

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
Petitioners v. KAREN FINLEY, ET AL.

CASE NO: 97-371 c.f.

PLACE: Washington, D.C.

DATE: Tuesday, March 31, 1998

PAGES: 1-55

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

APR 07 1998

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'98 APR -7 P2:32

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 NATIONAL ENDOWMENT FOR THE :
4 ARTS, ET AL., :
5 Petitioners :
6 v. : No. 97-371
7 KAREN FINLEY, ET AL. :
8 - - - - -X
9 Washington, D.C.
10 Tuesday, March 31, 1998
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:17 a.m.
14 APPEARANCES:
15 SETH P. WAXMAN, ESQ., Solicitor General, Department of
16 Justice, Washington, D.C.; on behalf of the
17 Petitioners.
18 DAVID D. COLE, ESQ., Washington, D.C.; on behalf of the
19 Respondents.
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
SETH P. WAXMAN, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
DAVID D COLE, ESQ.	
On behalf of the Respondents	28

1 P R O C E E D I N G S

2 (10:17 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-371, National Endowment
5 for the Arts v. Karen Finley.

6 General Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONERS

9 GENERAL WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 Since 1965, the National Endowment for the Arts
12 has selectively provided funding, public funding to arts
13 projects on the basis of aesthetic judgments in order to
14 enrich the lives of all Americans and to expand public
15 appreciation of art.

16 The question presented in this case is whether,
17 although it thus expands the opportunities for artistic
18 expression, Congress violated the First Amendment -- that
19 is, made a law abridging the freedom of speech -- by
20 directing that the NEA ensure, quote, that artistic
21 excellence and artistic merit are the standards by which
22 applications are judged, taking into consideration general
23 standards of decency and respect for the diverse beliefs
24 and values of the American public.

25 QUESTION: I'm sure the Court is as anxious as I

1 am to get to the merits. Do you think this case is
2 justiciable? You took the position in the district court
3 that it was not. What's the best case that makes it
4 justiciable, if you think it is? It seems remote.

5 GENERAL WAXMAN: Justice Kennedy --

6 QUESTION: It seems not concrete. The plaintiff
7 originally sued because he didn't get a grant. Then he
8 sued because he did. I don't know what he wants to
9 produce. I don't know if he's been denied any specific
10 rights.

11 GENERAL WAXMAN: Justice --

12 QUESTION: I'm dealing with the question in the
13 abstract, it seems.

14 GENERAL WAXMAN: Justice Kennedy, I think that
15 the question of Article III justiciability, which of
16 course must be measured at the time the suit was commenced
17 or, really, in this case at the time that the pre-1990
18 claims were settled and all that was left in the case was
19 the facial challenge to the 1990 act, is a close one.

20 In the district court we challenged Article III,
21 the Article III justiciability issue both on the question
22 that these plaintiffs lacked standing and also because,
23 since the agency had adopted an interpretation that
24 basically concluded that the 1990 language was satisfied
25 merely by the creation of extremely diverse panels and

1 that decency and respect were not expressly to be
2 considered as independent factors at the grant-making
3 stage, the agency was in the process.

4 Process was in effect no different than it had
5 been before, other than the fact that the diversity of the
6 panels was greater, and therefore our view was that the
7 agency was not doing anything significantly different
8 after the district court ruled than before it ruled, and
9 conversely, if this Court were to agree with our statutory
10 interpretation, the agency would be permitted, although
11 not compelled, to continue to operate the program
12 precisely the way it's operating now.

13 Now, this was not an issue that we raised on
14 appeal or we raised in our petition in this Court, and I
15 wish I could tell you exactly why that's the case, because
16 I wasn't there, but I suspect that we concluded that there
17 was some marginal concreteness, or some marginal
18 justiciability here by the fact that before -- between the
19 time that the 1990 amendment was passed in November of '90
20 and the time that the district court issues, issued its
21 injunction in June of 1992, we actually read to the panel
22 members the language of the statute.

23 We then told them that they were to judge
24 applications on the basis of artistic merit and artistic
25 excellence, and that the other words, the words that

1 follow taking into consideration, had been taken into
2 consideration by the creation of extremely diverse panels
3 in which each person from a diverse walk of life would
4 bring his or her own individual sensibilities to that
5 question, and we argued to the district court that, in
6 fact, the case was not justiciability. There was no
7 injury and there was no redressability possible.

8 In fact, during the period between the time that
9 the 1990 amendments were passed and the district court
10 ruled, three of the five plaintiffs in this case received
11 grants under the standard that they had concluded was
12 unconstitutional and a fourth had benefited indirectly
13 from a grant given to an organization.

14 QUESTION: General Waxman, let me see if I
15 understand you. I gather that you have no doubts on the
16 Article III question if your interpretation of the statute
17 is not correct --

18 GENERAL WAXMAN: That is correct.

19 QUESTION: -- in this facial challenge. The
20 statute which says, taking into account, requires that in
21 passing upon the applications the panels, diverse though
22 they may be, must take into account decency and the --

23 GENERAL WAXMAN: Respect for the diverse beliefs
24 and values of the American people.

25 QUESTION: -- beliefs and values, right, okay.

1 GENERAL WAXMAN: Yes. If, in fact our --

2 QUESTION: Do they, indeed, ensure that they
3 have decent panels? I mean, how do they go about ensuring
4 that?

5 (Laughter.)

6 GENERAL WAXMAN: They ensure -- Justice Scalia,
7 they ensure that they have diverse panels, and --

8 QUESTION: But that's just half of it. I mean,
9 it says decency, standards of decency and respect for
10 diverse beliefs and values.

11 I -- it's -- I guess it's easy to get diverse --
12 maybe it's easy to get diverse, but how do they ensure
13 decency?

14 GENERAL WAXMAN: Well, the chairperson has the
15 discretion to create the pro -- the selection procedures
16 any way she or he wants, so long as he is satisfied or
17 ensured that general standards of decency will be taken
18 into account in the process.

19 The NEA thus far has considered that, since --
20 for most people --

21 QUESTION: What do you mean, in the process?

22 GENERAL WAXMAN: In the process of --

23 QUESTION: In the process of selecting the
24 panel?

25 GENERAL WAXMAN: In the process --

1 QUESTION: How do you take into account
2 standards of decency in selecting the panel?

3 GENERAL WAXMAN: In -- no.

4 QUESTION: I don't understand how you do that.

5 GENERAL WAXMAN: In the process of deciding
6 which proposals will be granted on the basis of merit and
7 excellence, and here's how the NEA has construed the
8 statute to work.

9 The NEA Chair thus far has concluded that
10 whatever factors an individual takes into consideration in
11 deciding whether something is art, nonethe -- not to
12 mention artistically excellent and artistically merit,
13 meritorious, may be considerations of the mode and form of
14 expression in the case.

15 It's not dispositive, but if it includes a mode
16 or form of communication, the kind of thing that this
17 Court distinguished from viewpoint in Denver Area, and
18 Pacifica, and Pico, and Bethel, that it -- the NEA
19 concluded that many, if not most, if not all, certainly at
20 least some people in deciding whether something is really
21 artistically excellent or meritorious or how much it is,
22 will at least think about the mode or form of the
23 presentation that the artist is using, and that's --

24 QUESTION: Well, quite apart from the -- what
25 the NEA has done, I've got some difficulties about the

1 standing question akin to those that Justice Kennedy
2 mentioned.

