SUPREME COURT OF THE UNITED STATES

No. 97–371

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

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

[June 25, 1998]

JUSTICE O'CONNOR delivered the opinion of the Court.

The National Foundation on the Arts and Humanities Act, as amended in 1990, requires the Chairperson of the National Endowment for the Arts (NEA) to ensure that "artistic excellence and artistic merit are the criteria by which [grant] 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. §954(d)(1). In this case, we review the Court of Appeals' determination that §954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments. We conclude that §954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.

I

A

With the establishment of the NEA in 1965, Congress embarked on a "broadly conceived national policy of support for the . . . arts in the United States," see §953(b),

pledging federal funds to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of . . . creative talent." §951(7). The enabling statute vests the NEA with substantial discretion to award grants; it identifies only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts." See §§954(c)(1)–(10).

Applications for NEA funding are initially reviewed by advisory panels composed of experts in the relevant field of the arts. Under the 1990 Amendments to the enabling statute, those panels must reflect "diverse artistic and cultural points of view" and include "wide geographic, ethnic, and minority representation," as well as "lay individuals who are knowledgeable about the arts." §§959(c)(1)–(2). The panels report to the 26-member National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. The Chairperson has the ultimate authority to award grants but may not approve an application as to which the Council has made a negative recommendation. §955(f).

Since 1965, the NEA has distributed over three billion dollars in grants to individuals and organizations, funding that has served as a catalyst for increased state, corporate, and foundation support for the arts. Congress has recently restricted the availability of federal funding for individual artists, confining grants primarily to qualifying organizations and state arts agencies, and constraining sub-granting. See Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. 105–83, §329, 111 Stat. 1600. By far the largest portion of the grants distributed in fiscal year 1998 were awarded directly to state arts agencies. In the remaining categories, the most

substantial grants were allocated to symphony orchestras, fine arts museums, dance theater foundations, and opera associations. See National Endowment for the Arts, FY 1998 Grants, Creation & Presentation 5–8, 21, 20, 27.

Throughout the NEA's history, only a handful of the agency's roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public's trust. Two provocative works, however, prompted public controversy in 1989 and led to congressional revaluation of the NEA's funding priorities and efforts to increase oversight of its grant-making procedures. The Institute of Contemporary Art at the University of Pennsylvania had used $30,000 of a visual arts grant it received from the NEA to fund a 1989 retrospective of photographer Robert Mapplethorpe's work. The exhibit, entitled *The Perfect Moment*, included homoerotic photographs that several Members of Congress condemned as pornographic. See, *e.g.*, 135 Cong. Rec. 22372 (1989). Members also denounced artist Andres Serrano's work *Piss Christ*, a photograph of a crucifix immersed in urine. See, *e.g.*, *id.*, at 9789. Serrano had been awarded a $15,000 grant from the Southeast Center for Contemporary Art, an organization that received NEA support.

When considering the NEA's appropriations for fiscal year 1990, Congress reacted to the controversy surrounding the Mapplethorpe and Serrano photographs by eliminating $45,000 from the agency's budget, the precise amount contributed to the two exhibits by NEA grant recipients. Congress also enacted an amendment providing that no NEA funds "may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." Department

of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101–121, 103 Stat. 738, 738–742. The NEA implemented Congress' mandate by instituting a requirement that all grantees certify in writing that they would not utilize federal funding to engage in projects inconsistent with the criteria in the 1990 appropriations bill. That certification requirement was subsequently invalidated as unconstitutionally vague by a Federal District Court, see *Bella Lewitzky Dance Foundation* v. *Frohnmayer*, 754 F. Supp. 774 (CD Cal. 1991), and the NEA did not appeal the decision.

In the 1990 appropriations bill, Congress also agreed to create an Independent Commission of constitutional law scholars to review the NEA's grant-making procedures and assess the possibility of more focused standards for public arts funding. The Commission's report, issued in September 1990, concluded that there is no constitutional obligation to provide arts funding, but also recommended that the NEA rescind the certification requirement and cautioned against legislation setting forth any content restrictions. Instead, the Commission suggested procedural changes to enhance the role of advisory panels and a statutory reaffirmation of "the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us." See Independent Commission, Report to Congress on the National Endowment for the Arts 83–91 (Sept. 1990), 3 Record, Doc. No. 151, Exh. K (hereinafter Report to Congress).

