UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

RHODE ISLAND LATINO ARTS, NATIONAL QUEER THEATER, THE THEATER OFFENSIVE, and THEATRE COMMUNICATIONS GROUP,

Plaintiffs,

v.

NATIONAL ENDOWMENT FOR THE ARTS; MARY ANNE CARTER, in her official capacity as Acting Chair of the National Endowment for the Arts,

Defendants.

Civil Action
No. 25-cv-79-WES-PAS

DEFENDANTS' MOTION FOR PROTECTIVE ORDER UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(c) TO PRECLUDE EXTRA-RECORD DISCOVERY

Plaintiffs have filed facial challenges under the Administrative Procedure Act ("APA") and the Constitution (ECF 15) to the lawfulness of predecisional guidance (Ex. 1) issued by the National Endowment for the Arts ("NEA"). That nine-page guidance states that the NEA's Chair will implement Executive Order 14168 (the "EO") when reviewing grant applications that have been affirmatively recommended for funding subject to applicable law. Ex. 1; 20 U.S.C. § 955(f). Thus, the guidance makes clear that the three preceding layers of review—by (1) NEA staff, (2) expert panels in each artistic discipline, and (3) the National Council on the Arts—will not apply the EO. Ex. 1; ECF 2-2 at 25-26. The Chair alone will apply the EO when evaluating grant applications that have been recommended for approval on a case-by-case basis, no earlier than late October 2025. Ex. 1 at 2, 8. Plaintiffs seek discovery (ECF 16) to force the agency to speculate as to how the Chair will implement the EO concerning each application. The Court should preclude such discovery for three reasons.

First, compelling discovery—essentially to preview decisions that have not been made—would improperly countermand Congress's authorization of the agency's Chair "to establish and carry out a program of . . . grants-in-aid" to fund "projects," 20 U.S.C. § 954(b), "in accordance with regulations issue and procedures established by the Chair[ ]," 20 U.S.C. § 954(d). *See also* 20 U.S.C. § 959(a) (authorizing the Chair to "prescribe such regulations as the Chair[ ] deems necessary"). Because the agency "was not required to issue such guidance in the first place," it is "free to develop regulatory standards 'either by general [legislative] rule or by individual order' in an adjudication." *See Food & Drug Admin. v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 915, 925 (2025) (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 202-203, (1947) (*Chenery II*); brackets in original). "A contrary rule would be in tension with *Chenery II*'s teaching that, absent a statutory prohibition, agencies may generally develop regulatory standards through either adjudication or rulemaking." *Id*. at 925. As a result, the NEA's Chair "ha[s] discretion to work out"

the actual implementation of the agency's predecisional guidance when evaluating grant applications recommended for approval, and not in discovery preceding those evaluations. *See id*.[1]

Plaintiffs have brought a facial challenge to the NEA's predecisional guidance, and the lawfulness of that guidance must stand on the grounds the guidance cites. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*. 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Yet Plaintiffs' discovery proceeds on the mistaken assumption that the Chair has, in fact, worked out how the EO might be implemented in each individual case. But how the EO might apply in a given case will depend in part on the Chair's final review of an administrative record pertaining to each application generated by three preceding, provisional layers of review (as Exhibit 1 describes). Most of the review materials do not yet exist, which is a practical obstacle to clarifying the predecisional guidance as Plaintiffs' discovery seeks. *Cf. Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review more than the information before the Secretary at the time she made her decision risks our requiring administrators to be prescient . . . ."). And that practical obstacle is a reasonable basis for the agency's predecisional guidance to say only what it does and for this Court to preclude discovery. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) ("While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").

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[1] *Wages & White Lion* involved challenges to the FDA's denial of applications to market e-cigarettes. The Court described the agency's predecisional guidance as "discursive" and showing the agency "feeling its way toward a final stand," *id*. 910, and its "evolving assessment of the relevant issues," *id*. at 916. The Court also described the agency's predecisional guidance as "largely noncommittal," *id*. at 921, "not categorical," *id*. at 922, and not "lay[ing] down any clear test," *id*. at 920. Nevertheless, rejecting applicants' arguments that the agency's guidance failed to provide "fair notice" of how the guidance "would be imposed at the application stage," *id*. at 917, the Court concluded that the proper evaluation of the agency's guidance and decisionmaking arose under the "change-in-position doctrine," one of whose questions is whether the agency acted inconsistently with its own guidance, *id*. at 918. Plaintiffs' discovery, as explained above, seeks pre-adjudication reasoning that the agency is not required to provide.

