No. 25-2113

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RHODE ISLAND LATINO ARTS; NATIONAL QUEER THEATER; THE THEATER OFFENSIVE; THEATRE COMMUNICATIONS GROUP,
Plaintiffs-Appellees,

v.

NATIONAL ENDOWMENT FOR THE ARTS; MARY ANNE CARTER, IN HER OFFICIAL CAPACITY AS CHAIR OF THE NATIONAL ENDOWMENT FOR THE ARTS,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Rhode Island (No. 1:25-cv-00079-WES-PAS)

BRIEF OF AMICI CURIAE FIRST AMENDMENT SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Karin Dryhurst
Krister Rasmussen
JENNER & BLOCK LLP
1099 New York Ave. N.W. Suite 900
Washington, DC 20001-4412
(202) 639-6000
kdryhurst@jenner.com

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that *amici curiae* are unaware of any persons with any interest in the outcome of this litigation other than *amici curiae* represented in this brief and their counsel (listed below), and those identified in the party and *amicus* briefs filed, or to be filed, in this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Counsel for *Amici Curiae*

Karin Dryhurst, Jenner & Block LLP

Krister Rasmussen, Jenner & Block LLP

Amici Curiae

Floyd Abrams, Yale Law School, Abrams Institute for Freedom of Expression Founder

Vincent Blasi, Columbia Law School, Corliss Lamont Professor Emeritus of Civil Liberties

Erwin Chemerinsky, University of California Berkeley Law School, Dean & Jesse H. Choper Distinguished Professor of Law

Genevieve Lakier, University of Chicago Law School, Herbert and Marjorie Fried Teaching Scholar

Amanda Shanor, The Wharton School of the University of Pennsylvania, Assistant Professor of Legal Studies & Business Ethics and Wolpow Family Faculty Scholar

Geoffrey Stone, University of Chicago Law School, Edward H. Levi Distinguished Service Professor of Law

Rebecca Tushnet, Harvard Law School, Frank Stanton Professor of the First Amendment

/s/ Karin Dryhurst

Karin Dryhurst
Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars of the First Amendment, including a number who served on the Legal Task Force that the 1990 Independent Commission on the National Endowment for the Arts convened to advise on the constitutional questions presented by federal arts funding. Amici have no stake in the parties or the outcome as such, but they have a substantial interest in the correct interpretation of the 1990 amendments to the National Foundation on the Arts and the Humanities Act ("NFAHA"). These are amendments that certain amici helped to shape, and that the Supreme Court construed, in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), against the backdrop of the Commission's work. Amici submit this brief to explain why the policy challenged here cannot be reconciled with the viewpoint-neutral framework that Congress enacted and that *Finley* upheld.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on whether the National Endowment for the Arts ("NEA") may make grant decisions based on an applicant's viewpoint. *Finley* already answered that question: it may not. When Congress amended the NFAHA in 1990, it reaffirmed a viewpoint-neutral mandate for the NEA. In amending the NFAHA,

[1] *Amici* have obtained the consent of all parties to file this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

Congress drew heavily on the expertise of a bipartisan Independent Commission and its Legal Task Force of distinguished constitutional lawyers. Asked by Congress to advise on the NEA's proper role in evaluating the projects that it funds, the Independent Commission drew the constitutional line with care: the government may insist on artistic excellence and may to that extent make judgments based on aesthetic content. But it may not wield its funding power to punish disfavored viewpoints. Congress drafted the NFAHA to occupy precisely the space the Independent Commission identified as constitutionally safe, respecting a content/viewpoint distinction that the NEA now ignores.

In *Finley*, the Supreme Court upheld the NFAHA amendments on the same basis. The Court construed the NFAHA's "decency and respect" standard not to permit viewpoint discrimination, recognizing that Congress had respected the First Amendment boundaries laid down by the Independent Commission by deliberately "declin[ing] to disallow any particular viewpoints" in funding standards. *Finley*, 524 U.S. at 581–82. Nonetheless, the NEA now argues that the "decency and respect" standard authorizes its viewpoint-discriminatory policy. By directing the NEA Chairperson to weigh whether a project "promotes gender ideology"—a factor that, on the agency's own concession, can only count against a project and never in its favor—the policy imposes a one-directional burden on holders of a particular

view because of the view they hold. That is viewpoint discrimination of exactly the kind *Finley* warned against. *Finley*, 524 U.S. at 586–87.

