No. 98-1570

In the Supreme Court of the United States

JOHN SEFICK, PETITIONER

v.

RICHARD GARDNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals improperly departed from the record, or otherwise erred, in its application of uncontroverted legal standards to sustain the decision of the General Services Administration to deny petitioner a permit to exhibit a satiric sculpture of a federal district judge in the courthouse lobby.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 164 F.3d 370. The opinion of the district court (Pet. App. 9a-36a) is reported at 990 F. Supp. 587.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1998. The petition for a writ of certiorari was filed on March 29, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a retired federal probation officer who creates satirical sculptures of public figures. Pet.

App. 11a. In 1996, petitioner created a large plaster sculpture depicting the Honorable Brian Barnett Duff, a federal judge then in active service on the United States District Court for the Northern District of Illinois, wearing judicial robes and sitting astride a stylized white horse. *Id.* at 11a-12a. The work is about five feet wide, eight feet long, and eight feet tall. *Id.* at 12a. A narrative audio tape accompanying the sculpture, as originally conceived, identified the figure as Judge Duff and included a voice representing the judge complaining, for example, "I can't figure out why they're overturning all my rulings upstairs. Must be a lack of understanding. If they got their facts straight, they'd see it my way." *Id.* at 3a, 12a. A descriptive statement supplied by petitioner explains that the sculpture depicts Judge Duff "arriv[ing] at the Dirksen Federal Building atop a giant symbolic steed representing the United States Court System." *Id.* at 3a.

In August 1996, petitioner applied to the General Services Administration (GSA) for a permit to display his sculpture for two weeks in the lobby of the Dirksen Federal Courthouse in downtown Chicago. Pet. App. 2a, 12a. The Dirksen Courthouse houses, among other tenants, the primary chambers and offices of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois. *Id.* at 2a.[1] Respondent Gardner, at that time the GSA building manager with responsibility for reviewing applications to use courthouse space, denied the application, explaining in a letter to petitioner (1) that the courthouse lobby was undergoing an

[1] We are informed that other courthouse tenants include the Bankruptcy Court, the United States Attorney, the Federal Bureau of Investigation, and the United States Marshal.

extensive renovation, and GSA did not want to cause unwarranted obstructions for construction workers and lobby pedestrians, and (2) that GSA was concerned that the exhibit "[might] be construed as an attempt to influence judicial proceedings" in either the district court or the court of appeals. *Id.* at 12a-13a; see 40 U.S.C. 490(a)(17); 41 C.F.R. 101-20.403(a)(3) and (4).

Petitioner appealed the denial of his application to respondent Duffer, then the appropriate GSA Regional Officer. Pet. App. 14a-15a; 41 C.F.R. 101-20.404(a). The Regional Officer affirmed the denial of space in the Dirksen Courthouse, but he offered to issue a permit for display of the sculpture in the nearby Metcalf building, a federal office building that does not contain courts. Pet. App. 15a. In response, and after Judge Duff retired from active service, petitioner offered to alter his proposed installation by omitting any mention of Judge Duff by name and replacing the proposed tape recording with a recording of the song "Don't Cry for Me Argentina," from the musical *Evita*. *Id.* at 4a, 16a-17a. GSA again offered petitioner display space in the Metcalf building, and the sculpture was in fact displayed there for two weeks. *Id.* at 4a, 17a.

In January 1997, petitioner submitted a new application to exhibit his sculpture in the Dirksen Courthouse lobby. Pet. App. 18a. GSA again granted a permit, but again only for the Metcalf building. *Ibid.* The letter informing petitioner of that decision, signed by respondent Zbylut (who had succeeded respondent Gardner), again cited the construction work being done in the lobby of the Dirksen building, and attendant safety concerns. *Ibid.* The letter added that GSA had undertaken a "security evaluation" of the Dirksen building, as a result of threats made against some of the building's tenants, and that respondent Zbylut was "not approv-

ing any Applications for use of space in the building until these concerns are fully addressed." *Id.* at 18a-19a.

