524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500, 66 USLW 4586, 98 Cal. Daily Op. Serv. 3222, 98 Cal. Daily Op. Serv. 4921, 98 Daily Journal D.A.R. 6957, 11 Fla. L. Weekly Fed. S 675
(Cite as: 524 U.S. 569, 118 S.Ct. 2168)

Supreme Court of the United States
NATIONAL ENDOWMENT FOR THE ARTS, et al., Petitioners,
v.
Karen FINLEY, et al.
No. 97-371.

Argued March 31, 1998.
Decided June 25, 1998.

Performance artists and artists' organizations brought action against National Endowment for the Arts (NEA), claiming that denials of grant applications violated artists' constitutional rights. The United States District Court for the Central District of California, A. Wallace Tashima, J., 795 F.Supp. 1457, granted summary judgment for artists. NEA appealed. The Court of Appeals for the Ninth Circuit, 100 F.3d 671, affirmed. Rehearing and suggestion for rehearing en banc were denied, 112 F.3d 1015. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) statute requiring NEA to ensure that artistic excellence and artistic merit are criteria by which grant applications are judged, taking into consideration general standards of "decency and respect" for diverse beliefs and values of the American public, did not inherently interfere with First Amendment rights so as to be facially invalid, and (2) statute was not unconstitutionally vague.

Reversed and remanded.

Justice Ginsburg joined in part.

Justice Scalia filed opinion concurring in the judgment, in which Justice Thomas joined.

Justice Souter filed dissenting opinion.

West Headnotes

[1] Constitutional Law 92 ⇐1038

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1038 k. Freedom of Speech, Expression, and Press. Most Cited Cases
(Formerly 92k48(4.1))
Claimants bear heavy burden in advancing facial First Amendment challenge to statute, and, to prevail, must demonstrate substantial risk that application of statutory provision will lead to the suppression of speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐1571

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1571 k. Government Funding. Most Cited Cases
(Formerly 92k90.1(1))

United States 393 ⇐82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Statute requiring Chairperson of the National Endowment for the Arts (NEA) to ensure that artistic excellence and artistic merit are criteria by which grant applications are judged, taking into consideration general standards of "decency and respect" for diverse beliefs and values of the American public, does not inherently interfere with First Amendment rights of free expression so as to be facially invalid. U.S.C.A. Const.Amend. 1; National Foundation on

the Arts and the Humanities Act of 1965, § 5(d)(1), 20 U.S.C.A. § 954(d)(1).

[3] Statutes 361 ⇐61

361 Statutes
361I Enactment, Requisites, and Validity in General
361k57 Determination of Validity of Enactment
361k61 k. Presumptions and Construction in Favor of Validity. Most Cited Cases
Supreme Court is reluctant to invalidate legislation on basis of its hypothetical application to situations not before the Court.

[4] Constitutional Law 92 ⇐1571

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1571 k. Government Funding. Most Cited Cases
(Formerly 92k90.1(1))

United States 393 ⇐82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Although First Amendment has application in subsidy context, Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake, and, so long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⇐1571

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1571 k. Government Funding. Most Cited Cases
(Formerly 92k90.1(1))

United States 393 ⇐82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way; in doing so, Government has not discriminated on basis of viewpoint, but has merely chosen to fund one activity to exclusion of the other. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⇐1571

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1571 k. Government Funding. Most Cited Cases
(Formerly 92k90.1(1))

Constitutional Law 92 ⇐4108

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)4 Government Property, Facilities, and Funds
92k4108 k. Public Funds; Grants and

Loans. Most Cited Cases
(Formerly 92k291.6)

United States 393 ⇐82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
Statute requiring National Endowment for the Arts (NEA) to ensure that artistic excellence and artistic merit are criteria by which grant applications are judged, taking into consideration general standards of "decency and respect" for diverse beliefs and values of the American public, was not unconstitutionally vague in violation of First and Fifth Amendments; statute involved selective subsidies rather than any criminal or regulatory prohibitions, and it merely added some imprecise considerations to an already subjective selection process. U.S.C.A. Const.Amends. 1, 5; National Foundation on the Arts and the Humanities Act of 1965, § 5(d)(1), 20 U.S.C.A. § 954(d)(1).

[7] Constitutional Law 92 ⇐1524

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1524 k. Vagueness. Most Cited Cases
(Formerly 92k90(3))

Constitutional Law 92 ⇐4034

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4034 k. Speech, Press, Assembly, and Petition. Most Cited Cases
(Formerly 92k274.1(1))
Under First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. U.S.C.A. Const.Amends. 1, 5.

[8] Statutes 361 ⇐47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
When Government is acting as patron rather than as sovereign, consequences of statutory imprecision are not constitutionally severe. U.S.C.A. Const.Amends. 1, 5.

****2169 *569** *Syllabus*[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The National Foundation on the Arts and the Humanities Act of 1965 vests the National Endowment for the Arts (NEA) with substantial discretion to award financial grants to support the arts; it identifies only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to ... creativity and cultural diversity," "professional excellence," and the encouragement of "public ... education ... and appreciation of the arts." See 20 U.S.C. §§ 954(c)(1)-(10). Applications for NEA ****2170** funding are initially reviewed by advisory panels of experts in the relevant artistic field. The panels report to the National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. In 1989, controversial photographs that appeared in two NEA-funded exhibits prompted public outcry over the agency's grant-making procedures. Congress reacted to the

controversy by inserting an amendment into the NEA's 1990 reauthorization bill. The amendment became § 954(d)(1), which directs the Chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." The NEA has not promulgated an official interpretation of the provision, but the Council adopted a resolution to implement § 954 (d)(1) by ensuring that advisory panel members represent geographic, ethnic, and esthetic diversity. The four individual respondents are performance artists who applied for NEA grants before § 954(d)(1) was enacted. An advisory panel recommended approval of each of their projects, but the Council subsequently recommended disapproval, and funding was denied. They filed suit for restoration of the recommended grants or reconsideration of their applications, asserting First Amendment and statutory claims. When Congress enacted § 954(d)(1), respondents, joined by the National Association of Artists' Organizations, amended their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. The District Court granted summary judgment in favor of respondents on their facial constitutional challenge to § 954(d)(1). ***570** The Ninth Circuit affirmed, holding that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments.

Held: Section 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles. Pp. 2175-2180.

(a) Respondents confront a heavy burden in advancing their facial constitutional challenge, and they have not demonstrated a substantial risk that application of § 954(d)(1) will lead to the suppression of free expression, see *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 2917-2918, 37 L.Ed.2d 830. The premise of respondents' claim is that § 954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The provision, however, simply adds "considerations" to the grant-making process; it does not preclude awards to projects that might be deemed "indecent" or "disrespectful," nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application. Regardless of whether the NEA's view that the formulation of diverse advisory panels is sufficient to comply with Congress' command is in fact a reasonable reading, § 954(d)(1)'s plain text clearly does not impose a categorical requirement. Furthermore, the political context surrounding the "decency and respect" clause's adoption is inconsistent with respondents' assertion. The legislation was a bipartisan proposal introduced as a counterweight to amendments that would have eliminated the NEA's funding or substantially constrained its grant-making authority. Section 954(d)(1) merely admonishes the NEA to take "decency and respect" into consideration, and the Court does not perceive a realistic danger that it will be utilized to preclude or punish the expression of particular views. The Court typically strikes down legislation as facially unconstitutional when the dangers are both more evident and more substantial. See, *e.g., R.A.V. v. St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305. Given the varied interpretations of the "decency and respect" criteria urged by the parties, and the provision's vague exhortation to "take them into consideration," it seems unlikely that § 954(d)(1) will significantly compromise First Amendment values.

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" and the "respect" prongs of § 954(d)(1). It is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. See, *e.g.,* ****2171***Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853, 871, 102 S.Ct. 2799, 2810, 73 L.Ed.2d 435. And the statute already provides that the agency must take "cultural diversity" into

account. References to permissible applications would not alone be sufficient to sustain the statute, ***571** but neither is the Court persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account are a consequence of the nature of arts funding; the NEA has limited resources to allocate among many "artistically excellent" projects, and it does so on the basis of a wide variety of subjective criteria. Respondent's reliance on *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 837, 115 S.Ct. 2510, 2520-2521, 132 L.Ed.2d 700-in which the Court overturned a public university's objective decision denying funding to all student publications having religious editorial viewpoints-is therefore misplaced. The NEA's mandate is to make esthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*. Moreover, although the First Amendment applies in the subsidy context, Congress has wide latitude to set spending priorities. See, *e.g., Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 2002-2003, 76 L.Ed.2d 129. Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, the Court will uphold it. Pp. 2175-2179.

(b) The lower courts also erred in invalidating § 954(d)(1) as unconstitutionally vague. The First and Fifth Amendments protect speakers from arbitrary and discriminatory enforcement of vague standards. See *NAACP v. Button*, 371 U.S. 415, 432-433, 83 S.Ct. 328, 337-338, 9 L.Ed.2d 405. Section 954(d)(1)'s terms are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any forbidden area in the context of NEA grants. As a practical matter, artists may conform their speech to what they believe to be the NEA decisionmaking criteria in order to acquire funding. But when the Government is acting as patron rather than sovereign, the consequences of imprecision are not constitutionally severe. In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, to accept respondents' vagueness argument would be to call into question the constitutionality of the many valuable Government programs awarding scholarships and grants on the basis of subjective criteria such as "excellence." Pp. 2179-2180.

100 F.3d 671, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, KENNEDY, and BREYER, JJ., joined, and in all but Part II-B of which GINSBURG, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post,* p. 2180. SOUTER, J., filed a dissenting opinion, *post,* p. 2185.
***572** Seth P. Waxman, Washington, DC, for petitioners.

David D. Cole, Brooklyn, NY, for respondents.

For U.S. Supreme Court briefs, see:1998 WL 11935 (Pet.Brief)1998 WL 47281 (Resp.Brief)1998 WL 103383 (Reply.Brief)

Justice O'CONNOR delivered the opinion of the Court.

The National Foundation on the Arts and the Humanities Act of 1965, as amended in 1990, 104 Stat. 1963, requires the Chairperson of the National Endowment for the Arts (NEA) to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). In this case, we review the Court of Appeals'***573** determination that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is ****2172** void for vagueness under the First and Fifth

Amendments. We conclude that § 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.

I

A

With the establishment of the NEA in 1965, Congress embarked on a "broadly conceived national policy of support for the ... arts in the United States," see § 953(b), pledging federal funds to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of ... creative talent." § 951(7). The enabling statute vests the NEA with substantial discretion to award grants; it identifies only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts." See §§ 954(c)(1)-(10).

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

***574** Since 1965, the NEA has distributed over $3 billion in grants to individuals and organizations, funding that has served as a catalyst for increased state, corporate, and foundation support for the arts. Congress has recently restricted the availability of federal funding for individual artists, confining grants primarily to qualifying organizations and state arts agencies, and constraining subgranting. See Department of the Interior and Related Agencies Appropriations Act, 1998, § 329, 111 Stat. 1600. By far the largest portion of the grants distributed in fiscal year 1998 were awarded directly to state arts agencies. In the remaining categories, the most substantial grants were allocated to symphony orchestras, fine arts museums, dance theater foundations, and opera associations. See National Endowment for the Arts, FY 1998 Grants, Creation & Presentation 5-8, 21, 20, 27.

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

When considering the NEA's appropriations for fiscal year 1990, Congress reacted to the controversy surrounding the ***575** Mapplethorpe and Serrano photographs by eliminating $45,000 from the agency's budget, the precise amount contributed to the two exhibits by NEA grant recipients. Congress

also enacted an amendment providing that no NEA funds "may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism,**2173 the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 738-742. The NEA implemented Congress' mandate by instituting a requirement that all grantees certify in writing that they would not utilize federal funding to engage in projects inconsistent with the criteria in the 1990 appropriations bill. That certification requirement was subsequently invalidated as unconstitutionally vague by a Federal District Court, see *Bella Lewitzky Dance Foundation v. Frohnmayer,* 754 F.Supp. 774 (C.D.Cal.1991), and the NEA did not appeal the decision.

In the 1990 appropriations bill, Congress also agreed to create an Independent Commission of constitutional law scholars to review the NEA's grant-making procedures and assess the possibility of more focused standards for public arts funding. The Commission's report, issued in September 1990, concluded that there is no constitutional obligation to provide arts funding, but also recommended that the NEA rescind the certification requirement and cautioned against legislation setting forth any content restrictions. Instead, the Commission suggested procedural changes to enhance the role of advisory panels and a statutory reaffirmation of "the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us." See Independent Commission, Report to Congress on the NationalEndowment *576 for the Arts 83-91 (Sept.1990), 3 Record, Doc. No. 51, Exh. K (hereinafter Report to Congress).

Informed by the Commission's recommendations, and cognizant of pending judicial challenges to the funding limitations in the 1990 appropriations bill, Congress debated several proposals to reform the NEA's grant-making process when it considered the agency's reauthorization in the fall of 1990. The House rejected the Crane Amendment, which would have virtually eliminated the NEA, see 136 Cong. Rec. 28656-28657 (1990), and the Rohrabacher Amendment, which would have introduced a prohibition on awarding any grants that could be used to "promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion" or "of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin," *id.,* at 28657-28664. Ultimately, Congress adopted the Williams/Coleman Amendment, a bipartisan compromise between Members opposing any funding restrictions and those favoring some guidance to the agency. In relevant part, the Amendment became § 954(d)(1), which directs the Chairperson, in establishing procedures to judge the artistic merit of grant applications, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." FN*

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

"No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that-

"(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and"

"(2) applications are consistent with the

> purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded."

*577 The NEA has not promulgated any official interpretation of the provision, but in December 1990, the Council unanimously adopted a resolution to implement § 954(d)(1) merely by ensuring that the members of the advisory panels that conduct the initial review of grant applications represent geographic, ethnic, and esthetic diversity. See Minutes of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in App. 12-13; Transcript of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in *id.,* at 32-33. John Frohnmayer, then Chairperson of the NEA, also declared that he would "count on [the] procedures" ensuring diverse membership on the **2174 peer review panels to fulfill Congress' mandate. See *id.,* at 40.

B

The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before § 954(d)(1) was enacted. An advisory panel recommended approval of respondents' projects, both initially and after receiving Frohnmayer's request to reconsider three of the applications. A majority of the Council subsequently recommended disapproval, and in June 1990, the NEA informed respondents that they had been denied funding. Respondents filed suit, alleging that the NEA had violated their First Amendment rights by rejecting the applications on political grounds, had failed to follow statutory procedures by basing the denial on criteria other than those set forth in the NEA's enabling statute, and had breached the confidentiality of their grant applications through the release of quotations to the press, in violation of the Privacy Act of 1974, 5 U.S.C. § 552(a). Respondents sought restoration of the recommended grants or reconsideration of their applications, as well as damages for the alleged Privacy Act violations. When Congress enacted § 954(d)(1), respondents, now joined by the National Association of Artists' Organizations (NAAO), amended *578 their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. First Amended Complaint, ¶ 1.

The District Court denied the NEA's motion for judgment on the pleadings, 795 F.Supp. 1457, 1463-1468 (C.D.Cal.1992), and, after discovery, the NEA agreed to settle the individual respondents' statutory and as-applied constitutional claims by paying the artists the amount of the vetoed grants, damages, and attorney's fees. See Stipulation and Settlement Agreement, 6 Record, Doc. No. 128, pp. 3-5.

The District Court then granted summary judgment in favor of respondents on their facial constitutional challenge to § 954(d)(1) and enjoined enforcement of the provision. See 795 F.Supp., at 1476. The court rejected the argument that the NEA could comply with § 954(d)(1) by structuring the grant selection process to provide for diverse advisory panels. *Id.,* at 1471. The provision, the court stated, "fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.,* at 1472. Reasoning that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency,' " the court concluded that § 954(d)(1) "cannot be given effect consistent with the Fifth Amendment's due process requirement." *Id.,* at 1471-1472 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972)). Drawing an analogy between arts funding and public universities, the court further ruled that the First Amendment constrains the NEA's grant-making process, and that because § 954(d)(1) "clearly reaches a substantial amount of protected speech," it is impermissibly overbroad on its face. 795 F.Supp., at 1476. The Government did not seek a stay of the District Court's injunction, and con-

sequently the NEA has not applied § 954(d)(1) since June 1992.

A divided panel of the Court of Appeals affirmed the District Court's ruling. 100 F.3d 671 (C.A.9 1996). The majority***579** agreed with the District Court that the NEA was compelled by the adoption of § 954(d)(1) to alter its grant-making procedures to ensure that applications are judged according to the "decency and respect" criteria. The Chairperson, the court reasoned, "has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction." *Id.,* at 680. Concluding that the "decency and respect" criteria are not "susceptible to objective definition," the court held that § 954(d)(1) "gives rise to the danger of arbitrary and discriminatory application" and is void for vagueness under the First and Fifth Amendments. *Id.,* at 680-681. In the alternative, the court ruled that § 954(d)(1) violates the First Amendment's prohibition on viewpoint-based restrictions on protected speech. Government funding of the arts, the court explained, is both a "traditional sphere ****2175** of free expression," *Rust v. Sullivan,* 500 U.S. 173, 200, 111 S.Ct. 1759, 1776, 114 L.Ed.2d 233 (1991), and an area in which the Government has stated its intention to "encourage a diversity of views from private speakers," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 834, 115 S.Ct. 2510, 2519, 132 L.Ed.2d 700 (1995). 100 F.3d, at 681-682. Accordingly, finding that § 954(d)(1) "has a speech-based restriction as its sole rationale and operative principle," *Rosenberger, supra,* at 834, 115 S.Ct., at 2519, and noting the NEA's failure to articulate a compelling interest for the provision, the court declared it facially invalid. 100 F.3d, at 683.

The dissent asserted that the First Amendment protects artists' rights to express themselves as indecently and disrespectfully as they like, but does not compel the Government to fund that speech. *Id.,* at 684 (opinion of Kleinfeld, J.). The challenged provision, the dissent contended, did not prohibit the NEA from funding indecent or offensive art, but merely required the agency to consider the "decency and respect" criteria in the grant selection process. *Id.,* at 689-690. Moreover, according to the dissent's reasoning, the vagueness principles applicable to the direct regulation of speech have no bearing on the selective award of prizes, and ***580** the Government may draw distinctions based on content and viewpoint in making its funding decisions. *Id.,* at 684-688. Three judges dissented from the denial of rehearing en banc, maintaining that the panel's decision gave the statute an "implausible construction," applied the " 'void for vagueness' doctrine where it does not belong," and extended "First Amendment principles to a situation that the First Amendment doesn't cover." 112 F.3d 1015, 1016-1017 (C.A.9 1997).

We granted certiorari, 522 U.S. 991, 118 S.Ct. 554, 139 L.Ed.2d 396 (1997), and now reverse the judgment of the Court of Appeals.

II

A

[1] Respondents raise a facial constitutional challenge to § 954(d)(1), and consequently they confront "a heavy burden" in advancing their claim. *Rust, supra,* at 183, 111 S.Ct., at 1767. Facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973); see also *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 223, 110 S.Ct. 596, 603, 107 L.Ed.2d 603 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See *Broadrick, supra,* at 615, 93 S.Ct., at 2917-2918.

[2] Respondents argue that the provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails

to respect mainstream values or offends standards of decency. The premise of respondents' claim is that § 954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The NEA, however, reads the provision as merely hortatory, and contends that it stops well short of an absolute restriction. Section 954(d)(1) adds "considerations" to the grant-making process; it does not preclude awards to projects that might be deemed "indecent" or "disrespectful," nor place conditions on grants, or even specify that those factors must be given ***581** any particular weight in reviewing an application. Indeed, the agency asserts that it has adequately implemented § 954(d)(1) merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications. See Declaration of Randolph McAusland, Deputy Chairman for Programs at the NEA, reprinted in App. 79 (stating that the NEA implements the provision "by ensuring that the peer review panels represent a variety of geographical areas, aesthetic views, professions, areas of expertise, races and ethnic groups, and gender, and include a lay person"). We do not decide whether the NEA's view-that the formulation of diverse advisory panels is sufficient to comply with Congress' command-is in fact a reasonable ****2176** reading of the statute. It is clear, however, that the text of § 954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms. See § 954(d)(2) ("[O]bscenity is without artistic merit, is not protected speech, and shall not be funded").

Furthermore, like the plain language of § 954(d), the political context surrounding the adoption of the "decency and respect" clause is inconsistent with respondents' assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria. The legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority. See, *e.g.*, 136 Cong. Rec. 28626, 28632, 28634 (1990). The Independent Commission had cautioned Congress against the adoption of distinct viewpoint-based standards for funding, and the Commission's report suggests that "additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as part of a definition of 'artistic excellence'),***582** rather than isolated and treated as exogenous considerations." Report to Congress 89. In keeping with that recommendation, the criteria in § 954(d)(1) inform the assessment of artistic merit, but Congress declined to disallow any particular viewpoints. As the sponsors of § 954(d)(1) noted in urging rejection of the Rohrabacher Amendment: "[I]f we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member's aversions end, others with different sensibilities and with different values begin." 136 Cong. Rec. 28624 (statement of Rep. Coleman); see also *id.*, at 28663 (statement of Rep. Williams) (arguing that the Rohrabacher Amendment would prevent the funding of Jasper Johns' flag series, The Merchant of Venice, Chorus Line, Birth of a Nation, and the Grapes of Wrath). In contrast, before the vote on § 954(d)(1), one of its sponsors stated: "If we have done one important thing in this amendment, it is this. We have maintained the integrity of freedom of expression in the United States." *Id.*, at 28674.

