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National Endowment for the Arts v. Finley: First Amendment Free Speech No Longer Guaranteed for the Arts

In *National Endowment for the Arts v. Finley*,[1] the United States Supreme Court confronted the decency and respect criteria of the 1990 Amendment ("Amendment") to the National Foundation on the Arts and Humanities Act of 1965.[2] At issue was whether the Amendment violated the First and Fifth Amendments of the United States Constitution by impermissibly discriminating based on viewpoint and being void for vagueness.[3] The Supreme Court upheld the Amendment as facially valid.[4]

I. FACTUAL BACKGROUND

Congress created the National Endowment for the Arts ("NEA") in 1965 as part of the National Foundation on the Arts and Humanities.[5] Since its inception, the NEA has awarded over three billion dollars in grants with very few formal complaints "about misapplied funds or abuse of the public's trust."[6] The Amendment at issue, passed in 1990, is the result of congressional outrage over two works funded by the NEA: an exhibit by Robert Mapplethorpe including "homoerotic photographs" and a piece by Andres Serrano depicting the "crucifix immersed in urine."[7] The Amendment directs the NEA to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants.[8] In response to the Amendment, the NEA adopted a resolution to ensure diverse membership of panels conducting the initial review of grant applications.[9]

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1. 118 S. Ct. 2168 (1998).
2. 20 U.S.C. § 953 et seq. (1994).
3. *Finley*, 118 S. Ct. at 2171-72.
4. *Id.* at 2179.
5. Finley v. NEA, 795 F. Supp. 1457, 1460 (C.D. Cal. 1992).
6. *Finley*, 118 S. Ct. at 2172.
7. *Id.*
8. 20 U.S.C. § 954(d)(1).
9. *Finley*, 118 S. Ct. at 2173.

Prior to the Amendment's enactment, plaintiffs, individual performance artists, sought funding by the NEA.[10] Although initially approved by a panel, their applications were subsequently denied by the National Council on the Arts.[11] Plaintiffs then filed a complaint alleging violations of their First Amendment rights,[12] as well as violations of the National Foundation on the Arts and Humanities Act[13] and of the Privacy Act.[14] After the 1990 Amendment was enacted, plaintiffs amended their complaints.[15] Joined by the National Association of Artists' Organization, plaintiffs claimed that the Amendment violated their First and Fifth Amendment rights of free speech and due process, respectively.[16] Stating that the complaint indicated that plaintiffs' applications were denied based on the content of plaintiffs' past performances, the district court denied the NEA's motions for judgment on the pleadings[17] and for summary judgment on the constitutional violations of the Amendment.[18] The court stated that the Amendment violated the Fifth Amendment due process requirement because it "fail[ed] adequately to notify applicants of what is required of them or to circumscribe NEA discretion."[19] Likewise, it violated the First Amendment's guarantee of free speech by "sweep[ing] within its ambit [protected] speech" and expression.[20]

Dismissing the NEA's contention that the decency and respect criteria were not vague because the NEA was not required to add them to its standards for judging grant applications[21] and because its requiring diverse panels ensured adherence to the criteria,[22] the court of appeals affirmed the district court. The court held that the NEA's interpretation

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10. *Finley*, 795 F. Supp. at 1462-63.

11. *Id.*

12. *Id.* Plaintiffs claimed that their applications were denied for political reasons and that the NEA failed to follow First Amendment procedural safeguards. *Id.*

13. *Id.*

14. *Id.* (citing 5 U.S.C. § 552A (1994 & Supp. 1996)).

15. *Id.*

16. *Id.*

17. *Id.* at 1464.

18. *Id.* at 1476.

19. *Id.* at 1472.

20. *Id.* at 1476.

21. Finley v. NEA, 100 F.3d 671, 676-77 (9th Cir. 1996). The NEA interpreted the Amendment's language of "taking into consideration" as authorizing, not mandating, consideration of the criteria. *Id.* at 676.

22. *Id.* The NEA contended that the diverse panels, "reflect[ing] a wide range of backgrounds and points of view," would necessarily reflect general standards of decency and respect for the various views and beliefs of the American public. *Id.*

was implausible based on the language of the statute,[23] its legislative history,[24] and canons of statutory construction.[25] Likewise, the court rejected the NEA's assertion that the criteria did not violate free speech because "the government may restrict the content of speech it funds"[26] and held that the criteria constituted viewpoint discrimination and that the government could not discriminate based on viewpoint even when it funds speech.[27]

In a dissenting opinion, Judge Kleinfeld distinguished between the government's awarding a prize and its giving an entitlement.[28] In the former instance, the government "necessarily" discriminates by content and viewpoint.[29] Thus, because an NEA grant is like a prize to its recipient,[30] the government can discriminate based on viewpoint or content.[31] On appeal, the Supreme Court upheld the decency and respect criteria on the ground that they were neither unconstitutionally discriminatory based on viewpoint nor unconstitutionally vague.[32]