Informed by the Commission's recommendations, and cognizant of pending judicial challenges to the funding limitations in the 1990 appropriations bill, Congress debated several proposals to reform the NEA's grant-making process when it considered the agency's reauthorization in the fall of 1990. The House rejected the Crane Amendment, which would have virtually eliminated the NEA, see 136 Cong. Rec. 28656–28657 (1990), and the Rohrabacher

Amendment, which would have introduced a prohibition on awarding any grants that could be used to "promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion" or "of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin," *id.*, at 28657–28664. Ultimately, Congress adopted the Williams/Coleman Amendment, a bipartisan compromise between Members opposing any funding restrictions and those favoring some guidance to the agency. In relevant part, the Amendment became §954(d)(1), which directs the Chairperson, in establishing procedures to judge the artistic merit of grant applications, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."*

The NEA has not promulgated any official interpretation of the provision, but in December 1990, the Council unanimously adopted a resolution to implement §954(d)(1) merely by ensuring that the members of the advisory panels that conduct the initial review of grant applications represent geographic, ethnic, and aesthetic diversity. See Minutes of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in App. 12–13; Transcript of the

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* Title 20 U. S. C. §954(d) provides in full that:

"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; and

"(2) applications are consistent with the purposes 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."

Dec. 1990 Retreat of the National Council on the Arts, reprinted in *id.*, 32–33. John Frohnmayer, then Chairperson of the NEA, also declared that he would "count on [the] procedures" ensuring diverse membership on the peer review panels to fulfill Congress's mandate. See *id.*, at 40.

B

The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before §954(d)(1) was enacted. An advisory panel recommended approval of respondents' projects, both initially and after receiving Frohnmayer's request to reconsider three of the applications. A majority of the Council subsequently recommended disapproval, and in June 1990, the NEA informed respondents that they had been denied funding. Respondents filed suit, alleging that the NEA had violated their First Amendment rights by rejecting the applications on political grounds, had failed to follow statutory procedures by basing the denial on criteria other than those set forth in the NEA's enabling statute, and had breached the confidentiality of their grant applications through the release of quotations to the press, in violation of the Privacy Act of 1974, 5 U. S. C. §552(a). Respondents sought restoration of the recommended grants or reconsideration of their applications, as well as damages for the alleged Privacy Act violations. When Congress enacted §954(d)(1), respondents, now joined by the National Association of Artists' Organizations (NAAO), amended their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. First Amended Complaint, 1 Record, Doc. No. 16, p. 1 (Mar. 27, 1991).

The District Court denied the NEA's motion for judgment on the pleadings, 795 F. Supp. 1457, 1463–1468 (CD Cal. 1992), and, after discovery, the NEA agreed to settle

the individual respondents' statutory and as-applied constitutional claims by paying the artists the amount of the vetoed grants, damages, and attorney's fees. See Stipulation and Settlement Agreement, 6 Record, Doc. No. 128, pp. 3–5 (June 11, 1993).

The District Court then granted summary judgment in favor of respondents on their facial constitutional challenge to §954(d)(1) and enjoined enforcement of the provision. See 795 F. Supp., at 1476. The court rejected the argument that the NEA could comply with §954(d)(1) by structuring the grant selection process to provide for diverse advisory panels. *Id.*, at 1471. The provision, the court stated, "fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.*, at 1472. Reasoning that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency,'" the court concluded that §954(d)(1) "cannot be given effect consistent with the Fifth Amendment's due process requirement." *Id.*, at 1471–1472 (citing *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972)). Drawing an analogy between arts funding and public universities, the court further ruled that the First Amendment constrains the NEA's grant-making process, and that because §954(d)(1) "clearly reaches a substantial amount of protected speech," it is impermissibly overbroad on its face. 795 F. Supp., at 1476. The Government did not seek a stay of the District Court's injunction, and consequently the NEA has not applied §954(d)(1) since June 1992.

