

July 2015

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Recommended Citation

Choi, Alicia M. (1999) "National Endowment of the Arts v. Finley: A Dispute Over the "Decency and Respect" Provision," *Akron Law Review*: Vol. 32 : Iss. 2 , Article 4.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol32/iss2/4>

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NATIONAL ENDOWMENT FOR THE ARTS V. FINLEY: A DISPUTE OVER THE “DECENCY AND RESPECT” PROVISION

I. INTRODUCTION

Art is expression of ideas.¹ People express their perceptions, ideas, feelings, and values through the arts and literature, thus they are entitled to First Amendment² and Fifth Amendment³ protection.⁴ Since Congress incorporated the “decency and respect” provisions into the National Endowment for the Arts (the “NEA”) guidelines, the NEA

¹ Michael Wingfield Walker, *Artistic Freedom v. Censorship: The Aftermath of the NEA’s New Funding Restrictions*, 71 WASH. U. L.Q. 937, 955 (1993) (“The purpose of art is to hold a mirror up to society . . . our society loses something rare and precious every time we shut out even a single voice.”).

² U.S. CONST. amend. I. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .” *Id.*

³ U.S. CONST. amend. V. The Fifth Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law . . .” *Id.*

⁴ See generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1976) (“[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual”); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 13 (1965) (“Literature and the arts . . . fall within the subjects of ‘governing importance’ that the First Amendment absolutely protects from abridgment.”).

has suffered intense scrutiny and criticism from the public.⁵ This provision has made the organization unstable, affecting the development of effective policies and goals.⁶

There is substantial controversy over whether the government should be involved in art funding.⁷ The purpose of this Note is to present and critique arguments both supporting the “decency and respect” provision and those opposing it. Those who support the clause state that although the people do not have a constitutional right to receive funding, the “decency and respect” provision does not violate the people’s First

⁵ Senator Gordon argued that “the state owes all things to all people and has neither the discretion nor the moral right to abstain from any facet of activity or to reject any petitioning for funds.” 135 Cong. Rec. S5805-0, 5806 (1989). SECCA (Southeastern Center for Contemporary Arts) is an organization that granted \$15,000 to Andres Serrano for “Piss Christ”. *Id.* In response, Senator Gordon also proposed that the NEA deprive SECCA of Federal funding for a period of five years and until the agency shows that it will be administered responsibly. *Id.*; see generally Grace Glueck, *Border Skirmish: Art and Politics*, N.Y. TIMES, Nov. 19, 1989, § 2, at 1 (reporting on tensions between artists and lawmakers); Kim Masters, *Arts Panel Urges End to Grant Pledge*, WASH. POST, Aug. 4, 1990, at G1 (describing meeting of NEA Council on proposed pledge of compliance for grant recipients); Allan Parachini, *Endowment, Congressmen Feud over Provocative Art*, L.A. TIMES, June 14, 1989, § 6, at 1 (explaining escalating political controversy involving the NEA); see also Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and The First Amendment*, 72 N.Y.U. L. REV. 383, 429 (1997) (stating that “[t]he strict categorization that pervades public forum analysis is ill-suited to the complex and inherently ambiguous nature of art in public spaces. Consequently, courts have created an inconsistent, result-oriented jurisprudence of public art”).

⁶ Craig Alford Masback, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 YALE L. & POL’Y REV. 177, 193-94 (1992) (“The Congressional shift toward a more conservative consensus [by incorporating the “decency and respect” provision in the Act] has undercut the bipartisan support for the arts that existed at the NEA’s creation”) (citing MARGARET WYSZOMIRSKI, *Budgetary Politics and Legislative Support: The Arts in Congress*, in CONGRESS AND THE ARTS: A PRECARIOUS ALLIANCE? 28 (1985)). “Instead of working with Congress to develop art policies, the NEA has been in a largely defensive posture concerning its process and program, operating without a clear sense of purpose.” *Id.* at 194. Instead of allowing the NEA to independently create its own art policies, Congress has undermined the NEA by actually controlling its grant process and considerations. *Id.*