3 I mean, certainly people can't just walk in off
4 the street and make a facial challenge to a statute, can
5 they? They have to have some connection with what's being
6 done under the statute.

7 GENERAL WAXMAN: Absolutely, and what's so -- I
8 don't want to use a pejorative adjective. What's so
9 unusual about this case is that the plaintiffs in the
10 case, who were very successful in forcing Congress to
11 reject what was the alternative to this amendment, the
12 Rohrabacher provision that would have prohibited the NEA
13 from funding any art that manifested certain viewpoints,
14 and Congress instead passed a compromise provision along
15 the lines of the recommendations of the independent
16 commission that it had appointed, the same organizations,
17 the same plaintiffs who were successful in the legislature
18 in defeating a viewpoint-discriminatory prohibition, have
19 challenged this provision on the grounds that our
20 interpretation, the way that the NEA has chosen to
21 interpret the statute is wrong, although it's wrong in a
22 way that benefits them.

23 QUESTION: Well, I think you can take one
24 position in the legislature and another in the courts.
25 The question is, what does the statute say, is there any

1 injury, and I --

2 GENERAL WAXMAN: What's -- right. What's
3 unusual in this case is that the courts have -- are being
4 asked to reject an interpretation, an application of the
5 statute that the agency has reasonably made and which does
6 not, concededly does not violate the First Amendment
7 rights.

8 QUESTION: Well, Mr. Waxman, could we talk about
9 the statutory language?

10 You know, just reading it, I thought it meant
11 that the chairperson of the NEA had to ensure that its --
12 that the regulations and procedures were to provide that
13 artistic excellence and artistic merit are the criteria,
14 but in considering the excellence and merit, they have to
15 take into consideration general standards of decency and
16 respect for diversity.

17 That the interpretation suggested by the agency
18 that just setting up the panels differently was enough
19 strikes me as possibly in conflict with the language of
20 the statute.

21 GENERAL WAXMAN: Well, Justice O'Connor, both
22 lower courts agreed with you. We still submit that there
23 are two possibly --

24 QUESTION: Well, if that is the meaning of the
25 statute, do we nonetheless have a justiciability question,

1 or do you think --

2 GENERAL WAXMAN: I --

3 QUESTION: -- if that's the meaning of the
4 statute we don't have a problem of justiciability?

5 GENERAL WAXMAN: I'm not sure. I know that the
6 plaintiffs would claim that insofar as any decisionmaker
7 along the line, whether it be a panel member, a council
8 member, or the chair, takes into consideration these two
9 factors, they believe that they are harmed in some way.

10 We don't think that they have demonstrated in
11 any tangible way that they have established injury, in the
12 sense that none of them suggests that they have applied
13 for an application and been denied it because an
14 impermissible reading of these -- a viewpoint-
15 discriminatory reading of these words caused it.

16 QUESTION: Well, do they have to have suffered a
17 denial?

18 I mean, their claim is that the statute on its
19 face, if read as Justice O'Connor suggested, in effect is
20 a limitation based on viewpoint which tends to and
21 reasonably will tend to affect both the production of art
22 and the applications, so that even before you get to the
23 stage of granting or denying, you in fact will have had an
24 impermissible effect. Isn't that their argument?

25 GENERAL WAXMAN: Well, I guess if we're talking

1 now simply about justiciability and not the merits, and
2 I'll restrict my comments accordingly, first of all,
3 because of the way the agency has interpreted this statute
4 before it was very shortly enjoined from doing it at all,
5 it hasn't had the occasion to define the terms general
6 standard of decency and respect for diverse values.

7 But the way in which -- if this Court were to
8 conclude that the statutory interpretation that the NEA
9 adopted was not only the best -- not the best
10 interpretation, but was an unreasonable interpretation by
11 the agency charged with carrying it out, the appropriate
12 course at this point would be to allow the agency to
13 define the terms and -- in order to determine whether or
14 not they are in fact viewpoint discriminatory at all. We
15 contend in our brief --

16 QUESTION: Now, are you suggesting that we would
17 find it nonjusticiable because they have not gone through
18 the process of defining --

19 GENERAL WAXMAN: Not because they haven't -- not
20 because they haven't gone through the process, and again
21 this falls a little bit into the merits, but I think the
22 justiciability is very much in question, because these
23 terms, general standards of decency and respect for
24 diverse beliefs and values, can be defined by the agency,
25 could readily be defined by the agency in a manner that is

1 not viewpoint discriminatory, as --

2 QUESTION: Are you saying, General Waxman, that
3 if the law is as you say it is, then nobody is being hurt
4 because these words are largely hortatory, is that
5 essentially your position, and that challengers can't say,
6 agency, you've got it wrong, you have to interpret this
7 more strictly against us than you're willing to do? Is
8 that the essence of your justiciability --

9 GENERAL WAXMAN: Well, that's -- that's the
10 essence of why we think, if our reading is right, there
11 probably is not much of an Article III case or
12 controversy.

13 QUESTION: Even if your reading is wrong, aren't
14 you saying --

15 GENERAL WAXMAN: Even if our reading --

16 QUESTION: -- that even if your reading is
17 wrong?

18 GENERAL WAXMAN: Even if -- right.

19 The point, Justice Ginsburg, that I was making
20 to Justice Souter is that even if you reject that, even if
21 you say no, what this means is that when these --

22 QUESTION: But how would we even get to that?
23 You see, if the challengers are stuck with what the agency
24 says the law is, because that's the only thing that's
25 being applied currently, how can a challenger then

1 require -- bring this question to us unless what they're
2 saying is, what's on today could be off tomorrow, and
3 that's their real concern, because you're not saying that
4 the only construction of these words is the one that
5 you're putting on it.

6 GENERAL WAXMAN: No, that's -- we're absolutely
7 not, but I think the appropriate course for this Court to
8 take if it rejects -- if it concluded that our statutory
9 interpretation was unreasonable would be to permit the
10 agency -- after all, none of these people have grants that
11 have -- this is not an as-applied challenge.

12 The appropriate course would be to permit the
13 agency to define and apply general standards of decency
14 and respect and see whether it's done in a way that could
15 be said to violate the First Amendment at all.

16 QUESTION: Hasn't it had 8 years, hasn't it had
17 8 years to do that?

18 GENERAL WAXMAN: Precisely to the contrary.
19 During the year-and-a-half period in which the language
20 was passed and the district court enjoined the agency from
21 applying it, it said, we think that this provision can be
22 satisfied -- that is, that the chairperson can ensure that
23 these things will be taken into account -- when you have a
24 diverse -- when you have a diverse group of people who
25 bring their own sensibilities to bear in making aesthetic

1 judgments.

2 Since then, the agency has been precluded from
3 doing anything. We have been under an injunction since
4 June of 1992 from implementing this statute in any way.

5 QUESTION: Even issuing a reg?

6 GENERAL WAXMAN: Of course. We can't even read
7 to panelists what the statute says.

8 QUESTION: Why didn't the Government seek a stay
9 from a single-judge injunction?

10 GENERAL WAXMAN: I think the answer -- I don't
11 know the answer to that question.

12 QUESTION: You weren't around then, either,
13 right?

14 GENERAL WAXMAN: I was around --

15 (Laughter.)

16 GENERAL WAXMAN: I was around in the physical --
17 in the existential sense I was --

18 (Laughter.)

19 GENERAL WAXMAN: I was in the process of a
20 private citizen, indeed a private lawyer very much
21 enjoying the arts in all of their manifest expressions.