II. LEGAL BACKGROUND

A fundamental principle of First Amendment jurisprudence is that the government may not preclude speech "simply because society finds the [speech] . . . offensive or disagreeable."[33] The Supreme Court has repeatedly stated that the regulation of speech based on content or viewpoint is subject to strict scrutiny,[34] which renders the regulations unconstitutional in most cases. Although Congress has the power to regulate speech "on the basis of a noncontent element" like noise, and even on a content element like obscenity, it does not have the power to "proscribe [speech] on the basis of *other* content elements."[35] Furthermore, content-based discrimination may be constitutional if the class of

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23. *Id.* at 676. The statute reads that "the Chairperson *shall* ensure that . . . ." *Id.* (emphasis added).

24. *Id.* at 677. The amendment was a response to NEA funding for two controversial works of art, evidencing congressional intent that the criteria should apply. *Id.*

25. *Id.* at 676. NEA's reading renders section 959(c), which requires diverse panels, superfluous. *Id.*

26. *Id.* at 681.

27. *Id.* at 682.

28. *Id.* at 684 (Kleinfeld, J., dissenting).

29. *Id.* at 687.

30. *Id.* at 685.

31. *Id.* at 687.

32. *Finley*, 118 S. Ct. at 2179.

33. Texas v. Johnson, 491 U.S. 397, 414 (1989).

34. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 380 (1984); Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

35. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

speech being discriminated against is a proscribable one and if the discrimination is based solely on the "very reason the entire class of speech at issue is proscribable."[36] For example, the government may prohibit only obscenity involving "the most lascivious displays of sexual activity," but may not prohibit only obscenity containing "offensive political messages."[37]

In *R.A.V. v. City of St. Paul*,[38] the Court struck a city ordinance that criminalized the placing of a burning cross 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."[39] Bound by the Minnesota Supreme Court's interpretation of the ordinance,[40] the Court nevertheless found that the statute constituted viewpoint discrimination.[41] The Court stated that the ordinance violated the First Amendment by allowing abusive expression "no matter how vicious or severe"[42] as long as the expression did not contain references "to one of the specified disfavored topics."[43] Stating that "majority preferences must be expressed in some fashion other than silencing speech on the basis of its content," the Court discounted the City's assertion that the ordinance was the only way it could let minorities know that "group hatred" was "not condoned by the majority."[44]

Likewise, the Court rejected the City's argument that the ordinance fell within the "secondary effects" exception to First Amendment prohibitions of content-based discrimination found in *Renton v. Playtime Theatres, Inc.*[45] The City argued that the ordinance sought to protect minorities from "victimization" due to their minority status.[46] The Court, however, stated that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."[47] The City further

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36. *Id.* at 388.
37. *Id.*
38. 505 U.S. 377 (1992).
39. *Id.* at 380 (quoting ST. PAUL, MINN. CODE § 292.02 (1990)).
40. *Id.* at 381. The Minnesota court had held the phrase "arouses anger, alarm or resentment" was limited to conduct amounting to "fighting words" within the meaning of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). 505 U.S. at 380-81.
41. *Id.* at 391.
42. *Id.*
43. *Id.*
44. *Id.* at 392 (citing Brief for Respondents at 25, *R.A.F.* (No. 90-7675)).
45. *Id.* at 394 (citing *Renton*, 475 U.S. 41 (1986)) (applying a "content-neutral" time, place, and manner analysis to uphold a zoning ordinance restricting the placement of adult theatres near schools, churches, and residential areas).
46. *Id.*
47. *Id.* (quoting Boos v. Barry, 485 U.S. 312 (1988)).

contended that, even if the ordinance was content-based discriminatory, it was nevertheless constitutional because it was narrowly tailored to serve the compelling state interest of protecting the rights of groups that had been historically subject to discrimination.[48] The Court held that the ordinance was not necessary to fulfill the City's purported interest because there were neutral alternatives that would satisfy that interest.[49]

Stating that the distinction between content and viewpoint discrimination is imprecise, the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*[50] rejected the University's argument that its refusal to pay publication costs for a student journal with religious overtones constituted content, not viewpoint, discrimination and, thus, was not "presumptively unconstitutional."[51] Instead, analogizing to *Lamb's Chapel v. Center Moriches Union Free School District*,[52] the Court found that the University's policy constituted viewpoint discrimination.[53] The Court discounted the University's attempt to distinguish between the funds it denied and the access to facilities denied in *Lamb's Chapel* on the ground that "the State must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission."[54] The Court noted a distinction between the government as speaker and the government as facilitator.[55] On one hand, the government acts as speaker either by actually speaking or by providing funds to private entities to relay the government's message, both of which allow the government to "make content-based choices" and to "say what it wishes."[56] On the other hand, the government acts as facilitator by "expend[ing] funds to encourage a diversity of views from private speakers," which does not allow the government to discriminate based on viewpoint.[57] Arguing that while "money is scarce[,] . . . physical facilities are not,"[58] the University sought a further distinction from *Lamb's Chapel*. The Court, however, rejected that argument on the

48. *Id.* at 395.