⁷ Michael J. Elston, *Artists and Unconstitutional Conditions: The Big Bad Wolf Won’t Subsidize Little Red Riding Hood’s Indecent Art*, 56 LAW & CONTEMP. PROBS. 327, 327 (1993) (stating that the controversy between artistic expression and government funding has placed the arts in a platform of political debate and has “focused attention to the ongoing debate over unconstitutional conditions”); Robert M. O’Neil, *Artistic Freedom and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 177, 189-91 (1990) (recognizing that the restrictions placed on funded artists in the form of decency requirements have a ‘potential chilling effect’ on ‘bold and controversial works’ affecting both the artists themselves and the display industry of museums and galleries).

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and Fifth Amendments.⁸ The provision is only a “consideration”, not a requirement.⁹ Opponents of the “decency and respect” provision argue that the First and Fifth Amendments prohibit the government from controlling the content of the subsidized arts.¹⁰

Part II of this Note provides a brief background on the establishment of the NEA. Part III is the Statement of the Case providing a brief statement of facts, procedural history, and the Supreme Court holding in *National Endowment for the Arts v. Finley*.¹¹

Part IV is the Analysis of this Note where Part A discusses the First Amendment provision regarding content-based and viewpoint-based restrictions on speech and unconstitutional conditions.¹² Part B will deal with the Fifth Amendment and the dangers of overbreadth and vagueness.¹³ Part C will discuss the possibilities of dissolving the NEA.¹⁴ Part D will discuss different options the NEA has to achieve a compromise between its goals and the artistic views.¹⁵ This Note concludes that the

⁸ *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998) (“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”). The Supreme Court overturned the lower court decisions and determined that because this provision is not “viewpoint” discrimination, it is not in violation of the First Amendment. *Id.* The Court also determined that the provision is not void for vagueness; thus, it is not in violation of the Fifth Amendment. *Id.* at 2179-80; *see also* J. Sarah Kim, Comment, *Defending the Decency Clause in Finley v. Nat. Endowment for the Arts*, 4 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 627, 661 (1993) (stating that when Congress incorporated the decency clause, it was not attempting to “control the search for political truth” or to suppress dangerous ideas). By the very nature of the arts, it is somewhat necessary to submerge into the content of such work to determine its “artistic merit.” *Id.* at 662.

⁹ Kim, *supra* note 8, at 662.

¹⁰ James Kilpatrick, Editorial, *No Indecency at Public Expense*, *STATE J.REG.* 4, June 26, 1998 (Springfield, IL), *available in* 1998 WL 14409729 quoting *Finley*:

I feel this is a great loss to our country . . . I’m disappointed because I feel that a lot of people weren’t behind [the decency provision], like Clinton. He’s a democrat. [The NEA] strikes me as a very dubious idea, for one thing, to create a system of state-approved art. Government has no business saying that this painting gets a seal of approval but this one does not. Such official patronage smacks more of Stalinist Russia than of a free America.

Id.

¹¹ 118 S. Ct. at 2168.

¹² *See infra* notes 56-83 and accompanying text.

¹³ *See infra* notes 84-111 and accompanying text.

¹⁴ *See infra* notes 112-126 and accompanying text..

¹⁵ *See infra* notes 127-149 and accompanying text.

NEA should not be dissolved but instead Congress should consider four alternative avenues in reaching a resolution between artists and the NEA.¹⁶

II. BACKGROUND

Congress created the National Foundation on the Arts and the Humanities (“Foundation”) to “develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States.”¹⁷ The Foundation is composed of several organizations, including the NEA.¹⁸ The Foundation vests in the NEA substantial discretion to award financial grants to support the arts.¹⁹ The purpose of

¹⁶ See *infra* notes 150-159 and accompanying text.

¹⁷ 20 U.S.C. § 953(b) (1995) (“[T]he purpose of the [National] Foundation [on the arts] shall be to develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States, and for institutions which preserve the cultural heritage of the United States pursuant to this subchapter.”).