22 (Laughter.)

23 QUESTION: But that's in the --

24 GENERAL WAXMAN: But let me just say this, we --

25 QUESTION: General Waxman, that's been affirmed

1 on -- that view that the law is unconstitutional been
2 affirmed on appeal, and there was a denial of rehearing en
3 banc.

4 GENERAL WAXMAN: That's true, and I think
5 that --

6 QUESTION: Nobody sought a stay from this Court.

7 GENERAL WAXMAN: And I -- if -- Mr. Chief
8 Justice, if I can just get to what I thought my -- the
9 pitch was going to be after my wind-up, the point is --

10 (Laughter.)

11 GENERAL WAXMAN: -- that the agency has never
12 see its -- the agency views what the district court did as
13 essentially enjoining it from doing something that it
14 wasn't doing, and didn't particularly think had to be
15 done, and so the only tangible way in which the agency's
16 operation of this program has been affected by the
17 district court order and the court of appeals order is
18 that when it talks to new panel members it can't read them
19 the statute, read them the words of the statute. It just
20 tells them it's artistic excellence and artistic --

21 QUESTION: General Waxman, are you trying to
22 persuade us that, even after the statute was passed,
23 Andres Serrano would have the same chance of getting a
24 grant as he did before?

25 GENERAL WAXMAN: Well, I don't know whether -- I

1 don't think we have to --

2 QUESTION: Yes, but that's what you're arguing.

3 GENERAL WAXMAN: -- decide whether he would have
4 the same chance, but what I'm suggesting is --

5 QUESTION: Well, if he has a lesser chance,
6 doesn't the -- hasn't the statute had some impact?

7 GENERAL WAXMAN: Well, I -- we don't think
8 actually that he would have a lesser chance. Congress
9 rejected -- and the legislative debate which we've
10 reprinted in our brief, in our reply brief, is very
11 instructive.

12 Congress rejected a provision that would have
13 denied funding to the Merchant of Venice or Rigoletto, or
14 D. W. Griffiths' Birth of a Nation. It wanted those
15 provisions to be funded.

16 It just wanted to make sure that in the process
17 of deciding what is the most excellent art in a program
18 which is designed to benefit the American people and
19 expose people, including young people and people in rural
20 areas, to the benefits of artistic expression, that those
21 things were taken into account.

22 The agency's view, Justice Stevens, is that many
23 people -- I know it would be true of me -- who go into an
24 evaluative process as to whether something is art, or
25 excellent art, or meritorious art, or art that's -- that

1 the Congress can spend taxpayer's money to fund, one of
2 the things you think about is the mode of expression. It
3 can either add to or detract from the merit of the
4 proposal, but it's not irrelevant.

5 QUESTION: It seems to me you're going to have a
6 hard time persuading me the statute's essentially
7 meaningless, which is basically what you're arguing.

8 GENERAL WAXMAN: Well, we -- I feel like I'm
9 here making an argument in support of a -- we didn't --

10 QUESTION: I have the same problem.

11 Suppose the statute said that each and every
12 grant must meet the following standard, and then it set
13 forth the statutory standard, and that each panel member
14 will certify that as to each particular artist whose work
15 has been approved, that this statute has been met, is your
16 position the same?

17 GENERAL WAXMAN: In other words, if, instead of
18 having two criteria with considerations, there were four
19 criteria that had -- and each thing had to be judged?

20 QUESTION: Yes.

21 GENERAL WAXMAN: Our position would be twofold.
22 One, because we think that standards of decency, or
23 general standards of decency and respect for diverse
24 values can be defined in a manner that does not take
25 account of viewpoint, that is not viewpoint

1 discriminatory, for that reason the provision would be
2 constitutional.

3 As a fallback, if you didn't -- if you thought
4 that it was absolutely unreasonable for the agency to
5 conclude that those provisions couldn't be defined without
6 reference to viewpoint, you would have to then address --
7 we would have to then address the very difficult question
8 that Congress thought in passing this compromise you
9 wouldn't have to address.

10 That is, do we have a statute that establishes
11 independent funding prohibitions that can't be viewed
12 other than as viewpoint discriminatory, and we do
13 acknowledge that that would pose additional First
14 Amendment concerns, but they were concerns that this --
15 that Congress didn't intend that this Court address.

16 One of the reasons -- the Congress was told with
17 respect to the Rohrabacher amendment that it may very well
18 be constitutional. There was a big argument among the
19 First Amendment scholarly community, and they very
20 deliberately chose a provision which they thought was
21 going to not embroil the agency in a kind of litigation,
22 endless litigation over its meaning, much the same as the
23 decision that the --

24 QUESTION: Well, I would think --

25 GENERAL WAXMAN: If I may just finish -- much

1 the same as the decision the Combined Federal Campaign
2 made in the Cornelius case.

3 QUESTION: I would think that most artists would
4 say that they're interested primarily in mode of
5 expression. Did Picasso have a viewpoint? I think he was
6 more, much more interested in mode of expression.

7 GENERAL WAXMAN: I --

8 QUESTION: It seems to me ultimately that's an
9 unstable line you're drawing.

10 GENERAL WAXMAN: Well, I do respectfully
11 disagree to this extent, Justice Kennedy. There is no
12 doubt that in considering the content of a work of art,
13 you consider the subject matter, the medium, the mode of
14 expression, and the viewpoint expressed if it's a kind of
15 art that is expressing a viewpoint, or could be
16 interpreted as expressing a viewpoint.

17 This Court has recognized on several occasions
18 that decency, in the term that it was used in *Pacifica*,
19 and *Denver Area*, and *Pico*, and *Bethel*, and *Kohlmeier* is
20 distinct from viewpoint. Yes, use of indecent speech or
21 controversial speech may very, very well add to or
22 subtract from the force of the message, but it's not the
23 same as viewpoint, and similarly --

24 QUESTION: Well, will you help me with some just
25 basic inquiry?

1 If the Federal Government wants to buy artwork
2 to put in the Capitol, I assume it can go out and select
3 works of art that its committee thinks are decent and
4 represent diversity, and can spend the Federal money for
5 that kind of art, and it isn't open to challenge, is that
6 right?

7 GENERAL WAXMAN: Assuredly right.

8 QUESTION: Now, if the Government wants to
9 educate children, or people, and chooses to speak by way
10 of paying for certain kind of artistic expression as a
11 means of the Government speaking and educating, and
12 insists on decency and diversity, it can do that.

13 GENERAL WAXMAN: We believe that it can.

14 QUESTION: All right. Here, it has a limited
15 amount of money to give away. Now, what is it that makes
16 it impossible for the Government to give a limited amount
17 of money away on the same standards? Is the Government
18 not speaking? I mean, what do we have here?

19 GENERAL WAXMAN: I will state the obvious and
20 suggest that the question probably would be better
21 answered then my friend Professor Cole, because we don't
22 think that there is any constitutional problem here with
23 this provision.

24 I mean, the argument on the other side boils
25 down to the fact that 3 years ago this Court decided, in a

1 context that is wholly different than the one we have
2 here, a case called Rosenberger v. The Rectors and
3 Visitors of the University of Virginia.

4 QUESTION: General Waxman, may I suggest that
5 maybe there is something different? Maybe if a faithful
6 executive is trying to carry out the legislative will, the
7 message that comes from the whole history of this is,
8 don't fund Serrano or Mapplethorpe.