That § 954(d)(1) admonishes the NEA merely to take "decency and respect" into consideration and that the legislation was aimed at reforming procedures rather than precluding speech undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination. In cases where we have struck down legislation as facially unconstitutional, the dangers were both more evident and more substantial. In *R.A.V. v. St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), for example, we invalidated on its face a municipal ordinance that defined

as a criminal offense the placement of a symbol on public or private property " 'which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.' " See *id.,* at 380, 112 S.Ct., at 2541. That provision set forth a clear penalty, proscribed views on particular "disfavored subjects," *id.,* at 391, 112 S.Ct., at 2547-2548, and suppressed "distinctive idea[s], conveyed by a distinctive message," *id.,* at 393, 112 S.Ct., at 2548.

583** In contrast, the "decency and respect" criteria do not silence speakers by expressly "threaten[ing] censorship of ideas." See *ibid.* Thus, we do not perceive a realistic danger that § 954(d)(1) will compromise First Amendment values. As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. Respondents assert, for example, that "[o]ne would be hard-pressed to find two people in the United States who could agree on what the 'diverse beliefs and values of the American public' are, much less on whether a particular work of art 'respects' them"; and they claim that " '[d]ecency' is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas." Brief for Respondents 41. The NEA likewise*2177** views the considerations enumerated in § 954(d)(1) as susceptible to multiple interpretations. See Department of the Interior and Related Agencies Appropriations for 1992, Hearing before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess., 234 (1991) (testimony of John Frohnmayer) ("[N]o one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions"). Accordingly, the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views. Indeed, one could hardly anticipate how "decency" or "respect" would bear on grant applications in categories such as funding for symphony orchestras.

[3] Respondents' claim that the provision is facially unconstitutional may be reduced to the argument that the criteria in § 954(d)(1) are sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination. Given the varied interpretations of the criteria and the vague exhortation ***584** to "take them into consideration," it seems unlikely that this provision will introduce any greater element of selectivity than the determination of "artistic excellence" itself. And we are reluctant, in any event, to invalidate legislation "on the basis of its hypothetical application to situations not before the Court." *FCC v. Pacifica Foundation,* 438 U.S. 726, 743, 98 S.Ct. 3026, 3037, 57 L.Ed.2d 1073 (1978).

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the "decency" prong of § 954(d)(1) and its reference to "respect for the diverse beliefs and values of the American public." Educational programs are central to the NEA's mission. See § 951(9) ("Americans should receive in school, background and preparation in the arts and humanities"); § 954(c)(5) (listing "projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts" among the NEA's funding priorities); National Endowment for the Arts, FY 1999 Application Guidelines 18-19 (describing "Education & Access" category); Brief for Twenty-six Arts, Broadcast, Library, Museum and Publishing *Amici Curiae* 5, n. 2 (citing NEA Strategic Plan FY 1997-FY 2002, which identifies children's festivals and museums, art education, at-risk youth projects, and artists in schools as examples of the NEA's activities). And it is well established that "decency" is a permissible factor where "educational suitability" motivates its consideration. *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853, 871, 102 S.Ct. 2799, 2810, 73 L.Ed.2d 435 (1982); see also *Bethel School Dist. No. 403 v. Fraser,* 478 U.S.

675, 683, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

Permissible applications of the mandate to consider "respect for the diverse beliefs and values of the American public" are also apparent. In setting forth the purposes of the NEA, Congress explained that "[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage." ***585** § 951(10). The agency expressly takes diversity into account, giving special consideration to "projects and productions ... that reach, or reflect the culture of, a minority, inner city, rural, or tribal community," § 954(c)(4), as well as projects that generally emphasize "cultural diversity," § 954(c)(1). Respondents do not contend that the criteria in § 954(d)(1) are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project's intended audience.

We recognize, of course, that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents' First Amendment challenge. But neither are we persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications ****2178** that it receives, including many that propose "artistically excellent" projects. The agency may decide to fund particular projects for a wide variety of reasons, "such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form." Brief for Petitioners 32. As the dissent below noted, it would be "impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression." 100 F.3d, at 685 (opinion of Kleinfeld, J.). The "very assumption" of the NEA is that grants will be awarded according to the "artistic worth of competing applicants," and absolute neutrality is simply "inconceivable." ***586** *Advocates for the Arts v. Thomson,* 532 F.2d 792, 795-796(C.A.1), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976).

Respondents' reliance on our decision in *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), is therefore misplaced. In *Rosenberger,* a public university declined to authorize disbursements from its Student Activities Fund to finance the printing of a Christian student newspaper. We held that by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints. *Id.,* at 837, 115 S.Ct., at 2520-2521. Although the scarcity of NEA funding does not distinguish this case from *Rosenberger,* see *id.,* at 835, 115 S.Ct., at 2519-2520, the competitive process according to which the grants are allocated does. In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately "encourage a diversity of views from private speakers," *id.,* at 834, 115 S.Ct., at 2519. The NEA's mandate is to make esthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*-which was available to all student organizations that were " 'related to the educational purpose of the University,' " *id.,* at 824, 115 S.Ct., at 2514-and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, see *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 386, 113 S.Ct. 2141, 2143-2144, 124 L.Ed.2d 352 (1993); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 555, 95 S.Ct. 1239, 1244-1245, 43

L.Ed.2d 448 (1975), or the second class mailing privileges available to " 'all newspapers and other periodical publications,' " see *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148, n. 1, 66 S.Ct. 456, 457, n. 1, 90 L.Ed. 586 (1946).

Respondents do not allege discrimination in any particular funding decision. (In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants. See 4 Record, Doc. No. 57, Exh. 35 (Sept. 30, 1991, letters from the NEA informing respondents Hughes and Miller that they had been awarded Solo Performance Theater ***587** Artist Fellowships).) Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983) (internal quotation marks omitted), and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237, 107 S.Ct. 1722, 1731-1732, 95 L.Ed.2d 209 (1987) (SCALIA, J., dissenting); see also *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S.Ct. 1438, 1443, 113 L.Ed.2d 494 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"). ****2179** In addition, as the NEA itself concedes, a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive "certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991); see Brief for Petitioners 38, n. 12. Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision. Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396, 89 S.Ct. 1794, 1809, 23 L.Ed.2d 371 (1969) ("[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with those problems if and when they arise" (internal citation omitted)).

B

[4][5] Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria ***588** that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. See *Regan, supra*, at 549, 103 S.Ct., at 2002-2003. In the 1990 amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling Act to provide that arts funding should "contribute to public support and confidence in the use of taxpayer funds," and that "[p]ublic funds ... must ultimately serve public purposes the Congress defines." § 951(5). And as we held in *Rust*, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S., at 193, 111 S.Ct., at 1772. In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ibid.*; see also *Maher v. Roe*, 432 U.S. 464, 475, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy").

III

[6][7][8] The lower courts also erred in invalidating § 954(d)(1) as unconstitutionally vague. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. See *NAACP v. Button,* 371 U.S. 415, 432-433, 83 S.Ct. 328, 337-338, 9 L.Ed.2d 405 (1963). The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any "forbidden area" in the context of grants of this nature. Cf. *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574, 107 S.Ct. 2568, 2571-2572, 96 L.Ed.2d 500 (1987) (facially invalidating a flat ban ***589** on any "First Amendment" activities in an airport); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499, 102 S.Ct. 1186, 1193-1194, 71 L.Ed.2d 362 (1982) ("prohibitory and stigmatizing effect" of a "quasi-criminal" ordinance relevant to the vagueness analysis); *Grayned v. City of Rockford,* 408 U.S., at 108, 92 S.Ct., at 2298-2299 (requiring clear lines between "lawful and unlawful" conduct). We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. See Statement of Charlotte Murphy, Executive Director of NAAO, reprinted in App. 21-22. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government programs awarding scholarships and grants on the basis of subjective ****2180** criteria such as "excellence." See, *e.g.,* 2 U.S.C. § 802 (establishing the Congressional Award Program to "promote initiative, achievement, and excellence among youths in the areas of public service, personal development, and physical and expedition fitness"); 20 U.S.C. § 956(c)(1) (providing funding to the National Endowment for the Humanities to promote "progress and scholarship in the humanities"); § 1134h(a) (authorizing the Secretary of Education to award fellowships to "students of superior ability selected on the basis of demonstrated achievement and exceptional promise"); 22 U.S.C. § 2452(a) (authorizing the award of Fulbright grants to "strengthen international cooperative relations"); 42 U.S.C. § 7382c (authorizing the Secretary of Energy to recognize teachers for "excellence in mathematics or science education"). To accept respondents' vagueness argument would be to call into question the constitutionality of these valuable Government programs and countless others like them.

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

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

"The operation was a success, but the patient died." What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more. I write separately because, unlike the Court, I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, it establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

I

THE STATUTE MEANS WHAT IT SAYS

Section 954(d)(1) provides:

"No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that-

"(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

***591** The phrase "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached (unless one jumps out of paragraph (1) to press "Chairperson" into service). Even so, it is clear enough that the phrase is meant to apply to those who do the judging. The application reviewers must take into account "general standards of decency" and "respect for the diverse beliefs and values of the American public" when evaluating artistic excellence and merit. One can regard this as either suggesting that decency and respect are elements of what Congress regards as artistic excellence and merit, or as suggesting that decency and respect are factors to be taken into account *in addition to* artistic excellence and merit. But either way, it is entirely, 100% clear that decency and respect are to be taken into account in evaluating applications.

This is so apparent that I am at a loss to understand what the Court has in mind (other than the gutting of the statute) when it speculates that the statute is merely "advisory." *Ante,* at 2176. General standards of decency and respect for Americans' beliefs and values *must* (for the statute says that the Chairperson "shall ensure" this result) be taken into account, see, *e.g.,* American Heritage Dictionary 402 (3d ed.1992) "consider****2181** ... [t]o take into account; bear in mind"), in evaluating all applications. This does not mean that those factors must always be dispositive, but it *does* mean that they must always be considered. The method of compliance proposed by the National Endowment for the Arts (NEA)-selecting diverse review panels of artists and nonartists that reflect a wide range of geographic and cultural perspectives-is so obviously inadequate that it insults the intelligence. A diverse panel membership increases the odds that, *if and when* the panel takes the factors into account, it will reach an accurate assessment of what they demand. But it ***592** in no way increases the odds that the panel *will* take the factors into consideration-much less *ensures* that the panel will do so, which is the Chairperson's duty under the statute. Moreover, the NEA's fanciful reading of § 954(d)(1) would make it wholly superfluous. Section 959(c) already requires the Chairperson to "issue regulations and establish procedures ... to ensure that all panels are composed, to the extent practicable, of individuals reflecting ... diverse artistic and cultural points of view."

The statute requires the decency and respect factors to be considered in evaluating *all* applications-not, for example, just those applications relating to educational programs, *ante,* at 2177, or intended for a particular audience, *ibid.* Just as it would violate the statute to apply the artistic excellence and merit requirements to only select categories of applications, it would violate the statute to apply the decency and respect factors less than universally. A reviewer may, of course, give varying weight to the factors depending on the context, and in some categories of cases (such as the Court's example of funding for symphony orchestras, *ante,* at 2177) the factors may rarely if ever affect the outcome; but § 954(d)(1) requires the factors to be considered in every case.

I agree with the Court that § 954(d)(1) "imposes no categorical requirement," *ante,* at 2176, in the sense that it does not require the denial of all applications that violate general standards of decency or exhibit

disrespect for the diverse beliefs and values of Americans. Cf. § 954(d)(2) ("[O]bscenity ... shall not be funded"). But the factors need not be conclusive to be discriminatory. To the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of decency, the likelihood that he will receive a grant diminishes. In other words, the presence of the "tak[e] into consideration" clause "cannot be regarded as mere surplusage; it means something," ***593***Potter v. United States,* 155 U.S. 438, 446, 15 S.Ct. 144, 147, 39 L.Ed. 214 (1894). And the "something" is that the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not.

This unquestionably constitutes viewpoint discrimination.[FN1] That conclusion is not altered by the fact that the statute does not "compe[l]" the denial of funding, *ante,* at 2176, any more than a provision imposing a five-point handicap on all black applicants for civil service jobs is saved from being race discrimination by the fact that it does not compel the rejection of black applicants. If viewpoint discrimination in this context is unconstitutional (a point I shall address anon), the law is invalid unless there are some situations in which the decency and respect factors *do not constitute viewpoint discrimination.* And there is none. The applicant who displays "decency," that is, "[c]onformity to prevailing standards of propriety or modesty," American Heritage Dictionary, at 483 (def. 2), and the applicant who displays "respect," that is, "deferential regard," for the diverse beliefs and values of the American people, *id.,* at 1536 (def. 1), will *always* have an edge over an applicant who displays the opposite. And finally, the conclusion of viewpoint discrimination is not affected by the fact that what constitutes " 'decency' " or " 'the diverse values and beliefs of ****2182*** the American people' " is difficult to pin down, *ante,* at 2176-any more than a civil service preference in favor of those who display "Republican-Party values" would be rendered nondiscriminatory by the fact that there is plenty of room for argument as to what Republican-Party values might be.

> FN1. If there is any uncertainty on the point, it relates only to the adjective, which is not at issue in the current discussion. That is, one might argue that the decency and respect factors constitute *content* discrimination rather than *viewpoint* discrimination, which would render them easier to uphold. Since I believe this statute must be upheld in either event, I pass over this conundrum and assume the worst.

594 The "political context surrounding the adoption of the 'decency and respect' clause," which the Court discusses at some length, *ante,* at 2176, does not change its meaning or affect its constitutionality. All that is proved by the various statements that the Court quotes from the Report of the Independent Commission and the floor debates is (1) that the provision was not meant categorically to exclude any particular viewpoint (which I have conceded, and which is plain from the text), and (2) that the language was not meant to do anything that is unconstitutional. That in no way propels the Court's leap to the countertextual conclusion that the provision was merely "aimed at reforming procedures," and cannot be "utilized as a tool for invidious viewpoint discrimination," *ante,* at 2176. It is evident in the legislative history that § 954(d)(1) was prompted by, and directed at, the public funding of such offensive productions as Serrano's "Piss Christ," the portrayal of a crucifix immersed in urine, and Mapplethorpe's show of lurid homoerotic photographs. Thus, even if one strays beyond the plain text it is perfectly clear that the statute was meant to disfavor-that is, to discriminate against-such productions. Not to ban their funding absolutely, to be sure (though as I shall discuss, that also would not have been unconstitutional), but to make their funding more difficult.

More fundamentally, of course, all this legislative history has no valid claim upon our attention at all. It is a virtual certainty that very few of the Mem-

bers of Congress who voted for this language both (1) knew of, and (2) agreed with, the various statements that the Court has culled from the Report of the Independent Commission and the floor debate (probably conducted on an almost empty floor). And it is wholly irrelevant that the statute was a "bipartisan proposal introduced as a counterweight" to an alternative proposal that would directly restrict funding on the basis of viewpoint. See *ante,* at 2176. We do not judge statutes as ***595** if we are surveying the scene of an accident; each one is reviewed, not on the basis of how much worse it could have been, but on the basis of what it says. See *United States v. Estate of Romani,* 523 U.S. 519, 535, 118 S.Ct. 1478, 1488, 140 L.Ed.2d 710 (1998) (SCALIA, J., concurring in part and concurring in judgment). It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, "The more we get together, the happier we'll be." It is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove,* 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951). The law at issue in this case is to be found in the text of § 954(d)(1), which passed both Houses and was signed by the President, U.S. Const., Art. I, § 7. And that law unquestionably disfavors-discriminates against-indecency and disrespect for the diverse beliefs and values of the American people. I turn, then, to whether such viewpoint discrimination violates the Constitution.

II

WHAT THE STATUTE SAYS IS CONSTITUTIONAL

The Court devotes so much of its opinion to explaining why this statute means something other than what it says that it neglects to cite the constitutional text governing our analysis. The First Amendment reads: "Congress shall make no law ... *abridging* the freedom of speech." U.S. Const., Amdt. 1 (emphasis added). To abridge is "to contract, to diminish; to deprive of." T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). With the enactment of § 954(d)(1), Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. *Avant-garde artistes* such as respondents remain ****2183 *596** entirely free to *epater les bourgeois;* [FN2] they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures " 'aimed at the *suppression* of dangerous ideas.' " *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 550, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983) (emphasis added) (quoting *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959), in turn quoting *Speiser v. Randall,* 357 U.S. 513, 519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958)). "The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that-unlike direct restriction or prohibition-such a denial does not, as a general rule, have any significant coercive effect." *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 237, 107 S.Ct. 1722, 1731, 95 L.Ed.2d 209 (1987) (SCALIA, J., dissenting).

FN2. Which they do quite well. The *oeuvres d'art* for which the four individual plaintiffs in this case sought funding have been described as follows:

> "Finley's controversial show, 'We Keep Our Victims Ready,' contains three segments. In the second segment, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. Holly

> Hughes' monologue 'World Without End' is a somewhat graphic recollection of the artist's realization of her lesbianism and reminiscence of her mother's sexuality. John Fleck, in his stage performance 'Blessed Are All the Little Fishes,' confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance 'Some Golden States' from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols." Note, 48 Wash. & Lee L.Rev. 1545, 1546, n. 2 (1991) (citations omitted).

One might contend, I suppose, that a threat of rejection by the only available source of free money would constitute coercion and hence "abridgment" within the meaning of the First Amendment. Cf. *Norwood v. Harrison,* 413 U.S. 455, 465, 93 S.Ct. 2804, 2810-2811, 37 L.Ed.2d 723 (1973). I would not agree with such a contention, which would make the NEA the mandatory patron of all art too ***597** indecent, too disrespectful, or even too *kitsch* to attract private support. But even if one accepts the contention, it would have no application here. The NEA is far from the sole source of funding for art-even indecent, disrespectful, or just plain bad art. Accordingly, the Government may earmark NEA funds for projects it deems to be in the public interest without thereby abridging speech. *Regan v. Taxation with Representation of Wash., supra,* at 549, 103 S.Ct., at 2002-2003.

Section 954(d)(1) is no more discriminatory, and no less constitutional, than virtually every other piece of funding legislation enacted by Congress. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program ...." *Rust v. Sullivan,* 500 U.S. 173, 193, 111 S.Ct. 1759, 1772, 114 L.Ed.2d 233 (1991). As we noted in *Rust,* when Congress chose to establish the National Endowment for Democracy it was not constitutionally required to fund programs encouraging competing philosophies of government-an example of funding discrimination that cuts much closer than this one to the core of *political* speech which is the primary concern of the First Amendment. See *id.,* at 194, 111 S.Ct., at 1772-1773. It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates-and is required by law to discriminate-in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, "Adams denounced all Frenchmen, but most especially 'schoolmasters, painters, poets, & C.' He warned Marshall that the fine arts were like germs that infected healthy constitutions." J. Ellis, After the Revolution: Profiles of Early American Culture 36 (1979). Surely the NEA itself is nothing less than an institutionalized discrimination****2184** against that point of view. Nonetheless, it is constitutional,***598** as is the congressional determination to favor decency and respect for beliefs and values over the opposite because such favoritism does not "abridge" anyone's freedom of speech.

Respondents, relying on *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 2518-2519, 132 L.Ed.2d 700 (1995), argue that viewpoint-based discrimination is impermissible unless the government is the speaker or the government is "disburs[ing] public funds to private entities to convey a governmental message." *Ibid.* It is impossible to imagine why that should be so; one would think that directly involving the government itself in the viewpoint discrimination (if it is unconstitutional) would make the situation even worse.

Respondents are mistaken. It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects-which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood).[FN3] None of this has anything to do with abridging anyone's speech. *Rosenberger,* as the Court explains, *ante,* at 2178, found the viewpoint***599** discrimination unconstitutional, not because funding of "private" speech was involved, but because the government had established a limited public forum-to which the NEA's granting of highly selective (if not highly discriminating) awards bears no resemblance.

> FN3. I suppose it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party-but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party, and I do not think that that unconstitutionality has anything to do with the First Amendment.

The nub of the difference between me and the Court is that I regard the distinction between "abridging" speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable. The Court, by contrast, seems to believe that the First Amendment, despite its words, has some ineffable effect upon funding, imposing constraints of an indeterminate nature which it announces (without troubling to enunciate any particular test) are not violated by the statute here-or, more accurately, are not violated by the quite different, emasculated statute that it imagines. "[T]he Government," it says, "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake," *ante,* at 2179. The Government, *I* think, may allocate both competitive and noncompetitive funding *ad libitum,* insofar as the First Amendment is concerned.

Finally, what is true of the First Amendment is also true of the constitutional rule against vague legislation: it has no application to funding. Insofar as it bears upon First Amendment concerns, the vagueness doctrine addresses the problems that arise from government *regulation* of expressive conduct, see *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972), not government grant programs. In the former context, vagueness produces an abridgment of lawful speech; in the latter it produces, at worst, a waste of money. I cannot refrain from observing, however, that if the vagueness doctrine *were* applicable, the agency charged with making grants under a statutory standard of "artistic excellence"-and which has itself thought that standard met by everything from the playing of Beethoven to a depiction of ***600** a crucifix immersed in urine-would be of more dubious constitutional validity than the "decency" and "respect" limitations****2185** that respondents (who demand to be judged on the same strict standard of "artistic excellence") have the humorlessness to call too vague.

* * *

In its laudatory description of the accomplishments of the NEA, *ante,* at 2172, the Court notes with satisfaction that "only a handful of the agency's roughly 100,000 awards have generated formal complaints," *ibid.* The Congress that felt it necessary to enact § 954(d)(1) evidently thought it much

more noteworthy that *any* money exacted from American taxpayers had been used to produce a crucifix immersed in urine or a display of homoerotic photographs. It is no secret that the provision was prompted by, and directed at, the funding of such offensive productions. Instead of banning the funding of such productions absolutely, which I think would have been entirely constitutional, Congress took the lesser step of requiring them to be disfavored in the evaluation of grant applications. The Court's opinion today renders even that lesser step a nullity. For that reason, I concur only in the judgment.