Second, in APA actions, discovery is presumptively prohibited, and judicial review proceeds on the administrative record. *Dep't of Commerce v. New York*, 588 U.S. 752, 780-81 (2019). As the Supreme Court explained, "That principle reflects the recognition that further judicial inquiry into executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided . . . ." *Id*. at 781 (cleaned up); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *cf. Chapman v. Supplemental Ben. Ret. Plan of Lin Television Corp*., 861 F. Supp. 2d 41, 47 (D.R.I. 2012) (Smith, J.) (declining to consider extra-record evidence in ERISA case) ("[A] court's review of an administrative decision is generally restricted to the administrative record . . . .").

The presumption against discovery in APA cases applies regardless of whether a claimant has pleaded separate causes of action under the Constitution (as Plaintiffs have). *See, e.g.*, *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) (Lagueux, J.) (adopting magistrate judge's report and recommendation to grant motion for protective order to preclude extra-record discovery) ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies was entitled to broad-ranging discovery.").

The limitation on scrutinizing only the administrative record in APA cases applies with greater force here, because Plaintiffs' requests seek predictions about administrative adjudications that will not occur for at least another five months based on yet-to-be-generated administrative records about each grant application. The NEA is not aware of any case resolving the scope of APA discovery disputes in which a court compelled discovery regarding predecisional guidance as part of a facial challenge before the agency had completed its administrative enforcement action or adjudication.

Third, none of the exceptions to the rule foreclosing discovery in APA cases applies here. The Supreme Court has "recognized a narrow exception to the general rule against inquiring into

'the mental processes of administrative decisionmakers.' On a 'strong showing of bad faith or improper behavior,' such an inquiry may be warranted and may justify extra-record discovery." *Dep't of Commerce*, 588 U.S. at 781 (quoting *Overton Park*, 401 U.S. at 420). Based on the parties' conferences, the NEA understands that Plaintiffs do not rely on either of these grounds. Instead, the NEA understands that Plaintiffs seek discovery on additional grounds recognized by the First Circuit—namely, "to facilitate [the court's] comprehension of the record or the agency's decision, particularly when highly technical, environmental matters are at issue or when the agency has failed to explain administrative action as to frustrate effective judicial review." *Housatonic River Initiative v. U.S. Envtl. Prot. Agency*, 75 F.4th 248, 278 (1st Cir. 2023) (declining to review extra-record materials in assessing challenge to EPA permit).[2] Neither of these exceptions apply.

The "highly technical" exception applies to "request[s] to supplement the administrative record with evidence *that was not before the agency at the time of the action*." *E.g.*, *Sierra Club v. United States Army Corps of Eng'rs*, No. 2:20-CV-00396-LEW, 2023 WL 4350730, at *2 (D. Me. July 5, 2023) (granting and denying in part motion to supplement administrative record) (emphasis added); *see also, e.g.*, *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988). Again, Plaintiffs seek information preceding the agency's final action on any application, and the Chair will work out how the EO will apply when evaluating those grant applications case by case. *Wages & White Lion Invs., LLC*, 145 S. Ct. at 925.

Judicial review is arguably frustrated when an agency has not explained itself at all *following* its adjudication or enforcement action. *See, e.g.*, *Camp*, 411 U.S. at 142-43. In the agency's predecisional guidance, it set forth the steps the agency will follow to adjudicate

[2] To the extent Plaintiffs rely on other grounds, they cannot apply. As the NEA has not yet produced the administrative record ("AR"), discovery could not be based on suspicion that the as-yet-to-be-produced AR is incomplete. And, while some courts have permitted extra-record discovery for "background," no one could cite that information "as a new rationalization either for sustaining or attacking the [a]gency's decision." *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980) (Kennedy, J.). Plaintiffs' discovery appears to seek information to strengthen merits arguments on their facial challenge.

funding decisions and the parameters of that review. That guidance, and the administrative record developed in issuing it, must suffice for the parties and the Court to resolve Plaintiffs' facial challenge. *State Farm*, 463 U.S. at 50. Similarly, in *Finley v. National Endowment for the Arts*, plaintiffs facially challenged Congress's revision of the NEA's enabling statute, and contended that uncertainty about how the agency might implement those revisions should invalidate them. Resp't's Br., *Nat'l Endowment for the Arts v. Finley* (1998) (No. 97-471), 1998 WL 47281 at *6. The Supreme Court was able to decide *Finley* notwithstanding that alleged uncertainty and rejected plaintiffs' vagueness challenge. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572, 588-89 (1998).