The government cannot escape that conclusion by recharacterizing privately created art as its own speech, nor by proposing that the government engages in its own speech in deciding how to award subsidies. The NEA grant program exists to facilitate private expression, not simply to transmit the government's message. Accepting the agency's theory would strip First Amendment scrutiny from the government's exercise of the subsidy power across the board. That would be just the kind of "dangerous misuse" of the government-speech doctrine against which the Supreme Court has warned. The judgment below should be affirmed.

ARGUMENT

I. The Government's Authority to Exercise Content-Sensitive Judgment in Facilitating Private Speech Does Not Extend to the Suppression of Disfavored Viewpoints.

A. Congress drafted the NFAHA's standard carefully to avoid unconstitutional viewpoint discrimination.

"The NEA's mandate is to make esthetic judgments," which entails an "inherently content-based 'excellence' threshold for NEA support." *Finley*, 524 U.S. at 586. Naturally: the NEA is directed by statute to promote projects based on their artistic excellence, and so must make decisions that are content-sensitive in at least *one* way, namely, in that they consider the aesthetic qualities of artwork. But the NEA here conflates the NFAHA's authorization of such aesthetic judgments

with impermissible viewpoint discrimination. *See* NEA Br. 5–6, 10, 23–24, 27, 38; *see also* J.A. 366–67, 368 (NEA Policy Notice). Although the NFAHA may permit *some* content-sensitive judgments—such as those involving aesthetic merit—it does not follow that it permits *all* content-sensitive judgments, and certainly not the viewpoint-based judgments at issue here. The two categories are not the same, and the history of the 1990 amendments confirms that Congress understood the difference.

In amending the NFAHA in 1990, Congress took care to craft a framework that could account for the diversity and creativity of the whole American public. The legislature drew on the expertise of a bipartisan Independent Commission specifically charged with reviewing the NEA's grant-making procedures and addressing the standards applicable to publicly funded art. The Commission, in turn, convened a Legal Task Force of six distinguished constitutional lawyers of diverse views—Floyd Abrams, Professor Michael McConnell, Professor Henry Monaghan, Theodore Olson, Dean Geoffrey Stone, and Professor Kathleen Sullivan—and submitted their unanimous Consensus Statement to Congress as part of its report.

The Legal Task Force's Consensus Statement drew the constitutional line with precision. While the government "has broad powers as to how to spend public funds," it may not do so "in a way that the Supreme Court has said is 'aimed at the suppression of dangerous ideas.'" Independent Comm'n, *A Report to Congress on*

the National Endowment for the Arts 85 (Sept. 1990) ("Comm'n Report"). The Statement explained that Congress "may insist on artistic excellence as a prerequisite for any funding," but "[w]hat it may not do[] . . . is to choose those to be funded—and, often more important, those not to be funded—in a manner which punishes what Congress views as 'dangerous content.'" *Id.* at 86 (emphasis omitted). And when funding denials are "the product of invidious discrimination with the aim of suppressing a particular message and for no other reason," the Task Force warned, "a particularly powerful case might be made that the decision was unconstitutional." *Id.* Of course, in its *own* speech, the NEA is free to adopt one view rather than another. But NEA grant recipients' speech is not the NEA's speech. *See infra* at 11–13.

As Floyd Abrams told the Commission, the Chairperson "has great powers[] . . . to make anything that may reasonably be called an aesthetic judgment"—but *only* an aesthetic judgment. Comm'n Report at 90. If the Chairperson is "genuinely making an aesthetic judgment that he believes this just isn't art, or that it is so vulgar that [it] cannot be described as excellent art," funding may be denied. *Id.* (bracket in original). But the Chairperson cannot deny funding because a project promotes a disfavored ideological position. Ideological conformity is not artistic merit. If anything, artistic merit tends to arise from a culture that welcomes all manner of nonconformity, as the history of art reflects.

Congress's 1990 amendments were thus calibrated to occupy the space the Legal Task Force identified as constitutionally safe. They added a standard understood to require pluralism, not orthodoxy, and they expressly declined to adopt viewpoint-specific content restrictions. *Finley*, 524 U.S. at 581–82. That is clear evidence that Congress, drawing on the Commission's Consensus Statement, understood viewpoint discrimination to be impermissible in administering the NEA.