¹⁸ *Id.*; 20 U.S.C. § 953(a) (1995) (“[T]here is established a National Foundation on the Arts and the Humanities . . . which shall be composed of a National Endowment for the Arts, a National Endowment for the Humanities, a Federal Council on the Arts and the Humanities, and an Institute of Museum Services.”).

¹⁹ 20 U.S.C. § 954(c) (1995) provides the following:

The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support-- (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence; (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons; (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence; (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community; (5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts; (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens; (7) programs for the arts at the local level; (8) projects that enhance managerial and organizational skills and capabilities; (9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and (10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection. . . . Any loans made by the Chairperson under this subsection shall be made in accordance

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 the NEA is to establish a “program of contracts, grants-in-aid, or loans to . . . individuals for projects and productions that are traditionally under-represented recipients of financial assistance.”²⁰ The NEA’s mission is to encourage American creativity, cultural diversity, and professional excellence.²¹ However, in order to assist artists in achieving a wide distribution of their work, Congress imposed a requirement that such artwork foster the mutual respect for the diverse beliefs and values of the American society.²²

Within the National Endowment for the Arts, there is a National Council on the Arts (“Council”) which is composed of a Chairperson, three members of the House of Representatives, two senators, and fourteen members appointed by the President.²³ The members appointed by the President are individuals, publicly recognized for their knowledge and expertise in the arts, which equitably represent women, minorities, and persons with disabilities involved in the arts.²⁴

According to the administrative provisions, the Chairperson must utilize advisory panels to review the applications for projects, productions, and workshops.²⁵ The advisory panel must base its decision solely upon artistic excellence and merit.²⁶ Once

with terms and conditions approved by the Secretary of the Treasury. In selecting individuals and groups of exceptional talent as recipients of financial assistance to be provided under this subsection, the Chairperson shall give particular regard to artists and artistic groups that have traditionally been underrepresented.

20 U.S.C. § 954(c) (1995).

²⁰ *Id.*

²¹ 20 U.S.C. § 954(c)(1)-(3) (1995); *see supra* note 17 and accompanying text.

²² 20 U.S.C. § 951(6) (1995) (indicating the importance of the arts among citizens while keeping in mind the different views and beliefs among all persons of the United States).

²³ 20 U.S.C. § 955(a)-(b)(1)(c) (1995) (establishing that two members of the House of Representatives shall be appointed by the Speaker of the House of Representatives, one member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives, one Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate).

²⁴ 20 U.S.C. § 955(b) (1995) (“[The Council members are] private citizens of the United States who are widely recognized for their knowledge . . . [and] interest in the arts; and have established records of distinguished service, or achieved eminence in the arts; and . . . [The members represent] practicing artists, civic cultural leaders, members of the museum profession, and others who are professionally engaged in the arts; and . . . [who have a fair representation of various arts] fields and interested citizen groups.”).

²⁵ 20 U.S.C. § 959(c) (1995) (establishing that the Chairperson shall issue regulations and establish procedures to ensure that the advisory panel is composed of individuals representing different geographic and ethnic backgrounds, minorities, and lay individuals with diverse artistic and cultural backgrounds).

²⁶ *Id.*

the Chairperson receives a recommendation from the advisory panel, the Chairperson must then make recommendations to the Council based upon both the advisory panel's decision and the Chairperson's own opinions.²⁷ The Council then makes a final recommendation of whether to approve an application and the amount of financial assistance if the application is granted.²⁸ Although the Chairperson retains the final authority to approve a grant application, the Chairperson cannot approve an application that the Council has rejected.²⁹

The National Foundation on the Arts and Humanities Act ("Act") requires the Chairperson to establish guidelines to evaluate the artistic merit, the artist's talent, and to consider "general standards of decency."³⁰ The decency standard was set by Congress after the endowment gave money to controversial works such as the homoerotic images of Robert Mapplethorpe³¹ and Andres Serrano.³²

²⁷ *Id.*

²⁸ 20 U.S.C. § 955(f) (1995) ("indicating that the Council must "advise the Chairperson with respect to policies, programs, and procedures for carrying out the Chairperson's functions, duties, or responsibilities . . . , and review applications for financial assistance . . . and make recommendations for the approval and amount of financial assistance [if any] to provide to each applicant").