CONCLUSION

For the preceding reasons, and because Plaintiffs facially challenge the lawfulness of predecisional guidance, the NEA respectfully asks the Court to grant its motion for a protective order and preclude discovery.

Dated: May 19, 2025

Respectfully submitted,

NATIONAL ENDOWMENT FOR THE ARTS; MARY ANNE CARTER, in her official capacity as Acting Chair of the National Endowment for the Arts,

By their Attorneys

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CERTIFICATIONS

I certify that on May 19, 2025, I filed this document and its attachments through the Court's ECF system, thereby electronically serving all parties of record in this action.

I also certify that the parties conferred in good faith concerning Plaintiffs discovery requests as part of conferences conducted by Teams on Thursday, April 25, and Friday, May 2, 2025.

/s/ Kevin Bolan
KEVIN BOLAN
Assistant United States Attorney

AGENCY:

National Endowment for the Arts.

ACTION:

Notice.

SUMMARY:

In order to implement the President's Executive Order 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* ("EO 14168" or "the EO"), the Chair[1] of the National Endowment for the Arts (NEA) has determined that appropriate action is needed to incorporate the EO in the NEA's grant application review process. Per the NEA Chair's authority under 20 U.S.C. § 959, the NEA publishes this explanation of its intended action to implement EO 14168.

The EO requires executive agencies to take all necessary steps, as permitted by law, to ensure that agency funds are not used to promote gender ideology. As set forth below, the NEA will implement EO 14168 on a grant-by-grant basis, in a manner that is consistent with the U.S. Constitution, the Administrative Procedure Act (APA), the NEA enabling statute 20 U.S.C. § 954, *et seq*. and its established policies and procedures regarding application review.

The statute 20 U.S.C. § 954(d)(1) confers upon the NEA Chair the discretionary authority to award a grant, or to decline to award a grant, and empowers the Chair as the final step in ensuring that each application represents "artistic excellence" and "artistic merit".[2] The NEA will adhere to Congress' direction for the Chair to judge applications on the basis of Artistic Excellence and Artistic Merit, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.[3]

The Chair will continue to review grant applications based on the statutory requirements. The existing multi-tiered application review process will remain unchanged. The Chair will implement EO 14168 by evaluating projects that promote gender ideology based on the existing statutory criteria at the final stage of application review.

Applicants will not be required to certify that no federal funds are used to promote gender ideology. Thus, there is no eligibility bar to submitting an application related to promoting gender ideology. The only criteria all applications are subject to are those set forth in the enabling statute, which the agency has always enforced. Under these criteria, there is no room for viewpoint discrimination. This implementation process is consistent with the First and Fifth Amendments as well as the APA. No applicant should suffer harm under this process, which essentially utilizes the existing statutory review scheme that the agency currently follows.

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[1] If the position of Chair is vacant, then "Chair" will refer to such official performing the functions and duties of the Chair, in the absence of a Chair being officially appointed and confirmed.
[2] See also 20 U.S.C. § 955(f)(2).
[3] 20 U.S.C. § 954(d)(1).

The case-by-case review by the Chair of grant applications for artistic excellence and merit, including whether the proposed project promotes gender ideology, will in general provide a significant public benefit by (1) furthering the current administration's priorities as provided in EO 14168; (2) providing more clarity to applicants on how EO 14168 is being implemented by the NEA; and (3) better informing applicants on whether and how to apply for NEA funding opportunities.

DATES:

The grant application review process set out in this Notice will be effective upon publication and will be applicable to all pending applications.

FOR FURTHER INFORMATION, CONTACT:

Ann Eilers, Deputy Chair for Management and Budget, National Endowment for the Arts, at (202) 682-5534, or by email at eilersa@arts.gov; Jennifer Lindow Eskin, Senior Advisor for Strategy, Programs, & Engagement, National Endowment for the Arts, at (202) 682-5781, or by email at eskinj@arts.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On January 20, 2025, the President issued EO 14168, "*Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*." [4] The order addressed a broad series of priorities related to the President's concerns about gender ideology and included among other things the following provisions:

> Sec. 2(g) Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.
>
> Sec . 3(e) Agencies shall take all necessary steps, as permitted by law, to end the Federal funding of gender ideology.
>
> Sec. 8(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

On February 6, 2025, the NEA decided to implement EO 14168 by requiring applicants to certify that "the applicant . . . understands that federal funds shall not be used to promote gender ideology, pursuant to Executive Order No. 14168[. . .]."[5] On March 17, 2025, the NEA rescinded that

[4] Exec. Order No. 14,168, 2025 WL 327882 (Pres.): *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, 90 FR 8615.