9 I think that that's the concern, and not the
10 Rosenberger v. Rust, or -- that, if I am an executive who
11 is trying to be faithful to the legislative will, I know
12 what prompted this, so why don't I say, well, that's my
13 marching orders. I know what the legislature didn't want.

14 GENERAL WAXMAN: Well, I guess I have a couple
15 of answers: 1) a chairperson could have done that.
16 Chairpersons, as the other side points out, were highly
17 cognizant of political concerns without the enactment of
18 this rather innocuous amendment. That's number 1.

19 Number 2, what the 1990 legislative debate shows
20 is exactly the opposite. The point of view expressed in
21 the Rohrabacher amendment and previously challenged by
22 Representative Biaggi that certain art that is viewpoint
23 discriminatory or denigrates religion or races won't be
24 funded was rejected.

25 And the legislative history is shot through and

1 through with the fact that what Congress wanted was what
2 the independent commission it had appointed was -- had
3 suggested, which is that you change the procedures, you
4 not employ specific content or viewpoint prohibitions, and
5 to the extent you want things like decency to be
6 considered, it be embedded in the subjective, aesthetic
7 judgments about what's meritorious and excellent.

8 QUESTION: General Waxman, I thought your first
9 response to Justice Ginsburg's question was going to be,
10 so what? I thought that what you responded to Justice
11 O'Connor was, the Government doesn't have to buy
12 Mapplethorpe pictures to hang up itself, and so also when
13 it funds the arts, it doesn't have to fund Mapplethorpe,
14 and it can say we don't like Mapplethorpe.

15 GENERAL WAXMAN: I knew that that would -- I
16 knew you would support --

17 (Laughter.)

18 QUESTION: You knew I was going to say that.

19 GENERAL WAXMAN: May I reserve the balance of my
20 time for rebuttal?

21 QUESTION: But why isn't he right? Why isn't he
22 right?

23 GENERAL WAXMAN: Well --

24 QUESTION: I mean, does the Government have to
25 or not?

1 GENERAL WAXMAN: Well, if you're talking
2 about -- if we're talking about whether Congress can say,
3 okay, the NEA is going to apply the following standards
4 but it's not going to fund Robert Mapplethorpe, that
5 raises many different constitutional concerns that don't
6 have -- in other words, going to single out one particular
7 person, at that point may violate -- it would have to be
8 scrutinized under, for example, the Due Process Clause as
9 to whether there is a rational basis --

10 QUESTION: Well, is it constitutionally
11 principled for the Government to do this by a wink-wink,
12 nudge-nudge --

13 (Laughter.)

14 QUESTION: -- approach, which is what you're
15 suggesting, that they pass a statute which is really
16 meaningless, but everybody knows what it means?

17 (Laughter.)

18 GENERAL WAXMAN: That's -- that is not -- that's
19 not, Justice Kennedy, what we're suggesting was done here.

20 What was done -- this is -- almost a year ago to
21 the day I was up here arguing the constitutionality of the
22 Communications Decency Act, which was an act that Congress
23 passed without any hearings and without any debate, and
24 without hearing anybody's views, and was just stuck in on
25 the floor in a rather quick attempt to deal with a serious

1 problem.

2 In this case, Congress did just the opposite,
3 and it rejected the kind of provision for -- whether it
4 had to or didn't have to, it rejected as more First-
5 Amendment controversial the Rohrabacher provision that had
6 been urged. It --

7 QUESTION: But you assume that that's
8 unconstitutional. What if Congress doesn't name names?
9 It just says, no crucifixes in urine. Can it say that?

10 GENERAL WAXMAN: I -- Justice Scalia, I --

11 QUESTION: Can it say that? It doesn't name any
12 names.

13 GENERAL WAXMAN: Justice Scalia, I am not
14 assuming -- I'm not standing up here arguing that it would
15 be unconstitutional. I think it may well be that in the
16 unique circumstances of public arts funding, unlike the
17 very different context in Rosenberger, viewpoint
18 distinctions may be constitutionally defensible.

19 QUESTION: So you in effect are saying, I'm not
20 going to rest my argument on the claim that the Government
21 is hiring anyone to speak here, or that what it's doing
22 bears an analogy to that, or that in fact the Government
23 is buying art, or that it bears an analogy to that.

24 You're really saying there's a third rule, the
25 Government -- the Government as distributor of largesse to

1 the arts, and that, that's a third rule, but you're not
2 saying that the Government is either the speaker or the
3 buyer, is that correct?

4 GENERAL WAXMAN: Well, I think the Government is
5 the buyer. The --

6 QUESTION: What's it buying?

7 GENERAL WAXMAN: It's buying --

8 QUESTION: What does it own, when it -- after
9 the grant?

10 GENERAL WAXMAN: This -- I think this is a
11 distinction without a difference to our argument, but it
12 is -- in fact it's behaving as Governments and sovereigns
13 as arts patrons always have.

14 When the Medicis --

15 QUESTION: Yes, but the King ended up with the
16 picture. The Government is not ending up with the
17 picture.

18 GENERAL WAXMAN: The King did not necessarily
19 end up with the picture. The Medicis, for example, funded
20 art that was placed in -- all over their realm. The same
21 people who funded and allowed to flourish the great
22 university, that forum, that community where free and
23 uninhibited expression of debate and views occurred, were
24 also arts patrons, and they bought and funded what they
25 liked.

1 QUESTION: Okay, then you are saying there is an
2 art patrons rule. I take it you're not hitching your
3 argument either to the claim that the Government is
4 buying, or the claim that the Government -- what is my --

5 QUESTION: Is speaking.

6 QUESTION: Is itself the speaker.

7 GENERAL WAXMAN: Well, I think --

8 QUESTION: Is hiring its speaker.

9 GENERAL WAXMAN: Yes. To the -- if you're
10 asking whether we're suggesting that there is something
11 unique, particularly unique about the Government funding
12 of the arts for First Amendment purposes, the answer is
13 yes, and for a variety of reasons.

14 For one thing, and most critically, this is an
15 area in which Government decisionmakers are expected and
16 required to make precisely the kind of aesthetic judgments
17 which are subjective and may take content and viewpoint
18 into account, and which the Government is ordinarily
19 prohibited from doing. It's --

20 QUESTION: Why are they required, when they're
21 not required to do this at all? Why is the Government
22 required, when the Government is not required, in fact, to
23 fund the arts at all? Where does the requirement come
24 from?

25 GENERAL WAXMAN: Unless you have a program,

1 Justice Souter, in which the NEA is simply disestablished
2 because of a belief that the First Amendment wouldn't
3 permit funding of the arts, or unless you can set up a
4 program where, you know, the proposals that were on the
5 thickest paper, or the ones that came in, you know, first,
6 were granted, inevitably the decisionmaker is going to be
7 making the kind of aesthetic judgments that, for example,
8 were not permitted in Ward v. Rock Against Racism.

9 Thank you.

10 QUESTION: Thank you, General Waxman.

11 Mr. Cole, we'll hear from you.

12 ORAL ARGUMENT OF DAVID D. COLE

13 ON BEHALF OF THE RESPONDENTS

14 MR. COLE: Mr. Chief Justice, and may it please
15 the Court:

16 As the Government concedes, this is not a case
17 about Government speech. It's not a case about the
18 Government hiring artists to express a Government message.
19 Rather, it's a case about the Government selectively
20 subsidizing private speakers speaking for themselves, and
21 in that setting two fundamental First Amendment principles
22 apply, and the decency and respect clause violates both.