49. *Id.* One possible alternative given by the Court was an ordinance banning all fighting words without limiting them to certain topics. *Id.* at 396.

50. 515 U.S. 819 (1995).

51. *Id.* at 830-31.

52. 508 U.S. 384 (1993) (holding unconstitutional a school district's denial of a church's request to show on school property a video on family issues).

53. *Rosenberger*, 515 U.S. at 830-31.

54. *Id.* at 832.

55. *Id.* at 833.

56. *Id.*

57. *Id.* at 834 (citing *Regan*, 461 U.S. 540 (1983)).

58. *Id.* at 835.

ground that scarcity requires the state to allocate resources on "some acceptable neutral principle," but does not allow the state "to exercise viewpoint discrimination that is otherwise impermissible."[59] The Court also noted two dangers to First Amendment principles that the University's policy represented: (1) a danger to liberty by allowing the state to read journals to ascertain their ideas and then to classify the journals based on those ideas and (2) a danger to speech by "chilling . . . individual thought and expression."[60] In a final attempt to save its policy, the University argued that it was prohibited by the First Amendment's Establishment Clause to fund religious journals.[61] Stating that the Establishment Clause does not require "the University to deny eligibility to student publications because of their viewpoint,"[62] the Court dismissed that argument with a wave of its proverbial hand.

The Supreme Court has attempted to draw a line between regulation of indecent and obscene speech. Although the Court has stated that obscenity is not protected by the First Amendment,[63] it has not been as precise with regard to indecent speech.

In *FCC v. Pacifica*,[64] the Court upheld an FCC order that declared "indecent" a broadcast of an afternoon monologue by George Carlin containing numerous references to excretory or sexual activities or organs.[65] The Court readily discounted Pacifica's definition of "indecent" as requiring a prurient appeal, stating that it was supported by neither the language nor the history of 18 U.S.C. § 1464[66] or by precedent.[67] The Court likewise dismissed Pacifica's argument that the order unconstitutionally encompassed too much protected speech by pointing out that the FCC had restricted its holding to the facts of the case before it.[68] Pacifica next contended that nonobscene speech may not be constitutionally prohibited from radio broadcast.[69] The Court noted that simply because "society may find speech offensive is not a sufficient reason for suppressing it"[70] and that "[s]ome uses of even the

59. *Id.*
60. *Id.*
61. *Id.* at 837.
62. *Id.* at 845.
63. Roth v. United States, 354 U.S. 476, 485 (1957).
64. 438 U.S. 726 (1978).
65. *Id.* at 750-51.
66. 18 U.S.C. § 1464 (1994) (provides for a fine, imprisonment, or both for anyone who "utters any obscene, indecent, or profane language by means of radio communication").
67. *Pacifica*, 438 U.S. at 741.
68. *Id.* at 742.
69. *Id.*
70. *Id.* at 745.

most offensive words are unquestionably protected."[71] However, the Court further stated that those type of words enjoy less protection in a radio broadcast than they would in other contexts.[72] Two reasons cited by the Court for this lowered protection were the "uniquely pervasive presence" of broadcast in the lives of Americans[73] and the unique accessibility of broadcasting to children.[74] In closing, the Court noted the narrowness of its holding, focusing on the content of the broadcast and the time of day in which it aired.[75]

Upholding the proscription of obscene interstate phone communications by the Communications Commission Authorization Act of 1983,[76] the Court in *Sable Communications of California, Inc. v. FCC*[77] stated the recurring principle that "the protection of the First Amendment does not extend to obscene speech."[78] In holding unconstitutional the statute's prohibition of indecent phone calls, the Court distinguished *Pacifica* for the following reasons: *Pacifica* did not involve a complete ban on indecent broadcasts, but sought to restrict those broadcasts "to times of day when children most likely would not be exposed to [them]";[79] the court in *Pacifica* relied on the uniqueness of broadcasting in its decision;[80] and the holding in *Pacifica* was restricted to the facts of that case.[81] The Government asserted that anything less than a complete ban on indecent phone communications would not protect children from the messages contained in them.[82] The Court dismissed that assertion on the ground that there was insufficient evidence to show that the Government could not use other, less restrictive means to meet its compelling interest.[83]

The Court in *Reno v. ACLU*[84] held unconstitutional section 223(a)(1)-(B) of the Communications Decency Act ("CDA") of 1996,[85] which

