statute provided that artists were entitled to a grant if they met certain conditions, then there might be a property interest at stake. But there is no such mandatory language in the statute. Instead, there is the type of "complete agency discretion of the granting agency" that courts have routinely identified as indicating that there is no entitlement.² Congress requires applications to be judged on artistic merit and excellence, but this does not diminish the

¹ Board of Regents v. Roth, 408 U.S. 564, 567 (1972).

² Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) (quoting Association of Orange Co. Deputy Sheriffs v. Gates, 716 F.2d 733, 734 (9th Cir. 1983)).

Chairperson's discretion to award grants as she deems appropriate.³ Thus, an applicant for an NEA grant has no protected property interest.

Nor is any liberty interest facially implicated by 20 U.S.C. 954(d)(1). To infringe facially upon a cognizable liberty interest, a statute must require the public disclosure of allegedly stigmatizing matters. See Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982). But here the statute does not require disclosure of the reasons why an application for an NEA grant is denied.

II. BECAUSE CONGRESS MAY SELECTIVELY SUBSIDIZE SPEECH AND BECAUSE THE NEA PROGRAM IS NOT A FORUM, THE DECENCY PROVISION IS CONSTITUTIONAL.

As we demonstrate below, this case is controlled by Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983), which holds that the government may choose to subsidize some, but not all, activities of a certain type without violating the First Amendment, even when the activities subsidized are protected by the First Amendment. Neither Rust nor Rosenberger governs this case. Rust concerns the ability of a government to require participants in a program to adhere to messages that the government wishes to support; but the NEA grant program involves no such viewpoint regulation. Rosenberger,

³ In fiscal year 1993, out of 16,259 applicants, only 4,096 received grants. 1993 Annual Report, National Endowment for the Arts, p. 11. Grants to individual applicants -- as opposed to institutional applicants -- were very selective. For example, grants were awarded to only 110 out of more than 4,500 applicants for Visual Artists Fellowships. Id. at 210.

by contrast, concerns the government's ability to limit access to a government-created forum; but the NEA grant program is not a forum.⁴

1. In Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983), the Court dealt with a statute that made contributions to qualifying charitable organizations tax deductible, unless the organizations engaged in lobbying. Lobbying organizations challenged their exclusion from the tax subsidy on First Amendment grounds. The Court held that "Congress is not required by the First Amendment to subsidize lobbying," and it "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"⁵ Regan, 461 U.S. at 546.

Rust and Rosenberger are cases with a more particular focus than Regan, which sets forth the general rule concerning the ability of the government to subsidize First Amendment activities selectively. Rust concerned government-funded family planning projects in which employees were prohibited from giving abortion-related advice to clients. The Court upheld this restriction, reasoning that the government may "refus[e] to fund activities, including speech, which are specifically excluded from the scope of the project funded." 500 U.S. at 195. However, Rust cautioned that government subsidies are not "invariably sufficient" to

⁴ As we have explained in our previous briefs, this Court need not address these constitutional issues at all if it agrees that there are at least some possible ways in which in which the statute could be constitutionally implemented.

⁵ A long line of cases confirm this principle. See, e.g., Cammarano v. United States, 358 U.S. 498 (1959); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297, 316-18 (1980); Planned Parenthood of Central and Northern Arizona, 718 F.2d 938, 942-44 (9th Cir. 1983), aff'd 479 U.S. 925; DKT Memorial Fund v. AID, 887 F.2d 275, 288 (D.C. Cir. 1989).

authorize viewpoint regulation in fora "open to the public for expressive activity," or in universities, which are "a traditional sphere of free expression." 500 U.S. at 199-200.

While Rosenberger reaffirmed the Rust holding -- "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes" (115 S. Ct. at 2519) -- Rosenberger involves a public university's limiting access to a forum that it had created, an issue expressly reserved in Rust. 500 U.S. at 200. Thus, Rosenberger does not alter the teaching of Rust concerning the government's authority to define the limits of its programs, and neither case alters the ability of the government to subsidize First Amendment activities selectively when (a) there is no viewpoint regulation, and (b) there is no forum.

2. This case is governed by Regan. Congress is not required to subsidize indecent art, and the First Amendment rights of those who wish to produce such art are not violated by the government's refusal to subsidize their efforts.⁶ Thus, under Regan, the decency provision must be upheld unless the modes of analysis articulated in Rust and Rosenberger are implicated. And they would only be implicated if the government were either engaging in viewpoint restriction or limiting access to a forum.