Justice SOUTER, dissenting.
The question here is whether the italicized segment of this statute is unconstitutional on its face: "[A]rtistic excellence and artistic merit are the criteria by which applications [for grants from the National Endowment for the Arts (NEA)] are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.* " 20 U.S.C. § 954(d) (emphasis added). It is.

The decency and respect proviso mandates viewpoint-based decisions in the disbursement of Government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental***601** rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional. The Court's conclusions that the proviso is not viewpoint based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint-based discrimination, are all patently mistaken. Nor may the question raised be answered in the Government's favor on the assumption that some constitutional applications of the statute are enough to satisfy the demand of facial constitutionality, leaving claims of the proviso's obvious invalidity to be dealt with later in response to challenges of specific applications of the discriminatory standards. This assumption is irreconcilable with our longstanding and sensible doctrine of facial overbreadth, applicable to claims brought under the First Amendment's speech clause. I respectfully dissent.

I

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 2545, 105 L.Ed.2d 342 (1989). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas," *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972), which is to say that "[t]he principle of viewpoint neutrality ... underlies the First Amendment," *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 505, 104 S.Ct. 1949, 1962, 80 L.Ed.2d 502 (1984). Because this principle applies not only to affirmative suppression of speech, but also to disqualification for government favors, Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses. See, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (public university's student activities funds may not be disbursed on viewpoint-based terms); ***602***Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (after-hours access to public school property may not be withheld on the basis of viewpoint); *Leathers v. Medlock,* 499 U.S. 439, 447, 111 S.Ct. 1438, 1443, 113 L.Ed.2d 494 (1991) ("[D]ifferential taxation of First ****2186** Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (government-mandated access to public utility's billing envelopes must not be viewpoint based); *Members of City Council of*

Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

It goes without saying that artistic expression lies within this First Amendment protection. See, *e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 569, 115 S.Ct. 2338, 2345, 132 L.Ed.2d 487 (1995) (remarking that examples of painting, music, and poetry are "unquestionably shielded"); *Ward v. Rock Against Racism,* 491 U.S. 781, 790, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment"); *Schad v. Mount Ephraim,* 452 U.S. 61, 65, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); *Kaplan v. California,* 413 U.S. 115, 119-120, 93 S.Ct. 2680, 2684, 37 L.Ed.2d 492 (1973) ("[P]ictures, films, paintings, drawings, and engravings ... have First Amendment protection"). The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political,[FN1] but simply on their expressive character, which ***603** falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rest[s] upon [the] ideal" of governmental viewpoint neutrality. *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641, 114 S.Ct. 2445, 2458-2459, 129 L.Ed.2d 497 (1994).

> FN1. Art "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952).

When called upon to vindicate this ideal, we characteristically begin by asking "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." *Ward v. Rock Against Racism, supra,* at 791, 109 S.Ct., at 2754 (citation omitted). The answer in this case is damning. One need do nothing more than read the text of the statute to conclude that Congress's purpose in imposing the decency and respect criteria was to prevent the funding of art that conveys an offensive message; the decency and respect provision on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose. In the words of a cosponsor of the bill that enacted the proviso, "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. 28624 (1990).[FN2] Another supporter of the bill observed that "the Endowment's support for artists like Robert Mapplethorpe and Andre[s] Serrano has offended and angered many citizens," behooving "Congress ... to listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again." *Id.,* at 28642. Indeed, if there were any question at all about what Congress had in ***604** mind, a definitive answer comes in the succinctly accurate remark of the proviso's author, that the bill ****2187** "add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account." *Id.,* at 28631.[FN3]

> FN2. There is, of course, nothing whatsoever unconstitutional about this view as a general matter. Congress has no obligation to support artistic enterprises that many people detest. The First Amendment speaks up only when Congress decides to

participate in the Nation's artistic life by legal regulation, as it does through a subsidy scheme like the NEA. If Congress does choose to spend public funds in this manner, it may not discriminate by viewpoint in deciding who gets the money.

FN3. On the subject of legislative history and purpose, it is disturbing that the Court upholds § 954(d) in part because the statute was drafted in hope of avoiding constitutional objections, with some Members of Congress proclaiming its constitutionality on the congressional floor. See *ante,* at 2176. Like the Court, I assume that many Members of Congress believed the bill to be constitutional. Indeed, Members of Congress must take an oath or affirmation to support the Constitution, see U.S. Const., Art. VI, cl. 3, and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands, see, *e.g., United States v. X-Citement Video, Inc.,* 513 U.S. 64, 73, 115 S.Ct. 464, 470, 130 L.Ed.2d 372 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution"); *Yates v. United States,* 354 U.S. 298, 319, 77 S.Ct. 1064, 1077, 1 L.Ed.2d 1356 (1957). But courts cannot allow a legislature's conclusory belief in constitutionality, however sincere, to trump incontrovertible unconstitutionality, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

I recognize, as the Court explains, *ante,* at 2176, that the amendment adding the decency and respect proviso was a bipartisan counterweight to more severe alternatives, and that some Members of Congress may have voted for it simply because it seemed the least among various evils. See, *e.g.,* 136 Cong. Rec. 28670 (1990) ("I am not happy with all aspects of the Williams-Coleman substitute .... It ... contains language concerning standards of decency that I find very troubling. But I applaud Mr. Williams for his efforts in achieving this compromise under very difficult circumstances .... I support the Williams-Coleman substitute"). Perhaps the proviso was the mildest alternative available, but that simply proves that the bipartisan push to reauthorize the NEA could succeed only by including at least some viewpoint-based limitations. An appreciation of alternatives does not alter the fact that Congress passed decency and respect restrictions, and it did so knowing and intending that those restrictions would prevent future controversies stemming from the NEA's funding of inflammatory art projects, by declaring the inflammatory to be disfavored for funding.

II

In the face of such clear legislative purpose, so plainly expressed, the Court has its work cut out for it in seeking a ***605** constitutional reading of the statute. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397-1398, 99 L.Ed.2d 645 (1988).

A

The Court says, first, that because the phrase "general standards of decency and respect for the diverse beliefs and values of the American public" is imprecise and capable of multiple interpretations, "the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." *Ante,* at

2176. Unquestioned case law, however, is clearly to the contrary.

"Sexual expression which is indecent but not obscene is protected by the First Amendment," *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989), and except when protecting children from exposure to indecent material, see *FCC v. Pacifica Foundation.* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), the First Amendment has never been read to allow the government to rove around imposing general standards of decency, see, *e.g., Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (striking down on its face a statute that regulated "indecency" on the Internet). Because "the normal definition of 'indecent' ... refers to nonconformance with accepted standards of morality," *FCC v. Pacifica Foundation, supra,* at 740, 98 S.Ct., at 3035, restrictions turning on decency, especially those couched in terms of "general standards of decency," are quintessentially viewpoint based: they require discrimination on the basis of conformity with mainstream mores. The Government's contrary suggestion that the NEA's decency standards restrict only the "form, mode, or style" of artistic expression, not the underlying viewpoint or message, Brief for Petitioners 39-41, may be a tempting abstraction (and one not lacking in support, cf. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 83-84, 103 S.Ct. 2875, 2889-2890, 77 L.Ed.2d 469 (1983) (STEVENS, J., concurring in judgment)). But here it suffices to realize that "form, ****2188** mode, or style" are not subject to abstraction***606** from artistic viewpoint, and to quote from an opinion just two years old: "In artistic ... settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. ... Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 805, 116 S.Ct. 2374, 2415-2416, 135 L.Ed.2d 888 (1996) (KENNEDY, J., joined by GINSBURG, J., concurring) (citation and internal quotation marks omitted); see also *Cohen v. California,* 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"). "[T]he inextricability of indecency from expression," *Denver Area Ed. Telecommunications Consortium, supra,* at 805, 116 S.Ct., at 2415-2416, is beyond dispute in a certain amount of entirely lawful artistic enterprise. Starve the mode, starve the message.

Just as self-evidently, a statute disfavoring speech that fails to respect America's "diverse beliefs and values" is the very model of viewpoint discrimination; it penalizes any view disrespectful to any belief or value espoused by someone in the American populace. Boiled down to its practical essence, the limitation obviously means that art that disrespects the ideology, opinions, or convictions of a significant segment of the American public is to be disfavored, whereas art that reinforces those values is not. After all, the whole point of the proviso was to make sure that works like Serrano's ostensibly blasphemous portrayal of Jesus would not be funded, see *supra,* at 2186, while a reverent treatment, conventionally respectful of Christian sensibilities, would not run afoul of the law. Nothing could be more viewpoint based than that. Cf. *Rosenberger,* 515 U.S., at 831, 115 S.Ct., at 2517 (a statute targeting a "prohibited perspective, not the general subject matter" of religion is viewpoint based); *United States v. Eichman,* 496 U.S. 310, 317, 110 S.Ct. 2404, 2409, 110 L.Ed.2d 287 (1990) (striking down anti-flag-burning***607** statute because it impermissibly prohibited speech that was "disrespectful" of the flag). The fact that the statute disfavors art insufficiently respectful of America's "diverse" beliefs and values alters this conclusion not one whit: the First Amendment does not validate the ambition to disqualify many disrespectful viewpoints instead of merely one. See *Rosenberger, supra,* at 831-832, 115 S.Ct., at 2517-2518.

B

Another alternative for avoiding unconstitutionality that the Court appears to regard with some favor is the Government's argument that the NEA may comply with § 954(d) merely by populating the advisory panels that analyze grant applications with members of diverse backgrounds. See *ante,* at 2173-2174, 2175-2176. Would that it were so easy; this asserted implementation of the law fails even to "reflec[t] a plausible construction of the plain language of the statute." *Rust v. Sullivan,* 500 U.S. 173, 184, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991).

The Government notes that § 954(d) actually provides that "[i]n establishing ... regulations and procedures, the Chairperson [of the NEA] shall ensure that (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." According to the Government, this language requires decency and respect to be considered not in judging applications, but in making regulations. If, then, the Chairperson takes decency and respect into consideration through regulations ensuring diverse panels, the statute is satisfied. But it would take a great act of will to find any plausibility in this reading. The reference to considering decency and respect occurs in the subparagraph speaking to the "criteria by which applications are judged," not in the preamble directing the Chairperson to adopt regulations; it is in judging applications that decency and respect are most obviously to be considered. It is no surprise, then, that the ***608** Government's ****2189** reading is directly contradicted by the legislative history. According to the provision's author, the decency and respect proviso "mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong. Rec. 28672 (1990). Or, as the cosponsor of the bill put it, "the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.,* at 28624.

The Government offers a variant of this argument in suggesting that even if the NEA must take decency and respect into account in the active review of applications, it may satisfy the statute by doing so in an indirect way through the natural behavior of diversely constituted panels. This, indeed, has apparently been the position of the Chairperson of the NEA since shortly after the legislation was first passed. But the problems with this position are obvious. First, it defies the statute's plain language to suggest that the NEA complies with the law merely by allowing decency and respect to have their way through the subconscious inclinations of panel members. "[T]aking into consideration" is a conscious activity. See Webster's New International Dictionary 2570 (2d ed.1949) (defining "take into consideration" as "[t]o make allowance in judging for"); *id.,* at 569 (defining "consideration" as the "[a]ct or process of considering; continuous and careful thought; examination; deliberation; attention"); *id.,* at 568 (defining "consider" as "to think on with care ... to bear in mind"). Second, even assuming that diverse panel composition would produce a sufficient response to the proviso, that would merely mean that selection for decency and respect would occur derivatively through the inclinations of the panel members, instead of directly through the intentional application of the criteria; at the end of the day, the proviso would still serve its purpose to screen out offending artistic works, and it would still be unconstitutional. Finally, a less obvious but equally dispositive response***609** is that reading the statute as a mandate that may be satisfied merely by selecting diverse panels renders § 954(d)(1) essentially redundant of § 959(c), which provides that the review panels must comprise "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." Statutory interpretations that "render superfluous other provisions in the same enactment" are strongly disfavored. *Freytag v. Commissioner,* 501

U.S. 868, 877, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991) (internal quotation marks omitted).

A third try at avoiding constitutional problems is the Court's disclaimer of any constitutional issue here because "[§] 954(d)(1) adds 'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Ante,* at 2175. Since " § 954(d)(1) admonishes the NEA merely to take 'decency and respect' into consideration," *ante,* at 2176, not to make funding decisions specifically on those grounds, the Court sees no constitutional difficulty.

That is not a fair reading. Just as the statute cannot be read as anything but viewpoint based, or as requiring nothing more than diverse review panels, it cannot be read as tolerating awards to spread indecency or disrespect, so long as the review panel, the National Council on the Arts, and the Chairperson have given some thought to the offending qualities and decided to underwrite them anyway. That, after all, is presumably just what prompted the congressional outrage in the first place, and there was nothing naive about the Representative who said he voted for the bill because it does "not tolerate wasting Federal funds for sexually explicit photographs [or] sacrilegious works." 136 Cong. Rec. 28676 (1990).

***610** But even if I found the Court's view of "consideration" plausible, that would make no difference at all on the question of constitutionality. What if the statute required a panel to apply criteria "taking into consideration the centrality of Christianity to the ****2190** American cultural experience," or "taking into consideration whether the artist is a communist," or "taking into consideration the political message conveyed by the art," or even "taking into consideration the superiority of the white race"? Would the Court hold these considerations facially constitutional, merely because the statute had no requirement to give them any particular, much less controlling, weight? I assume not. In such instances, the Court would hold that the First Amendment bars the government from considering viewpoint when it decides whether to subsidize private speech, and a statute that mandates the consideration of viewpoint is quite obviously unconstitutional. Cf. *Dawson v. Delaware,* 503 U.S. 159, 167, 112 S.Ct. 1093, 1098-1099, 117 L.Ed.2d 309 (1992) (holding that the First Amendment forbids reliance on a defendant's abstract beliefs at sentencing, even if they are considered as one factor among many); *Ozonoff v. Berzak,* 744 F.2d 224, 233 (C.A.1 1984) (Breyer, J.) (holding that an Executive Order which provided that a person's political associations " *may* be considered" in determining security clearance violated the First Amendment). Section 954(d)(1) is just such a statute.

III

A second basic strand in the Court's treatment of today's question, see *ante,* at 2177-2179, and the heart of Justice SCALIA's, see *ante,* at 2182-2184, in effect assume that whether or not the statute mandates viewpoint discrimination, there is no constitutional issue here because government art subsidies fall within a zone of activity free from First Amendment restraints. The Government calls attention to the roles of government-as-speaker and government-as-buyer, in which the government is of course entitled to engage in viewpoint***611** discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page; [FN4] and if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third. [FN5]

FN4. See *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 1772-1773, 114

L.Ed.2d 233 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

FN5. On proposing the Public Works Art Project (PWAP), the New Deal program that hired artists to decorate public buildings, President Roosevelt allegedly remarked: "I can't have a lot of young enthusiasts painting Lenin's head on the Justice Building." Quoted in Mankin, Federal Arts Patronage in the New Deal, in America's Commitment to Culture: Government and the Arts 77 (K. Mulcahy & M. Wyszomirski eds.1995). He was buying, and was free to take his choice.

The Government freely admits, however, that it neither speaks through the expression subsidized by the NEA,[FN6] nor buys anything for itself with its NEA grants. On the contrary, believing that "[t]he arts ... reflect the high place accorded by the American people to the nation's rich cultural heritage," § 951(6), and that "[i]t is vital to a democracy ... to provide financial assistance to its artists and the organizations that support their work," § 951(10), the Government acts as a patron, financially underwriting the production of art by private artists and impresarios for independent consumption. Accordingly, the Government would have us liberate government-as-patron from First Amendment strictures not by placing it squarely within the categories of government-as-buyer or government-as-speaker, ***612** but by recognizing a new category by analogy to those accepted ones. The analogy is, however, a very poor fit, and this patronage falls embarrassingly on the wrong side of the line between government-as-buyer or speaker and government-as-regulator-of-private-speech.

FN6. Here, the "communicative element inherent in the very act of funding itself," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 892-893, n. 11, 115 S.Ct. 2510, 2548, n. 11, 132 L.Ed.2d 700 (1995) (SOUTER, J., dissenting), is an endorsement of the importance of the arts collectively, not an endorsement of the individual message espoused in a given work of art.

The division is reflected quite clearly in our precedents. Drawing on the notion of government-as-speaker, we held in ****2191***Rust v. Sullivan,* 500 U.S., at 194, 111 S.Ct., at 1772-1773, that the Government was entitled to appropriate public funds for the promotion of particular choices among alternatives offered by health and social service providers (*e.g.,* family planning with, and without, resort to abortion). When the government promotes a particular governmental program, "it is entitled to define the limits of that program," and to dictate the viewpoint expressed by speakers who are paid to participate in it. *Ibid.*[FN7] But we added the important qualifying language that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Id.,* at 199, 111 S.Ct., at 1776. Indeed, outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of ... ideas." *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 548, 103 S.Ct. 1997, 2002, 76 L.Ed.2d 129 (1983) (internal quotation marks and brackets omitted); see also *Lamb's Chapel,* 508 U.S., at 394, 113 S.Ct., at 2147-2148 (when the government subsidizes private speech, it may not "favor some viewpoints or ideas at the expense of others"); ***613***Hannegan v. Esquire, Inc.,* 327 U.S. 146, 149, 66 S.Ct. 456, 458, 90 L.Ed. 586 (1946) (the Postmaster General may not deny subsidies to certain periodicals on the ground that they are "

'morally improper and not for the public welfare and the public good' ").

> FN7. In *Rust,* "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger, supra,* at 833, 115 S.Ct., at 2519 (citing *Rust, supra,* at 194, 111 S.Ct., at 1772-1773).

Our most thorough statement of these principles is found in the recent case of *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), which held that the University of Virginia could not discriminate on viewpoint in underwriting the speech of student-run publications. We recognized that the government may act on the basis of viewpoint "when the State is the speaker" or when the State "disburses public funds to private entities to convey a governmental message." *Id.,* at 833, 115 S.Ct., at 2519. But we explained that the government may not act on viewpoint when it "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.,* at 834, 115 S.Ct., at 2519. When the government acts as patron, subsidizing the expression of others, it may not prefer one lawfully stated view over another.

Rosenberger controls here. The NEA, like the student activities fund in *Rosenberger,* is a subsidy scheme created to encourage expression of a diversity of views from private speakers. Congress brought the NEA into being to help all Americans "achieve a better understanding of the past, a better analysis of the present, and a better view of the future." § 951(3). The NEA's purpose is to "support new ideas" and "to help create and sustain ... a climate encouraging freedom of thought, imagination, and inquiry." §§ 951(10), (7); see also S.Rep. No. 300, 89th Cong., 1st Sess., 4 (1965) ("[T]he intent of this act should be the encouragement of free inquiry and expression"); H.R.Rep. No. 99-274, p. 13 (1985) (Committee Report accompanying bill to reauthorize and amend the NEA's governing statute) ("As the Preamble of the act directs, the Endowment['s] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free"). Given this ***614** congressional choice to sustain freedom of expression, *Rosenberger* teaches that the First Amendment forbids decisions based on viewpoint popularity. So long as Congress chooses to subsidize expressive endeavors at large, it has no business requiring the NEA to turn down funding applications of artists and exhibitors who devote their "freedom of thought, imagination, and inquiry" to defying our tastes, our beliefs, or our values. It may not use the NEA's purse to ****2192** "suppres [s] ... dangerous ideas." *Regan v. Taxation with Representation of Wash., supra,* at 548, 103 S.Ct., at 2002 (internal quotation marks omitted).

The Court says otherwise, claiming to distinguish *Rosenberger* on the ground that the student activities funds in that case were generally available to most applicants, whereas NEA funds are disbursed selectively and competitively to a choice few. *Ante,* at 2178. But the Court in *Rosenberger* anticipated and specifically rejected just this distinction when it held in no uncertain terms that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 515 U.S., at 835, 115 S.Ct., at 2519.[FN8] Scarce money demands choices, of course, but choices "on some acceptable [viewpoint] neutral principle," like artistic excellence and artistic merit; [FN9] "nothing in our decision[s] indicate [s] ***615** that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Ibid.;* see also *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 676, 118 S.Ct. 1633, 1640-1641, 140 L.Ed.2d 875 (1998) (scarcity of air time does not justify viewpoint-based exclusion of candidates from a debate on public television; neut-

ral selection criteria must be employed). If the student activities fund at issue in *Rosenberger* had awarded competitive, merit-based grants to only 50%, or even 5%, of the applicants, on the basis of "journalistic merit taking into consideration the message of the newspaper," it is obvious beyond peradventure that the Court would not have come out differently, leaving the University free to refuse funding after considering a publication's Christian perspective. FN10

FN8. The Court's attempt to avoid *Rosenberger* by describing NEA funding in terms of competition, not scarcity, will not work. Competition implies scarcity, without which there is no exclusive prize to compete for; the Court's "competition" is merely a surrogate for "scarcity."

FN9. While criteria of "artistic excellence and artistic merit" may raise intractable issues about the identification of artistic worth, and could no doubt be used covertly to filter out unwanted ideas, there is nothing inherently viewpoint discriminatory about such merit-based criteria. We have noted before that an esthetic government goal is perfectly legitimate. See *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 507-508, 101 S.Ct. 2882, 2892-2893, 69 L.Ed.2d 800 (1981) (plurality opinion). Decency and respect, on the other hand, are inherently and facially viewpoint based, and serve no legitimate and permissible end. The Court's assertion that the mere fact that grants must be awarded according to artistic merit precludes "absolute neutrality" on the part of the NEA, *ante,* at 2178, is therefore misdirected. It is not to the point that the Government necessarily makes choices among competing applications, or even that its judgments about artistic quality may be branded as subjective to some greater or lesser degree; the question here is whether the Government may apply patently viewpoint-based criteria in making those choices.