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71. *Id.* at 746.
72. *Id.* at 748.
73. *Id.*
74. *Id.* at 749.
75. *Id.* at 750. The Court noted the time of day of the broadcast, the composition of the audience, and the difference between radio and other media when narrowing its holding. *Id.*
76. 47 U.S.C. § 223(b)(1)(A) (1994).
77. 492 U.S. 115 (1989).
78. *Id.* at 124.
79. *Id.* at 127 (quoting *Pacifica*, 438 U.S. at 733).
80. *Id.*
81. *Id.* at 128.
82. *Id.*
83. *Id.* at 128-29.
84. 117 S. Ct. 2329 (1997).
85. 47 U.S.C. § 223(a) (Supp. 1997).

criminalized the communication of indecent material via the Internet.[86] The Court distinguished the CDA from the statute at issue in *Ginsberg v. New York*,[87] which upheld a conviction for violation of a New York statute prohibiting the sale to minors of materials that are obscene, on the ground that the effects of the statute in *Ginsberg* were much narrower than those of the CDA.[88] Likewise, the Court distinguished the CDA from the FCC's order in *Pacifica* on three grounds: the order in *Pacifica* targeted a specific broadcast,[89] did not impose criminal sanctions,[90] and dealt with a medium that had not received much First Amendment protection.[91] The Court also found a distinction between the CDA and the zoning ordinance in *Renton* on the ground that the ordinance in *Renton* dealt with the "secondary effects" of content.[92]

Noting especial concern about the vagueness of the CDA because it was a content-based criminal statute, the Court disregarded the Government's assertion that the CDA was no more vague than the obscenity standard promulgated by the Court in *Miller v. California*,[93] which created a three-part test for obscenity in response to a conviction under a California statute that made knowing distribution of obscene material a misdemeanor. Furthermore, the Court held that the CDA unreasonably burdened adult communication in an effort to protect minors from indecent material.[94] The Court also discussed the unprecedented breadth of the CDA's coverage of communication, which was not limited to commercial speech or entities, and the Government's failure to explain why a less restrictive prohibition would be ineffective.[95] The Government's attempts to limit the overbreadth of the CDA were quickly dismissed by the Court.[96] First, the Court found that the Government's argument that the prohibited speech could be communicated on the Worldwide Web because there were "ample 'alternative channels'" for persons to engage in the restricted speech was irrelevant because a "time, place, and manner analysis is . . . inapplicable" when speech is regulated based on content.[97] Second, it reasoned that the Govern-

86. *Reno*, 117 S. Ct. at 2351.
87. 390 U.S. 629 (1968).
88. *Reno*, 117 S. Ct. at 2341.
89. *Id.* at 2342.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 2345 (citing Miller v. California, 413 U.S. 15 (1973)).
94. *Id.* at 2346.
95. *Id.* at 2347-48.
96. *Id.* at 2348.
97. *Id.*

ment's argument that the statute's knowledge requirements limit the statute's application was "untenable."[98] Third, it found the Government's argument that "scientific, educational, or other redeeming material" would escape the "indecent" and "patently offensive" prohibitions of the CDA lacked support.[99] The Court severed the unconstitutional proscription on "indecent" transmissions, retaining the portion prohibiting "obscene" transmissions.[100]

In addition to the distinction between indecent and obscene speech, the Court has likewise tried to create a distinction between the government as subsidizer and the government as regulator. When the government subsidizes a program and chooses to exclude from its subsidy certain ideas or viewpoints, it does not thereby discriminate based on viewpoint.[101]

In *Regan v. Taxation with Representation of Washington*,[102] a unanimous Court upheld Internal Revenue Code section 501(c)(3),[103] which does not allow tax exemptions to organizations that engage in a substantial amount of lobbying.[104] The Court began its analysis by noting that "tax exemptions and tax deductibility are forms of subsid[ies]."[105] A nonprofit corporation that was denied tax-exempt status under section 501(c)(3) argued that denying tax-exempt status to an organization that exercised its constitutional right was unconstitutional under *Speiser v. Randall*.[106] The corporation also argued that the prohibition on lobbying by section 501(c)(3) organizations violated the Equal Protection Clause of the Fifth Amendment because veterans' organizations could receive tax-exempt status under section 501(c)(19) and were allowed to engage in substantial lobbying activities.[107] Addressing the first argument, the Court held that Congress had not infringed on any First Amendment rights, but, rather, had simply