23 First, the Government subsidies must be
24 viewpoint neutral. This Court has held that in Lamb's
25 Chapel, in Rosenberger, in Cornelius. Second --

1 QUESTION: Rosenberger was quite different from
2 this, Mr. Cole. There were just a number of -- everybody
3 was going to get something in Rosenberger except the
4 people who wanted to do something religious.

5 Here, the Government doesn't purport to say
6 we're going to give grants to everybody that wants it.
7 There's a definite degree of selectivity involved.

8 MR. COLE: There is a degree of selectivity
9 involved here but there was also, Chief Justice Rehnquist,
10 a degree of selectivity in Rosenberger. Approximately 9
11 of 10 applicants were funded in Rosenberger.
12 Approximately 2 of 7 applicants to the NEA are granted.

13 QUESTION: Well, that's quite different, I
14 think.

15 MR. COLE: Well, I don't think it makes a
16 constitutional difference, and I think when you look at
17 Rosenberger what Rosenberger -- what the University of
18 Virginia did was, they said we will fund not any student
19 activity that comes to us, but any student activity that
20 is related to the educational purposes of the university,
21 so they were selective. They were making a content --

22 QUESTION: Yes, but I think the Chief Justice is
23 correct in making the distinction. There were no
24 aesthetic judgments to be made. There were no subjective
25 judgments to be made. If you were a student newspaper you

1 fell within the program. That was it.

2 And I think your statistical analysis is
3 misleading, because NEA statistics are that they have only
4 so many funds and they base it on aesthetics. The only
5 reason there were rejections in Rosenberger was, they just
6 didn't -- they weren't the kind of newspapers that were
7 under the program. So I think the Chief Justice is
8 correct in the distinction he makes.

9 MR. COLE: Well, I'm not sure, Justice Kennedy,
10 whether there's a distinction between a Government agency
11 which makes judgments about educational purpose and
12 allocates funds selectively on that basis, or academic
13 merit, which is what public universities do in hiring, and
14 the NEA, which makes judgments base on artistic merit.
15 All of those programs are selective. They take into
16 account consent.

17 But what this Court has said is that you cannot,
18 when subsidizing private speakers, when the Government is
19 not speaking itself you cannot engage in viewpoint bias,
20 and the decency --

21 QUESTION: Mr. Cole, may I suggest that one is a
22 prize or an award, and there really is a difference
23 between a student activity fund that if you're not social
24 and you're engaged in some respectable student activity
25 you get it, and an award, a prize, a grant that is highly

1 selective, and so I quite agree, and I don't think that
2 you can maintain that this is just like Rosenberger, just
3 like a bulletin board, anybody can put up their names or
4 draw from that pot except certain people.

5 MR. COLE: Okay. Well, Justice Ginsburg, I
6 don't think that the Rosenberger case would have come out
7 differently if the University of Virginia had a limited
8 pot of funds and it said, based on that limited pot of
9 funds we're going to give funding to those groups which
10 best further the educational purpose of the university,
11 and they -- it turned out they gave them out to 2 of 7
12 applicants, but they excluded religious groups, groups
13 with religious perspectives.

14 That would still be an exclusion based upon
15 viewpoint, which would be impermissible, and I don't think
16 the case would have come out differently if it 2 of 7.
17 The Court in Rosenberger said scarcity is not a
18 justification for viewpoint discrimination.

19 QUESTION: You're a better predictor than I am.
20 I'm not at all sure it wouldn't have come out differently.

21 MR. COLE: Well, you were in the majority, so
22 you're a better predictor than I am, I'm sure.

23 (Laughter.)

24 MR. COLE: But I don't think it should come --

25 QUESTION: My record's not too good. I

1 wouldn't --

2 (Laughter.)

3 QUESTION: I wouldn't give up too easily.

4 MR. COLE: I guess -- I think what's important
5 is that it shouldn't come out differently, and here's why.
6 What Rosenberger recognized is that there's a very big
7 difference between the Government speaking for itself,
8 where it can make viewpoint decisions, as in Rust, and
9 where the Government is facilitating private expression.

10 Why is that an important distinction? I think
11 that's an important distinction because there's a very big
12 difference between the Government participating in the
13 marketplace with the power of its ideas on the one hand
14 and the Government engaging in a kind of deceptive
15 ventriloquism in which it says it's funding a broad range
16 of private expression, but then it uses viewpoint-based
17 criteria to exclude --

18 QUESTION: Well, I'm not sure that decency or
19 indecency is viewpoint-based. I'm not sure it is.

20 MR. COLE: Well, I think --

21 QUESTION: I'm not sure that respect is a
22 viewpoint-based thing, or diversity. I don't even know
23 what this is, and you've got some kind of a facial
24 challenge here, I gather.

25 MR. COLE: Right. Well, I --

1 QUESTION: And I'd be interested for you to also
2 pursue whether we have an Article III case at all here.

3 MR. COLE: Okay. All right. Well, I'll answer
4 your questions in turn, Justice O'Connor.

5 First, decency and respect are inherently, as
6 they are used in this statute, viewpoint-based. It's
7 common definition of decency is conformity to accepted
8 standards of morality. That's what this Court said in
9 *Pacifica*, conformity to accepted standards of morality.
10 Whether something conforms or not is a viewpoint
11 distinction. The same subject matter, if it's treated in
12 a way that conforms to accepted standards of morality, is
13 permitted. If it's treated through a viewpoint that does
14 not, it is not.

15 The same with respect. The respect clause
16 requires respect of American beliefs and values. If you
17 are disrespectful of American beliefs and values, you are
18 disadvantaged. If you are respectful, you are advantaged.
19 That -- the Court in *Rosenberger* said the way you
20 distinguish viewpoint --

21 QUESTION: All right. You don't argue here that
22 somehow the Government has created some kind of a public
23 forum, do you?

24 MR. COLE: Well, in essence that's what the NEA
25 says. The NEA says that the arts funding --

1 QUESTION: I didn't hear that.

2 MR. COLE: Well, they say in their mission
3 statement, and it's cited in the record, that they create
4 a national forum for the exchange of ideas by creating, as
5 is set forth in the statute, a --

6 QUESTION: Well, I'm talking about a public
7 forum in the sense that this Court had used it. Do you
8 take the position and rely on some kind of forum analysis,
9 then?

10 MR. COLE: Well, I think under forum analysis we
11 win. I think under forum analysis, as this Court has
12 said, even if you conclude that it's a nonpublic forum --

13 QUESTION: That doesn't answer the question. Do
14 you take the position that this funding program creates
15 some kind of public forum?

16 MR. COLE: I --

17 QUESTION: Yes or no.

18 MR. COLE: We take the position that whether it
19 does or not we prevail because this Court has held that
20 even in a nonpublic forum viewpoint neutrality is required
21 and vagueness is not permitted, and these criteria are
22 both viewpoint-based and vague.

23 If I could address your standing question and
24 Justice Kennedy's standing question for a moment, I think
25 City of Lakewood v. Plain Dealer Publishing clearly

1 establishes that there is standing here.

2 In Plain Dealer -- in that case, the Court held
3 that there was standing to bring a facial challenge by a
4 newspaper who sought access to a benefit for speech,
5 access to news boxes.