²⁹ *Id.* The Chairperson alone cannot reach a final determination as to whether to approve or disapprove an application until the Council gives the Chairperson its final recommendation on such application. *Id.* If the Council approves an application, the Chairperson may still reject the application. *Id.* If the Chairperson agrees and approves the application, he may only provide the applicant the amount of financial assistance recommended by Council. *Id.* If the Council rejects an application, the Chairperson has no authority to grant the application but may only affirm the Council's decision. *Id.*

³⁰ National Foundation on the Arts and Humanities Act § 20 U.S.C. § 954(d) (1995); Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, 103 Stat. 738 (1990). Congress also enacted an amendment providing that no NEA funds:

may be used to promote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

103 Stat. at 738-42.

³¹ *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998). In Robert Mapplethorpe's situation, the NEA granted him \$30,000 for exhibiting his photographs of homoerotic scenes such as a man urinating into another's mouth. *Id.*; *see also*, 135 CONG. REC. 58762-01, 58809 (1989).

³² 118 S. Ct. 2168, 2172 (1998). Serrano filled a bottle with his own urine and then placed a crucifix with Jesus Christ in the bottle and then took a picture of it. *Id.* For that the NEA gave Serrano \$15,000 to honor him as an artist. *Id.*; *see also*, 135 Cong. Rec. S5594-01 (daily ed. May 18, 1989) (statement of Sen. D'Amato) (stating that works of art such as Serrano's should not be given support, especially, when the taxpayer's money is being used to finance

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III. STATEMENT OF THE CASE

A. *Facts*

Karen Finley is a performer best known for a monologue in which she coated her bare breasts with chocolate, which looked like feces, to symbolize women's oppression.³³ She then proceeded to describe, using some profanity and several novel dance steps, an imagined sexual assault.³⁴ In 1990, she applied to the NEA for a grant to subsidize her performance.³⁵ The NEA's Performance Artists Program Peer Review Panel reviewed a total of ninety applications, and recommended that eighteen applications be funded, including Finley's.³⁶ However, the Council recommended disapproval and, subsequently, NEA Chairman John E. Frohnmayer denied Finley's application for funding.³⁷ Finley subsequently brought suit against the NEA alleging a violation of her constitutional and statutory rights.³⁸ Specifically, Finley sought a declaration that the decency and respect provisions of 20 U.S.C. § 954(d)(1) were in violation of the First and Fifth Amendments.³⁹

the works). D'Amato further stated that "If [people] want free speech, [people] want to draw dirty pictures, [people] want to do anything you want, that is [their] business, but not with taxpayers' money. . . . On what conceivable basis does anyone who would engage in such blasphemy and insensitivity toward the religious community deserve to be honored?" *Id.*

³³ Mordecai Rosenfeld, *A Bittersweet Controversy*, N.Y.L.J., Sept. 2, 1998, at 2.

³⁴ *Id.*

³⁵ *Finley v. Nat'l. Endowment for the Arts*, 795 F. Supp. 1457, 1462 (C.D. Cal. 1992), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 2168 (1997), *rev'd*, 118 S. Ct. 2168 (1998).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* In June 1990, NEA Chairman John E. Frohnmayer polled members of the Council by individual telephone calls concerning the Performance Artists Program grants. *Id.* After receiving their denial, Finley, along with three other individuals whose applications were denied, filed this suit. *Id.* They asserted that the NEA and Frohnmayer violated their constitutional and statutory rights by improperly denying their applications for NEA funds and by releasing to the public information from their application forms. *Id.* at 1460. Indeed, the district court correctly found that the Chairperson violated the application process established by Congress to consider grants. The Chairperson should not have approached each member individually but should have demanded all members meet and come to a joint resolution. The Chairperson's approach opened the door to possibilities of coercion and bias votes from the members. The NEA should have demanded the Chairperson and the committee members to reconsider the four individual applications and then vote. However, because the NEA did not pursue this issue on appeal, it is rendered moot.