98. *Id.* at 2349.
99. *Id.*
100. *Id.* at 2351.
101. Rust v. Sullivan, 500 U.S. 173, 193 (1991).
102. 461 U.S. 540 (1983).
103. 26 U.S.C. § 501(c)(3) (1994).
104. *Regan*, 461 U.S. at 551.
105. *Id.* at 544. "A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions." *Id.*
106. *Id.* at 545 (citing Speiser v. Randall, 357 U.S. 513 (1958) (striking California's requirement of a loyalty oath to receive an abatement of property tax for veterans)).
107. *Id.* at 546-47.

refused to fund the exercise of those rights, which is constitutional.[108] With regard to the equal protection argument, the Court held that the Code did not create "any suspect classification" and, thus, refused to apply strict scrutiny to the statute.[109] The Court also stated that even though the corporation might not have as much money as it would like or as much as it would need to exercise its rights to the extent it wished, the Constitution "'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'"[110]

The Court in *FCC v. League of Women Voters of California*[111] held section 399 of the Public Broadcasting Act[112] unconstitutional for violating the First Amendment's protection of speech.[113] A nonprofit corporation challenged section 399's ban on editorializing by noncommercial broadcasting stations receiving funding from the Corporation for Public Broadcasting.[114] Noting the unique characteristics of broadcasting,[115] the Court applied what some scholars might term "middle scrutiny."[116] The Court began its analysis by stating that section 399's ban was "specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection"[117] and that the ban was content-based because "[a] wide variety of noneditorial speech . . . [was] plainly not prohibited."[118] The Government argued that the ban was necessary to protect noncommercial broadcasting stations receiving federal funding from becoming merely "vehicles for government propagandizing" and to protect them from "private interest groups wishing to express their own partisan viewpoints."[119] Looking to legislative history to address the first

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108. *Id.* at 545-46. "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.*

109. *Id.* at 548-49. "We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.*

110. *Id.* at 550 (quoting Harris v. McRae, 448 U.S. 297, 318 (1980)).

111. 468 U.S. 364 (1984).

112. 47 U.S.C. §§ 390-399 (1994 & Supp. II 1996).

113. *League of Women Voters*, 468 U.S. at 386.

114. *Id.* at 370-71 n.7.

115. *Id.* at 377 ("spectrum scarcity").

116. *Id.* at 380. The Court required the restriction to be "narrowly tailored to further a substantial government interest." *Id.*

117. *Id.*

118. *Id.* at 383.

119. *Id.* at 384-85. The Court readily dismissed the Government's second asserted interest, finding that the ban did not substantially advance that interest because stations could still broadcast their views by controlling the selection of programs and guests, and finding that the interest was sufficiently protected by, for example, the FCC's fairness doctrine. *Id.* at 396-99.

purported interest, the Court noted congressional concern about noncommercial broadcasting stations "becoming forums devoted solely to programming and views that were acceptable to the Federal Government."[120] However, continuing to examine legislative history, the Court doubted whether section 399 was intended to alleviate that concern[121] and found that section 399 did not substantially advance the Government's purported interest.[122] The Court also held that section 399's ban was not "sufficiently tailored" to the Government's interests "to justify its substantial interference with broadcaster's speech."[123] Finding that the ban applied to many private stations as well as to those stations receiving federal funding and noting that legislative history illustrated congressional concern about influence from the federal government, the Court dismissed the Government's argument that the ban also helped to protect stations from influence by state or local governments.[124] Furthermore, the Court found other, less restrictive means to satisfy the Government's interest.[125] Finally, the Court addressed the Government's analogy to *Regan*,[126] finding *Regan* distinguishable on the ground that section 399 banned all editorializing by stations receiving federal funding, whereas the tax in *Regan* allowed an organization "to segregate activities according to the source of its funding."[127]

In *Arkansas Writers' Project, Inc. v. Ragland*,[128] the Court found unconstitutional the newspaper and magazine exemptions of the Arkansas sales tax.[129] Readily dismissing the State's contention that

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120. *Id.* at 386.

121. *Id.* at 387.

122. *Id.* at 388. The interest was met, instead, by the "elaborate structure established by the Public Broadcasting Act," as well as by provisions in the Act prohibiting the interference by government entities and employees in the operation of the stations and of the Corporation. *Id.* at 388-89 (citing sections 396(c)-(g), 398(a)).

123. *Id.* at 392-93. "Section 399 includes within its grip a potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidacies, or elections." *Id.*

124. *Id.* at 393-94.

125. *Id.* at 395. Congress could require stations to air disclaimers stating that the opinions given were not representative of the federal government's views. *Id.*

126. 461 U.S. 540 (1983). *See* text accompanying *supra* notes 35-43.

127. *League of Women Voters*, 468 U.S. at 400.

128. 481 U.S. 221 (1987).