B. *Finley* upheld the NFAHA on the express understanding that it does not permit viewpoint discrimination.

The NEA purports to derive the authority for its policy from the NFAHA amendments' "decency and respect" standard. *See* NEA Br. 1–2, 6, 10, 14, 16, 18, 20, 23–24, 28–29, 31. But the Supreme Court in *Finley* upheld the "decency and respect" standard against a facial First Amendment challenge precisely by construing it *not* to permit viewpoint discrimination, which the Court reaffirmed is presumptively unconstitutional. The scope of the NEA Chairperson's judgment under that standard therefore cannot extend to targeting the viewpoints disfavored in its policy, which singles out applicants deemed to promote "gender ideology" as uniquely less deserving of federal funding. *See* J.A. 542 ("gender ideology" can only weigh against approval, and never for it).

The *Finley* Court was clear that it upheld the "decency and respect" standard because it understood Congress to have adopted that standard consistent with the Independent Commission's views on the bounds of the First Amendment. The Court

recognized that "[t]he Independent Commission had cautioned Congress against the adoption of distinct viewpoint-based standards for funding," and that "[i]n keeping with that recommendation, the criteria in § 954(d)(1) inform the assessment of artistic merit, but Congress declined to disallow any particular viewpoints." *Finley*, 524 U.S. at 581–82. By conflating content sensitivity with viewpoint discrimination, the NEA's defense effaces the very content/viewpoint distinction on which *Finley* tells us the constitutionality of the "decency and respect" standard depends. *See supra* section I.A.

The plaintiffs in *Finley* asserted a facial challenge to the statute and so did not allege that the NEA had discriminated against them based on their viewpoints. But as the Court cautioned, and "as the NEA itself concede[d]" at the time, "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.'" *Finley*, 524 U.S. at 587 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). The Court upheld the provision on the express understanding that it would not be "applied in a manner that raises concern about the suppression of disfavored viewpoints." *Id.* By interpreting *Finley* as a loophole to *permit* viewpoint discrimination, the NEA reads the case backwards and breaks with decades of clear precedent. *See, e.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 385

n.16 (1984) (an interest in avoiding "use of public money . . . to which some taxpayers may object" cannot "be invoked to justify a . . . decision to suppress speech"); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (indicating constitutional concerns raised by "singling out a disfavored group on the basis of speech content"). State-sanctioned viewpoint discrimination is precisely what *Finley* refused to authorize, and for good reason: it is "poison to a free society." *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring).

C. The NEA policy impermissibly discriminates based on viewpoint.

"The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The NEA's policy disfavoring "gender ideology" regulates on exactly that rationale. "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828–29. That rule should dispose of this case.

As defined in Executive Order 14168, "gender ideology" involves "the false claim that males can identify as and thus become women and vice versa," and "includes the idea that there is a vast spectrum of genders that are disconnected from one's sex." Exec. Order No. 14,168, § 2(f), 90 Fed. Reg. 8615, 8615–16 (Jan. 20, 2025). Executive Order 14168 requires executive agencies to "take all necessary steps, as permitted by law, to end the Federal funding of gender ideology." *Id.* § 3(e),

90 Fed. Reg. at 8616. This prohibition has nothing to do with artistic content. Instead, it singles out a particular view in an ongoing public debate about the relationship between biological sex and gender identity and targets those who hold that view for disfavor.

In a Notice of April 30, 2025, the NEA announced the policy at issue in this suit as its implementation of that directive. J.A. 541–42. This replaced an earlier version that required applicants to certify that they would not use federal funds to promote "gender ideology" pursuant to the Order—a requirement the agency rescinded after Plaintiffs lodged an initial First Amendment challenge. *See* J.A. 540–41. Under the new policy announced in the April 30 Notice, the NEA Chairperson will implement the demands of the Order during her own final review of grant-making decisions by the NEA advisory panels and Council. J.A. 542. Per the Notice, the Chairperson will assess those applications "for artistic excellence and merit, including whether the proposed project promotes gender ideology," on a "case-by-case" basis. *Id.*

