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COURTSIDE

ADAM CANDEUB

At the end of June, the Supreme Court decided *NEA v. Finley*, in which it upheld the constitutionality of requiring the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants. Four grant applicants had brought suit. The district court ruled in favor of applicants, and the Ninth Circuit affirmed, ruling that the requirement was unconstitutional because it discriminated on the basis of viewpoint and was impermissibly vague. The Supreme Court reversed.

Writing for the Court, Justice O'Connor rejected the applicants' argument that the statutory provision at issue requires viewpoint discrimination. Rather, she found that the provision requires the NEA "merely to take 'decency and respect' into consideration." Justice O'Connor reached this conclusion by comparing the "decency and respect" provision to another provision that prohibits the NEA from funding obscenity. She stated that the "decency and respect" provision, which only requires the NEA to "tak[e] into consideration" certain standards, "stands in sharp contrast" to the obscenity provision, which prohibits certain classes of speech "in no uncertain terms." She also relied upon legislative history showing that the disputed provision "was a bipartisan . . . counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority," and was not meant to impose "viewpoint-based standards for funding." Accordingly, she construed the statutory provision as merely "advisory."

Justice O'Connor also reasoned that because the decency and respect provision is "susceptible to multiple interpretations," it does not "effectively preclude or punish the expression of particular views," and thus does not "engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a

statute on its face." She contrasted the provision with other legislation, ruled unconstitutional by the Court, that suppressed "distinctive" ideas and messages and thus presented "more evident and more substantial dangers" of invidious viewpoint discrimination.

Interpreting the statutory provision as advisory and open-ended, the Court concluded that the provision is unlikely to "introduce any greater element of selectivity than the determination of 'artistic excellence' itself," which the statute also requires.

Therefore, the Court concluded, any First Amendment concerns would be too "hypothetical" to justify declaring the provision unconstitutional. The

Court also reserved judgment on the reasonableness of the NEA's interpretation of the statute, under which "the formulation of diverse advisory panels is sufficient to comply with Congress' command."

Finally, the Court concluded that the statute is not unconstitutionally vague. Although recognizing that the First and Fifth Amendments protect speakers "from arbitrary and discriminatory enforcement of vague standards," the Court concluded that when "the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." The Court added that in the context of selective subsidies, like the NEA grants, it is often impossible to "legislate with clarity."

Justice Scalia, joined by Justice Thomas, concurred in the judgment but sharply criticized the majority's opinion. Quoting the old saw "The operation was a success, but the patient died," Justice Scalia stated that "[w]hat such a procedure is to medicine, the Court's opinion in this case is to law." He criticized the majority opinion for finding the "decency and respect" language merely advisory. Rather, Justice Scalia argued that the statutory provision required content- and viewpoint-based discrimination, but was nonetheless constitutional.

Justice Scalia concluded that the

statute required that the decency and respect factors "always be considered," and thus constituted viewpoint discrimination. He further argued that the legislative history, to the extent it was relevant at all, confirmed that the legislation sought to "disfavor," and therefore discriminate against such "offensive productions as Serrano's 'Piss Christ,' the portrayal of a crucifix immersed in urine, and Mapplethorpe's show of lurid homoerotic photographs."

The Court concluded that the statute is not unconstitutionally vague.

Commenting that "[a]vant-garde artistes such as respondents remain entirely free to *pater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it," Justice Scalia argued that the statute was constitutional even though it was discriminatory. In his most fundamental disagreement with the majority, he distinguished between "the denial of taxpayer subsidy" and "measures aimed at the suppression of dangerous ideas" and argued that the First Amendment simply does not apply to mere denials of subsidies.

Justice Souter alone dissented. Like Justices Scalia and Thomas, he disagreed with the majority's "advisory" reading of the statute and argued that the statute did require viewpoint discrimination. But, unlike Justices Scalia and Thomas, he concluded that the discrimination was unconstitutional. Justice Souter argued that *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) applies. In *Rosenberger*, the Court held that the University of Virginia could not discriminate on the basis of editorial viewpoint in underwriting the speech of student-run publications. Similarly, Justice Souter argued that the government could not engage in viewpoint discrimination in the awarding of grants.

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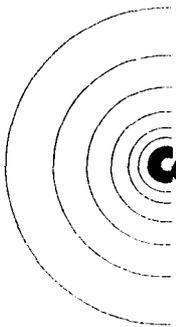
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