A divided panel of the Court of Appeals affirmed the District Court's ruling. 100 F. 3d 671 (CA9 1996). The majority agreed with the District Court that the NEA was compelled by the adoption of §954(d)(1) to alter its grant-making procedures to ensure that applications are judged according to the "decency and respect" criteria. The

Chairperson, the court reasoned, "has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction." *Id.*, at 680. Concluding that the "decency and respect" criteria are not "susceptible to objective definition," the court held that §954(d)(1) "gives rise to the danger of arbitrary and discriminatory application" and is void for vagueness under the First and Fifth Amendments. *Id.*, at 680–681. In the alternative, the court ruled that §954(d)(1) violates the First Amendment's prohibition on viewpoint-based restrictions on protected speech. Government funding of the arts, the court explained, is both a "traditional sphere of free expression," *Rust* v. *Sullivan*, 500 U. S. 173, 200 (1991), and an area in which the Government has stated its intention to "encourage a diversity of views from private speakers," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834 (1995). 100 F. 3d, at 681–682. Accordingly, finding that §954(d)(1) "has a speech-based restriction as its sole rationale and operative principle," *Rosenberger*, *supra*, at 834, and noting the NEA's failure to articulate a compelling interest for the provision, the court declared it facially invalid. 100 F. 3d, at 683.

The dissent asserted that the First Amendment protects artists' rights to express themselves as indecently and disrespectfully as they like, but does not compel the Government to fund that speech. *Id.*, at 684 (Kleinfeld, J., dissenting). The challenged provision, the dissent contended, did not prohibit the NEA from funding indecent or offensive art, but merely required the agency to consider the "decency and respect" criteria in the grant selection process. *Id.*, at 689–690. Moreover, according to the dissent's reasoning, the vagueness principles applicable to the direct regulation of speech have no bearing on the selective award of prizes, and the Government may draw distinctions based on content and viewpoint in making its funding decisions. *Id.*, at 684–688. Three judges dis-

sented from the denial of rehearing en banc, maintaining that the panel's decision gave the statute an "implausible construction," applied the "'void for vagueness' doctrine where it does not belong," and extended "First Amendment principles to a situation that the First Amendment doesn't cover." 112 F. 3d 1015, 1016–1017 (CA9 1997).

We granted certiorari, 522 U. S. __ (1997), and now reverse the judgment of the Court of Appeals.

II

A

Respondents raise a facial constitutional challenge to §954(d)(1), and consequently they confront "a heavy burden" in advancing their claim. *Rust*, *supra*, at 183. Facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973); see also *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick*, *supra*, at 615.

Respondents argue that the provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency. The premise of respondents' claim is that §954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The NEA, however, reads the provision as merely hortatory, and contends that it stops well short of an absolute restriction. Section 954(d)(1) adds "considerations" to the grant-making process; it does not preclude awards to projects that might be deemed "indecent" or "disrespectful," nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing

an application. Indeed, the agency asserts that it has adequately implemented §954(d)(1) merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications. See Declaration of Randolph McAusland, Deputy Chairman for Programs at the NEA, reprinted in App. 79 (stating that the NEA implements the provision "by ensuring that the peer review panels represent a variety of geographical areas, aesthetic views, professions, areas of expertise, races and ethnic groups, and gender, and include a lay person"). We do not decide whether the NEA's view— that the formulation of diverse advisory panels is sufficient to comply with Congress' command— is in fact a reasonable reading of the statute. It is clear, however, that the text of §954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms. See §954(d)(2) ("[O]bscenity is without artistic merit, is not protected speech, and shall not be funded").

Furthermore, like the plain language of §954(d), the political context surrounding the adoption of the "decency and respect" clause is inconsistent with respondents' assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria. The legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority. See, *e.g.*, 136 Cong. Rec. 28626, 28632, 28634 (1990). The Independent Commission had cautioned Congress against the adoption of distinct viewpoint-based standards for funding, and the Commission's report suggests that "additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as

part of a definition of 'artistic excellence'), rather than isolated and treated as exogenous considerations." Report to Congress, at 89. In keeping with that recommendation, the criteria in §954(d)(1) inform the assessment of artistic merit, but Congress declined to disallow any particular viewpoints. As the sponsors of §954(d)(1) noted in urging rejection of the Rohrabacher Amendment, "if we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member's aversions end, others with different sensibilities and with different values begin." 136 Cong. Rec. 28624 (statement of Rep. Coleman); see also *id.*, at 28663 (statement of Rep. Williams) (arguing that the Rohrabacher Amendment would prevent the funding of Jasper Johns' flag series, "The Merchant of Venice," "Chorus Line," "Birth of a Nation," and the "Grapes of Wrath"). In contrast, before the vote on §954(d)(1), one of its sponsors stated: "If we have done one important thing in this amendment, it is this. We have maintained the integrity of freedom of expression in the United States." *Id.*, at 28674.