As the agency concedes, a finding that a project "promotes gender ideology" can *only weigh against* approval—and can never favor it. *Id.* On the agency's own account, then, the factor can do nothing but lower a disfavored project's likelihood of approval. That is a clear burden imposed on holders of a particular view just because of the view they hold. Moreover, the vagueness of the EO definition and

the NEA's policy exerts a chilling effect that will encourage the erasure of a whole class of people from publicly funded art, not to mention disfavor artworks of obvious cultural value. The policy appears to allow the NEA to interpret mere depictions of transgender people—or of people behaving in ways that do not fit stereotypical expectations of their sex—as promoting the "claim that males can identify as and thus become women and vice versa," or "the idea that there is a vast spectrum of genders that are disconnected from one's sex." Exec. Order No. 14,168, § 2(f), 90 Fed. Reg. at 8615-16. Would the NEA weigh "gender ideology" against a painting of the Egyptian queen Hatshepsut, who referred to herself as "king" and used male regalia as Pharaoh? Aude Semat & Mona Eltahawy, *Spotlight: Challenging Power through Gender Representation*, Met Museum (June 2, 2022), https://www.metmuseum.org/perspectives/hatshepsut-gender-representation. How about a production of Shakespeare's Twelfth Night, whose cross-dressing heroes entertain romances that blur gender boundaries? *See* Will Tosh, *What You Will: Gender Fluidity in Twelfth Night*, Shakespeare's Globe (Feb. 9, 2021), https://www.shakespearesglobe.com/discover/blogs-and-features/2021/02/09/what-you-will-gender-fluidity-in-twelfth-night. That the questions must even be asked shows the chill. It may not be clear where the administration will draw the line on "gender ideology," but artists will be pushed to self-censor for fear of crossing it.

Contrary to the NEA's argument, the Chairperson's statutory authority to review projects for artistic merit does not allow her to put up this kind of categorical, one-sided ideological hurdle. The Independent Commission expressly urged Congress *not* to attempt any such authorization because it would violate the First Amendment bar on viewpoint discrimination and invite public outcry. As Professor McConnell told the Commission, "[w]henever a process is set up so that controversial judgments are superimposed on a system, those judgments are legally and popularly vulnerable." Comm'n Report 89. The NEA's policy "leverage[s] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," effecting the "imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Finley*, 524 U.S. at 587 (quoting *Simon & Schuster*, 502 U.S. at 116). This is precisely the evil *Finley* identified and that the Task Force unanimously warned is unconstitutional.

II. The Court Should Not Save the NEA's Unconstitutional Policy by Expanding the Government-Speech Doctrine.

A. NEA grants are not government speech.

The purpose of the NEA grant program, as the statute states, is to facilitate private expression: 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 this creative talent." 20 U.S.C. § 951(7). Its purpose is not to "transmit the government's own message," *Shurtleff v. City of Boston*, 596 U.S.

243, 251–52 (2022). In spite of this, the NEA urges the novel view that the government is itself speaking when it decides to fund a given project: that "when the NEA approves a project for funding," it supposedly "communicates the message that the agency believes the project to meet the highest standards of artistic excellence and merit and that it is worthy of both public and private support." NEA Br. 30–31.

But as the district court recognized, when the NEA decides to fund certain art, that is not itself an act of government speech, but rather an example of "the government invit[ing] the people to participate in a program." J.A. 547 n.4 (quoting *Shurtleff*, 596 U.S. at 252 (alteration in original)). The Supreme Court's framework makes clear that the relevant speech, for First Amendment purposes, is the speech that *issues* from the program. A reviewing court must determine whether speakers participating in the program are "exercising a power to speak for [the] government" or speaking for themselves. *See Shurtleff*, 596 U.S. at 268 (Alito, J., concurring). The government cannot evade its obligations under the First Amendment and *Shurtleff* by shifting the analysis to the subsidy decision rather than the actual expression that the government program exists to promote.

The NEA's position here is indistinguishable from one the Supreme Court rejected in *Matal v. Tam*, where, like here, the United States defended its application of a content-sensitive statutory provision (there, permitting the Patent and Trademark Office to deny federal registration to "disparaging" marks) on the theory

that the registration of a trademark converts the mark into government speech. *Matal v. Tam*, 582 U.S. 218, 227–28 (2017). Exactly the same logic applies here. Just as the NEA must determine that candidate projects meet certain statutory standards (including "artistic merit" and "decency and respect"), so too must the PTO determine that candidate marks meet certain statutory standards for trademark eligibility. But in neither case does that determination, nor the expression it makes possible, amount to government speech.