[5] Memorandum and Order, ECF 13, 7:2.

requirement and is issuing this memorandum to clarify its process for implementing the EO, to the extent permitted by law.[6]

This Notice outlines the NEA's grant application review standards and processes, and how it will implement EO 14168 in that review process.

II. Grant Application Review

A. Project-based Reviews

Applicants are judged based on their application materials for their proposed projects, and not any other activities they may conduct that exist beyond the four corners of their application. There are additional factors that must be considered by the NEA. For instance, an organization that has been suspended or debarred may not receive federal funds. There are also project types that are ineligible because the NEA has chosen not to fund them – for instance, construction projects or projects with significant entertainment or social activities. Also, there are projects for which the NEA has stated a preference, such as projects supporting the work of artists and arts organizations in contributing to the health and well-being of individuals and communities.

B. Review Standards -- Artistic Excellence and Artistic Merit

The NEA's enabling statute provides two specific criteria in reviewing grant applications: Artistic Excellence and Artistic Merit.[7] Additionally, there is a secondary factor that is required to be considered: general standards of decency and respect for the diverse beliefs and values of the American public."[8] The Grants for Arts Projects guidelines describe the Artistic Excellence and Artistic Merit as follows:

i. Artistic Excellence.

The artistic excellence of the project includes:

- The quality of the artists and other key individuals, works of art, organizations, arts education providers, artistic partners, and/or services involved in the project.

ii. Artistic Merit.

The artistic merit of the project includes:

- The value and appropriateness of the project to the organization's mission, artistic field, artists, audience, community, and/or constituency.
- The ability to carry out the project based on such factors as the appropriateness of the budget, clarity of the project activities, resources involved, and the qualifications of the project's personnel and/or partnerships.

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[6] *Id*., at 10:3-11:11.
[7] 20 U.S.C. § 954(d)(1).
[8] *Id*.

- Clearly defined goals and/or proposed outcomes and an appropriate plan to determine if those goals and/or outcomes are met. This includes, where relevant, measures to assess student and/or teacher learning in arts education.
- Evidence of direct compensation to artists, makers, art collectives, and/or art workers.
- As applicable: Engagement with individuals whose opportunities to experience and participate in the arts are limited by geography, ethnicity, economic status, or disability.

C. Review Process

The above Artistic Excellence and Artistic Merit standard of review is implied in every phase of the review process, which is outlined below.

1. Once the application submission deadline is closed, NEA staff reviews each of the applications submitted by the deadline for completeness and other eligibility issues.
2. If NEA staff determines that an application is complete and meets all eligibility requirements, each application is reviewed by a panel of arts experts (and a layperson) under the Artistic Excellence and Artistic Merit.
3. Each application receives a score between 1 and 10 on each artistic excellence and merit criteria. The panels provide their recommendations.
4. The panel recommendations are submitted to the National Council on the Arts, which deliberates, votes on the applications before them, and proposes funding levels for the applications recommended for Chair's approval.
5. Chair reviews the Council's recommendations and has the "final authority" to approve or deny an application.[9]

D. Chair's Discretion

The NEA's authorizing legislation, 20 U.S.C. § 954, *et seq*., authorizes the Chair, and the Chair alone, to create the terms by which a program of grants in aid may be disbursed to organizations and individuals. Particularly, Artistic Excellence and Artistic Merit, taken together, give the Chair the discretion to award a grant, or to decline to award a grant, and situates the Chair as the final step in ensuring that each application represents "artistic excellence" and "artistic merit". Her final approval authority granted by the enabling statute is more than a mere perfunctory role. The Congress compels the Chair to either affirm or reject the Council's assessment of a project's excellence and/or merit. In exercising this authority, the Chair does so based on the particulars of each application as they relate to artistic excellence and merit. As the Court wrote in Finley, "the NEA's mandate is to make aesthetic judgments" which are "inherently content-based", and "[a]ny 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."[10]

[9] 20 U.S.C. § 955(f)(2).
[10] *Natal Endowment for the Arts v. Finley*, 524 U.S. 569, 571 (1998).