3. This case is not governed by Rust because the decency provision is not a species of viewpoint restriction. Decisions upholding regulation of indecent art or speech have noted that this kind of regulation is not based upon a speaker's viewpoint. For example, the First Circuit in the course of upholding a general scheme for funding the arts, noted that while

⁶ Selective subsidization that is valid under the First Amendment may still, in some instances, raise equal protection questions. See, e.g., Regan, 461 U.S. at 546-50. But no equal protection claims have been raised in this case.

funding decisions could not be based on "promotion of certain messages," the government may refuse to support art containing "offensive" language and imagery.⁷ Thus, judgments based on offensiveness, a category that would include indecency, are not viewpoint-based judgments. The Seventh Circuit recognized the same point when it held that a university could exercise "managerial judgment concerning access to sexually frank pictorial art, even a judgment influenced by the offensive nature of the art"; the court contrasted this kind of judgment with a regulation of art based on its viewpoint.⁸ As Justice Stevens has noted, "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."⁹

4. Rosenberger does not govern this case because the NEA is not a forum. Fora are created when the government establishes "certain means of communication" and the means

⁷ Advocates for the Arts v. Thomson, 532 F.2d 792, 796-98 (1st Cir. 1976).

⁸ Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625, 632, 630-31 (7th Cir. 1985).

⁹ FCC v. Pacifica Foundation, 438 U.S. 726, 743 n.18 (1978) (opinion of Justice Stevens). See also Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 869-71 (1982) (plurality opinion) (a school library may not remove books from its shelf if it motivated by a desire to "suppress[] ideas," but such decisions could be based on a determination that the books were "vulgar," or could be motivated by concerns regarding "educational suitability"); Bethel School Dist. No. 403, 478 U.S. 675, 683-85 (1986) (so long as its decision was "unrelated to any political viewpoint," *id.* at 685, a school could punish a student for using "vulgar and offensive terms" in a speech to his schoolmates because "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate.") Justice Brennan concurred on the understanding that the penalties were not triggered by "disagree[ment] with the views [the student] sought to express." *Id.* at 689.

are made available to the public.¹⁰ But fora are not created "when the government appropriates public funds to promote a particular policy of its own." Rosenberger, 115 S. Ct. 2519. Thus, the NEA is not a forum where, as here, the government affords subsidies to art to advance public purposes. Although one of the purposes of the NEA is to assist the development of artists (20 U.S.C. 951(7)), Congress recently emphasized that "[p]ublic funds provided by the Federal Government must ultimately serve public purposes the Congress defines." 20 U.S.C. 951(5). NEA's organic statute details the public purposes it was established by Congress to serve.¹¹ Accordingly, the NEA's grant program is not designed primarily to provide artists with a means of communication, but is an example of the "government appropriat[ing] public funds to promote a particular policy of its own." Rosenberger, 115 S. Ct. at 2519.

Consequently, the NEA grant program is not a forum, and it does not involve viewpoint restrictions. Rather, this case presents the kind of distinctions routinely made in

¹⁰ Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 44 (1983).

¹¹ These public purposes include: "[T]he encouragement and support of national progress in the * * * arts, [achieving] a better understanding of the past, a better analysis of the present, and a better view of the future; [fostering and supporting] a form of education, and access to the arts * * * designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants; [being] sensitive to the nature of public sponsorship and contributing to public support and confidence in the use of taxpayer funds; [honoring and preserving the Nation's] multicultural artistic heritage as well as support[ing] new ideas"; and other similar purposes. 20 U.S.C. 951. Congress has also authorized the Chairperson to support projects that "have substantial artistic and cultural significance, giving emphasis to American creativity and cultural diversity," that have "significant merit" and would "otherwise be unavailable to our citizens for geographic or economic reasons," that "reach, or reflect the culture of, a minority, inner city, rural, or tribal community," and that encourage public knowledge, understanding, and appreciation of the arts." 20 U.S.C. 954(c).

virtually every government program — government subsidization of some, but not all, activities of a certain kind. Under Regan, even though the activity at issue is protected by the First Amendment, such selective subsidization does not violate the First Amendment.

III. ASSUMING ARGUENDO THAT THE NEA IS A FORUM, THE DECENCY PROVISION IS A VALID, CONTENT-BASED REGULATION.

1. There are three categories of fora: traditional public, limited public, and nonpublic. In no forum can access be denied in order to suppress a particular viewpoint, but, as we have demonstrated above, the decency provision does not regulate viewpoints.

The decency provision does regulate on the basis of content. The test for the validity of nonviewpoint, content-based limitations is different in each kind of forum. In traditional public fora, like parks and streets, content-based access limits must be justified by a compelling state interest. But in a nonpublic forum, content-based regulation is valid as long as it is "reasonable in light of the purpose served by the forum."¹² And in a limited public forum, nonviewpoint content-based regulation is permissible to retain the intended limits of the forum. Rosenberger, 115 S. Ct. at 2516. Accordingly, the government has great latitude to make nonviewpoint, content-based distinctions in nonpublic fora, less latitude in limited public fora, and very little latitude in traditional public fora.