The district court rightly rejected the bizarre and wholly insupportable conclusion that the government is speaking whenever it funds the diverse views—sometimes inconsistent with each other—of the recipients of NEA funding. Just as in *Matal*, the sheer diversity of views mandated by statute and funded in practice means that the government would be "babbling prodigiously and incoherently, saying many unseemly things, and expressing contradictory views." J.A. 555 (quoting *Matal*, 582 U.S. at 236). That logic applies even more strongly here: NEA grant decisions fund a plethora of perspectives, are made with substantial input from non-government advisors, and occur well before the expressive behavior has even taken shape. *See, e.g.*, J.A. 557 ("NQT[] . . . has received approval for NEA funding in previous cycles before even deciding which plays to include in the relevant year's festival."). As in *Matal*, the court should not accept such a "huge and dangerous

extension of the government-speech doctrine." 582 U.S. at 239.

B. Expanding the government-speech doctrine to cover subsidy programs would clear away the First Amendment bar on viewpoint discrimination.

The NEA's position here is not only legally incorrect, but also short-sighted and dangerous. If the government could classify subsidized private expression—or its choice of whether to subsidize that expression—as its own speech, it could eliminate First Amendment scrutiny from the control it exercises over recipients of public funding. The state would be free to reward allies, sideline dissenters, and use the subsidy power as a tool of ideological control.

The logic of the NEA's position is that *any* time the government decides to disburse a subsidy subject to certain statutory conditions, it is engaging in an act of speech in which it is "entitled to say what it wishes and to select the views that it wants to express," free from "First Amendment scrutiny." NEA Br. 30 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) (internal quotation marks omitted)). The result of this position would be to eliminate First Amendment protections for all government subsidy decisions. That would effectively nullify the prohibition on viewpoint discrimination, which exists to prevent the government from using its institutional advantages—including control over public resources—to distort public discourse in its favor.

The Supreme Court has repeatedly repudiated the claim that the content of

government-funded expression is government speech. And there is no practical difference between that claim and the NEA's claim that the government's decision about what private expression to fund is government speech. Under either rule, the government would be free to "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," which is flatly impermissible, as "even in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas." *Finley*, 524 U.S. at 587 (internal quotation marks omitted).

For this reason, the Court warned in *Matal* that the government-speech doctrine is "susceptible to dangerous misuse" and that courts must "exercise great caution before extending" it. *Matal*, 582 U.S. at 235. Justice Alito, discussing *Matal*, explained further in his *Shurtleff* concurrence: "If registration transforms trademarks into government speech, the same logic would presumably hold for other speech included on systems of government registration. Books on the copyright registry, for example, would count as the Government's own speech—presumably subject to editorial control. And the Government would be free to exclude authors from copyright protection based on their views." *Shurtleff*, 596 U.S. at 262–63 (Alito, J., concurring). Here, even as its statutory mission is to foster diverse expression, the NEA asks the Court to afford it *de facto* editorial control over *all* the books, plays, films, and other forms of art that its funding supports. That such a

power would for now be exercised on the basis of "gender ideology" in no way limits its scope in principle. The consequence of recognizing subsidy decisions as government speech would be to bar First Amendment challenges to—for instance—future NEA decisions not to fund projects that depict "pro-life ideology," or "free-market ideology," or any other conceivably disfavored viewpoint.

The NEA misreads the statute, the caselaw, and the Constitution. The First Amendment's prohibition on viewpoint discrimination admits no exception for the subsidy power, and *Finley* does not supply one.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: June 12, 2026

Respectfully submitted,

/s/ Karin Dryhurst

Karin Dryhurst
Counsel of Record
Krister Rasmussen
JENNER & BLOCK LLP
1099 New York Ave. N.W. Suite 900
Washington, DC 20001-4412
(202) 639-6000
kdryhurst@jenner.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,681 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Karin Dryhurst
Karin Dryhurst

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2026, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Karin Dryhurst
Karin Dryhurst