129. *Id.* at 234. Exemptions "include[d] 'gross receipts or gross proceeds derived from the sale of newspapers . . . and religious, professional, trade and sports journals and/or publications printed and published within [Arkansas] . . . when sold through regular subscriptions.'" *Id.* at 224 (quoting ARK. STAT. ANN. § 84-1904(f) (codified at ARK. CODE ANN. § 26-52-401(4) (1997)) and (j) (codified as amended at ARK. CODE ANN. § 26-52-401(14) (1997))).

the appellant lacked standing,[130] the Court proceeded to address the State's arguments supporting the tax scheme. The State first contended that the tax was "a generally applicable economic regulation" because it imposed a nominal tax on the receipts of sales of all tangible property.[131] The Court, on the other hand, declared the tax discriminatory because it allowed an exemption for certain types of magazines while taxing others.[132] The Court found this selective taxation based on the content of magazines "particularly repugnant to First Amendment principles."[133] The State then sought to justify the tax by propounding several compelling state interests: a general state interest in raising revenue,[134] an interest in encouraging "fledgling" publishers,[135] and a need to "foster communication" in the state.[136] Taking the first purported interest, the Court stated that an interest in raising revenue was insufficient to support selective treatment of members of the press.[137] With regard to encouraging "fledgling" publishers, the Court found that the tax was not "narrowly tailored to achieve that end" because it was "both overinclusive and underinclusive."[138] Finally, the Court held that an interest to foster communication was not achieved by the tax because it only fostered information about "religion, sports, and professional and trade matters."[139]

Upholding the Department of Health and Human Services' ("HHS") regulations prohibiting the use of funds obtained under Title X of the Public Health Service Act[140] for abortion-related activities, the Court in *Rust v. Sullivan*[141] answered the petitioners' first argument by holding that the Secretary of HHS had the authority to promulgate the regulations and that his construction of the statute was permissible.[142] Petitioners, Title X grantees and doctors supervising the disbursement

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130. *Id.* at 227.

131. *Id.* at 228-29. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439 (1991) (upholding a generally applicable tax in the face of a First Amendment challenge).

132. *Id.* at 229. *See supra* note 126.

133. *Ragland*, 481 U.S. at 229.

134. *Id.* at 231.

135. *Id.* at 232.

136. *Id.* (quoting Tr. of Oral Arg. at 32; *Ragland* at 232 (No. 85-1370)).

137. *Id.*

138. *Id.* "[E]ven the most lucrative and well-established religious, professional, trade, and sports journals do not pay sales tax. By contrast, struggling general interest magazines and struggling specialty magazines on subjects other than those specified in [the statute] are ineligible for favorable tax treatment." *Id.*

139. *Id.*

140. 42 U.S.C. §§ 300 to 300a-6 (1994).

141. 500 U.S. 173 (1991).

142. *Id.* at 184.

of Title X funds on their own and their patients' behalf, also asserted that the regulations were impermissibly viewpoint discriminatory because they prohibited recipients of Title X funds from discussing "abortion as a lawful option."[143] Applying *Maher v. Roe*,[144] the Court stated that the government was simply exercising its authority to "subsidize family planning services" and declining to "'promote or encourage abortion.'"[145] The Court noted that the government has the authority to limit the scope of its programs and that the regulations were designed to enforce those limits.[146] Distinguishing *Rust* from *Arkansas Writers' Project*, the Court stated that *Rust* related to the government's refusal to fund activities outside the scope of its program and was not an attempt to "singl[e] out a disfavored group on the basis of speech content."[147] Likewise, noting that the government did not deny a benefit, but only ensured that funds were spent for the purpose for which they were earmarked, the Court rejected petitioners' argument that the regulations' restrictions on subsidizing abortion-related speech constituted a condition on a benefit by requiring the relinquishment of a constitutional right.[148] Finally, the Court found that a Title X grantee was not prohibited from discussing abortion-related issues, but was only required to do so separately from activities receiving federal funding.[149]

III. THE COURT'S RATIONALE

In *Finley*, the Court held constitutional the decency and respect criteria contained in the 1990 Amendment to the National Foundation on the Arts and Humanities Act ("Act") of 1965.[150] The Court deter-

143. *Id.* at 192.

144. 432 U.S. 464 (1977) (holding constitutional Connecticut's policy of funding childbirth but not nontherapeutic abortions for indigent women).

145. *Rust*, 500 U.S. at 193-94. "To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect." *Id.* at 194.

146. *Id.* at 193-94. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.

147. *Id.* at 194.

148. *Id.* at 196. "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." *Id.* at 198.

149. *Id.* at 198.