The distinction between nonpublic and public fora turns on whether the government has "intentionally open[ed] a nontraditional forum for public discourse." Id. (emphasis added). In public fora like the general funding program in Rosenberger, access was awarded

¹² Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, 806 (1985); Perry, 460 U.S. at 46.

to virtually any student who met certain broad criteria. Conversely, the federal government's annual charity drive was deemed a nonpublic forum because participation was limited "to 'appropriate' voluntary agencies," and "selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum."

Cornelius, 473 U.S. at 804-05.

If, by any stretch of analysis, the NEA could be held to be a forum at all, it is a nonpublic forum. The NEA grant program is similar to the charity drive in Cornelius. NEA grants are highly selective.¹³ No one, by meeting some set of criteria, is entitled to a grant. The NEA may restrict grants, on the basis of content, as long as the restrictions are "reasonable in light of the purposes of the forum" and viewpoint neutral. Cornelius, 473 U.S. at 809.

"Reasonable" restrictions in nonpublic fora may be based on the "avoidance of controversy," and insuring the "success" of a government program. Cornelius, 473 U.S. at 810-11. And the district court, relying on plaintiffs' pleadings, noted that some recent grants had led to a "political maelstrom" at the NEA. ER at 6. As controversy threatened to disrupt the federal workplace in Cornelius, so this political maelstrom threatened the disruption of the NEA's mission. Congress could easily find that the public support necessary to the funding of a major grant institution like the NEA would be threatened if it became associated with works that, according to the NEA Chairperson, were "offensive" to a large majority of the population. ER at 6. Moreover, Congress could also find that such an

¹³ See note 3, *supra*. By contrast, in Rosenberger, the student-activities-fund program provided funding to 118 of 135 applying groups, 115 S. Ct. at 2515.

association might lead the public to avoid NEA-funded works, thus undermining the principal, public purpose of the NEA -- educating and increasing the access of the public to the arts. Because limiting participants in the CFC for the purpose of avoiding controversy was upheld in Cornelius as reasonable and valid, so also is Congress' response to a controversy that threatened the disruption of the NEA's mission. Finally, the purposes of the NEA include "fostering of mutual respect for the diverse beliefs and values of all persons and groups," and "funding art that is representative of the best of American culture." 20 U.S.C. 951. The decency provision is also a reasonable restriction because it furthers the accomplishment of these positive purposes.

2. But even if the NEA grant program were held to be a limited public forum, content restriction would be permissible to "confine a limited] forum to the limited and legitimate purposes for which it was created." Rosenberger, 115 S. Ct. 2516. As the Supreme Court explained:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. Id. at 2516-17.

The decency provision resembles other, concededly valid, viewpoint-neutral restrictions of content that establish the limits of eligibility for NEA grants.¹⁴ All art funded by the NEA must display "artistic excellence or artistic merit." 20 U.S.C. 954(d)(1).

¹⁴ "[G]overnment must make . . . content-based distinctions in regulating expression in schools, libraries, and museums, or in subsidizing the arts." Cinevision Corp. v. City of Burbank, 745 F.2d 560, 574 (9th Cir. 1984).

These terms are not defined, but imply considerations such as beauty, proficiency, taste, originality, novelty, etc. The formal, aesthetic criteria that make up "artistic excellence" may vary. But what distinguishes these criteria, and what makes them adequate for defining the limits of a limited public forum, is that they are not tools employed for the purpose of evaluating the message or viewpoint that may be present in the work of art. The decency provision narrows the range of recipients eligible to receive grants in ways indistinguishable from the aesthetic criteria comprised in artistic excellence. Similarly, it is a neutral criterion that does not turn upon the viewpoint of a work of art. If artistic excellence is a valid means of establishing the limits of a government-created, limited public forum, so also is decency.

CONCLUSION

For the foregoing reasons, and those set forth in our principal briefs, the judgment of the district court should be reversed.

OF COUNSEL:

KAREN CHRISTIANSEN
General Counsel

HOPE O'KEEFE
Assistant General Counsel
National Endowment for
the Arts

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Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

NORA M. MANELLA
United States Attorney

WILLIAM KANTER
(202) 514-4575
ALFRED MOLLIN
(202) 514-0236
Attorneys, Appellate Staff,
Civil Division, Room 3332
Department of Justice,
Washington, D.C. 20530-0001