³⁹ *Id.* at 1460 (challenging section 954(d)(1) where "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public").

B. Procedural History

The district court found that the decency clause violated the First Amendment on its face by unfairly precluding some forms of protected speech and that the clause was unpermissibly vague under the Fifth Amendment.⁴⁰ The district court rejected the NEA's argument that "decency" and "respect" were simply implicit and voluntary guidelines in funding decisions.⁴¹ Instead, the court stated that the clause represented explicit criteria to determine eligibility for the NEA grants and that an overbroad statute would restrict both protected and unprotected speech.⁴² The court held that while the government may constitutionally regulate "obscene" speech, the decency clause may repress "indecent" speech, a form of expression clearly immune from substantial governmental interference.⁴³

Finally, the court argued that in certain "protected" areas, such as public education funding, government grants "may not be used to suppress unpopular expression."⁴⁴ Since both "academic expression and artistic expression reached the core of a democratic society's cultural and political vitality," the court found that, similar to education funding, art funding demanded education neutrality.⁴⁵ The Ninth Circuit Court of Appeals affirmed the district court's findings and ruled in Finley's favor.⁴⁶

⁴⁰ *Id.* at 1468, 1471.

⁴¹ *Finley v. Nat'l Endowment for the Arts*, 795 F. Supp. 1457, 1471 (C.D. Cal. 1992) ("Had Congress believed that 'decency' and 'respect for diverse views' were naturally embedded in the concept of 'artistic merit,' there would be no need to elaborate on the [artistic merit] standard"), *aff'd*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 2168 (1997), *rev'd*, 118 S. Ct. 2168 (1998).

⁴² *Id.*

⁴³ *Id.* at 1472; *see, e.g.*, *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is protected by the First Amendment . . ."); *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978) ("Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality.").

⁴⁴ *Finley*, 795 F. Supp. at 1475; *see, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 199 (finding that since public universities operate in a "traditional sphere of free expression fundamental to the functioning of our society," they are a protected class under the First Amendment).

⁴⁵ *Finley*, 795 F. Supp. at 1473-74 (surveying the NEA's legislative history and recognizing the high ideals and ethics embedded in the Act, the court found that "artistic expression served many of the societal values as scholarly expression in [the field of public education]"). Also, the court found that since the NEA makes many of its grants in a university setting, artistic activity in the classroom deserves the same freedom as that given to other educational activities. *Id.*

⁴⁶ *Id.* at 1468, 1471; *Finley v. Nat'l Endowment for the Arts*, 100 F.3d 671, 680-83 (9th Cir. 1996) (finding that the decency clause failed to notify applicants adequately of what is required of them because "persons of common intelligence must necessarily guess at the meaning and differ as to the application" of the decency clause). The court stated that

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C. Supreme Court Holding

The Supreme Court overturned the Court of Appeals decision, finding that the decency clause does not inherently interfere with the First Amendment right to free expression and it does not violate the Fifth Amendment's void for vagueness provision.⁴⁷ The Court found that 20 U.S.C. § 954(d)(1) merely adds "considerations," or factors, to the grant-making process.⁴⁸ It does not state that all grants should be denied to applications involving "indecent" or "disrespectful" artworks.⁴⁹ Although the statute does not state how much weight the Advisory Commission Council or Chairperson should give to these factors, the NEA has wide discretion in considering this provision.⁵⁰

Furthermore, the Court stated that in order to succeed, Finley carried the burden of demonstrating that there is "a substantial risk that the application of [the decency clause] will lead to the suppression of speech."⁵¹ However, the Court found that the provision on its face was very clear in that the "decency and respect" provision is only a consideration,⁵² it is not a provision that compels the Chairperson to require "decency and respect" in every application.⁵³ Because the very nature of the subject matter is

decency and respect are "contentless in the context of American society: the very nature of our pluralistic society is that there are an infinite number of values and beliefs and, correlatively, there may be no national 'general standards of decency.'" *Id.* at 680; *see also* George Vetter, Esq. & Christopher C. Roche, Esq., *The First Amendment and The Artist—Part I*, 44 R.I. B.J. 7, 17 (1996) (stating that although the NEA has not denied an application based upon the decency clause, critics believe that NEA is manipulating and channeling the decency clause through the "artistic excellence" requirement).