6 There was no requirement that the city give out
7 news boxes, but they had given a Government official
8 unbridled discretion in how to give them out, and the
9 Court held in that case that the chill from unbridled
10 discretion statutes and the allocation of benefits to
11 speech -- no entitlement, benefits to speech -- can be
12 alleviated only through a facial challenge.

13 QUESTION: I think I would agree with you if the
14 agency here were applying the law the way you interpret it
15 and the way the lower courts interpret it, but I do find
16 it strange that where you have a law which, however
17 unrealistic the interpretation may be, the agency says,
18 we're interpreting it in such a way that we will fund
19 Mapplethorpe and everything else.

20 MR. COLE: Well --

21 QUESTION: Now, that may be wrong. I don't know
22 how anybody on the other side of this issue could compel
23 the agency to do it right, but --

24 MR. COLE: Well, it certainly --

25 QUESTION: But why did that hurt you?

1 MR. COLE: Well, it hurts us for the following
2 reason, Justice Scalia. The Government has been quite
3 ambiguous about its statutory construction, and what it
4 has said is that the statutory construction it is
5 advancing to this Court today is the same statutory
6 construction that they applied for the year-and-a-half
7 before the statute was declared unconstitutional, so let's
8 look at what they did for the year-and-a-half before the
9 Court struck it down.

10 They instructed each panelist to bring their own
11 standards of decency to the table in making these
12 decisions. They went to each panel, they read them the
13 statute, they said the statute says that you must consider
14 artistic excellence and artistic merit, taking into
15 consideration general standards of decency --

16 QUESTION: Mr. Cole, may I stop you just for a
17 moment, because it sounds like you are veering away from a
18 case that would be fit for summary judgment, which is what
19 this was.

20 I take it there would be some dispute about what
21 went on.

22 MR. COLE: I think --

23 QUESTION: There was no hearing about that, to
24 develop that.

25 MR. COLE: I don't think there's --

1 QUESTION: The Government -- you're making
2 assertions today. I would certainly be interested to find
3 out what the Government's position is on it, but I thought
4 we're dealing with a ruling as a matter of law and that we
5 take the Government's position of what they say this
6 statute means.

7 That's what they say the statute means, and
8 that's what they're enforcing. That's what they
9 represented to this Court, and to say no, they're not
10 telling you the truth about what standard they're applying
11 is quite a charge to make.

12 MR. COLE: Well, Your Honor, all I can say is
13 the record is very clear. The reason that it was a
14 summary judgment is that there was no dispute about this.

15 The -- Chairman Frohnmayer testified before
16 Congress, was asked, how do you take into consideration
17 general standards of decency? He said, well, I can't --
18 I'm going to read.

19 He said, no one individual is wise enough to be
20 able to consider general standards of decency and the
21 diverse beliefs and values of the American public all by
22 his or herself. These are group decisions. They are made
23 by the National Council on the Arts as well as the
24 panelists.

25 Now, if the chair was making decisions about

1 decency in selecting panels, he wouldn't say these are
2 group decisions made by the Council on the Arts as well as
3 the panelists.

4 He was then asked, what happens if you get --

5 QUESTION: He was the chairman of the NEA at the
6 time?

7 MR. COLE: He was the Chair -- yes, Chief
8 Justice Rehnquist, he was the Chair at the time that the
9 statute was being enforced.

10 He as then asked, well, what would you do -- are
11 you advocating your responsibility in applying this
12 statute? What would you do if something came up to you
13 and it was indecent or disrespectful?

14 He said, I would send it back to the panels and
15 the council if I thought they made a mistake. So he's
16 saying, I'll look at decency to make sure that they've not
17 made a mistake.

18 The next Chair, who was also enforcing the
19 statute before it was struck down, Ms. Radice, testified
20 in Congress that she would be happy to and would apply
21 decency to the grant-making process.

22 So I think you have to look -- at this Court
23 said in Forsyth County, in a facial challenge you have to
24 look at how the agency has in fact applied the statute.
25 There's no dispute about it.

1 And they're quite vague, actually, in this Court
2 in what they say.

3 QUESTION: They're quite vague about how they
4 apply it, I agree with that, but I also found right in the
5 record what the Solicitor General just quoted was there,
6 on page 33, the instructions that they give, so if you
7 have an -- I assume you don't object to that as a
8 correct -- my basic question is, given the uncertainty
9 that you -- you started with a premise, and if I accept
10 that premise a lot flows.

11 You said, all they're doing is subsidizing
12 private views here, but in looking at the endowment
13 charter it sounds as if they have a lot they do.

14 It talks about education. It talks about grants to
15 schools. It talks about workshops. It talks about
16 teaching children. It talks about a whole host of things
17 that aren't simply that that could include giving money to
18 somebody to teach art in the public school grade 4, that
19 could include having a television program on Sesame
20 Street -- dozens of things, all right.

21 Is -- am I accurate?

22 MR. COLE: Yes.

23 QUESTION: All right. Well, if I'm accurate,
24 how can you have a facial challenge no matter how you
25 interpret indecency, because after all there are some

1 important uses where the most tough definition would
2 apply.

3 MR. COLE: Well, Justice Breyer, two points with
4 respect to that. First of all, I think you have to look
5 at the breadth of the statute. This statute does not say,
6 take into consideration decency where children are
7 involved. It requires the agency to take into
8 consideration standards of decency and American beliefs
9 and values in every application decision.

10 Secondly --

11 QUESTION: Well, we've said you can't bring a
12 facial challenge if any part of the statute can be
13 constitutionally applied.

14 MR. COLE: And our position is that this statute
15 is unconstitutional because it is viewpoint-based, it uses
16 a viewpoint-based criteria -- it would -- it would be --

17 QUESTION: If you say it could be -- the
18 language could be applied where children were involved,
19 you lose your facial challenge there.

20 MR. COLE: I don't think it could be applied
21 where children -- but what the Court could do in a -- what
22 the agency could do is decide whether a particular
23 application was suitable for children, but an application
24 could be suitable or unsuitable for children for all sorts
25 of ways that don't have to do with viewpoint.

1 What's problematic about this statute is, it
2 singles out art precisely because it has a nonconforming
3 or disrespectful viewpoint and, as this Court has said,
4 even when the Government is allocating subsidies, if it's
5 doing it to private speakers it can't skew the marketplace
6 by attempting to impost that kind of ideological screen.

7 I think --

8 QUESTION: No, that wasn't my question.

9 My question was basically, you're making a
10 facial challenge. I don't see it says all, not in my
11 version it doesn't say all, and as long as there -- the
12 problem in my mind, for you, is I can easily think of
13 some -- some instances of importance in the life of the
14 NEA where it would be obviously appropriate or lawful to
15 take into account even tough standards of decency, and the
16 other problem for you is, I don't know what the word
17 decency means.

18 It -- there's certainly a sense of decency, a
19 sense of it, in which no work of art that is good could be
20 indecent. It's very hard for me to think, if I think of
21 that sense, that a great work of art is also an indecent
22 work. I can't think of one.

23 So since we don't know either the -- let's call
24 it the horizontal meaning, or the vertical application,
25 how can we now strike the statute down on its face?

1 MR. COLE: Well, Your Honor, in the Lakewood
2 case the Government came forward and said certainly there
3 would be appropriate considerations that the mayor could
4 use in deciding how to allocate these benefits to speech.