FN10. Justice SCALIA suggests that *Rosenberger* turned not on the distinction between government-as-speaker and government-as-facilitator-of-private-speech, but rather on the fact that "the government had established a limited public forum." *Ante,* at 2184. Leaving aside the proper application of forum analysis to the NEA and its projects, I cannot agree that the holding of *Rosenberger* turned on characterizing its metaphorical forum as public in some degree. Like this case, *Rosenberger* involved viewpoint discrimination, and we have made it clear that such discrimination is impermissible in all forums, even nonpublic ones, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985), where, by definition, the government has not made public property generally available to facilitate private speech, *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (defining a nonpublic forum as "[p]ublic property which is not by tradition or designation a forum for public communication"). Accordingly, *Rosenberger 's* brief allusion to forum analysis was in no way determinative of the Court's holding.

A word should be said, finally, about a proposed alternative to this failed analogy. As the Solicitor General put it ***616** at oral argument, "there is something unique ... about the Government funding of the arts for First Amendment purposes." Tr. of Oral Arg. 27. However different the governmental patron may be from the governmental speaker or buyer, the argument goes, patronage is also singularly different from traditional regulation of speech, and the limitations placed on the latter would be out

of place when applied to viewpoint discrimination in distributing patronage. To this, there are two answers. The first, again, is *Rosenberger,* which forecloses any claim that the NEA and the First Amendment issues that arise under it are somehow unique. But ****2193** even if we had no *Rosenberger,* and even if I thought the NEA's program of patronage was truly singular, I would not hesitate to reject the Government's plea to recognize a new, categorical patronage exemption from the requirement of viewpoint neutrality. I would reject it for the simple reason that the Government has offered nothing to justify recognition of a new exempt category.

The question of who has the burden to justify a categorical exemption has never been explicitly addressed by this Court, despite our recognition of the speaker and buyer categories in the past. The answer is nonetheless obvious in a recent statement by the Court synthesizing a host of cases on viewpoint discrimination. "The First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991). Because it takes something to defeat a presumption, the burden is necessarily on the Government to justify a new exception to the fundamental rules that give life to the First Amendment. It is up to the Government to explain why a sphere of governmental participation in the arts (unique or not) should be treated as outside traditional First Amendment limits. The Government has not carried this burden here, or even squarely faced it.

***617** IV

Although I, like the Court, recognize that "facial challenges to legislation are generally disfavored," *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 223, 110 S.Ct. 596, 603, 107 L.Ed.2d 603 (1990), the proviso is the type of statute that most obviously lends itself to such an attack. The NEA does not offer a list of reasons when it denies a grant application, and an artist or exhibitor whose subject raises a hint of controversy can never know for sure whether the decency and respect criteria played a part in any decision by the NEA to deny funding. Hence, the most that we could hope for in waiting for an as-applied challenge would be (a) a plaintiff whose rejected proposal raised some risk of offense and was not aimed at exhibition in a forum in which decency and respect might serve as permissible selection criteria, or (b) a plaintiff who sought funding for a project that had been sanitized to avoid rejection. But no one has denied here that the institutional plaintiff, the National Association of Artists' Organizations (NAAO), has representative standing on behalf of some such potential plaintiffs. See App. 21-25 (declaration of NAAO's Executive Director, listing examples of the potentially objectionable works produced by several member organizations). We would therefore gain nothing at all by dismissing this case and requiring those individuals or groups to bring essentially the same suit, restyled as an as-applied challenge raising one of the possibilities just mentioned.

In entertaining this challenge, the Court finds § 954(d)(1) constitutional on its face in part because there are "a number of indisputably constitutional applications" for both the "decency" and the "respect" criteria, *ante,* at 2177, and it is hard to imagine "how 'decency' or 'respect' would bear on grant applications in categories such as funding for symphony orchestras," *ibid.* There are circumstances in which we have rejected facial challenges for similar reasons. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger ***618** must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). But quite apart from any question that might be raised about that statement as a general rule,[FN1] it is beyond question, as the Court freely concedes, that it can have no application here, it being well settled that the general rule does not limit challenges brought under the

First Amendment's speech clause.

> FN11. Cf., *e.g., Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 895, 112 S.Ct. 2791, 2830, 120 L.Ed.2d 674 (1992) (statute restricting abortion will be struck down if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion").

****2194** There is an "exception to th[e] [capable-of-constitutional-application] rule recognized in our jurisprudence [for] facial challenge[s] based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute invalid in all its applications (*i.e.,* facially invalid) if it is invalid in any of them." *Ada v. Guam Society of Obstetricians & Gynecologists,* 506 U.S. 1011, 1012, 113 S.Ct. 633, 634, 121 L.Ed.2d 564 (1992) (SCALIA, J., dissenting from denial of certiorari); [FN12] see, *e.g., Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (striking down decency provision of Communications Decency Act as facially overbroad); *id.,* at 893-894, 117 S.Ct., at 2355 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (declining to apply the rule of *Salerno* because the plaintiffs' claim arose under the First Amendment); *Schad v. Mount Ephraim,* 452 U.S., at 66, 101 S.Ct., at 2181 ("Because appellants' claims are rooted in the First Amendment, they are entitled to ... raise an overbreadth challenge") (internal quotation marks omitted); *Gooding v. Wilson,* 405 U.S. 518, 521-522, 92 S.Ct. 1103, 1105-1106, 31 L.Ed.2d 408 (1972).[FN13] Thus, ***619** we have routinely understood the overbreadth doctrine to apply where the plaintiff mounts a facial challenge to a law investing the government with discretion to discriminate on viewpoint when it parcels out benefits in support of speech. See, *e.g., City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 759, 108 S.Ct. 2138, 2145, 100 L.Ed.2d 771 (1988) ("[A] facial challenge lies whenever a licensing law gives a governmental official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers"); *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d [illegible] (applying overbreadth doctrine to invalidate on its face an ordinance allowing for content and viewpoint discrimination in the awarding of parade permits).

> FN12. We have, however, recognized that "the overbreadth doctrine does not apply to commercial speech." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 497, 102 S.Ct. 1186, 1192, 71 L.Ed.2d 362 (1982).

> FN13. Cf. *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment").

To be sure, such a "facial challenge will not succeed unless the statute is 'substantially overbroad,' *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225, 2232, 101 L.Ed.2d 1 (1988), by which we mean that the statute should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications," *New York v. Ferber,* 458 U.S. 747, 771, 102 S.Ct. 3348, 3362, 73 L.Ed.2d 1113 (1982), and that is no impediment to invalidation here. The Court speculates that the "decency" criterion might permissibly be applied to applications ***620** seeking to create or display art in schools or children's museums, whereas the "respect" criterion might permissibly be applied to applications seeking to create art that celebrates a minority, rural, or inner-city culture. But even so, this is certainly a case in which the challenged statute "reaches a substantial number of impermissible ap-

plications," not one in which the statute's "legitimate reach dwarfs its arguably impermissible applications." *Id.*, at 771, 773, 102 S.Ct. at 3362, 3363. On the contrary, nothing in the record suggests that the grant scheme administered under the broad authorization of the NEA's governing **2195 statute, see §§ 951, 954(c), devotes an overwhelming proportion of its resources to schools and ethnic commemoration. Since the decency and respect criteria may not be employed in the very many instances in which the art seeking a subsidy is neither aimed at children nor meant to celebrate a particular culture, the statute is facially overbroad. Cf. *City of Lakewood, supra,* at 766, 108 S.Ct., at 2149 ("[I]n a host of ... First Amendment cases we have ... considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue"). Accordingly, the Court's observation that there are a handful of permissible applications of the decency and respect proviso, even if true, is irrelevant.[FN15]

FN14. In placing such emphasis on the potential applicability of the decency criterion to educational programs, the Court neglects to point out the existence of § 954a, entitled "[a]ccess to the arts through support of education," which is concerned specifically with funding for arts education, especially in elementary and secondary schools. It seems that the NEA's "mission" to promote arts education, *ante,* at 2177, is carried out primarily through § 954a, not § 954. While the decency standard might be constitutionally permissible when applied to applications for grants under § 954a, that standard does not appear to be relevant to such applications at all; the decency and respect provision appears in § 954(d), which governs grant applications under § 954, not under § 954a.

FN15. The Court seemingly concedes that these isolated constitutional [illegible] are in fact of little matter. For [illegible] ing of specific applications [illegible] valid, the Court goes on to adm[illegible] "would not alone be sufficien[illegible] the statute." *Ante,* at 2177. The [illegible] etheless upholds the statute [illegible] not "persuaded that, in othe[illegible] the language of § 954(d)(1) itself [illegible] rise to the suppression of protect[illegible] sion." *Ibid.* This conclusion appe[illegible] on some combination of (a) the [illegible] competition rationale as [illegible] *Rosenberger* and justifying the [illegible] tion, (b) the Court's reading of the [illegible] and respect proviso as some[illegible] than viewpoint based, and (c) he[illegible] treatment of "taking into cons[illegible] establishing no firm mandate [illegible] constitutional scrutiny. As [illegible] plained, however, fair reading [illegible] and attention to case law fore[illegible] on any, let alone all, of these argu[illegible]

***621** The Government takes a differen[illegible] guing that overbreadth analysis is out [illegible] this case because the "prospect for [illegible] pressive conduct," which forms the bas[illegible] overbreadth doctrine, see, *e.g., Mas[illegible] Oakes,* 491 U.S. 576, 584, 109 [illegible] 2638-2639, 105 L.Ed.2d 493 (1989) (p[illegible] ion of O'CONNOR, J.), "is not presen[illegible] for Petitioners 20-21, n. 5. But that [illegible] wrong. We have explained before that the [illegible] of a denial of government funding ne[illegible] ries with it the potential to "chil[l] [illegible] thought and expression." *Rosenberger,* [illegible] 835, 115 S.Ct., at 2520. In the world of [illegible] ing, this is so because the makers of [illegible] potentially controversial art will either [illegible] work to avoid anything likely to offend, [illegible] from seeking NEA funding altogether. [illegible]

to whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid esthetic. And either way, the proviso's viewpoint discrimination will "chill the expressive activity of [persons] not before the court." *Forsyth County, supra,* at 129, 112 S.Ct., at 2401. See App. 22-24 (declaration of Charlotte Murphy, Executive Director of respondent NAAO) (recounting how some NAAO members have not applied for NEA grants for fear that their work would be found indecent or disrespectful, while others have applied but were "chilled in their applications and in the scope of their projects" by the decency and respect provision). Indeed, because NEA grants are often matched by funds from private donors, the constraining impact of § 954(d)(1) is significantly magnified:

"[T]he chilling effect caused by [the NEA's viewpoint-based selection criteria] is exacerbated by the practical realities of funding in the artistic community. Plainly stated, the NEA occupies a dominant and influential role in the financial affairs of the art world in the United ***622** States. Because the NEA provides much of its support with conditions that require matching or co-funding from private sources, the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors. ... [In addition,] most non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient's artistic merit and value. NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources. Grant applicants rely on the NEA well beyond the dollar value of any particular grant." ****2196***Bella Lewitzky Dance Foundation v. Frohnmayer,* 754 F.Supp. 774, 783 (C.D.Cal.1991) (footnote and internal quotation marks omitted).[FN16]

FN16. See also, *e.g.,* 131 Cong. Rec. 24808 (1985) ("[S]upport from the Endowmen[t] has always represented a 'Good Housekeeping Seal' of approval which has helped grantees generate non-Federal dollars for projects and productions").

Since the decency and respect proviso of § 954(d)(1) is substantially overbroad and carries with it a significant power to chill artistic production and display, it should be struck down on its face.[FN17]

FN17. I agree with the Court that § 954(d) is not unconstitutionally vague. Any chilling that results from imprecision in the drafting of standards (such as "artistic excellence and artistic merit") by which the Government awards scarce grants and scholarships is an inevitable and permissible consequence of distributing prizes on the basis of criteria dealing with a subject that defies exactness. The necessary imprecision of artistic-merit-based criteria justifies tolerating a degree of vagueness that might be intolerable when applying the First Amendment to attempts to regulate political discussion. Cf. *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 694-695, 118 S.Ct. 1633, 1649-1650, 140 L.Ed.2d 875 (1998) (STEVENS, J., dissenting). My problem is not with the chilling that may naturally result from necessarily open standards; it is with the unacceptable chilling of "dangerous ideas," *Speiser v. Randall,* 357 U.S. 513, 519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958), that naturally results from explicitly viewpoint-based standards.

***623** V

The Court does not strike down the proviso, however. Instead, it preserves the irony of a statutory mandate to deny recognition to virtually any expression capable of causing offense in any quarter as the most recent manifestation of a scheme enacted to "create and sustain ... a climate encouraging freedom of thought, imagination, and

inquiry." § 951(7).

U.S. Cal.,1998.
National Endowment for the Arts v. Finley
524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500, 66 USLW 4586, 98 Cal. Daily Op. Serv. 3222, 98 Cal. Daily Op. Serv. 4921, 98 Daily Journal D.A.R. 6957, 11 Fla. L. Weekly Fed. S 675

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EXHIBIT D

132 F.3d 272
(Cite as: 132 F.3d 272)

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United States Court of Appeals,
Sixth Circuit.
NATIONAL RIFLE ASSOCIATION OF AMERICA, a New York not-for-profit corporation; Michigan United Conservation Clubs, a Michigan non-profit corporation; Olympic Arms, a Washington corporation; Calico Light Weapons Systems, a California corporation; D.C. Engineering, Inc., a Michigan corporation; Ammo Dump, a Michigan corporation; Glenn Duncan; Charles Duncan; James E. Flynn; James J. Fotis; and Craig D. Sandler, Plaintiffs-Appellants,
Navegar, Inc., a Florida corporation; Thomas L. Heritier, Plaintiffs,
v.
John W. MAGAW, Director, Bureau of Alcohol, Tobacco and Firearms; United States of America, Defendants-Appellees.
No. 95-2150.

Argued Jan. 27, 1997.
Decided Nov. 21, 1997.

Firearm manufacturers and dealers, nonprofit gun rights organizations, and individuals who wished to possess products prohibited by Title XI of Violent Crime Control and Law Enforcement Act of 1994 (Crime Control Act) brought preenforcement declaratory judgment action challenging Act's constitutionality. United States moved to dismiss for lack of subject matter jurisdiction. The United States District Court for the Eastern District of Michigan, Robert H. Cleland, J., 909 F.Supp. 490, granted motion on ripeness and standing grounds. Plaintiffs appealed. The Court of Appeals, Contie, Circuit Judge, held that: (1) manufacturers and dealers had standing to assert equal protection and commerce clause claims, but not vagueness claim, and (2) individuals and organizations lacked standing to assert any claims.

Affirmed in part, reversed and remanded in part.

Ryan, Circuit Judge, issued opinion concurring in part and dissenting in part.

West Headnotes

[1] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews issues of justiciability pursuant to Article III de novo. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[2] Federal Courts 170B ⚿30

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction and Determination and Waiver
170Bk30 k. Power and Duty of Court. Most Cited Cases
Threshold question in every federal case is whether court has judicial power to entertain suit. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[3] Federal Courts 170B ⚿1.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk1 Judicial Power of United States; Power of Congress
170Bk1.1 k. In General. Most Cited Cases
Federal judicial power is limited to those disputes which confine federal courts to role consistent with system of separated powers and which are traditionally thought to be capable of resolution through judicial process. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[4] Federal Civil Procedure 170A ⇐103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

Federal Civil Procedure 170A ⇐103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; Redressability. Most Cited Cases
Article III standing requires litigant to have suffered injury-in-fact, fairly traceable to defendant's allegedly unlawful conduct, and likely to be redressed by requested relief. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[5] Declaratory Judgment 118A ⇐1

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(A) In General
118Ak1 k. Nature and Scope of Remedy. Most Cited Cases

Declaratory Judgment 118A ⇐61

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak61 k. Necessity. Most Cited Cases
Declaratory judgments are typically sought before completed "injury-in-fact" has occurred, but must be limited to resolution of "actual controversy." 28 U.S.C.A. § 2201.

[6] Declaratory Judgment 118A ⇐62

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak62 k. Nature and Elements in General. Most Cited Cases

Declaratory Judgment 118A ⇐68

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak68 k. Future or Contingent Situations. Most Cited Cases
When seeking declaratory and injunctive relief, plaintiff must show actual present harm or significant possibility of future harm in order to demonstrate need for pre-enforcement review. 28 U.S.C.A. § 2201.

[7] Declaratory Judgment 118A ⇐123

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(E) Statutes
118Ak122 Statutes in General
118Ak123 k. Validity of Statutes or Proposed Bills. Most Cited Cases
Pre-enforcement review is usually granted under Declaratory Judgment Act when statute imposes costly, self-executing compliance burden or chills protected First Amendment activity. U.S.C.A. Const.Amend. 1; 28 U.S.C.A. § 2201.

[8] Declaratory Judgment 118A ⇐61

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak61 k. Necessity. Most Cited Cases
Existence of "actual controversy" in constitutional sense is necessary to sustain jurisdiction under Declaratory Judgment Act. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2201.

[9] Declaratory Judgment 118A ⇐299.1

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties

118Ak299.1 k. In General. Most Cited Cases
To determine whether plaintiff has standing to adjudicate "actual controversy," requisite for relief under Declaratory Judgment Act, one must ask whether parties have adverse legal interests of sufficient immediacy and reality to warrant issuance of declaratory judgment even though injury-in-fact has not yet been completed. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2201.

[10] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Ripeness requires that "injury in fact" be certainly impending. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[11] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Ripeness separates those matters that are premature because injury is speculative and may never occur from those that are appropriate for court's review. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[12] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
To meet Article III's justiciability requirement, alleged injury must be legally and judicially cognizable, and issues must be fit for judicial [illegible]; this requires that plaintiff have suffered [illegible] legally protected interest which is [illegible] thought to be capable of resolution through [illegible] process, and is currently fit for [illegible]. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[13] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. [illegible] Cases
To determine whether plaintiff meets requirements of Article III, and whether it is thus appropriate for federal court to hear plaintiff's pre-enforcement challenges to statute under Declaratory Judgment Act, court must ask three questions: whether plaintiff has standing-whether he is proper party to request adjudication of particular issue because he has suffered concrete injury-in-fact; whether particular challenge is brought at proper time because it is ripe for pre-enforcement review; and whether issue currently is fit for judicial decision. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2201.

[14] Declaratory Judgment 118A ⚿300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases
Firearm manufacturers and dealers who brought preenforcement declaratory judgment action challenging constitutionality of portions of Crime Control Act demonstrated sufficient injury-in-fact to afford them standing to assert claims that statute violated their equal protection rights by prohibiting them from making or selling products they formerly

produced or sold, while allowing competitors to continue making similar products, and that Congress lacked authority under Commerce Clause to regulate products in question; Act would inflict concrete commercial injury, Act forced plaintiffs to abandon line of business, so that they were proper parties to bring action, and their injury would be redressed by requested relief, as, if Act were struck down, they would then resume production and sales of prohibited items. U.S.C.A. Const. Art. 1, § 8, cl. 3; Art. 3, § 2, cl. 2; U.S.C.A. Const.Amend. 14; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[15] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Basic rationale of ripeness doctrine is to prevent courts, through premature adjudication, from entangling themselves in abstract disagreements. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[16] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Ripeness becomes issue when case is anchored in future events that may not occur as anticipated, or at all; thus, ripeness is question of timing. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[17] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Case is ripe for pre-enforcement review under Declaratory Judgment Act only if probability of future event occurring is substantial and of sufficient immediacy and reality to warrant issuance of declaratory judgment. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2201.

[18] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
In deciding whether to address issues presented in preenforcement challenge to statute, ripeness doctrine requires court to address hardship to parties if judicial relief is denied at pre-enforcement stage in proceedings, likelihood that harm alleged by plaintiffs will ever come to pass, and whether case is fit for judicial resolution at pre-enforcement stage, which requires determination of whether factual record is sufficiently developed to produce fair adjudication of merits of parties' respective claims. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[19] Constitutional Law 92 ⚿978

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k978 k. Ripeness; Prematurity. Most Cited Cases
(Formerly 170Bk13)
Firearm manufacturers and dealers' declaratory judgment action challenging portions of Crime Control Act on equal protection and commerce

clause grounds was ripe for judicial review, even if no prosecution were pending or imminent; plaintiffs were faced with significant changes in day-to-day operation of their businesses in order to comply with Act, postponement of decision would work substantial hardship, requiring expenditure or loss of substantial amounts of money, which could not be recovered if law were eventually struck down, and likelihood that Act would be enforced against manufacturers and dealers who refused to comply was clear. U.S.C.A. Const. Art. 1, § 8, cl. 3; Art. 3, § 2, cl. 2; U.S.C.A. Const.Amend. 14; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[20] Constitutional Law 92 ⚖855

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)9 Freedom of Speech, Expression, and Press
92k855 k. In General. Most Cited Cases
(Formerly 92k42.2(1))
Parties not yet affected by actual enforcement of statute are allowed to challenge actions under First Amendment in order to ensure that overbroad statute does not act to "chill" exercise of free speech and expression. U.S.C.A. Const. Art. 3, § 2, cl. 2; U.S.C.A. Const.Amend. 1.

[21] Federal Courts 170B ⚖12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Actual or imminent enforcement of statute is not always prerequisite to preenforcement challenge in non-First Amendment cases, if statute creates "present harm," such as substantial economic injury. U.S.C.A. Const. Art. 3, § 2, cl. 2; U.S.C.A. Const.Amend. 1.