150. *Finley*, 118 S. Ct. at 2172.

mined that the Amendment was facially valid because it was neither viewpoint discriminatory nor void for vagueness.[151]

After setting forth the heavy burden that respondents (plaintiffs below) had to carry in order to have the Amendment declared facially unconstitutional,[152] the Court began its analysis by answering respondents' contention that the criteria required the NEA to deny funding based on viewpoint discrimination.[153] The Court held that the criteria did not constitute viewpoint discrimination.[154] First, the criteria were merely advisory, as evidenced by the plain language of the statute,[155] its legislative history,[156] and the aim of the Amendment.[157] Second, the Court distinguished *R.A.V.* on the grounds that it related to a statute carrying criminal penalties and that the statute had the effect of suppressing views on disfavored topics; whereas, the Amendment at issue did not silence speech because it did not pose an express threat of censorship.[158] The Court also noted that because the criteria were subjective and, thus, susceptible to a myriad of interpretations, they did not represent viewpoint discrimination.[159] Citing permissible applications of the criteria[160] and noting that these applications "would not alone be sufficient to sustain the statute against . . . First Amendment challenge[s]," the Court nevertheless refused to find viewpoint discrimination because of the limited resources of the NEA, which require it to be highly selective.[161]

Applying *Rosenberger*, the Court stated that although the two cases were similar in that they both related to scarce resources, the similarity ended there.[162] Unlike the University's policy of paying publication costs for all journals except those manifesting a religious viewpoint, the NEA's grant process is competitive and "does not indiscriminately

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151. *Id.* at 2179-80.

152. *Id.* at 2175. "To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Id.*

153. *Id.*

154. *Id.* at 2176.

155. 20 U.S.C. § 954(d)(1) ("taking into consideration").

156. *Finley*, 118 S. Ct. at 2176. The Amendment was a result of a bi-partisan counter to proposed amendments that would have eviscerated the NEA or its grant-making authority. *Id.*

157. *Id.* The Court stated that the Amendment's aim was to reform selection procedures and not to preclude speech. *Id.*

158. *Id.*

159. *Id.* at 2176-77.

160. *Id.* at 2177. For example, the decency criterion is often used in educational programs. *Id.*

161. *Id.* at 2177-78.

162. *Id.* at 2178.

'encourage a diversity of views from private speakers.'"[163] Additionally, the Act's "artistic excellence" criterion, which is "inherently content based," differs from the University's criterion that the journals be "'related to the educational purpose of the University.'"[164]

After stating that it was not confronted with an "as-applied" constitutional challenge and that the case would have been different if the criteria were used to suppress a disfavored view,[165] the Court next distinguished between the government's using "impermissible" criteria in regulating speech and in subsidizing speech.[166] Citing *Regan*, the Court stated that Congress has "wide latitude to set spending priorities."[167] In an analogy to *Rust*, the Court held that Congress had simply chosen to fund one program but was not required to fund an alternative one and that Congress's choice did not constitute viewpoint discrimination.[168]

Finally, the Court addressed whether the Amendment was void for vagueness.[169] Conceding that the terms of the criteria were vague and might not be acceptable in "a criminal statute or regulatory scheme," the Court declared that the criteria were not unconstitutionally vague in the Amendment.[170] The Court noted that although the vagueness of the terms may cause artists to "conform their speech" to that which may be more acceptable to the NEA in order to acquire funding, Congress is not constitutionally required to be precise when it acts "as patron rather than as sovereign."[171] Furthermore, the Court held that if the Amendment were declared vague and struck for being unconstitutionally so, then all other government programs subsidizing scholarships and grants and employing similar criteria would be unconstitutional as well.[172]

In a concurring opinion, Justice Scalia, joined by Justice Thomas, first stated that the majority ignored the plain language of the statute when it agreed with the NEA that the Amendment is simply advisory.[173] The Amendment reads that "the Chairperson 'shall ensure'" that the criteria are taken into consideration in the award of grants; thus, the

163. *Id.* (quoting *Rosenberger*, 515 U.S. at 834).
164. *Id.* (quoting *Rosenberger*, 515 U.S. at 824).
165. *Id.* at 2178.
166. *Id.* at 2179.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 2179-80.
171. *Id.* at 2179.
172. *Id.* at 2179-80.
173. *Id.* at 2180 (Scalia, J., concurring).

criteria must always be considered.[174] Scalia further wrote that the Amendment is constitutional because it does not abridge speech; rather, it only inhibits the funding of certain types of speech.[175] Like the majority, Scalia also noted that nearly all congressional funding legislation is discriminatory but is still constitutional.[176] However, unlike the majority, he stated that neither the First Amendment nor the void for vagueness doctrine applies to the government's funding of speech.[177]