E. Final Decision by the Chair

i. Artistic Excellence and Artistic Merit

In assessing the artistic excellence and artistic merit of applications, the Chair considers among other things: the quality of the artists, works of art, organizations, arts education providers, artistic partners; the value and appropriateness of the project to the organization's mission, artistic field, artists, audience, community, and/or constituency; budget, project's clarity, resources, and project staff and partners' qualifications; clearly defined goals and/or proposed outcomes and an appropriate plan; evidence of compensation to artists; as applicable, engagement with individuals whose opportunities to experience and participate in the arts are limited by geography, ethnicity, economic status, or disability.

ii. Content-based considerations recognized in *Finley*

In doing so, the Chair may make content-based judgments. The Court in *Finley* wrote that "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."[11] The *Finley* Court also noted that "[t]he 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.'"[12] For example, the Chair may find that despite the Council's recommendation, the contemporary relevance of a particular application or its suitability to a special audience, or that its educational value leaves something to be desired.

iii. Agency priorities

The NEA has historically expressed a preference for certain projects, which often reflect administration priorities. For example, the current NEA Grants for Arts Projects program guidelines encourage arts projects including activities that:

(1) Celebrate the nation's rich artistic heritage and creativity by honoring the semiquincentennial of the United States of America (America250);
(2) Originate from or are in collaboration with HBCUs, tribal colleges and universities, American Indian and Alaska Native tribes, Hispanic serving institutions, Asian American and Pacific Islander communities, and organizations that support the independence of people with disabilities;
(3) Support health and well-being of people and communities through the arts; and,
(4) Support existing and new technology-centered creatives practices across all artistic disciplines and forms.

[11] *Finley*, at 571.
[12] *Finley*, at 585.

III. Implementing EO 14168

The Chair's evaluation of projects promoting gender ideology will be to the extent practicable by law and in a manner consistent with the U.S. Constitution and federal laws and regulations, including the NEA statute, and agency policies and procedures.

To implement EO 14168, the Chair may evaluate projects promoting gender ideology in a manner consistent with the NEA's statutory framework of Artistic Excellence and Artistic Merit, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. In doing so, the Chair may consider factors including program priorities. As noted in *Finley*, assessments of Artistic Excellence and Artistic Merit may include (but are not limited to) considering "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."[13]

In reviewing applications, the Chair will make the decision on a grant-by-grant basis, relying on the criteria outlined in Section II above. For example, in reviewing an application that promotes gender ideology, the Chair could consider whether or not the specific elements of that project align with general standards of decency and respect for the diverse beliefs and values of the American public, or whether those elements indicate a sufficient level of anticipated public interest in or appreciation of the project, or are likely to be suitable for or appeal to intended audiences.[14] The process does not include an eligibility bar, nor does it include a certification requirement.

IV. This Implementation Procedure Complies with Constitutional and APA Requirements.

A. This Implementation Process Complies with the First Amendment.

i. NEA Grantmaking Constitutes Government Speech.

The NEA's grantmaking decisions constitute a form of government speech and therefore are not subject to scrutiny under the Free Speech Clause of the First Amendment.[15] NEA grantmaking constitutes government speech in accordance with the three-factor test outlined in *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200 (2015), following the decision in *Pleasant Grove City v. Summum*.[16]

First, the history of the expression indicates that the NEA is communicating a message: namely that the project receiving federal support meets the highest standards of Artistic Excellence and Artistic Merit, taking into consideration general standards of decency and respect for the diverse

[13] *Finley*, at 585.
[14] Id.
[15] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209 (2015).
[16] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009).

beliefs and values of the American public.[17] In creating the NEA, Congress did not intend for the Government to fund "art for art's sake", but rather art that serves a public purpose, including "to achieve a better understanding of the past, a better analysis of the present, and a better view of the future", to enable and support projects "which have substantial national or international artistic and cultural significance", and to "[foster] mutual respect for the diverse beliefs and values of all persons and groups".[18] Congress recognized in the NEA's enabling legislation that "[p]ublic funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines."[19]

Second, NEA-funded projects "are often closely identified in the public mind with the [Government]."[20] NEA-funded projects are required to credit the NEA and to include the NEA logo on project websites and promotional materials, making it likely to convey that the Government endorses the Artistic Excellence and Artistic Merit of the project.[21] It is reasonable for the public to conclude that taxpayer-funded projects are closely identified with the Government, and that the Government is conveying a message that these projects exemplify artistic excellence and merit and respect for the diverse values of Americans, and are an appropriate use of taxpayer resources.