[22] Federal Courts 170B ⚖12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
When statute creates substantial economic burdens and compliance is coerced by threat of enforcement, it is not necessary to determine whether plaintiff subject to regulation has sufficiently alleged intention to refuse to comply, but rather, it is sufficient for plaintiff to demonstrate statute's direct and immediate impact on his business and to establish that compliance with regulation imposed will cause significant economic harm; further, it is not necessary to try to determine imminence of threatened prosecution, but it is necessary, instead, to determine if statute can realistically be expected to be enforced against plaintiff singled out for regulation because government has made it clear that immediate compliance is mandatory. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[23] Declaratory Judgment 118A ⚖84

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(A) Rights in General
118Ak84 k. Criminal Laws. Most Cited Cases
When ruling under Declaratory Judgment Act, usually only purely legal issues are fit for judicial resolution before prosecution is initiated. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2201.

[24] Federal Courts 170B ⚖13

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General

170Bk12 Case or Controversy Requirement

170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases
Firearm manufacturers and dealers' declaratory judgment action challenging portions of Crime Control Act on equal protection and commerce clause grounds was fit for judicial review, even though no prosecution was pending; issues presented were purely legal, bare text of unenforced Act indicated harm it would engender, and actual practices of enforcement were not relevant to debate involving its constitutionality. U.S.C.A. Const. Art. 1, § 8, cl. 3; Art. 3, § 2, cl. 2; U.S.C.A. Const.Amend. 14; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[25] Constitutional Law 92 ⚿978

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k978 k. Ripeness; Prematurity. Most Cited Cases
(Formerly 92k46(1))
Generally, statute challenged on vagueness grounds must be judged on as-applied basis, and facial challenge before statute has been applied is premature.

[26] Federal Courts 170B ⚿13

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases
Firearms manufacturers and dealers' preenforcement claim for declaration that portions of Crime Control Act were unconstitutionally vague was not fit for judicial review; plaintiffs had not pursued formal procedure of applying to Bureau of Alcohol, Tobacco, and Firearms (BATF) for determination as to whether particular weapon or accessory was prohibited under Act, and certain challenged phrases in Act were capable of valid application. U.S.C.A. Const. Art. 3, § 2, cl. 2; 18 U.S.C.A. §§ 921(a)(30)(A), (B); 28 U.S.C.A. § 2201.

[27] Statutes 361 ⚿47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
Court can find statute unconstitutionally vague on its face only if court concludes that it is capable of no valid application.

[28] Constitutional Law 92 ⚿719

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)3 Particular Questions or Grounds of Attack in General
92k719 k. Weapons. Most Cited Cases
(Formerly 92k42.1(3))
Individual plaintiffs who desired to possess firearms prohibited by Crime Control Act lacked standing to bring preenforcement action challenging Act's constitutionality; their assertions that they "wish[ed]" or "intend[ed]" to engage in proscribed conduct was insufficient to establish injury-in-fact, and even though some of them contacted federal agent, submitted hypothetical question, and were informed that questioned activity could subject them to federal prosecution, threat of prosecution against those plaintiffs was still abstract, hypothetical, and speculative. U.S.C.A. Const. Art. 3, § 2, cl. 2; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[29] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Mere existence of statute, which may or may not ever be applied to plaintiffs, is not sufficient to create case or controversy within meaning of Article III. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[30] Federal Courts 170B ⟹12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
Mere possibility of criminal sanctions applying does not in and of itself create "case or controversy." U.S.C.A. Const. Art. 3, § 2, cl. 2.

[31] Declaratory Judgment 118A ⟹300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases
Claim by individual plaintiffs, who were neither gun manufacturers nor gun dealers, that Crime Control Act had "chilling" effect on their desire to purchase weapons and accessories that were outlawed by Act was insufficient to establish requisite injury-in-fact to afford them standing to pursue their preenforcement declaratory judgment action challenging Act's constitutionality; plaintiffs did not allege that law "chilled" because it forced them to forego constitutionally protected activity in order to avoid becoming enmeshed in criminal proceeding. U.S.C.A. Const. Art. 3, § 2, cl. 2; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[32] Declaratory Judgment 118A ⟹300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases
Citizen plaintiffs' allegations of fear of prosecution which would thwart their desire to possess or transfer firearms prohibited by Crime Control Act were insufficient to afford them standing to bring preenforcement declaratory judgment action challenging Act's constitutionality; plaintiffs' allegations amounted to no more than generalized grievances shared in substantially equal measure by large class of citizens, and thus did not warrant exercise of jurisdiction. U.S.C.A. Const. Art. 3, § 2; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[33] Federal Courts 170B ⟹12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
One policy against adjudicating generalized grievances is that court should decide case with some confidence that its decision will not pave way for lawsuits, which have some, but not all, of facts actually decided by court. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[34] Constitutional Law 92 ⟹665

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)1 In General

92k665 k. In General. Most Cited Cases
(Formerly 92k42(2))

Constitutional Law 92 ⚖672

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)1 In General
92k672 k. Requirement That Complainant Be Injured. Most Cited Cases
(Formerly 92k42(2))
Party who seeks preenforcement judicial review of statute's constitutionality must be able to show not only that statute is invalid, but also that he has sustained or is immediately in danger of sustaining some direct injury as result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. U.S.C.A. Const. Art. 3, § 2, cl. 2.

[35] Declaratory Judgment 118A ⚖300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases
Nonprofit gun rights associations lacked standing to bring preenforcement declaratory judgment action challenging constitutionality of provisions of Crime Control Act that prohibited purchase and possession of certain firearms; declarations submitted by associations' members did not allege injury-in-fact sufficient to confer standing in individual member's own right. U.S.C.A. Const. Art. 3, § 2, cl. 2; 18 U.S.C.A. §§ 921(a)(30)(A), (a)(31), 922(v, w)(1); 28 U.S.C.A. § 2201.

[36] Associations 41 ⚖20(1)

41 Associations
41k20 Actions by or Against Associations
41k20(1) k. In General. Most Cited Cases
Association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) interests it seeks to protect are germane to organization's purpose; and (c) neither claim asserted nor relief requested requires participation of individual members in lawsuit. U.S.C.A. Const. Art. 3, § 2, cl. 2.

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Mark B. Stern (argued and briefed), Andrea Newmark, Michael Hluchaniuk, Asst. U.S. Atty., Sandra M. Schraibman, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Defendants-Appellees.

Before: CONTIE, RYAN, and BOGGS, Circuit Judges.

CONTIE, J. , delivered the opinion of the court, in which BOGGS, J., joined. RYAN, J. (pp. 295-298), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CONTIE, Circuit Judge.

This case presents a pre-enforcement challenge to the constitutionality of Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 (1994) (the "Crime Control Act" or "the Act"). Two non-profit gun rights associations, three firearms manufacturers, one manufacturer of ammunition feeding devices, two federally licensed firearms dealers, and five individual plaintiffs originally sought declaratory and injunctive relief under the Declaratory Judgment Act, alleging that portions of the statute

were unconstitutional. The defendants are John Magaw, the director of the Bureau of Alcohol, Tobacco, and Firearms ("BATF"), and the United States of America.

In a first amended complaint filed in June 1995, plaintiffs sought a declaratory judgment*277 that certain provisions of the Act exceeded Congress' power under the Commerce Clause, violated the Equal Protection Clause of the Fourteenth Amendment, and were vague in violation of the Due Process Clause of the Fifth Amendment. Plaintiffs also sought an injunction preventing enforcement of the provisions of the statute alleged to be unconstitutional. The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) on the ground that the complaint did not set forth a justiciable "case or controversy," as required by Article III of the United States Constitution. Defendants argued that plaintiffs did not have standing to sue because they had not alleged an actual or imminent injury, and that the suit was not ripe for adjudication because there was no pending or impending criminal prosecution of any plaintiff based on the criminal provisions being challenged. The district court granted defendants' motion and dismissed the action on standing and ripeness grounds. *5*National Rifle Ass'n of America v. Magaw,* 909 F.Supp. 490 (E.D. Mich. 1995). Eleven plaintiffs-appellants (hereinafter, "plaintiffs") filed a timely notice of appeal.[FN1]

FN1. Two of the original plaintiffs-Navegar, Inc., doing business as Intratec, a Florida corporation, and Thomas L. Heritier-did not join in the appeal.

For the following reasons, we affirm in part and reverse in part.

I. *The Crime Control Act*

The Gun Control Act of 1968, as amended, 18 U.S.C. §§ 921-930 (the "GCA"), imposes a comprehensive regulatory scheme on the manufacture and distribution of firearms. On September 13, 1994, Congress passed the Crime Control Act, which amends the GCA. It prohibits, for a period of ten years, the manufacture, transfer, or possession of semiautomatic assault weapons and the transfer or possession of large capacity ammunition feeding devices. 18 U.S.C. §§ 922(v)(1), 922(w)(1). The term "semiautomatic assault weapon" is defined as any of the firearms known by nine categories of specified brand names or model numbers.[FN2] *6 18 U.S.C. § 921(a)(30)(A). Another section of the Act defines the prohibited firearms by generic features, including semiautomatic rifles that have "an ability to accept a detachable magazine" and have at least two of five other specified characteristics. 18 U.S.C. § 921(a)(30)(B). The Act exempts certain weapons from its prohibitions, as listed in § 922, Appendix A, and described in § 922(v)(3). In section 922(w)(1) of the Act, the transfer or possession of any "large capacity ammunition feeding device" is outlawed for a period of ten years. Section 921(a)(31)(A) defines such a device to include ammunition magazines manufactured after the date of the enactment of the Act, which can hold more than ten rounds of ammunition.[FN3]

FN2. 18 U.S.C. § 921(a)(30)(A) provides:

> (30) The term "semiautomatic assault weapon" means-
>
> (A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as-
>
> (i)Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);
>
> (ii) Action Arms Israeli Military Industries UZI and Galil;
>
> (iii) Beretta Ar70 (SC-70);
>
> (iv) Colt AR-15;
>
> (v) Fabrique National FN/FAL, FN/

LAR, and FNC;

(vi) SWD M-10, M-11, M-11/9, and M- 12;

(vii) Steyr AUG;

(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and

(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.

FN3. 18 U.S.C. § 921(a)(31) provides:

The term "large capacity ammunition feeding device"-

(A) means a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition; but

(B) does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

The statute contains various exceptions to the general prohibitions, including a "grandfather" provision that permits the possession or transfer of semiautomatic assault weapons and large capacity ammunition feeding devices that were lawfully possessed on the date of enactment. 18 U.S.C. §§ 922(v)(2), 922(w)(2). Persons convicted of knowingly ***278** violating these provisions of the Act are subject to fines and prison sentences of up to five years. 18 U.S.C. § 924(a)(1).

Prior to passage of the Act, the BATF, a division of the Treasury Department, sent a letter on September 6, 1994, to all federally licensed firearms manufacturers, advising them *7 of the statute's prohibitions and exemptions. The Act became effective on September 13, 1994. Following passage of the Act, the BATF sent a subsequent letter on September 26, 1994, advising manufacturers that certain component parts lawfully possessed on or before September 13, 1994 were not "grandfathered" under the law and could not be assembled into a complete semiautomatic assault weapon for sale in ordinary commercial channels. The letter informed the manufacturers that BATF inspectors would conduct a final inventory of their semiautomatic assault weapons to determine the number lawfully possessed on the date of enactment of the Act.

The eleven plaintiffs-appellants who bring this appeal may be divided into several categories. The federally licensed corporations-D.C. Engineering, Inc., Olympic Arms, Inc., and Calico Light Weapons Systems, Inc.-manufacture firearms or ammunition feeding devices. The firearms dealers, Ammo Dump and Glenn Duncan, hold a federal firearms license and conduct a firearms business in the sale and repair of weapons. We will designate the manufacturers and firearm dealers as the Group I plaintiffs. A second group consists of the individual plaintiffs-Charles Duncan, James E. Flynn, James J. Fotis, and Craig D. Sandler, who wish to possess prohibited products (Group II plaintiffs). We will designate as the third group the nonprofit gun rights associations, the National Rifle Association ("NRA") and Michigan United Conservation Clubs ("MUCC"), whose members wish to own, possess, and transfer firearms prohibited by the statute (Group III plaintiffs). Because we believe that each group of plaintiffs presents different concerns in regard to the doctrines of standing and ripeness, we will treat each group separately. [FN4]

FN4. Plaintiffs argue that "if any plaintiff in a case demonstrates a 'case and controversy,' the constitutional requirements are met for all." This is a misstatement of the law. It is true that as long as one plaintiff meets the requirements of Article III, the

court can adjudicate the issues raised in the complaint. Although it is not necessary to inquire whether the other plaintiffs have standing before adjudicating the issues raised, *Secretary of the Interior v. California,* 464 U.S. 312, 319 n. 3, 104 S.Ct. 656, 660 n. 3, 78 L.Ed.2d 496 (1984), this does not mean that the other plaintiffs have necessarily met the constitutional requirements for standing. It simply means that no further inquiry was made about whether the other plaintiffs had standing, because the court deemed it unnecessary. As the Supreme Court has stated, there is no need to "address the standing of the other respondents, whose position is identical." *Id.* In contrast, in the present case, we deem it necessary to inquire about the standing of each category of plaintiffs because their positions are not identical. The injury-in-fact pled by the Group I plaintiffs is very different from that of Group II or Group III.

***8** Plaintiffs' complaint specifically alleged that the definitions of "semiautomatic assault weapon" contained in §§ 921(a)(30)(A), (B) of the Act were unconstitutionally vague and denied them due process of law (Counts I, II, and VI); that Congress exceeded the scope of its constitutional power under the Commerce Clause by enacting the prohibitions in §§ 922(v)(1), 922(w)(1) of the Act (Count III); that the ban on certain semiautomatic assault weapons, as designated in § 921(a)(30), and the protection of others, as designated in § 922(v)(3) and § 922, Appendix A, was arbitrary and capricious, violating the Equal Protection Clause (Count IV), and was not rationally related to any legitimate federal interest (Count VII); and that BATF's interpretation of the terms "frame" and "receiver" in § 921(a)(3)(B) for purposes of the grandfather provision at § 922(v)(2) was arbitrary and capricious (Count V).[FN5] The district court found that plaintiffs' complaint did not present a justiciable "case or controversy" as required by Article III of the Constitution.

FN5. Because the complaint asks the court to declare the status of "a frame or a receiver" and to determine whether it fits within the grandfather provision, we will treat this as a vagueness challenge.

II. *Justiciability Requirements*

[1] We review issues of justiciability pursuant to Article III *de novo.* ***279***Kelley v. Selin,* 42 F.3d 1501, 1507 (6th Cir.), *cert. denied,* 515 U.S. 1159, 115 S.Ct. 2611, 132 L.Ed.2d 855 (1995).

[2][3][4] ***9** Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." U.S. Const. art. III, § 2. The threshold question in every federal case is whether the court has the judicial power to entertain the suit. *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975). Federal judicial power is limited to those disputes "which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). As the Supreme Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471-76, 102 S.Ct. 752, 757-61, 70 L.Ed.2d 700 (1982), the "case or controversy" requirement defines, with respect to the Judicial Branch, the idea of separation of powers on which the Federal Government is founded. In an attempt to give meaning to Article III's "case or controversy" requirement, the courts have developed a series of principles termed "justiciability doctrines." The Article III doctrine that requires a litigant to have "standing" to invoke the jurisdiction of a federal court is perhaps the most important. *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Article III standing requires a litigant to have suffered an injury-in-fact, fairly traceable to the defendant's

allegedly unlawful conduct, and likely to be redressed by the requested relief. *Id.* at 751, 104 S.Ct. at 3324-25; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992); *Linton by Arnold v. Commissioner of Health and Environment, State of Tennessee,* 973 F.2d 1311, 1316 (6th Cir.1992).

[5][6][7] In the present case, plaintiffs bring suit under the Declaratory Judgment Act, 28 U.S.C. § 2201, which provides the mechanism for seeking pre-enforcement review of a statute.[FN6] Declaratory judgments are typically sought before ***10** a completed "injury-in-fact" has occurred, *Pic-A-State Pa., Inc. v. Reno,* 76 F.3d 1294, 1298 (3rd Cir.), *cert. denied,* 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996), but must be limited to the resolution of an "actual controversy." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 239-40, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937). When seeking declaratory and injunctive relief, a plaintiff must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review. *See Bras v. California Pub. Utilities Comm'n,* 59 F.3d 869, 873 (9th Cir.1995), *cert. denied,* 516 U.S. 1084, 116 S.Ct. 800, 133 L.Ed.2d 748 (1996). Although in regard to criminal statutes, courts are wary of compromising the public interest in efficient law enforcement by intervening prior to prosecution and foreshortening the prosecutor's action, courts have allowed pre-enforcement review of a statute with criminal penalties when there is a great and immediate danger of irreparable loss. *Watson v. Buck,* 313 U.S. 387, 400, 61 S.Ct. 962, 966, 85 L.Ed. 1416 (1941). As the court in *Minnesota Citizens Concerned for Life v. Federal Election Comm'n,* 113 F.3d 129, 132 (8th Cir.1997), indicated, pre-enforcement review is usually granted under the Declaratory Judgment Act when a statute "imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity."

FN6. The Act provides:

> (a) In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[8][9] The existence of an "actual controversy" in a constitutional sense is necessary to sustain jurisdiction under the Declaratory Judgment Act. *Aetna Life Ins. Co.,* 300 U.S. at 239-40, 57 S.Ct. at 463-64; *Muller v. Olin Mathieson Chemical Corp.,* 404 F.2d 501, 503 (2nd Cir.1968). The Supreme Court has explained that an actual controversy in this ***280** sense is one that is appropriate for judicial determination, stating:

> A justiciable controversy is ... distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal ***11** interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised [under the Act]....

Aetna Life Ins. Co., 300 U.S. at 240-41, 57 S.Ct. at 464 (citations omitted). To determine whether a plaintiff has standing to adjudicate an "actual controversy," requisite for relief under the Declaratory Judgment Act, one must ask whether the parties have "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" even though the injury-in-fact has not yet been completed. *Golden v. Zwickler,* 394

U.S. 103, 108, 89 S.Ct. 956, 959-60, 22 L.Ed.2d 113 (1969); *Michigan State Chamber of Commerce v. Austin,* 788 F.2d 1178, 1181 (6th Cir.1986).

[10][11] A second doctrine that "cluster[s] about Article III" is ripeness. *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C.Cir.1982) (Bork, J., concurring), *cert. denied,* 464 U.S. 823, 104 S.Ct. 91, 78 L.Ed.2d 98 (1983). Ripeness requires that the "injury in fact be certainly impending." *National Treasury Employees Union v. United States,* 101 F.3d 1423, 1427 (D.C.Cir.1996). Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977) (hereinafter, "*Abbott Labs.*").

[12] Third, the Supreme Court has stressed that the alleged injury must be legally and judicially cognizable, *Raines v. Byrd,* 521 U.S. 811, ----, 117 S.Ct. 2312, 2317, 138 L.Ed.2d 849 (1997), and that the issues must be fit for judicial resolution. This requires that the plaintiff have suffered "an invasion of a legally protected interest," *Lujan,* 504 U.S. at 560, 112 S.Ct. at 2136, which is "traditionally thought to be ***12** capable of resolution through the judicial process," *Flast v. Cohen,* 392 U.S. at 97, 88 S.Ct. at 1951, and is currently fit for judicial review.

[13] Thus, in order to determine whether each category of plaintiffs in the present case meets the requirements of Article III, and whether it is appropriate for a federal court to hear their pre-enforcement challenges to the Crime Control Act, this court must ask three questions: (1) whether the plaintiff has standing-whether he is the proper party to request an adjudication of a particular issue, because he has suffered a concrete injury-in-fact; (2) whether a particular challenge is brought at the proper time and is ripe for pre-enforcement review; and (3) whether the issue currently is fit for judicial decision.

III. *The Manufacturers and Dealers (Group I Plaintiffs)*

A. *Standing*

[14] To determine whether the manufacturers and firearms dealers have standing to challenge the constitutionality of the Crime Control Act, we must examine the nature of the injury-in-fact which they have alleged. "The injury alleged must be ... 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.' " *Allen v. Wright,* 468 U.S. at 751, 104 S.Ct. at 3324 (citations omitted). The Supreme Court has stated:

[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury ***281** as a result of a favorable ruling too speculative?

Id. at 752, 104 S.Ct. at 3325. *See also Lujan,* 504 U.S. at 560-61, 112 S.Ct. at 2136-37.

***13** In the present case, the manufacturers and dealers allege that passage of the Act has a significant impact on the way they conduct their businesses and indicate compliance with the prohibitions of the Act causes them immediate economic harm. Because of the ban on specific semiautomatic assault weapons and large capacity ammunition feeding devices, the manufacturing plaintiffs allege they will be forced to redesign and relabel some products and cease production of others. For example, prior to passage of the Act, plaintiffs Olympic Arms and Calico Light Weapons Systems manufactured firearms specifically prohibited by § 921(a)(30)(A) (in particular, the Colt AR-45), and

D.C. Engineering manufactured large capacity ammunition feeding devices prohibited by § 921(a)(31). These plaintiffs were forced to cease manufacturing prohibited products when the statute took effect out of fear of prosecution. In order to comply with the Act, they must forego a particular line of business or redesign and relabel their products. The federally licensed firearms dealers plead that compliance with the Act affects their daily businesses by prohibiting the possession and sale of specific weapons and ammunition feeding devices. For example, plaintiff Glenn Duncan, a licensed firearms dealer and gunsmith, attests that prior to passage of the Act, he regularly sold, repaired, and modified the AR-15 firearm and others prohibited by the Act, but is now forbidden from doing so. The firearm dealers also allege that they possess component parts which they can no longer use to assemble proscribed weapons, out of fear of prosecution. In sum, the manufacturers and dealers, who must comply with the Act as a condition of functioning in an intensely regulated industry, illustrate that they have suffered economic harm from the impact of passage of the Act, which has restricted the operation of their businesses in various ways-either forcing them to "stop production," "decline work," and to "refrain from sales and marketing," or imposing the need to redesign and relabel products.