Justice Souter dissented, stating that the decency and respect criteria mandate viewpoint-based discrimination, which is unconstitutional under the First Amendment, by requiring "conformity with mainstream mores," thereby excluding the expression of mores outside the mainstream.[178] He also stated that the NEA's interpretation of the statute, allowing compliance with the statute by having diverse values and backgrounds represented by the membership of the advisory panels, was incorrect.[179] The plain language of the statute and legislative history supported the reading that the "decency and respect" criteria were not an optional consideration but a mandatory one, and having diverse panels did not fulfill that mandate.[180] Additionally, the NEA's reading would have rendered superfluous section 959(c), which requires diverse panels.[181] Justice Souter also noted that the majority's statement that the Amendment does not preclude awarding funds to applicants who did not meet the criteria was inaccurate because this type of occurrence had been the catalyst for the Amendment.[182] He determined that the First Amendment applies the same even when the government is acting as a patron of the arts so that Congress may still not promote one viewpoint at the expense of another.[183] Justice Souter stated that the overbreadth doctrine, which strikes a statute if even one of its applications is impermissible, should be applied because the criteria have the effect of "'chill[ing] . . . individual thought and expression.'"[184] Fear of denial of an application will cause some artists to alter their work in order to

174. *Id.* at 2180-81.
175. *Id.* at 2182.
176. *Id.* at 2183.
177. *Id.* at 2184.
178. *Id.* at 2187 (Souter, J., dissenting).
179. *Id.* at 2188.
180. *Id.* at 2188-89.
181. *Id.* at 2189.
182. *Id.*
183. *Id.* at 2191.
184. *Id.* at 2195 (quoting *Rosenberger*, 515 U.S. at 835).

meet the criteria or will cause them to forego seeking funding from the NEA.[185]

IV. IMPLICATIONS

The NEA plays a prominent role in the art world. Before its funding was recently reduced, the NEA had granted sixty percent of the applications it had received.[186] Even after the recent cutbacks, the NEA is still "the largest single source of national leadership and support for the arts in America."[187] Additionally, NEA funding acts as a "major catalyst" for private funding of the arts.[188]

As a result, the NEA's denial of funding has significant ramifications. For the art world, receiving NEA funding is the equivalent of receiving the Nobel Peace Prize,[189] and when an applicant is denied funding by the NEA, that artist's ability to receive private funding is significantly reduced.[190] Because private funding groups tend to be rather conservative,[191] art that is deemed "indecent" or "disrespectful" and is denied NEA funding because it challenges traditionally-held ideas or viewpoints is much less likely to receive private funds.

Because the NEA looks at all of an artist's work, including prior work, in deciding whether to award funding, artists will be forced to conform work produced with private funds to that which the NEA is more likely to deem decent and respectful.[192] Thus, the criteria not only have the effect of chilling creative expression that might shake the status quo, but also "invite mediocrity, blandness, and homogenization."[193] That fact is compounded by the amount of influence the NEA possesses in the art

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185. *Id.* at 2195.

186. Brief for Respondents at 3, NEA v. Finley, 118 S. Ct. 2168 (1998) (No. 97-371).

187. Brief of Twenty-Six Arts, Broadcast, Library, Museum and Publishing Amici Curiae in Favor of Respondents at 15, *Finley* (No. 97-371).

188. Brief for Respondents at 9, *Finley* (No. 97-371). In 1993, NEA grants of approximately "$120 million generated matching funds estimated at $1.1 billion." *Id.*

189. Brief Amicus curiae for the Rockefeller Foundation in Support of Respondents at 6, *Finley* (No. 97-371). "NEA awards confer an imprimatur of quality on an artist or organization, significantly improving the grantee's chances of securing outside funding in the future." *Id.*

190. Brief for Respondents at 9, *Finley* (No. 97-371).

191. Brief Amicus Curiae of Volunteer Lawyers of the Arts and Various Arts Organizations in Support of Respondents at 18 n.9, *Finley* (No. 97-371).

192. Brief for Respondents at 48, *Finley* (No. 97-371). "Any artist, curator, theater producer, or publisher who thinks she might apply for an NEA grant in the future will be chilled in the art that she creates today, for fear that an NEA official's judgment that it is 'indecent' or 'disrespectful' will count against her later." *Id.*

193. Brief Amicus Curiae of Volunteer Lawyers for the Arts and Various Arts Organizations in Support of Respondents at 20, *Finley* (No. 97-371).

world.[194] Unfortunately, artists will have difficulty trying to satisfy the criteria given the disparity of views on what actually constitutes decency and respect.[195]

Furthermore, the criteria upheld in *Finley* seem to cut against the NEA's statutory purpose, which is "to foster private artistic expression by creating 'a climate encouraging freedom of thought, imagination and inquiry [and] also the material conditions facilitating the release of this creative talent.'"[196]

ANDREA K. MCKOY

194. *See supra* note 185.

195. *Finley*, 118 S. Ct. at 2176-77.

196. Brief of Twenty-Six Arts, Broadcast, Library, Museum and Publishing Amici Curiae in Favor of Respondents at 11, *Finley* (No. 97-371) (quoting 20 U.S.C. § 951 (1994)).