2. Petitioner sued respondents in federal district court, alleging that the refusal to issue a permit for display of his sculpture in the Dirksen building discriminated against him on the basis of his viewpoint, in violation of the First Amendment.[2] Pet. App. 4a. The district court first held that the Dirksen Courthouse lobby is not a "public forum" for First Amendment purposes. *Id.* at 21a-22a; see generally, *e.g.*, *Arkansas Educ. Television Comm'n* v. *Forbes*, 118 S. Ct. 1633, 1641 (1998) (discussing forum analysis). Petitioner does not challenge that determination. Pet. 3, 12. The trial (to the bench) accordingly focused on whether GSA's decisions denying petitioner display space in the Dirksen building were "reasonable" and "viewpoint neutral." Pet. App. 10a, 22a. The court required the government to bear the burden of proof on those issues. *Id.* at 23a-25a.

After hearing the evidence, the district court found that respondents had denied petitioner access to the Dirksen Courthouse because of the extensive construction work being done in the lobby; because of general concerns about security, particularly in light of the April 1995 bombing of a federal office building in Oklahoma City; and because of concern that display of petitioner's sculpture in the courthouse lobby might influence or impede judicial proceedings. Pet. App. 12a-20a; see *id.* at 26a. The court specifically found that "no

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[2] Although petitioner initially asserted claims against respondents in their individual, as well as official, capacities, he later dropped the individual claims, and he presently seeks only injunctive relief. See Pet. App. 11a.

[respondent] rejected [petitioner's] sculpture [for display in the courthouse lobby] because he disapproved of its viewpoint, or because any other person who disagreed with the viewpoint pressured the [respondent] to reject the sculpture." *Id.* at 21a.

The district court rejected petitioner's argument that the explanations offered by respondents were merely "pretexts for viewpoint discrimination." Pet. App. 26a. The court acknowledged that various other activities were allowed in the courthouse lobby despite the construction activity, but it concluded that respondents "had legitimate and reasonable explanations for allowing those activities but not [petitioner's] sculpture." *Id.* at 27a. In contrast to tenants who sponsored activities that were generally brief in duration and could be easily rescheduled or relocated if the need arose, petitioner, who had no other relationship with GSA or the building, "proposed a 400-pound sculpture to be displayed for two weeks." *Ibid.* Moreover, "substantial unrebutted testimony indicated that at all relevant times, security was a serious concern in all federal buildings and especially those housing court facilities," and "the general debate about banning lobby displays for security reasons had nothing to do with the viewpoint or subject of any display." *Id.* at 28a. The court accepted respondents' explanation that any "perceived inconsistencies" between their denial of petitioner's permit applications and their approval of permits for certain other activities "were satisfactorily explained as departures from the chain of command * * *, or based on the particular nature of the activity approved." *Id.* at 27a; see *id.* at 21a, 28a.

With respect to petitioner's argument that his sculpture could not plausibly be viewed as attempting to influence pending proceedings, and that respondents'

reliance on that ground must therefore be pretextual, the court pointed out that "largely semantic [arguments] regarding whether [respondents'] decision fits under the precise terms of the [applicable GSA] regulation" were inapposite in the context of petitioner's First Amendment claim. Pet. App. 28a-29a. Rather, the court observed, "regardless of how well [petitioner's] sculpture fits under the regulatory concept of potential 'influence,' it fits sufficiently under a concept more relevant for present purposes": *i.e.*, "the need to maintain the dignity and purpose" of a courthouse building, in which "decorum must be maintained" in order "[t]o dispense fair and effective justice." *Id.* at 29a. "[C]ases must be heard," the court explained, "in a dignified environment that impresses upon the participants the seriousness and importance of the proceedings, and the need to follow the rules of deliberation, decision, and personal behavior that the trial judge supplies." *Ibid.* Concluding that respondents' concern "was essentially * * * over courthouse decorum," the court held that respondent Duffer "reasonably and genuinely saw [petitioner's] sculpture as capable of negatively influencing jury deliberations" because "[a] juror who, in the courthouse, encounters an arguably cartoonish sculpture of a sitting judge commenting that all of his rulings are being overturned might conclude that the courthouse is something less than the sober and weighty place it must be, or that Judge Duff and his colleagues do not warrant the respect that their positions—not their personal feelings—require." *Id.* at 30a.