In Count Three of the complaint, the manufacturers and dealers argue that the prohibitions enacted in §§ 922(v)(1) and 922(w)(1) of the Act exceed congressional power to regulate ***14** under the Commerce Clause. In Counts Four and Seven, they contend that the prohibition against specific weapons in § 921(a)(30)(A) violates the Equal Protection Clause by banning certain firearms by brand name or model number, while permitting firearms of the same type, function, and capacity to be sold under other makers' names. They allege the statute permits the manufacture of nearly identical arms, and the prohibitions are not rationally related to any government purpose.

The precise standing issue, in regard to the manufacturers and dealers, is whether upon pleading such facts, the Group I plaintiffs may bring an Equal Protection and Commerce Clause challenge to the Act. In other words, does a manufacturer or dealer, who alleges that he is prohibited from making a product he formerly produced or sold, have standing to challenge a law that allows competitors to continue making similar products? Does a manufacturer, who alleges that he has been forced to cease production of a banned product and to redesign or relabel his products, have standing to challenge Congress' authority to regulate the product under the Commerce Clause? Based on the facts alleged by the manufacturers and dealers indicating the impact of the Act on their businesses, we believe they have demonstrated sufficient injury-in-fact to confer standing.[FN7]

> FN7. Contrary to the dissent's contention, we do not believe that greater specificity in pleading is required. In *Abbott Labs.*, the Supreme Court case most analogous to the present one, the Court did not require such specificity. In *Abbott Labs.*, the Court found that a regulation requiring the relabeling of products by drug manufacturers created a concrete injury-in-fact. 387 U.S. at 152-53, 87 S.Ct. at 1517-18. In *Abbott Labs.*, the cost of relabeling was not specified and the drug manufacturers were not required to demonstrate that a rise in prices could not cover these costs. We believe the dissent errs in suggesting that such data is required when a regulation, such as the one in *Abbott Labs.* has an obvious economic impact. We note that not once in *Abbott Labs.* did the Supreme Court use the term "economic injury" or "economic damage," as it is a matter of common sense that a company that must relabel products will be forced to make additional expenditures. Similarly, in the present case, we believe it is a matter of common sense that manufacturers, who must both redesign *and* relabel

> products, will be forced to make additional expenditures, and a company that is forced to cease producing a product, which it wishes to continue to produce, has sustained a concrete economic injury. In *Abbott Labs.*, the Supreme Court found there was "no question that petitioners have sufficient standing," because the regulation at issue required relabeling of products which would require "significant changes in their everyday business practices." *Id.* at 154, 87 S.Ct. at 1518. We believe the changes required by the Act in the present case go far beyond the relabeling of products, which in *Abbott Labs.* was by itself a sufficient "injury-in-fact" to confer standing. Finally, we note that contrary to the dissent's contention, the Group I plaintiffs specifically stated that they have "stop [ped] production" of prohibited products, and this type of injury was explicitly argued in their briefs.

***282 *15** We find that the injury-in-fact to the manufacturers and dealers created by the alleged constitutional violations in these counts of the complaint is "concrete and particularized," *Lujan,* 504 U.S. at 560, 112 S.Ct. at 2136, "real and immediate," *Golden v. Zwickler,* 394 U.S. at 108, 89 S.Ct. at 959-60, and not "abstract" or "conjectural." *Los Angeles v. Lyons,* 461 U.S. 95, 101-02, 103 S.Ct. 1660, 1664-65, 75 L.Ed.2d 675 (1983). There is no doubt that the effects of the prohibitions of the Act are currently felt by the manufacturers and dealers in a concrete way. The prohibitions are not hypothetical, but take effect immediately, and the court need not speculate on the kind of activity the manufacturers and dealers want to engage in-they want to continue making and selling the products specifically prohibited by name, model number, and design in certain provisions of the Act. *See United Public Workers v. Mitchell,* 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947) (threat was hypothetical as court could only speculate on kinds of political activity appellants wished to engage in). The statute inflicts a concrete commercial injury, which takes effect immediately prior to prosecution. The manufacturers' and dealers' challenges to the Act under the Commerce Clause and Equal Protection Clause are, thus, disputes brought by truly adversarial parties with a genuine stake in the outcome of the adjudication. *Allen v. Wright,* 468 U.S. at 770, 104 S.Ct. at 3334-35. The causal connection between the economic injury and the conduct complained of is "fairly ... trace[able] to the challenged action" of defendants. *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976). The prohibitions of the Act are addressed directly to ***16** manufacturers and dealers of semiautomatic assault weapons and large capacity ammunition feeding devices, and the injury to these plaintiffs' businesses stems directly from the Act's ban of specific products by brand name, model number, and design. Finally, it is likely that the injury will be redressed by the requested relief. The manufacturers and dealers have abandoned a line of business because of passage of the Act; were the Act to be declared unconstitutional, they would promptly resume the prohibited activities.

As the court in *Pic-A-State Pa., Inc.,* 76 F.3d at 1299, pointed out, courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute. *See also Doe v. Bolton,* 410 U.S. 179, 188, 93 S.Ct. 739, 745-46, 35 L.Ed.2d 201 (1973) (when a criminal statute directly targets a specific profession and directly operates to restrict a person in his profession, pre-enforcement review is available). In the present case, the manufacturer and dealer plaintiffs have been targeted for regulation by the Crime Control Act and have been directly harmed by the statute's prohibitions against specific weapons and ammunition feeding devices. Thus, they are the proper parties to bring suit. In addition, this court has held that "[a]n economic injury which is traceable to the challenged action" satisfies the requirements of Article III standing.

Linton, 973 F.2d at 1316. As the Supreme Court indicated in *Abbott Labs.,* there is no question that the manufacturers and firearm dealers have sufficient standing as plaintiffs, because "the regulation is directed at them in particular; it requires ***283** them to make significant changes in their everyday business practices; if they fail to observe the ... rule they are quite clearly exposed to the imposition of strong sanctions." 387 U.S. at 154, 87 S.Ct. at 1518 . To conclude, the manufacturers and dealers have alleged an immediate, concrete injury-in-fact to their businesses, which is fairly traceable to the challenged prohibitions of the Act, and there is a substantial likelihood that the relief requested will redress their claimed injury. For these reasons, we find the Group I plaintiffs have met their burden of demonstrating an "actual controversy" sufficient to confer standing to ***17** adjudicate the challenges set forth in Counts Three, Four, and Seven of the complaint.[FN8]

> FN8. Our finding that the economic injury alleged by the manufacturers and dealers is sufficient to confer standing is not inconsistent with the holding of the Ninth Circuit in *San Diego County Gun Rights Committee v. Reno,* 98 F.3d 1121 (9th Cir.1996). There, the court found that an economic injury is clearly a sufficient basis for standing, but that the plaintiffs failed to demonstrate that their alleged economic injury was fairly traceable to the Crime Control Act. The plaintiffs' alleged economic injury was that the Crime Control Act had caused the price of banned devices and grandfathered arms to increase "from 40% to 100%." *Id.* at 1130. The court in *San Diego* found the plaintiffs did not have standing, because the connection between the alleged economic injury and the prohibitions in the statute was too attenuated. *Id.* In contrast, in the present case, there is a direct causal connection between the economic injuries alleged and the prohibitions in the statute.

Our conclusion that the manufacturers and dealers in the present case have standing to bring suit is consistent with the opinion of the Court of Appeals for the District of Columbia in *Navegar, Inc. v. United States,* 103 F.3d 994 (D.C.Cir.1997). There, the court found that one of the original plaintiffs herein, Navegar, Inc., had standing to challenge certain provisions of the Crime Control Act.[FN9] *Id.* at 1002. In *Navegar,* the appellants, Navegar, doing business as Intratec, and Penn Arms, challenged those portions of the Act that singled out for prohibition specific weapons manufactured only by them.[FN10] The court found that the weapon-specific nature of these provisions of the Act put the appellants in a special posture with regard to the issue of standing, stating as follows:

> FN9. As previously noted in footnote one, Navegar, Inc., doing business as Intratec, was one of the original plaintiffs in the present case, but did not join in the appeal.
>
> FN10. Portions of the Act make it unlawful to manufacture or transfer Intratec's "TEC-9," "TEC-DC9" and "TEC-22" models and Penn Arm's "Striker 12" model of semiautomatic assault weapons. 18 U.S.C. §§ 921(a)(30)(A)(viii), (ix).

***18** [T]he Act in effect singles out the appellants as its intended targets, by prohibiting weapons that only the appellants make. This fact sets this case apart from most others in which preenforcement challenges to the Act have been held nonjusticiable. It also makes the applicability of the statute to appellants' business indisputable: if these provisions of the statute are enforced at all, they will be enforced against these appellants for continuing to manufacture and sell the specified weapons....
Id. at 999. We believe the reasoning of *Navegar* applies in the present case. The Crime Control Act specifically targets the manufacturers and dealers herein, who make and sell the particular products prohibited in §§ 921(a)(30), (31) of the Act, and the applicability of the Act to their businesses is indisputable.

Not only have the manufacturer and dealer plaintiffs herein terminated the manufacture and sale of prohibited products and suffered economic harm in response to passage of the Act, but any further attempt to pursue prohibited lines of business risks serious criminal penalties. In circumstances such as these, we believe the Group I plaintiffs have standing to challenge the prohibitions of § 921(v)(1) and § 921(w)(1) as defined in § 921(a)(30) and § 921(a)(31) of the Act on Commerce Clause and Equal Protection grounds. *See General Motors Corp. v. Tracy,* 519 U.S. 278, ----, 117 S.Ct. 811, 818, 136 L.Ed.2d 761 (1997) (consumers who suffer economic injury from regulation forbidden under the Commerce Clause satisfy standing requirements of Article III); *Craig v. Boren,* 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976) (plaintiff beer vendor had standing to challenge the constitutionality of Oklahoma statute prohibiting the sale of ***284** beer to males under the age of 21 and females under the age of 18 where vendor would either sustain economic injury or lose her license as a result of the statute's operation); *Postscript Enterprises, Inc. v. Whaley,* 658 F.2d 1249, 1252 (8th Cir.1981) (appellant had sustained injury-in-fact that satisfies Article III's standing requirement as the legal duties created by the ordinance were addressed directly to vendors ***19** such as appellant, who was obliged either "to heed the statutory prohibition, thereby incurring a direct economic injury through the constriction of its market, or to disobey the statutory command and suffer legal sanctions.").

B. *Ripeness*

[15][16][17] We must next decide whether the manufacturers' and dealers' challenges in Counts Three, Four, and Seven of the complaint are ripe for judicial review. The Supreme Court has stated that the basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 580, 105 S.Ct. 3325, 3332, 87 L.Ed.2d 409 (1985). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 200-01, 103 S.Ct. 1713, 1720-21, 75 L.Ed.2d 752 (1983); *Dames & Moore v. Regan,* 453 U.S. 654, 689, 101 S.Ct. 2972, 2991-92, 69 L.Ed.2d 918 (1981). Ripeness is, thus, a question of timing. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 139, 95 S.Ct. 335, 356, 42 L.Ed.2d 320 (1974). A case is ripe for pre-enforcement review under the Declaratory Judgment Act only if the probability of the future event occurring is substantial and of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler,* 394 U.S. at 108, 89 S.Ct. at 959-60; *Armstrong World Indus. v. Adams,* 961 F.2d 405, 412 (3rd Cir.1992).

[18] This court has stated that ripeness requires us to weigh several factors in deciding whether to address the issues presented for review. *United Steelworkers, Local 2116 v. Cyclops Corp.,* 860 F.2d 189, 194 (6th Cir.1988). We must address the hardship to the parties if judicial relief is denied at the pre-enforcement stage in the proceedings. *Id.* at 195. We must examine the "likelihood that the harm alleged by plaintiffs will ever come to pass." *Id.* at 194. And we must consider whether the case is fit for judicial resolution at the pre-enforcement stage, which requires a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims. *Id.* at 195. *See also* ***20***Brown v. Ferro Corp.,* 763 F.2d 798, 801 (6th Cir.) ("ripeness doctrine ... requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances"), *cert. denied,* 474 U.S. 947, 106 S.Ct. 344, 88 L.Ed.2d 291 (1985). As the Supreme Court has stated, the prudential considerations that weigh in the ripeness calculus are the need to "fles[h] out" the controversy and the burden on the plaintiff who must "adjust his conduct immediately." *Lujan,* 497 U.S. at 891, 110 S.Ct. at 3190.

[19] In the present case, the district court found the action was not ripe for judicial review because no prosecution of any plaintiff was pending or imminent. The district court stated that a pre-enforcement challenge to a statute with criminal penalties is premature prior to enforcement unless the threat of prosecution is imminent. The district court based its analysis primarily on cases that involve challenges to statutes criminalizing the exercise of First Amendment rights, such as *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), and *Babbitt v. United Farm Workers Nat'l Union.* 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). We believe the district court erred in this regard, because the harm or injury-in-fact alleged in First Amendment cases is very different from that alleged by the manufacturers and dealers herein, and, consequently, different concerns arise when determining whether the case is ripe for judicial review.

[20][21] Within the context of the First Amendment, the Supreme Court has enunciated concerns that justify a lessening of the ***285** usual prudential requirements for a pre-enforcement challenge to a statute with criminal penalties. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 956, 104 S.Ct. 2839, 2846-47, 81 L.Ed.2d 786 (1984). The harm alleged in First Amendment cases is the "chilling effect" on the constitutionally protected right to free expression, which, the Supreme Court has stated, is "of transcendent value to all society." *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965). A statute prohibiting activity protected by the First Amendment leads to "self-censorship, a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 393, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988); *Dombrowski,* 380 U.S. at 486-87, 85 S.Ct. at 1120-22 (the practical value of the First Amendment right may be ***21** destroyed if not vindicated before trial). The ripeness inquiry to pre-enforcement challenges in First Amendment cases usually focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute in order to ensure that the fear of prosecution is genuine and the alleged chill on First Amendment rights is concrete and credible, and not merely imaginative or speculative. *Steffel v. Thompson,* 415 U.S. at 459, 94 S.Ct. at 1215; *Babbitt,* 442 U.S. at 301-03, 99 S.Ct. at 2310-11. Parties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to " 'chill' the exercise of free speech and expression," a constitutionally protected right. *Dambrot v. Central Michigan Univ.,* 55 F.3d 1177, 1182 (6th Cir.1995). More stringent requirements apply when litigants challenge a statute, such as the Crime Control Act, which does not inhibit or "chill" the expression of a constitutionally protected right, but instead imposes significant and costly compliance measures. However, contrary to the district court's contention, actual or imminent enforcement is not always a prerequisite in non-First Amendment cases, if the statute creates a "present harm," such as substantial economic injury. In order to determine whether the present case is ripe for pre-enforcement review, we believe, therefore, that we must look to cases dealing with similar economic injury for precedential guidance, and not to First Amendment cases. *See Allen v. Wright,* 468 U.S. at 751-52, 104 S.Ct. at 3324-25 (questions about justiciability can be answered chiefly by comparing the allegations of the particular complaint to those made in similar cases).

The seminal case regarding pre-enforcement review outside the First Amendment context is *Abbott Labs.,* 387 U.S. at 136, 87 S.Ct. at 1507. This case involved a challenge by drug manufacturers to regulations promulgated under the Food, Drug and Cosmetic Act before the regulations had been enforced against them.[FN11] ***22** The Supreme Court determined that there was jurisdiction in the federal courts under the Declaratory Judgment Act and the Administrative Procedure Act for pre-enforcement

review, but found that a further inquiry had to be made. "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them ... unless [they] arise in the context of a controversy 'ripe' for judicial resolution." *Id.* at 148, 87 S.Ct. at 1515. The Supreme Court stated that the problem is best seen in a twofold aspect, requiring the Court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515.

> FN11. At issue in *Abbott Labs.* were regulations interpreting a statutory command to print generic names "prominently." The agency interpreted the statute to require each use of the name to be so printed.

1. *Hardship to the Parties*

In the face of the regulations at issue in *Abbott Labs.*, the petitioners (the pharmaceutical firms) were forced either to change all labels and promotional materials for various generic drugs or to refuse to abide by the new regulations and risk serious criminal and civil penalties for noncompliance. *Id.* at 152-53, 87 S.Ct. at 1517-18. The Supreme Court found that the new drug-labeling regulations ***286** had the status of law and had an immediate impact on the day-to-day operations of the petitioners' businesses, requiring substantial monetary investment in order to comply. *Id.* The Supreme Court reasoned that "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review" at the pre-enforcement stage, because promulgation of the regulations "puts petitioners in a dilemma": "Either they must comply with the [labeling] requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." *Id.* at 152, 87 S.Ct. at 1517 (internal quotation marks omitted). The Supreme Court found that the immediate impact of the regulations on the drug manufacturers also satisfied the "hardship" prong. *Id.* at 153, 87 S.Ct. at 1517-18. "[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." ***23** *Suitum v. Tahoe Regional Planning Agency,* ---U.S. ----, ----, 117 S.Ct. 1659, 1669, 137 L.Ed.2d 980 (1997). In *Abbott Labs.*, the hardship requirement was satisfied by the fact that the affected companies either had to expend substantial amounts of money to comply with the regulations or not comply and risk serious criminal and civil penalties.

In assessing the magnitude and immediacy of the hardship imposed by the Crime Control Act upon the manufacturers and dealers in the present case, we find that the resemblance between the facts of *Abbott Labs.* and those before us is striking. The manufacturers and dealers herein are faced with significant changes in the day-to-day operation of their businesses in order to comply with a statutory provision. Like the drug companies in *Abbott Labs.*, plaintiffs, for all practical purposes, are coerced into a particular course of conduct by the prospect of heavy civil and criminal penalties that might be visited upon them. 387 U.S. at 152-53, 87 S.Ct. at 1517-18. The alleged economic harm is similar. The Group I plaintiffs must relabel and redesign products or cease production and sales of prohibited products, requiring either a substantial monetary investment or loss in order to comply. As was the case in *Abbott Labs.*, the impact of the government action is "direct and immediate," and noncompliance risks serious civil and criminal penalties. *Id.* The Court in *Abbott Labs.* found that such a circumstance "put petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* at 152, 87 S.Ct. at 1517. The Court assessed the "hardship to the parties if judicial relief were denied at the [pre-enforcement] stage in the proceedings" and concluded:

To require [petitioners] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unne-

cessarily.... [W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act and Declaratory Judgment Act must be permitted....

Id. at 153, 87 S.Ct. at 1518.

24** In the present case, the hardship factor clearly weighs in the manufacturers' and dealers' favor. *See Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n,* 710 F.2d 1165, 1172 (6th Cir.1983) (hardship to the company of requiring it to wait to challenge proposed changes in testing "tar" and nicotine levels of manufacturer's cigarettes appears to be no less than the hardship faced by the drug companies in *Abbott Labs.*). The government's interest in deferral is outweighed because postponement of a decision would work substantial hardship, requiring the expenditure or loss of substantial amounts of money, which could not be recovered if the law were eventually struck down. As in the *Regional Rail Reorganization Act Cases,* 419 U.S. at 144, 95 S.Ct. at 359, the manufacturers' and dealers' decisions "to be made now or in the short future [will] be affected by whether or not the ... issues are now decided." The Supreme Court found that in such a circumstance, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* at 143, 95 S.Ct. at 358, quoting ***287Pennsylvania v. West Virginia,* 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923). *See also Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. at 581, 105 S.Ct. at 3333 (nothing would be gained by postponing a decision and to require the industry to proceed without knowing whether the arbitration scheme was valid would impose "a palpable and considerable hardship"); *Pacific Gas & Electric Co.,* 461 U.S. at 201-02, 103 S.Ct. at 1721 (preenforcement challenge to waste disposal regulations, requiring expenditure of millions of dollars over a number of years, was permitted, because the need for judicial decision was immediate; otherwise electric utilities would be forced either to abandon all nuclear energy development or run the risk that planning and development expenses would be incurred for naught); *Environmental Protection Agency v. National Crushed Stone Ass'n,* 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980) (facial challenge to the variance provision of an EPA pollution-control regulation was ripe for pre-enforcement review, because failure to review the matter would cause hardship, and resolution of the conflict would determine for some crushed stone plants whether they could continue to exist or not); *Brown v. Ferro Corp.,* 763 F.2d at 804 (very real ***25** hardship may be caused by failure of court to consider the validity of golden parachutes at this time).

The manufacturers and firearms dealers herein present a classic example of when pre-enforcement review must be granted. Absent the availability of pre-enforcement review, these plaintiffs must either terminate a line of business, make substantial expenditures in order to comply with the Act, or willfully violate the statute and risk serious criminal penalties. Like the drug companies in *Abbott Labs.,* these plaintiffs are "put ... in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* at 152, 87 S.Ct. at 1517. The government's action would reasonably prompt a regulated industry, unwilling to risk substantial penalties by defying the statute, to undertake costly compliance measures or forego a line of business. *State Farm Mutual Auto. Ins. Co. v. Dole,* 802 F.2d 474, 480 (D.C.Cir.1986), *cert. denied,* 480 U.S. 951, 107 S.Ct. 1616, 94 L.Ed.2d 800 (1987). Thus, the federal court is not asked to decide a case involving conjectural or hypothetical injury, but one that creates substantial economic hardship, which is direct and immediate, and will be compounded by a refusal of the court to intervene prior to enforcement of the statute.