5 The Court said that is not permissible to defeat
6 a statute which is vague and gives the agency --

7 QUESTION: Well then, should we also strike down
8 the entire NEA, because at the very beginning of it, after
9 all, there is at the very beginning all kinds of language
10 about how this has to be done with general regard for
11 taxpayer sensibilities, and do we have to strike down the
12 FCC statute because the FCC says award licenses in the
13 public interest, which has been plainly interpreted to
14 give the FCC power to do all kinds of restrictions in the
15 area of indecency.

16 I mean, there are lots of statutes on the
17 statute books that have general language that might be
18 interpreted by an agency to censor in accordance with
19 viewpoints, but the agency doesn't do it. Correctly so.

20 Do you see my point?

21 MR. COLE: Well --

22 QUESTION: My question is, why should we not
23 give them the same presumption we give to every other
24 agency? They'll do it properly, we assume, until they
25 don't.

1 MR. COLE: Well, first of all they did it, and
2 you can see how they did it --

3 QUESTION: The client got the grant.

4 MR. COLE: The client -- the way that this
5 statute -- the way that this statute was enforced, they
6 never issue a decision saying, you're denied because of
7 indecency.

8 We -- I represent the National Association of
9 Artists' Organizations, which represents 500 arts
10 institutions and individuals who have regularly applied
11 for, are denied funding by the NEA. What the -- the claim
12 is that the application of such open-ended criteria to an
13 applicant creates a chill which, as this Court held in
14 Lakewood, requires a facial challenge, and you can't sit
15 back and let that chill affect artists' speech in the
16 meantime.

17 QUESTION: And that would be so no matter how
18 the agency itself is interpreting the statute, because you
19 claim that the possibility of interpreting it to mean what
20 it says is substantial enough that artists who are
21 developing projects are not likely to develop projects
22 that would offend --

23 MR. COLE: Well --

24 QUESTION: -- the statute as it's written?

25 MR. COLE: Well, I think certainly it applies

1 here, where the agency did apply it in a way that was
2 chilling. The language does not permit an --

3 QUESTION: Let's assume the agency didn't,
4 because I think that's going to be a very controverted
5 proposition that wouldn't justify a summary judgment.
6 Let's assume that the agency has not interpreted it in
7 such a way that there's any constitutional violation of
8 the sort you allege, but let's also assume that you claim
9 that in doing it that way, they are not complying with the
10 proper interpretation of the statute, all right.

11 Would you not still make the argument that since
12 the statute says something different from what they're
13 doing, our First Amendment cases, which allow challenges
14 of a much broader scope than in other fields, would enable
15 your clients to say that they are being deterred from
16 developing indecent artistic programs by the statute
17 that's staring them in the face, even though today the
18 agency has said, well, we're going to ignore it? Isn't
19 that your argument?

20 MR. COLE: Well, that is -- that is -- we would
21 make that claim, but we would also make the claim, Justice
22 Scalia, that the Government itself took -- has taken the
23 position in this litigation that the statute is
24 indeterminate, and no one can guess how the chairperson
25 might implement the statute.

1 QUESTION: If you take Justice -- if you answer
2 yes to Justice Scalia, then you're just sticking pins into
3 yourself, basically. You're saying that things are all
4 right now, but if they really opened up on this thing,
5 they might be worse later.

6 MR. COLE: No, I'm not saying that, Chief
7 Justice Rehnquist. I'm saying if that were the case, but
8 that is not the case, as the record makes absolutely
9 clear, and secondly, I'm saying that even -- even if the
10 agency were somehow able to read a statute which says,
11 decency and respect must be considered, to say decency and
12 respect will not be considered, the agency can't do that.
13 The statute simply cannot be read in that way.

14 QUESTION: Now, I don't know why you've run away
15 from this. Suppose you had a municipal office that issues
16 parade permits, and it sets forth criteria that are
17 plainly discriminatory. It says, we won't allow parades
18 by this group, that group and the other group, and plainly
19 unconstitutional, but the agency in fact says, well,
20 that's what it says, but we don't really apply these
21 regulations that way, you'd have a First Amendment claim
22 to --

23 MR. COLE: That's right.

24 QUESTION: -- to challenge the regulation as
25 written, wouldn't you?

1 MR. COLE: That's right. All I'm suggesting in
2 response to Chief Justice Rehnquist is that is not the
3 facts of this case, but yes, we would have a claim, and I
4 think --

5 QUESTION: Now, is it the case, just to go to
6 the merits for a second, and I'm only asking these
7 questions in order to get your response, say, if, in fact
8 the NEA wants to give a grant for somebody to produce
9 something that's public work, and suppose what they do is
10 a white supremacist group, and they want to have racial
11 epithets all over the picture, and the NEA says we think
12 that's an inappropriate use of this money, in your opinion
13 is that -- and we can imagine the most -- imagine the most
14 horrible ones you can possibly think of, all right, and
15 they say, the person gets up there and he says, I'm a
16 member of the Ku Klux Klan, or whatever, and this is my
17 point of view, and is it your view that the Constitution
18 requires the NEA to fund that, that particular applicant?

19 MR. COLE: Well, Justice Breyer, the
20 Constitution doesn't require the NEA to fund anybody.

21 QUESTION: No, no -- no, I'm sorry. Everything
22 else being equal, what the person says, I'm taking you at
23 your -- you know --

24 MR. COLE: Right.

25 QUESTION: Tough, for -- take -- everything you

1 say is correct, and then we get to this point, and the
2 panel's sitting there and saying, you know, I grant you
3 it's as good a work of art as anything else, purely
4 artistically, but I don't think that this particular work
5 of art is appropriate for a school, for a public place,
6 for a television program.

7 And then the hardest case, you know, which
8 you're most likely to say yes, that's -- I agree with you,
9 but it's unconstitutional, just because what this person
10 wants to do is go and exhibit it at a lot workshops.

11 Now, what's your view on that, on the merits of
12 that constitutional question?

13 MR. COLE: Our position, Justice Breyer, is that
14 it is unconstitutional for the Government to set up the
15 funding program to fund private speech broadly and then to
16 exclude recipients based on their viewpoint.

17 Now, a -- the examples you gave might be denied
18 funding for all sorts of reasons, but if it is denied
19 because of disapproval of the viewpoint, that is what this
20 Court has said the paradigmatic First Amendment --

21 QUESTION: So do we have to distribute, or
22 exhibit it in the courthouse?

23 MR. COLE: No, because then you're engaged in
24 Government speech. Of course, the Government in making
25 decisions about its own aesthetic spaces --

1 QUESTION: If it's a program -- I have that. If
2 it's a program for a school.

3 MR. COLE: If it's a program for a school, I
4 think it's appropriate to consider what is suitable for
5 children.

6 I don't think it's appropriate to use viewpoint
7 as a proxy for suitability for children. Suitability for
8 children could take into account all sorts of -- all sorts
9 of --

10 QUESTION: So they have to exhibit my example in
11 the school.

12 MR. COLE: No. If -- if the reason that they
13 have -- well, let me step back for one moment. First, if
14 the reason is that they disapprove of the viewpoint that's
15 problematic generally.

16 In the school setting -- in the school setting
17 this court has recognized that there's a legitimate
18 inculcative role that the school board plays, and can
19 therefore make all kinds of viewpoint -- it is engaged in
20 Government speech, but the NEA -- this is not -- this is
21 a -- the breadth of this statute I think distinguishes it
22 from anything like that, and this is kind of like Romer.