⁴⁷ National Endowment for the Arts, v. Finley, 118 S. Ct. 2168, 2172 (1998).

⁴⁸ *Id.* at 2175 (stating that the NEA implements the "decency and respect" provision by organizing an advisory panel which represents a wide variety of race and educational background, beliefs, and aesthetic views).

⁴⁹ *Id.*

⁵⁰ *Id.* (finding that the "decency and respect" criterion does not prohibit artists from expressing themselves). It is a factor that the committee may consider when evaluating an application for a grant. *Id.* It is not a mandatory factor that the committee must consider. *Id.*

⁵¹ *Id.*

⁵² *Id.* (finding that the "decency and respect" provision is viewpoint discrimination because "it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency.").

⁵³ *Id.* at 2177 (finding that the respect and decency provisions would not introduce "any greater element of selectivity than the determination on the basis of artistic excellence"). The Court stated that they are not willing to start speculating as to possible cases where the decency and respect provisions would in fact threaten ideas. *Id.* Finley did not argue that the reason why their applications were denied was because they were in violation of the decency and respect provisions nor did they present any specific instances where the NEA

open to different interpretations, the Court determined that in the context of selected artistic subsidies it is not possible at all times for Congress to legislate with clarity⁵⁴ and it is difficult to establish a precise criterion when granting subsidies.⁵⁵

IV. ANALYSIS

A. *The First Amendment*

“Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁵⁶

1. Content-Based and Viewpoint-Based Restrictions on Speech

When the NEA determines whether to grant funding to an artwork based on artistic merit, it must consider how the subject matter, viewpoint, and mode of expression relate and harmonize with each other and to the effectiveness of the work of art.⁵⁷ Content is a broad concept that encompasses whole subjects of discussion regardless of the “viewpoint” expressed.⁵⁸ A viewpoint may be defined as the way an individual perceives or observes the world around him.⁵⁹ Also, subject matter may be defined as the thing that it is being represented, drawn, or painted in the work of art.⁶⁰ Mode of expression is the means by which the artwork is expressed.⁶¹

denied an application based upon these provisions. *Id.* The Court stated that just as much it is conceded that different people interpret respect and decency in different ways, “artistic excellence” is also open to different interpretations. *Id.*

⁵⁴ *Id.* at 2179 (recognizing that the artist may develop their artistic work taking into account the decision-making criteria from the NEA when funding works). However, since “the government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.” *Id.*

⁵⁵ *Id.* at 2180 (stating that if the decency and respect provisions are unconstitutionally vague, “then so too are all government programs awarding scholarships and grants on the basis of subjective criteria such as excellence”).

⁵⁶ *Police Dep’t. v. Mosley*, 408 U.S. 92, 95 (1972).

⁵⁷ *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795-96 (1st Cir. 1976) (“Funding decisions based on literary or artistic worth are unavoidably based in some part on . . . subject matter or content. . .”).

⁵⁸ Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 101 (1996).

⁵⁹ *Id.* at 120 (stating that this is the most ambiguous and subjective element of expression).

⁶⁰ Amy Sabrin, Essay, *Thinking about Content: Can it Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1219 (1993). For instance, in Van Gogh’s painting “Sunflowers,” the subject matter is a vase filled with sunflowers. In *Oliver Twist*, the subject matter is an orphan in nineteenth-century London. *Id.*

⁶¹ *Id.* (explaining that visual art work, for instance, may be represented through an oil paint, a sculpture, a water paint, or a photograph).