Although we are aware of the Supreme Court's admonition "not to entertain constitutional questions in advance of the strictest necessity," *Poe v. Ullman,* 367 U.S. 497, 503, 81 S.Ct. 1752, 1756, 6

L.Ed.2d 989 (1961), we believe that as a policy matter, strong reasons counsel against requiring the manufacturers and dealers to engage in illegal conduct before their challenges can be heard. There are no advantages to the court to be gained from withholding judicial review at the present time and waiting until a manufacturer or dealer has been prosecuted under the Act. A defense in criminal proceedings on constitutional grounds does not provide an adequate remedy for the economic injury incurred. *Abbott Labs.*, 387 U.S. at 153, 87 S.Ct. at 1517-18. Furthermore, we believe a citizen should be allowed to prefer "official adjudication to public disobedience." *See* 13A, Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure,* § 3532.5 at 183-84 (2nd ed.1984). As the court in *Navegar* indicated, a denial of review to the ***26** manufacturers and dealers affected by the Act would be totally unjustified by the constitutional or prudential concerns underlying the ripeness doctrine. 103 F.3d at 1001. As in *Abbott Labs.*, the prohibitions of the Act "require an immediate and significant change in the[se] plaintiffs' conduct of their affairs with serious penalties attached to non-compliance." 387 U.S. at 153, 87 S.Ct. at 1518. To require the manufacturers and dealers to challenge the prohibitions of the Act "only as a defense to an action brought by the Government might harm them severely and unnecessarily." *Id.* Therefore, we find that the manufacturers' and dealers' challenges to the Act on Commerce Clause and Equal Protection grounds are ripe for review, and "access to the courts ... under the Declaratory Judgment Act must be permitted." *Id.*

***288** 2. *Well-Founded Fear of Prosecution*

The United States argues that the rationale of *Abbott Labs.* does not apply in the present case, because in *Abbott Labs.*, the pre-enforcement challenge was brought pursuant to the Administrative Procedure Act, which specifically provides for challenges to final agency action. We do not agree that *Abbott Labs.* must be construed so narrowly. One reason the Supreme Court gave for granting pre-enforcement review in *Abbott Labs.* was that the regulations at issue had the status of law. 387 U.S. at 152, 87 S.Ct. at 1517. Moreover, the Supreme Court has found a pre-enforcement challenge to the constitutionality of a statute with criminal penalties ripe for review pursuant to the Declaratory Judgment Act. In *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972), the Supreme Court reviewed a state statute which the appellants alleged inflicted economic harm. The Supreme Court developed the "present effectiveness in fact" doctrine to address the likelihood that the harm allegedly inflicted by the regulation in the statute would come to pass. *Id.* at 507, 92 S.Ct. at 1755. The Court found that the appellants, a water carriers' association and individual members who owned or operated federally licensed Great Lakes cargo vessels, could bring a pre-enforcement challenge to the constitutionality of the Michigan Watercraft Pollution Control Act, which prohibited them from dumping sewage ***27** and required them to have sewage storage devices on board their vessels. *Id.* at 506, 92 S.Ct. at 1755.

The Court found that the question of whether the complaint presented an actual controversy ripe for review under the Declaratory Judgment Act was whether "there [was] a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Id.* The Court found that the complaint, which challenged the statute on both Commerce Clause and Equal Protection grounds, presented an actual controversy that was ripe for review, because the obligation to install the sewage storage devices under the Michigan statute was presently effective in fact, even though the appellants had not been threatened with criminal prosecution. *Id.* The Court stated:

They depend [for their argument that the statute is ripe for review] ... on the present effectiveness in fact of the obligation under the Michigan statute to install sewage storage devices. For if appellants are now under such an obligation, that in and of itself

makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion.

Id. at 507, 92 S.Ct. at 1755. As was the case in *Abbott Labs.*, the appellants' challenges were ripe for judicial review because of the immediacy of the hardship imposed by the Michigan statute.
Thus, if appellants are to avoid prosecution, they must be prepared, according to Michigan authorities, to retain all sewage on board as soon as pump-out facilities are available, which, in turn, means that they must promptly install sewage storage devices. In this circumstance, compliance is coerced by the threat of enforcement, and the controversy is both immediate and real.

Id. at 508, 92 S.Ct. at 1756. Like the petitioners in *Abbott Labs.*, the appellants in *Lake Carriers' Ass'n* were put in the untenable position of ***28** having to choose either to comply with the statute and immediately sustain an economic hardship or refuse to comply and risk future enforcement of the statute against them, which would result in severe penalties.

In *Lake Carriers' Ass'n,* the Supreme Court indicated that in order to establish the need for pre-enforcement review, the Court also had to determine whether compliance was "uncoerced by the risk of enforcement." *Id.* at 507, 92 S.Ct. at 1756. In other words, the Court had to determine if appellants' decision to challenge the obligations and prohibitions contained in the Watercraft Pollution Control Act was truly motivated by a well-founded fear that refusal to comply would lead to prosecution. The Court found that the state of Michigan had sought "on the basis of the Act and the threat of future enforcement to obtain compliance as soon as possible." *Id.* Therefore, the appellants' pre-***289** enforcement challenge was ripe for judicial review. *Id.* at 506, 92 S.Ct. at 1755.

The same is true in the present case. As this court has pointed out, the Supreme Court typically has allowed pre-enforcement review when enforcement of a statute or ordinance against a particular plaintiff is inevitable. *Kardules v. City of Columbus,* 95 F.3d 1335, 1344 (6th Cir.1996); *see also Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) (landlord's challenge to rent control ordinance was ripe for pre-enforcement review as landlords had demonstrated real and danger of sustaining a direct economic injury as a result of the ordinance's operation and future enforcement against them); *Illinois v. General Electric Co.,* 683 F.2d 206, 210 (7th Cir.1982) ("[T]he Act has only one conceivable target ... and it is extremely unlikely that the state would overlook its violation," and the controversy is therefore ripe), *cert. denied,* 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

In the present case, the likelihood that the Gun Control Act will be enforced against federally licensed firearm manufacturers and dealers who refuse to comply with its prohibitions is clear. The court in *Navegar* found with respect to one of the original plaintiffs herein, Navegar, Inc. The court pointed out that the Act's specific prohibitions as to ***29** products made by appellants Navegar and Intratec Arms indicated the Act's intention of eliminating this portion of their business and made the Act "present[ly] effective[ ] in fact," citing *Lake Carriers' Ass'n.* 103 F.3d at 1000. The court in *Navegar* found that the appellants' failure to comply would inevitably lead to prosecution, stating:

To conclude that the appellants face no credible threat of prosecution under these portions of the Act, we would have to believe that the government would enact a widely publicized law targeting products that only the appellants make, but then sit idly by while the appellants continue to manufacture the outlawed weapons. To imagine that the government would conduct itself in so chimerical a fashion would be to declare in effect that federal courts may never, in the absence of an explicit verbal "threat," decide preenforcement challenges to criminal statutes. This has never been the law. To require litigants seeking resolution of a dispute

that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.

Id. at 1000-01.

We agree with the reasoning in *Navegar* and find that it applies to the manufacturers and dealers in the present case. The prohibitions of the Crime Control Act are presently effective in fact, and these plaintiffs' challenges are motivated by a well-founded fear of prosecution. The applicability of the Act to their businesses is indisputable, and "compliance is coerced by the threat of enforcement." *Lake Carriers' Ass'n,* 406 U.S. at 507, 92 S.Ct. at 1755-56. Evidence that the government intends to enforce the Act against these plaintiffs is demonstrated by the September 1994 letters sent out by BATF, explaining the ***30** prohibitions of the Act and indicating that BATF inspectors would conduct a final inventory of semiautomatic assault weapons which fit within the exemptions. The letters indicate the government's intention to enforce the law through inspections and to prevent the manufacture and sale of prohibited products that do not fall within its exemptions. We agree with the court in *Navegar* that it is inconceivable that the government would enact a widely publicized law, outlawing specific products by name, model number, and design, which are manufactured and sold by specific companies and dealers, and then sit idly by if the companies continued to manufacture and the dealers continued to sell the outlawed products. 103 F.3d at 1000-01. As in *Lake Carriers' Ass'n,* the government in the present case has "sought through the threat of future enforcement to obtain compliance as soon as possible." 406 U.S. at 507, 92 S.Ct. at 1756.

[22] To conclude, we believe the district court erred in its ripeness analysis in regard ***290** to the manufacturers and dealers. Although the court correctly noted that the more relaxed standing requirements for First Amendment cases do not apply in the present case because the Crime Control Act does not chill the exercise of a constitutionally protected right, the court failed to consider the "actual present harm" alleged and whether such harm created an injury-in-fact ripe for judicial review.[FN12] The district court did not consider in regard to the Group I plaintiffs the economic burden imposed by the Act, the hardship incurred by postponing review, or whether the United States had made it clear that immediate compliance was expected. When a statute creates substantial economic burdens and compliance is coerced by the threat of ***31** enforcement, it is not necessary to determine whether a plaintiff subject to the regulation has sufficiently alleged an intention to refuse to comply; it is sufficient for the plaintiff to demonstrate the statute's direct and immediate impact on his business and to establish that compliance with the regulation imposed will cause significant economic harm. *Abbott Labs.,* 387 U.S. at 153, 87 S.Ct. at 1517-18. It is not necessary to try to determine the imminence of a threatened prosecution; it is necessary, instead, to determine if the statute can realistically be expected to be enforced against a plaintiff singled out for regulation because the government has made it clear that immediate compliance is mandatory. *Lake Carriers' Ass'n,* 406 U.S. at 507, 92 S.Ct. at 1755-56. *See also Production Credit Ass'n of Northern Ohio v. Farm Credit Admin.,* 846 F.2d 373, 375 (6th Cir.1988) (when examining whether a challenge to the validity of a regulation is ripe for pre-enforcement review, the court must determine whether the impact of the regulation imposes a substantial burden of compliance and will be applied to plaintiffs in the future), *cert. denied,* 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 106 (1988). In the present case, we believe the manufacturers and dealers have met the ripeness requirements of *Abbott Labs.* and *Lake Carriers' Ass'n,* which were cases that involved similar economic harm. Accordingly, we find the issues presented by the manufacturers' and dealers' Commerce Clause and Equal Protection challenges to

the Crime Control Act are ripe for judicial review under the Declaratory Judgment Act.

> FN12. In the present case, plaintiffs do not allege that the Crime Control Act infringes upon or "chills" their exercise of a constitutionally protected right to bear arms in violation of the Second Amendment. Thus, they do not allege that the prohibitions of the Act force them to forego an activity that, in and of itself, is constitutionally protected. The manufacturers and dealers allege, instead, that the prohibitions against the activity they wish to engage in violate the Commerce Clause and Equal Protection Clause and cause them economic harm.

C. *Fitness for Judicial Review*

[23] Finally, we must examine whether the issues raised by the Group I plaintiffs are presently fit for judicial resolution. As the Court in *Abbott Labs.* indicated, when ruling under the Declaratory Judgment Act, usually only purely legal issues are fit for judicial resolution before prosecution is initiated. 387 U.S. at 148, 87 S.Ct. at 1515. *See also Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. at 581, 105 S.Ct. at 3333 ("issue presented is purely legal and will not be clarified by further factual development"); ***32***Brown & Williamson Tobacco Corp.,* 710 F.2d at 1171 (question of law which requires no further fact-finding is fit for judicial review).

1. *Equal Protection and Commerce Clause Challenges*

[24] The Group I plaintiffs bring a facial challenge to the constitutionality of the Crime Control Act on Commerce Clause and Equal Protection grounds, which are purely legal issues. Further development of a factual record by prosecution of these plaintiffs would not inform the court's legal analysis. In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard. *Abbott Labs.,* 387 U.S. at 149, 87 S.Ct. at 1515-16. Usually until the controversy has become focused in a concrete factual situation, it is difficult for the court to evaluate the practical merits of the position of each party. *See Valley Forge Christian College,* 454 U.S. at 472, 102 S.Ct. at 758-59 (questions presented ***291** to the court must be resolved, "not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"). In the present case, the bare text of the unenforced statute indicates the harm the Act will engender, and the actual practices of enforcement are not relevant to the debate involving its constitutionality under the Commerce Clause and Equal Protection Clause.

For example, in Counts Four and Seven, the manufacturers and dealers contend that the Act violates the Equal Protection Clause because it protects from further regulation some manufacturers' semi-automatic assault weapons, while banning other nearly identical products of the same type, capacity, and function.[FN13] No factual development can change what the statute bans and what it protects. [FN14] Courts have ***33** found that the legal issues presented by an equal protection challenge may be conclusively resolved before enforcement of a statute or ordinance. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 210-12, 115 S.Ct. 2097, 2104-05, 132 L.Ed.2d 158 (1995) (subcontractor could seek forward-looking declaratory and injunctive relief for his challenge that the race-based presumptions used in subcontractor compensation clauses violated the Equal Protection Clause); *Zielasko v. Ohio,* 873 F.2d 957, 958-59 (6th Cir.1989) (equal protection challenge justiciable prior to criminal prosecution). The challenge in Count Three of the complaint also presents a purely legal issue-the scope of Congress' power to legislate under the Commerce Clause. The court's determination of whether the Crime Control Act violates the Commerce Clause can be made upon the

legal issues presented. *See Pic-A-State Pa., Inc.*, 76 F.3d at 1294 (interstate lottery ticket seller's challenge to the Interstate Wagering amendment as unconstitutional under the Commerce Clause was purely legal issue ripe for pre-enforcement review).

> FN13. The prohibitions of the Act expressly do not include any of the weapons listed in § 922, Appendix A or described in § 922(v)(3).
>
> FN14. For example, plaintiffs allege that whereas the "Colt AR-15" is banned under § 921(a)(30)(A)(iv), the "Ruger Mini-14" is protected under 18 U.S.C. § 922, Appendix A. Plaintiffs contend the two firearms are virtually identical, but that the Act singles out certain products and producers for prohibition, but gives express protection to the products of manufacturers with a greater constituency. In *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir.1994), this court found that a city ordinance's ban of certain assault weapons by brand name, without including within the prohibition similar assault weapons of the same type, function, or capability, was not rationally related to any legitimate government purpose.

We find no reason related to the constitutional or prudential concerns of the ripeness doctrine for requiring the Group I plaintiffs to undergo a criminal prosecution before bringing their Equal Protection and Commerce Clause challenges. The statute cannot be interpreted more narrowly on an "as applied" basis in order to avoid these constitutional issues. A constitutional decision prior to enforcement of the Act will be rendered at the behest of those actually injured and singled out by the statute, rather than at the behest of those who wish merely to impose their own views of public policy on the government. *See Valley Forge,* 454 U.S. at 473, 102 S.Ct. at 759. In regard to these ***34** issues, the manufacturers and dealers have alleged a "personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978), citing *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Enforcement of the Act against the manufacturers and dealers would not serve to further sharpen or focus their Commerce Clause or Equal Protection challenges. Accordingly, we find that the Commerce Clause and Equal Protection challenges in Counts Three, Four, and Seven of the complaint brought by the Group I plaintiffs are currently fit for judicial resolution.

2. *Vagueness Challenges*

[25][26] However, we find that the vagueness challenges in Counts One, Two, Five, and Six of the complaint are not currently fit ***292** for judicial resolution. Generally, courts have found that "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand." *Maynard v. Cartwright,* 486 U.S. 356, 361, 108 S.Ct. 1853, 1857-58, 100 L.Ed.2d 372 (1988). In other words, the statute must be judged on an as-applied basis, and a facial challenge before the statute has been applied is premature. *United States v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975); *United States v. Hofstatter,* 8 F.3d 316, 321 (6th Cir.1993), *cert. denied,* 510 U.S. 1131, 114 S.Ct. 1101, 127 L.Ed.2d 413 (1994). Nevertheless, this court in *Springfield Armory, Inc. v. City of Columbus,* 29 F.3d 250 (6th Cir.1994), found that the district court's review of a City of Columbus ordinance "on an as applied basis" was, in the circumstances of that case, "an erroneous way to approach the vagueness problem," because the ordinance banning certain assault weapons was obviously vague on its face. *Id.* at 254. In *Springfield Armory, Inc.,* the ordinance defined "assault weapons" by naming forty-six individual models of rifles, shotguns and pistols, listed by model name

and manufacturer. Added to the prohibition against these weapons was the following phrase:

other models by the same manufacturer with the same action design that have slight modifications or ***35** enhancements of firearms listed ... provided the caliber exceeds .22 rimfire.

Id. at 252. This court found that the term "slight modifications" was unconstitutionally vague and made the ordinance invalid on its face. *Id.* at 254.

We find the present case distinguishable from *Springfield Armory* for two reasons. First, in *Springfield Armory,* the court did not address the justiciability requirements of Article III. Second, the court was reviewing a city ordinance, not a federal statute enacted by Congress, and did not have to consider whether there had been "final agency action" in regard to an interpretation of the provision alleged to be vague. In contrast, in the present case, the Crime Control Act delegates rulemaking authority to the Secretary of the Treasury. 18 U.S.C. § 926. The Secretary, in turn, has delegated that authority to the BATF, which has the authority to make rules designating in greater specificity the requirements of the statute. *See* Treas. Dep't Order No. 221, 37 Fed.Reg. 11696, 11696-11697 (1972). *See also* 27 C.F.R. Part 178. William Earle of the BATF has attested that a person desiring a determination of whether a particular weapon or accessory is prohibited under the Act may apply to the BATF's Firearms Technology Branch. Plaintiffs in the present case have not gone through this formal procedure. Because there has been no final agency action interpreting the provisions of the statute alleged to be vague, plaintiffs' vagueness challenges are premature. *Abbott Labs.,* 387 U.S. at 149, 87 S.Ct. at 1515-16. We believe a federal court should not intervene and determine whether a statute enacted by Congress is unconstitutionally vague on its face before the agency with rulemaking authority has had an opportunity to interpret the statute.

Plaintiffs' vagueness challenges are premised on the alleged harm that one must guess, at his own risk, the meaning of the statute. For example, plaintiffs contend they are uncertain what weapons are "copies" or "duplicates" of those listed in 18 U.S.C. § 921(a)(30)(A). However, plaintiffs' allegations that they are "unable to ascertain the meaning of various ***36** restrictions" presently lacks the factual context which would be developed by an administrative determination. We believe such a context is necessary to sharpen the presentation of issues upon which the court depends for "illumination of difficult constitutional issues." *Baker v. Carr,* 369 U.S. at 204, 82 S.Ct. at 703. This court cannot determine in a vacuum whether a particular firearm is a "copy or duplicate" of one prohibited by the Act until a final agency decision has been made. Other courts agree that vagueness challenges to the Crime Control Act are not ripe for pre-enforcement review. *See Mack v. United States,* 66 F.3d 1025, 1033 (9th Cir.1995) (allegation that criminal prohibition of Crime Control Act is ambiguous is not ripe for review), *reversed on other grounds, Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *Navegar, Inc.,* 103 F.3d at 1001 (vagueness challenge to provisions***293** of Crime Control Act are not justiciable prior to enforcement of the Act).

[27] Plaintiffs also contend that the terms "flash suppressor" and "pistol grip that protrudes conspicuously beneath the action of the weapon" in § 921(a)(30)(B) of the Act are impermissibly vague. Plaintiffs provide no reason why the term "flash suppressor" is vague. Their allegation that the term "protrudes conspicuously" is vague would perhaps be ripe for judicial review if the provision were impermissibly vague in all its applications. As the Supreme Court has stated in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191-92, 71 L.Ed.2d 362 (1982), a court can find a statute unconstitutionally vague on its face only if the court concludes that it is capable of no valid application. In the present case, plaintiffs have not demonstrated that the term "protrudes conspicuously" is impermissibly vague in all its applications. As the court

in *Richmond Boro Gun Club, Inc. v. City of New York,* 97 F.3d 681 (2nd Cir.1996), pointed out when reviewing a similar term in a city ordinance that banned certain assault weapons, most sporting firearms "employ a more traditional pistol grip built into the wrist of the stock of the firearm" and photographs demonstrated a sufficient number of assault rifles, which were plainly equipped with "conspicuously protruding grips," to indicate that the term is ***37** not vague in all its applications. *Id.* at 685. Because there are possible valid applications, a vagueness challenge to this provision of the Act on its face is premature. *Village of Hoffman Estates,* 455 U.S. at 494-95, 102 S.Ct. at 1191-92.

For all these reasons, we find that plaintiffs' vagueness challenges in Counts One, Two, Five, and Six of the complaint are not currently fit for judicial resolution and were properly dismissed by the district court.

IV. *The Individual Plaintiffs (Group II)*

A. *Standing.*

[28][29][30] We find the individual plaintiffs do not have standing to sue. The rationale applied to the dealers and manufacturers (Group I plaintiffs) does not apply to them, as they have suffered no economic harm. They do not face the dilemma of whether to risk criminal and civil penalties to defy prohibitions that significantly affect their businesses or to comply with the Act and incur significant economic harm. We find that, in contrast, the individual plaintiffs have failed to demonstrate a cognizable injury-in-fact sufficient to confer standing prior to enforcement of the Act against them. "The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Stoianoff v. Montana,* 695 F.2d 1214, 1223 (9th Cir.1983). The individual plaintiffs aver that they "desire" and "wish" to engage in certain possibly prohibited activities, but are "restrained" and "inhibited" from doing so. They allege that they "are unable and unwilling, in light of the [ous penalties threatened for violation of the] to obtain and possess the firearms and [city ammunition feeding devices prohibited by] statute." Although the standing requirement injury-in-fact is fairly lenient and [wide variety of economic, aesthetic, and other harms, the individual plaintiffs] lege merely that they would like to [duct, which might be prohibited by] without indicating how they are currently [by the prohibitions other than their fear of] secution. Plaintiffs' assertions that they "intend" to engage in proscribed conduct [ficient to establish an injury-in-fact] III. *Lujan,* 504 U.S. at 564, 112 S.Ct. [mere "possibility of criminal sanctions] does not in and of itself create a [versy." *Boating Industry Associations* [601 F.2d 1376, 1384 (9th Cir.1979); *tional Marine Fisheries* Serv. (*NOAA*) [1189, 1191 (9th Cir.1975). The individual plaintiffs] have failed to show the high degree of [necessary for standing when fear of] the only harm alleged. *San Diego [Rights Committee,* 98 F.3d at 1127.