That §954(d)(1) admonishes the NEA merely to take "decency and respect" into consideration, and that the legislation was aimed at reforming procedures rather than precluding speech, undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination. In cases where we have struck down legislation as facially unconstitutional, the dangers were both more evident and more substantial. In *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992), for example, we invalidated on its face a municipal ordinance that defined as a criminal offense the placement of a symbol on public or private property "'which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.'" See *id.*, at 380. That provision set forth a clear penalty,

proscribed views on particular "disfavored subjects," *id.*, at 391, and suppressed "distinctive idea[s], conveyed by a distinctive message," *id.*, at 393.

In contrast, the "decency and respect" criteria do not silence speakers by expressly "threaten[ing] censorship of ideas." See *ibid.* Thus, we do not perceive a realistic danger that §954(d)(1) will compromise First Amendment values. As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. Respondents assert, for example, that "[o]ne would be hard-pressed to find two people in the United States who could agree on what the 'diverse beliefs and values of the American public' are, much less on whether a particular work of art 'respects' them"; and they claim that "[d]ecency' is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas." Brief for Respondents 41. The NEA likewise views the considerations enumerated in §954(d)(1) as susceptible to multiple interpretations. See Department of the Interior and Related Agencies Appropriations for 1992, Hearing before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess., 234 (1991) (testimony of John Frohnmayer) ("[N]o one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions"). Accordingly, the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views. Indeed, one could hardly anticipate how "decency" or "respect" would bear on grant applications in categories such as funding for symphony orchestras.

Respondents' claim that the provision is facially unconstitutional may be reduced to the argument that the crite-

ria in §954(d)(1) are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination. Given the varied interpretations of the criteria and the vague exhortation to "take them into consideration," it seems unlikely that this provision will introduce any greater element of selectivity than the determination of "artistic excellence" itself. And we are reluctant, in any event, to invalidate legislation "on the basis of its hypothetical application to situations not before the Court." *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 743 (1978).

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" prong of §954(d)(1) and its reference to "respect for the diverse beliefs and values of the American public." Educational programs are central to the NEA's mission. See §951(9) ("Americans should receive in school, background and preparation in the arts and humanities"); §954(c)(5) (listing "projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts" among the NEA's funding priorities); National Endowment for the Arts, FY 1999 Application Guidelines 18–19 (describing "Education & Access" category); Brief for Twenty-six Arts, Broadcast, Library, Museum, and Publishing *Amici Curiae* 5, n. 2 (citing NEA Strategic Plan FY 1997–FY 2002, which identifies children's festivals and museums, art education, at-risk youth projects, and artists in schools as examples of the NEA's activities). And it is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico,* 457 U. S. 853, 871 (1982); see also *Bethel School Dist. No. 403* v. *Fraser,* 478 U. S. 675, 683 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

Permissible applications of the mandate to consider

"respect for the diverse beliefs and values of the American public" are also apparent. In setting forth the purposes of the NEA, Congress explained that "[i]t is vital to democracy to honor and preserve its multicultural artistic heritage." §951(10). The agency expressly takes diversity into account, giving special consideration to "projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community," §954(c)(4), as well as projects that generally emphasize "cultural diversity," §954(c)(1). Respondents do not contend that the criteria in §954(d)(1) are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project's intended audience.

