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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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NATIONAL ENDOWMENT FOR THE ARTS ET AL. *v.* FINLEY ET AL.

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

No. 97–371. Argued March 31, 1998– Decided June 25, 1998

The National Foundation on the Arts and Humanities Act vests the National Endowment for the Arts (NEA) with substantial discretion to award financial grants to support the arts; it identifies only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to . . . creativity and cultural diversity," "professional excellence," and the encouragement of "public . . . education . . . and appreciation of the arts." See 20 U. S. C. §954(c)(1)–(10). Applications for NEA funding are initially reviewed by advisory panels of experts in the relevant artistic field. The panels report to the National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. In 1989, controversial photographs that appeared in two NEA-funded exhibits prompted public outcry over the agency's grant-making procedures. Congress reacted to the controversy by inserting an amendment into the NEA's 1990 reauthorization bill. The amendment became §954(d)(1), which directs the Chairperson 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." The NEA has not promulgated an official interpretation of the provision, but the Council adopted a resolution to implement §954(d)(1) by ensuring that advisory panel members represent geographic, ethnic, and aesthetic diversity. The four individual respondents are performance artists who applied for NEA grants before §954(d)(1) was enacted. An advisory panel recommended approval of each of their projects, but the Council subsequently recommended disapproval, and funding was denied. They filed suit for restoration of the recommended grants or reconsidera-

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tion of their applications, asserting First Amendment and statutory claims. When Congress enacted §954(d)(1), respondents, joined by the National Association of Artists' Organizations, amended their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. The District Court granted summary judgment in favor of respondents on their facial constitutional challenge to §954(d)(1). The Ninth Circuit affirmed, holding 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.

Held: Section 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles. Pp. 9–19.

(a) Respondents confront a heavy burden in advancing their facial constitutional challenge, and they have not demonstrated a substantial risk that application of §954(d)(1) will lead to the suppression of free expression, see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615. The premise of respondents' claim is that §954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The provision, however, simply 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. Regardless 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, §954(d)(1)'s plain text clearly does not impose a categorical requirement. Furthermore, the political context surrounding the "decency and respect" clause's adoption is inconsistent with respondents' assertion. The legislation was a bipartisan proposal introduced as a counterweight to amendments that would have eliminated the NEA's funding or substantially constrained its grant-making authority. Section 954(d)(1) merely admonishes the NEA to take "decency and respect" into consideration, and the Court does not perceive a realistic danger that it will be utilized to preclude or punish the expression of particular views. The Court typically strikes down legislation as facially unconstitutional when the dangers are both more evident and more substantial. See, *e.g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377. Given the varied interpretations of the "decency and respect" criteria urged by the parties, and the provision's vague exhortation to "take them into consideration," it seems unlikely that §954(d)(1) will significantly compromise First Amendment values.

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" and the "respect"

prong of §954(d)(1). It is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. See, *e.g.*, *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico*, 457 U. S. 853, 871. And the statute already provides that the agency must take "cultural diversity" into account. References to permissible applications would not alone be sufficient to sustain the statute, but neither is the Court 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 are a consequence of the nature of arts funding; the NEA has limited resources to allocate among many "artistically excellent" projects, and it does so on the basis of a wide variety of subjective criteria. Respondent's reliance on *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 837– in which the Court overturned a public university's objective decision denying funding to all student publications having religious editorial viewpoints– is therefore misplaced. 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*. Moreover, although the First Amendment applies in the subsidy context, Congress has wide latitude to set spending priorities. See, *e.g.*, *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 549. Unless and until §954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, the Court will uphold it. Pp. 9–17.

(b) The lower courts also erred in invalidating §954(d)(1) as unconstitutionally vague. The First and Fifth Amendments protect speakers from arbitrary and discriminatory enforcement of vague standards. See *NAACP* v. *Button*, 371 U. S. 415, 432–433. Section 954(d)(1)'s terms 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 NEA grants. As a practical matter, artists may conform their speech to what they believe to be the NEA decisionmaking criteria in order to acquire funding. But when the Government is acting as patron rather than 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, to accept respondents' vagueness argument would be to call into question the constitutionality of the many valuable Government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence." Pp. 17–19.

100 F. 3d 671, reversed and remanded.

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O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, and BREYER, JJ., joined, and in which GINSBURG, J., joined except for Part II–B. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. SOUTER, J., filed a dissenting opinion.