The district court recognized, in closing, that respondents "could have said more to explain their thought processes." Pet. App. 33a. The court observed, however, that respondents' "burden is simply to demonstrate that they acted reasonably and not to suppress a

viewpoint." *Ibid.* Concluding that respondents had carried that burden, the court held that their denial of petitioner's permit requests "did not violate the First Amendment." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-8a. The court first held that petitioner's suit for injunctive relief was not rendered moot by GSA's determination, after the events in issue, that for security and aesthetic reasons it would not permit displays of any type in the courthouse lobby. *Id.* at 4a-5a. The court then observed that petitioner could prevail on appeal "only by establishing that the district judge, as trier of fact, was clearly erroneous in concluding that the GSA did not discriminate against [petitioner's] sculpture because it was critical of the judiciary." *Id.* at 5a. The court noted that it would be difficult for petitioner to make that showing, particularly in light of "the extensive construction in the lobby at the time of [petitioner's] applications, and the security concerns * * * in the wake of the Oklahoma City bombing."[3] *Ibid.* It reasoned further that GSA's 1995 grant of a permit to petitioner to display another satiric sculpture of Judge Duff suggested that GSA was not "set against sculpture critical of federal judges." *Ibid.*

The court went on to emphasize that the courthouse lobby was a "nonpublic forum," and that in that context, even if petitioner could show that GSA had taken account of the work's "satirical perspective" in denying him a permit to use the lobby, respondents would not have violated the First Amendment by "insisting that

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[3] The court noted that "[a]ll four walls of the lobby in the Dirksen Courthouse are glass, so anything unusual inside will attract attention and thus traffic, which makes life more difficult for those charged with maintaining security." Pet. App. 5a.

exhibits in a federal courthouse be dignified." Pet. App. 5a-6a. To the contrary, the court explained:

> Courts seek to induce in the jurors, witnesses, and litigants who pass through the lobby on the way to the courtrooms a serious cast of mind. An implication in the lobby that judges do not take their oaths seriously, deal honestly with the facts, or respect the allocation of authority within the judiciary could undermine the seriousness with which other participants take their own oaths and tasks. * * * Newspapers and the streets outside are open to scathing criticism of what happens within the courthouse. * * * But the halls of justice may be kept hushed.

Id. at 6a-7a. Citing this Court's observation that "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose," *id.* at 8a (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)), the court concluded that "[n]othing in the [F]irst [A]mendment prevents the government from allowing sedate and decorous exhibits * * * while excluding the comic, the caustic, and the acerbic" (*id.* at 6a). Indeed, "[a] preference for the somber over the sardonic within a courthouse is not viewpoint or even subject-matter discrimination. It is a standard time, place, and manner limitation. A courthouse is not the place for this manner of expression." *Id.* at 7a.

ARGUMENT

Petitioner concedes that the lobby of the Dirksen Courthouse is not a "public forum" for purposes of First Amendment analysis. See Pet. 3, 12. He also agrees with the legal standard articulated by the courts below,

under which restrictions on access to the lobby are permissible so long as they are "reasonable in light of the purpose served by the forum and are viewpoint neutral." Pet. 12 (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); see Pet. App. 6a, 22a-23a. Petitioner argues only that the court of appeals improperly relied on factual findings not made by the district court or supported by the record (Pet. 10-11, 13), and that it failed to apply the legal standard properly to the facts of his case (Pet. 13). Those fact-bound contentions do not warrant review by this Court.