Third, the NEA maintains control, including through exercising final approval authority over the projects NEA funds, through a highly selective process.[22] NEA's project selection is therefore a form of Government speech.

ii. This Implementation Process Does Not Include Viewpoint Discrimination.

Even if NEA-funded projects constitute private speech, the NEA will not impose an eligibility bar and will not engage in viewpoint discrimination. Per the NEA's statutory criteria, applications will be judged based upon Artistic Excellence and Artistic Merit, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.[23]

As noted in *Finley*, the NEA has limited resources and "must deny the majority of the grant applications 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.'"[24]

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[17] 20 U.S.C. § 954 (d)(1).
[18] 20 U.S.C. § 951 (3) and (6); 20 U.S.C. § 954 (c)(1).
[19] 20 U.S.C. § 951 (5).
[20] *Walker*, at 211.
[21] *Walker*, at 211; *Summum*, at 472.
[22] *Walker*, at 210; *Summum*, at 473.
[23] 20 U.S.C. § 951(d)(1).
[24] *Finley*, at 585.

In the context of these decisions, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." NEA legislation mandates that "[p]ublic funds … must ultimately serve a public purpose the Congress defines", and the Court held in *Finley* that "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, 'the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.'"[25]

B. This Implementation Process Complies with the Fifth Amendment.

The NEA's implementation of EO 14168 does not include the enactment of any rules or requirements that are unconstitutionally vague under the Fifth Amendment. It does not include a certification requirement and therefore does not subject applicants to potential criminal penalties for making false statements.[26] This process does not include a bar to eligibility. Instead, the NEA will consider projects promoting gender ideology in a manner consistent with the NEA's statutory framework of Artistic Excellence and Artistic Merit. The Court in *Finley* established that this framework is not constitutionally vague, writing that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[27]

C. This Implementation Process Complies with the Administrative Procedure Act.

The NEA's implementation of EO 14168 does not include any agency actions that would violate the Administrative Procedure Act for exceeding the NEA's statutory authority, being arbitrary and capricious, or being contrary to a constitutional right. The NEA is not instituting an eligibility bar, nor is it mandating a certification requirement. Instead, the NEA will consider projects promoting gender ideology in a manner consistent with the NEA's existing statutory framework of Artistic Excellence and Artistic Merit.

V. Other Considerations in the Review Process

The case-by-case review by the Chair of grant applications for artistic excellence and merit, including whether the proposed project promotes gender ideology, seeks to serve the public by (1) furthering the current administration's priorities as provided in EO 14168; (2) providing more clarity to applicants on how EO 14168 is being implemented by the NEA; and (3) better informing applicants on whether and how to apply for NEA funding opportunities. Alternatively, a decision to not establish an implementation process would adversely affect the ability of the NEA to comply with the President's mandates and Administration priorities. A decision to establish a different implementation process, such as subjecting applications with proposed projects promoting gender ideology to a different review standard and process, or establishing an eligibility bar, would adversely affect applicants and the NEA's ability to implement the EO in a manner consistent with its enabling statute, the Constitution, and the APA.

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[25] *Finley*, at 587-8.
[26] *Bella Lewitzky Dance Found. v. Frohnmayer,* 754 F. Supp. 774, 781 (C.D. Cal. 1991), in which the finding of unconstitutional vagueness was the result of a certification requirement.
[27] *Finley*, at 589.

VI. Regulatory Requirements: Administrative Procedure Act (APA)

This process is exempt from notice-and-comment rulemaking and delayed effective date requirements on multiple grounds and is therefore amenable to immediate issuance and implementation. The NEA is merely adopting a general statement of policy, i.e., a "statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[28] As section 20 U.S.C. § 951 provides, final application review decisions are made by the Chairman of the NEA "in their discretion." This Notice clarifies the NEA's process for implementing EO 14168 to the extent permitted by law. In clarifying that applications for projects that promote gender ideology will be considered within the NEA's existing statutory framework, the NEA is not instituting a legislative rule that would be subject to requirements for notice-and-comment rulemaking and a delayed effective date.

VII. Termination and No Private Rights

The Chair retains the sole discretion to terminate this grant application review process at any point. This process is being implemented as a matter of the Chair's discretion. It is not intended to and does not create any rights, substantive or procedural, enforceable by any party in any matter, civil or criminal.

Mary Anne Carter
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National Endowment for the Arts

April 16, 2025

Amended April 30, 2025 to correct contact information.

[28] *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).