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Finley argued that the “decency and respect” provision is viewpoint discrimination because it censors any artwork that does not fall within the “mainstream” of public moral values.⁶² Indeed, Justice O’Connor has stated that the “First Amendment prohibits content based restriction of speech unless the government can show that such regulation is necessary to achieve a compelling government interest.”⁶³ The Court found that by denying funds, the NEA is not prohibiting the artist from pursuing his work elsewhere, the denial is only in reference to a grant.⁶⁴ Despite the fact that the decency criteria invites a subjective determination from the NEA, it does not seem to introduce a greater element of subjectivity than “artistic excellence” itself.⁶⁵

⁶² National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2175 (1998).

⁶³ Simon and Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

⁶⁴ *Finley*, 118 S. Ct. at 2177; *see, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978). In *FCC v. Pacifica Foundation*, a monologue was broadcast over the radio about seven dirty words which “you definitely wouldn’t say ever” on the public airwaves. *Id.* at 726. A motorist complained to the FCC claiming that he heard the broadcast while driving with his young son. *Id.* at 726. The FCC concluded that the broadcast was “indecent” but not obscene. *Id.* at 726. The FCC argued that it was not claiming that it could ban non-obscene language at all times. *Id.* at 727. Rather, it claimed that principles analogous to those of nuisance could be applied, making context all-important. *Id.* Thus, the FCC believed they could prohibit broadcasting this kind of language when children most probably would be listening. *Id.* The Supreme Court found that even if it involves protected language under the First Amendment, the FCC had the right to take content into account and prohibit language where it is especially offensive. *Id.* at 728. Appellants in *Broadrick v. Oklahoma*, 413 U.S. 601, 617 (1973), argued that the Oklahoma statute’s prohibition to actively participating in political activities would not only prohibit them from partisan political ideologies but will also limit their expressions and views when manifested ‘privately.’ However, the Court found illegitimacy in this argument when the State Personnel Board and the State Attorney General have interpreted the restriction as solely prohibiting ‘clearly partisan political activity.’ *Id.* The Board interpreted that “[The Act’s] reservation is subject to the prohibition that such persons may not take active part in political management or in political campaigns only.” *Id.* at 618 n.15.

⁶⁵ *Id.*; *see also* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2177 (1998) (stating that “Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.”). If a grant is to be awarded, it is necessary to consider these factors to determine whether the artist is entitled to the award. *Id.* at 2178. The government cannot fund all art or all groups that need funding. *Id.* National Endowment for the Arts v. Finley, 100 F.3d 671, 685 (9th Cir. 1996) (stating that since choices must be made, it is inherent that these choices will be made “with an eye to content.”); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 205 (1994) (comparing the government funding artwork to a public library that will have to make content based choices concerning which books and magazines to buy because the funds and bookshelves are limited in quantity); *see, e.g.*, Cinevision Corp. v. City of Burbank, 745 F.2d 560, 566 (9th Cir. 1984) (reviewing whether the city of Burbank could refuse performers Blue Oyster Cult, Todd Rundgren, and Jackson Browne from playing at the city auditorium); *Brown v. Board of*

2. Unconstitutional Conditions

Unconstitutional condition stands for the proposition that Congress cannot condition the granting of a benefit by asking the recipient to give-up a constitutional right.⁶⁶ The doctrine expresses the view that an individual's constitutional rights are absolute and non-negotiable.⁶⁷ For instance, in *Perry v. Sindermann*,⁶⁸ the Court explained that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."⁶⁹ That is, the government may not "deny a benefit to a person on a basis that infringes his constitutionally protected interests"⁷⁰

On several occasions, the Supreme Court has addressed whether NEA's funding policies constitute unconstitutional conditions.⁷¹ The Court did not interpret the NEA's guidelines for subsidizing art as a prohibition on the exercise of a fundamental right or a system to impose conditions on the exercise of First Amendment Constitutional rights.⁷² The Supreme Court found that the guidelines were a form of recognizing works that

Regents, 640 F. Supp. 674 (D. Neb. 1986) (considering whether it was permissible for the University of Nebraska to refuse to show in the movie "Hail Mary," which depicted the birth of Christ in a contemporary setting); Chemerinsky, *supra*, at 205 (finding that content-based choices are sometimes inevitable in circumstances where the government must decide whether to allow a play or a concert based on content in a public forum).

