UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

RHODE ISLAND LATINO ARTS, et al.,

Plaintiffs,

v.

NATIONAL ENDOWMENT FOR THE ARTS, et al.,

Defendants.

Case No. 25-cv-79-WES-PAS

PLAINTIFFS' OPPOSITION TO MOTION FOR PROTECTIVE ORDER TO PRECLUDE DISCOVERY

INTRODUCTION

Plaintiffs filed this lawsuit to challenge Defendants' policy, announced on February 6, 2025, that made any project that appeared to "promote gender ideology" ineligible for NEA funding. Before the Court could rule on that policy, Defendants rescinded it and promised to finalize a new one regarding implementation of Executive Order 14168. ECF No. 11-1 at 70–71. The NEA stated that it would "implement and make public" the new policy on April 30, 2025. *Id.* at 71. Defendants then asked this Court not to issue a preliminary injunction because it would get in the way of that process and because they had already given Plaintiffs the relief they sought: "not implement[ing] the EO." ECF No. 11 at 14. Relying on those "critical" assertions, the Court declined to "short circuit the ongoing administrative review process set to conclude in a matter of days." ECF No. 13 at 2, 43.

Defendants have now issued that new policy. *See* ECF No. 17-1 at 3 (hereinafter, "Final EO Implementation") ("This Notice outlines . . . how [the NEA] will implement EO 14168 . . ."). Yet the text does not actually explain how the NEA will implement EO 14168. The Final EO Implementation states that "appropriate action is needed to incorporate the EO in the NEA's grant application review process"—i.e., that the NEA can no longer rely on its existing implementation of 20 U.S.C. § 954—and that the Chair will review applications case-by-case "for artistic excellence and merit, *including whether the proposed project promotes gender ideology*." *Id.* at 1, 2 (emphasis added). Yet it also asserts that "the Chair will continue to review grant applications based on the statutory requirements" and that "[t]he only criteria all applications are subject to are those set forth in the enabling statute, which the agency has always enforced." *Id.* at 1.[1]

[1] The Final EO Implementation additionally asserts that it "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *id*. at 9, and "serve[s]

In light of this lack of clarity, Plaintiffs sought limited, focused discovery to effectuate this Court's judicial review. ECF No. 16. That discovery consists of requests for admission and interrogatories seeking to discern whether "promoting gender ideology" would (1) disqualify an application, (2) make it less likely to receive funding, or (3) make no difference at all. *Id.* Rather than answer these simple questions, Defendants objected on two grounds: first, that the Final EO Implementation is "predecisional" and, second, that discovery is not warranted because this is an APA case. ECF No. 17. Defendants are wrong. The limited discovery that Plaintiffs seek is warranted because Defendants' utter lack of clarity frustrates judicial review.

ARGUMENT

I. Plaintiffs' Discovery Requests Do Not Hinder Defendants' Discretion or Seek to Preview Decisions.

Defendants' first argument appears to be two-fold: first, that they have no obligation to announce a policy and, second, that Plaintiffs improperly ask the Chair to opine on decisions she has not yet made. Both arguments miss the mark: Plaintiffs seek clarity on a policy Defendants promised, and purported, to announce and implement on April 30, 2025. *See* ECF. No. 11-1 at 70 -71; ECF 17-1. And they do not ask whether Defendants will grant their (or any) particular applications; instead, they seek to understand Defendants' overarching policy regarding the role—if any—"gender ideology" will play in their decision-making process.

Defendants rely principally on *FDA v. Wages & White Lion Investments., LLC*, 145 S. Ct. 898 (2025), but it cannot help them. *FDA* does not mention discovery once, and the "essence" of the plaintiffs' argument in that case was "that the FDA told them in guidance documents that it would do one thing and then turned around and did something different when it reviewed their

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the public by . . . providing more clarity to applicants on how EO 14168 is being implemented [.]" *Id.* at 8. It is precisely because the new policy *lacks* such clarity that Plaintiffs seek discovery.

applications." *Id*. at 917. The dispute in *FDA* thus centered on whether it was proper for the agency to depart from a prior position—and that position was stated clearly enough for the Court to assess whether it had changed. *See also* ECF No. 17 at 2, n.1 (appearing to recognize this distinction). By contrast, here, Plaintiffs seek to understand what Defendants intend to do in the first place.