In any event, there is no merit to petitioner's arguments. After trial, the district court concluded that GSA was "reasonably and genuinely" concerned that display, in the courthouse lobby, of an "arguably cartoonish sculpture of a sitting judge commenting that all of his rulings are being overturned" could have a negative effect on passing jurors or litigants, who "might conclude that the courthouse is something less than the sober and weighty place it must be, or that [judges] do not warrant the respect that their positions—not their personal feelings—require." Pet. App. 30a. The court properly characterized that concern as "essentially concern over courthouse decorum," and it emphasized that the "vital interest in courthouse decorum is most emphatically not a mere interest in shielding judges from criticism and personal discomfort," but rather an interest in "ensur[ing] that the persons whose property and liberty are at stake in legal proceedings have their rights adjudicated fully, fairly, and according to the rule of law." *Id.* at 29a-30a.

In the section of its opinion with which petitioner takes issue (Pet. 10-11), the court of appeals simply endorsed those findings and conclusions of the district

court. See Pet. App. 6a-7a (The First Amendment does not preclude courthouse administrators from permitting lobby displays that are "somber" and "dignified" while excluding those that are "comic," "caustic," "acerbic" or "sardonic."). Petitioner's suggestion to the contrary notwithstanding, the court's substitution of the terms "dignified" and "comic" for the district court's "decorum" and "cartoonish" does not amount to improper appellate fact-finding. To the extent that the court of appeals' analysis depended on findings of fact, those findings were made by the district court. To the extent the court of appeals was discussing legal principles or drawing legal conclusions (as in its discussion of the permissibility, under the First Amendment, of taking the need for decorum into account in regulating the use of a courthouse lobby), the court was, of course, entitled to address the relevant issues de novo. See 40 U.S.C. 490(a)(17) (authorizing GSA to make space in public buildings available for activities "that will not disrupt the operation of the building"); 41 C.F.R. 101-20.403(a)(3) and (4) (GSA will not approve a use that "disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or * * * is intended to influence or impede any pending judicial proceeding.").

Petitioner is, moreover, wrong in asserting (Pet. 11) that the court of appeals addressed contentions not raised by the parties, to which petitioner had no opportunity to respond. Respondents specifically argued in their appellate brief, for example, that "[t]he need to preserve decorum and integrity in the forum at issue here is significant" (Gov't C.A. Br. 40), and petitioner replied specifically to that point by arguing that the record did not support the district court's ruling on that score (Pet. C.A. Reply Br. 6). The court of appeals

resolved that dispute against petitioner, and the matter does not merit further review.

Finally, even if there were some flaw in the court of appeals' alternative discussion of the constitutionality of preferring "sedate and decorous exhibits" (Pet. App. 6a) in courthouse lobbies, there would be no reason for review in this case. As the court noted at the outset of its opinion (*id.* at 5a), petitioner could prevail, even on his own First Amendment theory, "only by establishing that the district judge, as trier of fact, was clearly erroneous in concluding that the GSA did not discriminate against his sculpture because it was critical of the judiciary." See also *id.* at 21a (district court findings) ("[N]o [respondent] rejected [petitioner's] sculpture because he disapproved of its viewpoint, or because any other person who disagreed with the viewpoint pressured the [respondent] to reject the sculpture."), 23a-25a (requring the government to bear the burden of proof on viewpoint-neutrality). Although petitioner rehearses in this Court his reasons for disagreeing with that finding (see Pet. 6-7, 13), those arguments have been twice rejected, and petitioner cannot meet the heavy burden of establishing that the district court's dispositive finding was "clearly erroneous."[4]

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[4] Petitioner cites (Pet. 10) *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), which held (*id.* at 514) that in defamation cases appellate courts must exercise independent judgment in reviewing a trier of fact's conclusion that a false statement was made with "actual malice." It is not clear that the reasons for that decision (see *id.* at 501-511) would lead to a similar conclusion about the factual questions involved here (*i.e.*, whether respondents' decision to deny petitioner a permit was reasonable and viewpoint-neutral); but if *Bose* does apply, then petitioner's argument that the court of appeals stepped outside proper bounds

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in reviewing the district court's judgment is correspondingly weakened even further.