We agree with the district court's conclusion that the plaintiffs who telephoned BATF agents [ted a hypothetical question, and received] that the questioned ***294** activity could subject them to federal prosecution does not confer standing. A threat of prosecution against these plaintiffs is still abstract, hypothetical, and speculative. *Babbitt v. Wright,* 468 U.S. at 756, 104 S.Ct. at [a direct injury that is "presently effective"] the individual plaintiffs do not demonstrate the personal stake and interest necessary to give [tion the concreteness required for Article III standing. *Raines v. Byrd,* at ----, 117 S.Ct. at 2317.

[31] Furthermore, plaintiffs' implication that the statute has a "chilling" effect on their desire to purchase the outlawed weapons and accessories does

not establish standing. "Every criminal law, by its very existence, may have some chilling effect on personal behavior. That is the reason for its passage." *Doe v. Duling,* 782 F.2d 1202, 1206 (4th Cir.1986). Plaintiffs do not allege that the law "chills" because it forces them to forego constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.[FN15] Except for cases involving core First ***39** Amendment rights, the "existence of a 'chilling effect' ... has never been considered a sufficient basis, in and of itself, for prohibiting" [government action]. *Younger v. Harris,* 401 U.S. 37, 51, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971). As the Supreme Court has noted, "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum,* 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972).

> FN15. In contrast, the plaintiffs in *San Diego Gun Rights Committee* argued the Crime Control Act infringed on their constitutionally protected right to bear arms under the Second Amendment. 98 F.3d at 1124-25. Plaintiffs in the present case make no such allegation, and we do not consider the issue.

[32][33][34] Plaintiffs' allegations of fear of prosecution, which thwarts their desire to possess or transfer prohibited products, affects not only the named plaintiffs, but also anyone desiring to possess the products proscribed by the Crime Control Act. The Supreme Court has refrained from adjudicating "generalized grievances," pervasively shared. *Valley Forge Christian College,* 454 U.S. at 474-75, 102 S.Ct. at 759-60. The individual plaintiffs' alleged harm amounts to no more than a " 'generalized grievance' shared in substantially equal measure by ... a large class of citizens," and thus does not warrant the exercise of jurisdiction. *Warth v. Seldin,* 422 U.S. at 499, 95 S.Ct. at 2205. One of the policies against adjudicating generalized grievances is that the court should "decide the case with some confidence that its decision will not pave the way for lawsuits, which have some, but not all, of the facts actually decided by the court." *Valley Forge Christian College,* 454 U.S. at 472, 102 S.Ct. at 759. As the court in *San Diego Gun Rights Committee,* 98 F.3d at 1133, indicated, granting standing to gun rights enthusiasts, such as the individual plaintiffs in the present case, would allow virtually anyone to challenge a federal act concerning gun control. As the Supreme Court stated in *Massachusetts v. Mellon,* 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923):

The party who invokes the power [of judicial review] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not ***40** merely that he suffers in some indefinite way in common with people generally.

To conclude, the injury-in-fact alleged by the individual plaintiffs is not sufficient to fulfill the standing requirement of Article III.

V. *Association Plaintiffs (Group III)*

A. *Standing*

[35][36] The Supreme Court has stated that an association has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Because none of the declarations submitted by ***295** the NRA or MACC members allege an injury-in-fact sufficient to confer standing in the individual member's own right, the declarations are insufficient to confer standing on the National Rifle Association of America or the Michigan United

Conservation Clubs. The associations, thus, do not have standing to challenge the Act.

VI. *Conclusion*

The district court's order granting defendants' motion to dismiss for lack of subject matter jurisdiction is **AFFIRMED** in part and **REVERSED** in part.

A. *Standing*

We **AFFIRM** the district court's conclusion that plaintiffs-appellants, Charles Duncan, James E. Flynn, James J. Fotis, and Craig D. Sandler (Group II plaintiffs), and the National Rifle Association of America and Michigan United Conservation Clubs (Group III plaintiffs), do not have *41 standing to challenge the statute on any grounds because they have not suffered an actual or imminent injury-in-fact.

We **REVERSE** the district court's conclusion that plaintiffs-appellants, Olympic Arms, Calico Light Weapons Systems, D.C. Engineering, Ammo Dump, and Glenn Duncan (Group I plaintiffs) do not have standing to sue. We find these manufacturer and dealer plaintiffs have demonstrated a cognizable injury-in-fact that meets the requirements of Article III and have standing to sue.

B. *Ripeness*

We **AFFIRM** the district court's dismissal of the claims in Counts One, Two, Five, and Six of the complaint as not ripe for judicial review.

We **REVERSE** the district court's dismissal of the claims in Counts Three, Four, and Seven of the complaint, which we find are ripe for judicial review.

C. *Summary*

We **REMAND** this case to the district court for further proceedings on the merit of the Group I plaintiffs' Commerce Clause and Equal Protections challenges to the Crime Control Act in Counts Three, Four, and Seven of the complaint.

RYAN, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts I, II, IV, and V of my brother's scholarly and well-reasoned opinion, but must dissent from Part III. There, the majority concludes that those plaintiffs who are manufacturers and dealers have standing to sue because they have suffered an injury-in-fact, namely, an economic injury. While I believe the majority correctly states the law with regard to a plaintiff's standing for economic injuries, I am constrained to dissent because my review of the pleadings convinces me that these plaintiffs-whom I, adopting the phraseology of the majority, will denominate the Group I plaintiffs-have never alleged or argued that they suffer from any economic harm as a result of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 (1994).

As the majority correctly recognizes, "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas,* 495 U.S. 149, 154, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990). Equally well-established is the requirement that a plaintiff "must clearly and specifically set forth facts sufficient to satisfy the[ ] Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Id.* at 155-56, 110 S.Ct. at 1723. Thus, the onus here is on the plaintiffs, the parties invoking federal jurisdiction, to plead sufficient facts to demonstrate their standing in order to confirm jurisdiction in the federal court, which is " 'presumed to lack jurisdiction, unless the contrary appears affirmatively from the record.' " *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996) (citation omitted); *see King Iron Bridge & Mfg. Co. v. County of Otoe,* 120 U.S. 225,

226, 7 S.Ct. 552, 552-53, 30 L.Ed. 623 (1887). And an essential part of the standing inquiry is the existence ***43** of an " 'injury in fact,' " one which is "concrete in ***296** both a qualitative and temporal sense." *Whitmore,* 495 U.S. at 155, 110 S.Ct. at 1723.

The majority believes that the plaintiffs have adequately stated an injury-in-fact, in the form of economic damage sustained as a result of the Crime Control Act's strictures. The majority points to the manufacturer-plaintiffs' allegations that "they will be forced to redesign and relabel some products and cease production of others," and the dealer-plaintiffs' assertion that "compliance with the Act affects their daily businesses by prohibiting the possession and sale of specific weapons and ammunition feeding devices." (Maj. op. at 281.) The majority concludes from this that the manufacturers and dealers "have suffered economic harm from the impact of passage of the Act, which has restricted the operation of their businesses in various ways." (*Id.* at 281.) Elsewhere, the majority asserts that compliance will "requir [e] either a substantial monetary investment or loss in order to comply." (*Id.* at 286.)

This understanding simply does not comport with the pleadings as I read them. Having combed the record and the briefs, I have found only a minuscule number of references from which an economic injury is even remotely inferable. The plaintiffs have stated baldly that the Crime Control Act has "affected their daily business," with virtually no explication. They have asserted that the manufacturers have been "deterred" from making certain unspecified "intrastate transactions," and have asserted that they have changed the design and name of their firearms. They have also asserted that "[t]he manufacturing plaintiffs were forced to ... cease the production of" some unspecified products.

In an attempt to address my nagging sense that this pleading simply does not, as it were, cut the constitutional mustard, I have surveyed a number of cases in which courts have discussed, with some specificity, the execution of the general pleading principles sketched above-that is, cases in which a plaintiff's pleading of economic injury has been addressed and found either deficient or sufficient. This exercise has served to confirm my sense that the plaintiffs' pleading here ***44** is inadequate to justify this court's finding that standing has been established on the basis of an economic injury.

For example, in *United States v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), a case that has been characterized as "surely [going] to the very outer limit of the law" on standing, *Whitmore,* 495 U.S. at 159, 110 S.Ct. at 1725, a student environmental group brought suit against the Interstate Commerce Commission seeking to enjoin enforcement of certain surcharges on freight rates. In support of standing, SCRAP "alleged that each of its members was caused to pay more for finished products" as a result of the rate hikes. *SCRAP,* 412 U.S. at 678, 93 S.Ct. at 2411. That was found sufficient to convey standing because it amounted to an allegation that the plaintiffs "ha[d] been or w[ould] in fact be perceptibly harmed by the challenged ... action," and because the "allegations [were] ... capable of proof at trial." *Id.* at 688-89, 93 S.Ct. at 2416. Likewise, in *Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 56 (9th Cir.1994), the plaintiffs "alleged that they suffered 'lost sales, lost profits, lost business opportunities and other economic harms' as a consequence of the [defendant's] acts." *Id.* at 60. This was sufficient to challenge a government regulation that "directly affect[ed] [the plaintiffs'] customers and restrict[ed] [their] market." *Id.* at 61. Here, in contrast to these two cases, the plaintiffs have never asserted that the Crime Control Act will cause any perceptible financial harm, in any form.

In *McKinney v. United States Department of Treasury,* 799 F.2d 1544 (Fed.Cir.1986), the court considered a lawsuit seeking injunctive relief to bar importation of goods produced in the Soviet Union by forced labor. The plaintiff "assert[ed] standing on the basis of its members and supporters who in-

clude 'manufacturers or producers or workers employed by manufacturers or producers of products which are similar to and compete with goods or products being imported unlawfully from the Soviet Union.' " *Id.* at 1553 (footnote omitted). This allegation failed because

[t]he amended complaint does not identify any individuals, industries, producers, or ***297** workers in competition with the Soviet products ..., nor does the ***45** complaint provide any information regarding the nature, circumstances, or basis of the injury. Under such circumstances any alleged injury is wholly speculative and conjectural. In the absence of some reasonable delineation of the injury and that it was caused by identified Soviet goods, we hold that [the plaintiff] may not claim standing based solely upon the allegation that some of its members may be producers or workers.

Id. at 1554 (footnote and citation omitted). The court explained that "[r]elevant information might include one or more of the following: (1) reduction in product pricing; (2) decline in domestic sales; (3) decline in domestic production; (4) drop in producers' share prices; (5) decline in the number of producers; (6) producer bankruptcies; (7) worker layoffs or cutback; or (8) reduction in workers' wages." *Id.* at 1554 n. 27. It seems patent to me that the plaintiffs' pleading here is characterized by exactly the same type of generality as found in *McKinney,* and suffers from exactly the same type of omissions.

Finally, in *Adams v. Watson,* 10 F.3d 915 (1st Cir.1993), the court considered a lawsuit in which plaintiffs were objecting to state-imposed price regulations in the dairy industry. The first amended complaint was inadequate; it "included allegations that the pricing order caused appellants competitive injury and economic harm." Specifically, it

merely alleged that the pricing order "has the same effect as a 'customs duty' or 'protective tariff' on the importation of milk produced in other states," "subsidizes Massachusetts farmers which causes the disorderly marketing of milk," causes out-of-state farmers, including plaintiffs, to suffer economic harm and competitive disadvantage because it subsidizes Massachusetts farmers, and may force out-of-state farmers, including plaintiffs, out of business.

Id. at 917 & n. 6. Needless to say, this inadequate pleading offers far more in the way of economic-injury allegations than does the complaint here. The *Adams* court reversed the ***46** district court, however, insofar as it held that the plaintiffs should have been permitted to "recast their first amended complaint by adding two paragraphs for the stated purpose of alleging 'with greater specificity "injury in fact." ' " *Id.* at 917. The amendment would have set forth the specific "chain of economic events" that the plaintiffs believed would "result in [their] loss of future income, profits, and business opportunities." *Id.* at 919. Again, it is needless to say that the plaintiffs here have never suggested a specific "chain of economic events" that caused them harm.

To emphasize, the plaintiffs here have never even uttered the words "economic injury" or anything along those lines. They have never claimed that any revenue loss or expenditure-either currently existing or potentially forthcoming-is attributable to the Crime Control Act. Thus, contrary to the intimations of the majority, there is no allegation-and certainly no evidence-that the plaintiffs have suffered or will suffer "substantial economic harm" as a result of the Crime Control Act. And in addition to not having been pleaded, the theory of economic harm was never addressed by the district court, and has not been argued by the parties in their briefs.

Presumably, the majority feels that economic harm is palpable here: that if weapons are banned, or if redesigning or relabelling is required, the manufacturers and dealers of those weapons are necessarily injured, particularly vis-à-vis certain competitors whose products were not affected by the Crime Control Act. And indeed, there is a line of "direct competitor" cases in which "future injury-in-fact is viewed as 'obvious' since government action that

removes or eases only the competitive burdens on the plaintiff's rivals plainly disadvantages the plaintiff's competitive position in the relevant marketplace." *Adams,* 10 F.3d at 922 (emphasis omitted). But as the *Adams* court cautioned, " '[w]here "injury" and "cause" are *not obvious,* the plaintiff must plead their existence in his complaint with a fair degree of specificity.' " *Id.* (citation omitted).

***47** To me, this case does not present the court with an obvious situation of economic harm. To again quote the *Adams* court,

***298** All predictions are conjectural to a degree.... Economics is a cross between an art and a science, which is to say, both an imperfect art and an imperfect science. While the law of supply and demand may sometimes be suspended by unpredictable marketplace decisions, and even lesser fortuities like bovine obstinacy, basic economic theory quite consistently transcends utter randomness by positing elemental laws of cause and effect predicated on actual market experience and *probable* market behavior.

Id. at 923. I do not decline to join my colleagues' opinion out of any reticence stemming from a flawed understanding of basic economic principles. Instead, I see a wide variety of possible explanations for why, here, the Group I plaintiffs would not have suffered any economic harm from the Crime Control Act, and why the absence of actual harm is the most obvious explanation for why they failed to allude to such harm in their complaint.

It is, for example, quite possible that the manufacturers here have not actually stopped manufacturing prohibited weapons, despite the dictates of the Crime Control Act; nowhere do they straightforwardly assert that they have desisted from manufacturing-they state only that they have been "deterred." While they state that they have relabelled and redesigned some products, there is no corresponding statement of what that cost them, or any statement that they have not been able to raise their prices sufficiently to cover whatever costs did result. The latter possibility is definitely suggested by *San Diego County,* 98 F.3d 1121, in which the plaintiffs explicitly complained that manufacturers had raised the price of certain weapons by 40 to 100%. *See id.* at 1130. Relatedly, given that the relevant marketplace is extremely broad-indeed, nationwide-it is less likely that the Group I plaintiffs will experience future economic loss from the disadvantages apparently wrought by the Crime Control Act, *cf. Adams,* 10 F.3d at 922, and correspondingly less likely that ***48** even if there were a loss, it could be causally attributable to the Crime Control Act, *see San Diego County,* 98 F.3d at 1130.

In any event, we are not faced with the usual case, where the question is whether allegations of future competitive injury are too speculative to confer standing. We are instead faced with a case in which the plaintiffs have failed to even mention economic damage as a basis for standing, but where the majority has drawn what I believe are unwarranted conclusions from circumstances alluded to in the pleadings. Because I find the majority's reasoning entirely too speculative, I respectfully dissent.

C.A.6 (Mich.),1997.
National Rifle Ass'n of America v. Magaw
132 F.3d 272

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EXHIBIT E

114 S.Ct. 1747
511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539, 62 USLW 4354
(Cite as: 511 U.S. 513, 114 S.Ct. 1747)

Supreme Court of the United States
POSTERS 'N' THINGS, LTD., et al., Petitioners,
v.
UNITED STATES.
No. 92-903.

Argued Oct. 5, 1993.
Decided May 23, 1994.
Rehearing Denied June 27, 1994.
See 512 U.S. 1247, 114 S.Ct. 2771.

Defendants were convicted in the United States District Court for the Southern District of Iowa, Charles R. Wolle, Chief Judge, of use of interstate conveyance as part of scheme to sell drug paraphernalia, and they appealed. The Court of Appeals, 969 F.2d 652,Beam, Circuit Judge, affirmed, and writ of certiorari was sought. The Supreme Court, Justice Blackmun, held that: (1) statute required proof of scienter, and (2) statute was not unconstitutionally vague.

Justice Scalia, concurred in judgment and filed opinion in which Justices Kennedy and Thomas joined.

West Headnotes

[1] Controlled Substances 96H ⚿35

96H Controlled Substances
96HII Offenses
96Hk32 Sale, Distribution, Delivery, Transfer or Trafficking
96Hk35 k. Knowledge and Intent. Most Cited Cases
(Formerly 138k73.1 Drugs and Narcotics)
Statute proscribing use of interstate conveyance as part of scheme to sell drug paraphernalia requires proof that defendant knowingly made use of interstate conveyance as part of scheme to sell items that he knew were likely to be used with illegal drugs, but does not require proof of specific knowledge that items were "drug paraphernalia," as defined by statute. Anti-Drug Abuse Act of 1986, § 1822(a)(1), (d), as amended, 21 U.S.C.(1988 Ed.) § 857(a)(1), (d).

[2] Controlled Substances 96H ⚿6

96H Controlled Substances
96HI In General
96Hk4 Statutes and Other Regulations
96Hk6 k. Validity. Most Cited Cases
(Formerly 138k43.1 Drugs and Narcotics)
Statute proscribing use of interstate conveyance as part of scheme to sell drug paraphernalia was not unconstitutionally vague as applied to defendants operating business devoted substantially to sale of drug paraphernalia; several items sold by defendants were listed in statute as constituting per se drug paraphernalia, statute set forth objective criteria for determining whether items constituted drug paraphernalia, and statute required scienter. Anti-Drug Abuse Act of 1986, § 1822(a)(1), (d, e), as amended, 21 U.S.C. (1988 Ed.) § 857(a)(1), (d, e); U.S.C.A. Const.Amend. 5.

****1747** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

513** Upon searching petitioner Acty's residence and the premises of her business, petitioner Posters 'N' Things, Ltd., officers seized, among other things, pipes, "bongs," scales, "roach clips," drug diluents, and advertisements*1748** describing various drug-related products sold by petitioners. Petitioners were indicted on, and convicted in the District Court of, a number of charges, including the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of

former 21 U.S.C. § 857(a)(1), a provision of the Mail Order Drug Paraphernalia Control Act. In affirming, the Court of Appeals held, *inter alia,* that § 857 requires proof of scienter and that the Act is not unconstitutionally vague.

Held:

1. Section 857 requires proof of scienter. Section 857(d)-which, among other things, defines "drug paraphernalia" as any equipment "primarily intended or designed for use" with illegal drugs-does not serve as the basis for a subjective-intent requirement on the part of the defendant, but merely establishes objective standards for determining what constitutes drug paraphernalia: The "designed for use" element refers to the manufacturer's design, while the "primarily intended ... for use" standard refers generally to an item's likely use. However, neither this conclusion nor the absence of the word "knowingly" in § 857(d)'s text means that Congress intended to dispense entirely with a scienter requirement. Rather, § 857(a)(1) is properly construed under this Court's decisions as requiring the Government to prove that the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he knew were likely to be used with illegal drugs. It need not prove specific knowledge that the items are "drug paraphernalia" within the statute's meaning. Pp. 1749-1754.

2. Section 857 is not unconstitutionally vague as applied to petitioners, since § 857(d) is sufficiently determinate with respect to the items it lists as constituting *per se* drug paraphernalia, including many of the items involved in this case; since § 857(e) sets forth objective criteria for assessing whether items constitute drug paraphernalia; and since the scienter requirement herein inferred assists in avoiding any vagueness problem. Because petitioners operated a full-scale "head shop" devoted ***514** substan-tially to the sale of drug paraphernalia, the Court need not address § 857's possible application to a legitimate merchant selling only items-such as scales, razor blades, and mirrors-that may be used for legitimate as well as illegitimate purposes. Pp. 1754-1755.

3. Petitioner Acty's other contentions are not properly before the Court. P. 1755.

969 F.2d 652 (CA8 1992), affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS , O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 1755.
Alfredo Parrish, Des Moines, IA, for petitioners.

William C. Bryson, Washington, DC, for respondent.

For U.S. Supreme Court briefs, see:1993 WL 348902 (Pet.Brief)1993 WL 358181 (Resp.Brief)

Justice BLACKMUN delivered the opinion of the Court.

In this case we must address the scienter requirement of the Mail Order Drug Paraphernalia Control Act, Pub.L. 99-570, Tit. I, § 1822, 100 Stat. 3207-51, formerly codified, as amended, at 21 U.S.C. § 857, and the question whether the Act is unconstitutionally vague as applied to petitioners.

I

In 1977, petitioner Lana Christine Acty formed petitioner Posters 'N' Things, Ltd. (Posters), an Iowa corporation. The corporation operated three businesses, a diet-aid store, an art gallery, and a general merchandise outlet originally called "Forbidden Fruit," but later renamed "World Wide Imports." Law enforcement authorities received complaints that the merchandise outlet was selling drug paraphernalia. Other ****1749** officers investigating drug cases found drug diluents (chemicals used to "cut" or dilute illegal drugs) and other drug paraphernalia that had been purchased from Forbidden Fruit.