Defendants also assert that an APA claim rises and falls with "the grounds the guidance cites," and that Plaintiffs are improperly seeking to preview decisions and "speculate as to how the Chair will implement the EO." ECF No. 17 at 1, 2. Both arguments miss the same point; Plaintiffs seek discovery not about the *basis* for Defendants' final policy, but what the policy *is*.[2]

II. Discovery Should Be Granted Because the NEA's Failure to Explain Its Policy Frustrates Effective Judicial Review.

The limited, focused discovery that Plaintiffs seek is warranted because the NEA's failure to clearly articulate its new policy frustrates effective judicial review. Though APA actions generally proceed on the administrative record, courts have discretion to "consider supplemental evidence to facilitate [courts'] comprehension of the record or the agency's decision." *City of*

[2] Defendants do not appear to assert the deliberative process privilege, but Plaintiffs address its inapplicability in light of Defendants' reliance on the Final EO Implementation's "predecisional" nature. Because the privilege "is intended to prevent inquiry into governmental decisionmaking that is only collateral to the case," it "is vitiated entirely . . . when the government's decisionmaking process is central to the plaintiff's case" and "simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue." *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (collecting cases); *see also In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). In this case, Defendants' decisionmaking regarding "gender ideology" is a lynchpin issue. Moreover, even if any information were covered by the privilege, it must nevertheless be produced if: it is relevant; it isn't available from other sources; the litigation and the issues involved are serious; and there is little "possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *Securities and Exchange Commission v. Ripple Labs, Inc.*, 2022 WL 123590, at *2 (S.D.N.Y. Jan. 13, 2022). Here, each factor supports disclosure: The information is highly relevant because both Plaintiffs and the Court need to know Defendants' policy for this case to properly proceed; the information is not available elsewhere; the issues are significant; and there is no serious secrecy interest for the government to assert.

Taunton v. U.S. Env't Prot. Agency, 895 F.3d 120, 127 (1st Cir. 2018); *Housatonic River Initiative v. U.S. Env't Prot. Agency*, 75 F.4th 248, 278 (1st Cir. 2023). Courts have exercised this discretion in cases "where there is a 'failure to explain administrative action as to frustrate effective judicial review.'" *Olsen v. United States*, 414 F.3d 14, 155–56 (1st Cir. 2005) (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)); *Town of Winthrop v. FAA*, 535 F.3d 1, 14 (1st Cir. 2008).

This is such a case. The Final EO Implementation fails to clearly explain how Defendants will evaluate a project deemed to be "promoting gender ideology." In some sections, it suggests that such projects will be evaluated exactly the same as any other project. *See, e.g.*, ECF No. 17-1 at 6 ("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 . . . ."). Elsewhere, however, the Final EO Implementation suggests that such projects may face extra scrutiny because of their viewpoint. *See, e.g.*, *id*. at 2 (the Chair's "case-by-case review" will "includ[e] whether the proposed project promotes gender ideology"). The multiple, viable interpretations of the Final EO Implementation could yield very different cases for this Court to adjudicate. *See, e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 581–83, 587 (1998) (upholding "decency and respect" criteria because it had been construed merely to require the appointment of diverse peer review panels, not to impose any viewpoint filter, but warning that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," the Court "would confront a different case"). Plaintiffs' discovery requests seek to discern Defendants' new policy so that the Court will know exactly what case it is adjudicating.

The government additionally contends that judicial review cannot be frustrated unless there has been an adjudication or enforcement action, and so the Final EO Implementation must

constitute predecisional guidance, ECF No. 17 at 4–5, but it cites no authority that actually supports this contention. In *Camp v. Pitts*, the Court found no need to obtain additional explanation from the agency (through affidavits or testimony) because the agency had presented a contemporaneous explanation of its decision, but that does not address the situation presented here, where Plaintiffs seek clarity on the decision itself. 411 U.S. at 142–43. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*. forbade "post hoc rationalizations for agency action," 463 U.S. 29, 50 (1983), but is similarly silent on the scenario presented here, which seeks no rationalization for agency action, but only an explanation of what the agency action is. The government's comparison to *Finley* is equally inapposite. In *Finley*, the NEA was clear in its position: it "read[] the [decency and respect] provision as merely hortatory, and contend[ed] that it stops well short of an absolute restriction." 524 U.S. at 580. The Court could adjudicate the constitutional questions because the NEA had been clear. *See id*. at 581 ("It is clear, however, that the text of § 954(d)(1) imposes no categorical requirement."). Precisely that clarity—necessary for the Court's review—is lacking here.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' motion, ECF No. 17, and compel them to respond to Plaintiffs' discovery requests.

Dated: May 27, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the within document via the ECF system on this day of May 27, 2025 and that it is available for viewing and downloading to all counsel of record.

Dated: May 27, 2025

By: */s/ Vera Eidelman*
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