We recognize, of course, that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents' First Amendment challenge. But neither are we persuaded that, in other applications, the language of §954(d)(1) itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources and it must deny the majority of the grant applications that it receives, including many that propose "artistically excellent" projects. The agency may decide to fund particular projects for a wide variety of reasons, "such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form." Brief for Petitioners 32. As the dissent below noted, it would be "impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expres-

sion." 100 F. 3d, at 685 (Kleinfeld, J., dissenting). The "very assumption" of the NEA is that grants will be awarded according to the "artistic worth of competing applications," and absolute neutrality is simply "inconceivable." *Advocates for the Arts* v. *Thomson*, 532 F. 2d 792, 795–796 (CA1), cert. denied, 429 U. S. 894 (1976).

Respondent's reliance on our decision in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), is therefore misplaced. In *Rosenberger*, a public university declined to authorize disbursements from its Student Activities Fund to finance the printing of a Christian student newspaper. We held that by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints. *Id.*, at 837. Although the scarcity of NEA funding does not distinguish this case from *Rosenberger*, see *id.*, at 835, the competitive process according to which the grants are allocated does. In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately "encourage a diversity of views from private speakers," *id.*, at 834. The NEA's mandate is to make aesthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*– which was available to all student organizations that were "'related to the educational purpose of the University,'" *id.*, at 824– and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, see *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 386 (1993); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975), or the second class mailing privileges available to "'all newspapers and other periodical publications,'" see *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 148, n. 1 (1946).

Respondents do not allege discrimination in any par-

ticular funding decision. (In fact, after filing suit to challenge §954(d)(1), two of the individual respondents received NEA grants. See Exhibit 35 to Heins Declaration, 3 Record, Doc. Nos. 275 and 276 (Sept. 30, 1991 letters from the NEA informing respondents Hughes and Miller that they had been awarded Solo Performance Theater Artist Fellowships).) Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas," *Regan, supra,* 461 U. S., at 550 (internal quotation marks omitted), and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate. See *Arkansas Writers' Project, Inc.* v. *Ragland,* 481 U. S. 221, 237 (1987) (SCALIA, J., dissenting); see also *Leathers* v. *Medlock,* 499 U. S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"). In addition, as the NEA itself concedes, a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive "certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S. 105, 116 (1991); see Brief for Petitioners 38, n. 12. Unless and until §954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision. Cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 396 (1969) ("[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but

will deal with those problems if and when they arise") (internal citation omitted).

B

Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. See *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 549 (1983). In the 1990 Amendments that incorporated §954(d)(1), Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should "contribute to public support and confidence in the use of taxpayer funds," and that "[p]ublic funds . . . must ultimately serve public purposes the Congress defines." §951(5). And as we held in *Rust*, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U. S., at 193. In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ibid.*; see also *Maher* v. *Roe*, 432 U. S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy").

III

The lower courts also erred in invalidating §954(d)(1) as unconstitutionally vague. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. See *NAACP* v. *Button*, 371 U. S. 415, 432–433 (1963). The

terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any "forbidden area" in the context of grants of this nature. Compare *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987) (facially invalidating a flat ban on any "First Amendment" activities in an airport); *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982) ("prohibitory and stigmatizing effect" of a "quasi-criminal" ordinance relevant to the vagueness analysis); *Grayned* v. *City of Rockford*, 408 U. S., at 108 (requiring clear lines between "lawful and unlawful" conduct). We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. See Statement of Charlotte Murphy, Executive Director of NAAO, reprinted in App. 21–22. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence." See, *e.g.*, 2 U. S. C. §802 (establishing the Congressional Award Program to "promote initiative, achievement, and excellence among youths in the areas of public service, personal development, and physical and expedition fitness"); 20 U. S. C. §956(c)(1) (providing funding to the National Endowment for the Humanities to promote "progress and scholarship in the humanities"); §1134h(a) (authorizing the Secretary of Education to award fellowships to "students of superior ability selected on the basis of demonstrated achievement and exceptional promise");

22 U. S. C. §2452(a) (authorizing the award of Fulbright grants to "strengthen international cooperative relations"); 42 U. S. C. §7382c (authorizing the Secretary of Energy to recognize teachers for "excellence in mathematics or science education"). To accept respondents' vagueness argument would be to call into question the constitutionality of these valuable government programs and countless others like them.

Section 954(d)(1) merely adds some imprecise considerations to an already subjective selection process. It does not, on its face, impermissibly infringe on First or Fifth Amendment rights. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.