23 You could imagine a situation in which it would
24 be appropriate or not unconstitutional to deny civil
25 rights protections to gays and lesbians, but the breadth

1 of the statute, the application of it across the board --

2 QUESTION: Well then -- then -- I take it then
3 that you would say that if general standards of decency
4 were left out of the statute so the statute read, NEA must
5 take into consideration respect for the diverse beliefs
6 and values of the American people, same problem,
7 unconstitutional viewpoint?

8 MR. COLE: Well, I think they have to bread
9 together, Your Honor, in --

10 QUESTION: No. No. My hypothetical is --

11 MR. COLE: Okay. I'm --

12 (Laughter.)

13 MR. COLE: On your hypothetical -- on your
14 hypothetical, Justice Kennedy, if what it means is that it
15 is favoring those artistic expressions which are --

16 QUESTION: But that's the problem, what it
17 means, that -- and that's -- the Government tells us, this
18 is what it means, and you say no, it can't mean that, and
19 two courts have said it can't mean that.

20 And yet the Government is saying, here were
21 words, decent, respect. They can be interpreted different
22 ways, and usually I thought it was the obligation of a
23 Government officer to give words a meaning that renders
24 them consistent, not inconsistent with constitutional
25 limitations, and yet you're insisting that Government

1 officers take the position with respect to these two words
2 that they interpret them in the way that would be most
3 offensive to the Constitution.

4 MR. COLE: Well, I'm just saying what they did,
5 and I'm saying that the suggestion that decency and
6 respect might be considered simply through picking diverse
7 panels and no more, and not taking decency and respect
8 even into account in choosing the panels is completely
9 inconsistent with the statute. It would render the --
10 954(d)(1) redundant of 959(c).

11 Congress in the statute said, decency and
12 respect are the criteria by which applications are to be
13 judged, in 954(d)(1). In 959(c) it said, panels shall be
14 chosen in a diverse way.

15 You can't -- they must have meant something when
16 they put the decency and respect clause in the criteria
17 subsection of the statute, and not in the panel selection.

18 QUESTION: Mr. Cole, may I ask you a question
19 about your constitutional position? We've talked a lot
20 about what the statute means.

21 Assume your meaning -- your reading of the
22 statute is entirely correct. As I understand your brief,
23 you draw this distinction between the Government as a
24 speaker and the Government subsidizing private speech, and
25 I have two questions.

1 First, if the Government has a list of topics
2 such as say no to drugs, guns are dangerous, preserve the
3 environment, one, I think you would agree they could
4 subsidize private speech by saying we want poems, plays
5 and so forth advocating those particular causes.

6 MR. COLE: Right.

7 QUESTION: And maybe have a list of 20 things.

8 Now, if they can do that by subsidizing private
9 speakers to come up with creative ways of carrying that
10 message, why can they not subsidize all other speech and
11 say, you may not contravene any of the messages we want to
12 finance?

13 MR. COLE: Well, the reason, I think, is the
14 distinction this Court drew in *Rosenberger* between
15 Government speech and facilitating private expression, and
16 when the Government comes out and says, we're engaging in
17 a Government speech program, we know, as the citizens of
18 the United States, it is the Government speaking.

19 When they hire artists to do a Say No to Drugs
20 campaign throughout the schools, et cetera, we know it's
21 the Government speaking. We can take that into account.

22 When they, by contrast, set up a program which
23 is purportedly a program to fund --

24 QUESTION: No, it isn't, because they say very
25 clearly, it's general -- for all kinds of speech you can

1 think of except topics 1 through 20. We will finance
2 those, and we will also refuse to finance those who oppose
3 those topics.

4 Now, what -- there's no mystery about what
5 they're saying. You're saying that it's kind of a
6 misleading thing because they tell everybody we're
7 subsidizing everything, but I'm saying the statute is
8 perfectly clear that there are 20 topics that may not be
9 controverted. Now, there's no misleading aspect to it.

10 MR. COLE: Well --

11 QUESTION: Why can't they do that?

12 MR. COLE: -- that was Rosenberger. In
13 Rosenberger they said, we're not funding religious
14 viewpoints.

15 QUESTION: Your whole point -- your whole case
16 rests on Rosenberger?

17 MR. COLE: Oh, I don't think so, Your Honor,
18 because in Lamb's Chapel this Court held that viewpoint
19 discrimination is not permitted in nonpublic forums. In
20 Cornelius it held the same. I think what this Court has
21 said repeatedly is that when the Government is
22 facilitating private expression it cannot engage in
23 viewpoint discrimination.

24 QUESTION: But you've just agreed it can if you
25 give a list of 20 topics that you will finance, and

1 finance private speakers to speak any way they want to on
2 those topics. It is doing it on a purely viewpoint-based
3 ground.

4 MR. COLE: Oh, well, I'm -- if you're saying --

5 QUESTION: They're financing private speech on
6 the 20 topics they want to --

7 MR. COLE: If they're -- Justice Stevens, if
8 they're funding topics, that's subject matter. That's
9 permissible.

10 QUESTION: No, they're funding artists, but
11 artists who just portray these particular 20 topics that
12 they've designated.

13 MR. COLE: Right. Topics -- there's no problem
14 with topics. The Court has held that repeatedly. It's
15 viewpoint discrimination which is impermissible, and it's
16 when you take one side or another on a given subject
17 matter.

18 Under this statute, if you -- if an artists has
19 a -- presents a nude which is disrespectful or indecent,
20 that viewpoint is disadvantaged. If it's respectful or
21 decent, it's advantaged. That is viewpoint
22 discrimination.

23 And finally, I'd like to say the Court has
24 consistently required --

25 QUESTION: Well, it's surely viewpoint

1 discrimination if you say, I'll finance a program that
2 says don't -- say no to drugs, but I won't finance one
3 that says say yes to drugs. That's viewpoint
4 discrimination.

5 MR. COLE: That is, and then that would be the
6 Government speaking and we would know that. But the
7 Government -- if you think about private expression in
8 this country, virtually every form of important private
9 expression is funded by the Government. The print press
10 gets mailing privileges. The broadcast press gets
11 licenses. The public broadcasting gets taxpayer dollars.
12 The public --

13 QUESTION: I see where you're going there. Can
14 I give you -- just 30 seconds on the subject of the Ninth
15 Circuit opinion. Why is it that the word decency or
16 respect is somehow more vague than the words, artistic
17 excellence?

18 MR. COLE: Well, for two reasons, Justice
19 Breyer. First, artistic merit has been applied by a
20 profession so that there is a set of people, the people
21 who are --

22 QUESTION: You mean, people who are
23 professionals know more about what's artistically good
24 than the average person? I would have thought there's a
25 strong view, isn't there, that what is good and beautiful

1 is accessible to everyone?

2 MR. COLE: Well, I think there's a strong view,
3 Your Honor, that artistic merit, like academic merit, and
4 like character and fitness --

5 QUESTION: Oh, my good -- but if the Government
6 says what we want is that which ordinary people believe is
7 beautiful, doesn't the Government have a right to fund
8 that kind of program?

9 MR. COLE: I think what the Government does not
10 have the right to do is to exclude viewpoints which it --

11 QUESTION: We're talking only about -- I'm
12 talking about the -- sorry. You're --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole.
14 The case is submitted.

15 (Whereupon, at 11:18 a.m., the case in the
16 above-entitled matter was submitted.)
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

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

CASE NO: 97-371

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Fedele-----

(REPORTER)