⁶⁶ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1476-89 (1989).

⁶⁷ *Id.* at 1478.

⁶⁸ 408 U.S. 593 (1972).

⁶⁹ *Id.* at 597; *see also* Speiser v. Randall, 357 U.S. 513, 526 (1958) ("The procedural device [at issue] must necessarily produce a result which the State could not command directly. . . . result[ing] in a deterrence of speech which the Constitution makes free."); Elston, *supra* note 7, at 345 (asserting some examples of situations where unconstitutional condition might occur). For instance, a program granting medical benefits to recipients depending on whether they choose to give birth or have an abortion would present an unconstitutional condition. *Id.* *But cf.* Lyng v Int'l. Union, 485 U.S. 360, 364-65 (1988) (finding that an unconstitutional condition did not exist when a program provides food stamps depending on whether union members were on strike or lost their jobs for other reasons).

⁷⁰ *Perry*, 408 U.S. at 597.

⁷¹ *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (finding a policy of not subsidizing the exercise of a fundamental right differs in an important respect from a prohibition on the exercise of a fundamental right); Harris v. McRae, 448 U.S. 297, 315 (1980) (holding that the government may choose to subsidize medically necessary services and not to subsidize abortions); *Perry*, 408 U.S. at 597 (holding that "[The government] may not deny a benefit to a person on a basis that infringes . . . [on the beneficiary's] interest in freedom of speech.").

⁷² *See, e.g.*, Boos, 485 U.S. at 312; Harris, 448 U.S. at 315.

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 otherwise would never have been recognized by the public.⁷³ In addition, the Court found that when the NEA refuses an application, it does not prevent or prohibit the individual or organization from pursuing its artwork.⁷⁴ Indeed, 20 U.S.C. § 954(d)(1) adds “considerations” or factors to the grant-making process,⁷⁵ it does not state that all grants should be denied to applications involving “indecent” or “disrespectful” art works.⁷⁶ Also, 20 U.S.C. § 954 does not state how much weight the Advisory Commission, Council or Chairperson should give to this factor, only that the factor be taken into consideration.⁷⁷

In 1990, Congress created an Independent Commission of Constitutional Law Scholars to review the NEA’s grant making procedure.⁷⁸ The Commission concluded that there is no constitutional obligation to provide arts funding, but recommended that the Chairperson exercise extreme caution when establishing procedures setting forth content restrictions.⁷⁹

Although the “decency and respect” provision is not a categorical determination of whether to grant funding, in those circumstances when it is a factor and the application

⁷³ See, e.g., *Boos*, 485 U.S. at 312; *Perry*, 408 U.S. at 597; *Harris*, 448 U.S. at 315.

⁷⁴ *National Endowment for the Arts, v. Finley*, 118 S. Ct. 2168, 2179 (1998); see also Paul N. Rechenberg, *Losing the Battle on Obscenity, But Can We Win the War? The National Endowment for the Arts’ Fight Against Funding Obscene Artistic Works*, 57 MO.L.REV.299, 300 (1992) (stating that some artistic work which has gone beyond nudity has triggered such debate that artists are finding themselves defending their artistic works).

⁷⁵ 20 U.S.C. § 954(d) (1995) (“in establishing such regulations and procedures, the Chairperson shall ensure that – artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . .”).

⁷⁶ *But see, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 380, 393 (1992) (invalidating the municipal ordinance that made it a criminal offense to place a symbol on public or private property “which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”). That provision disfavored specific subjects and suppressed “distinctive, idea[s], conveyed by a distinctive message.” *Id.*

⁷⁷ *Finley*, 118 S. Ct. at 2175 (stating that the NEA implements the “decency and respect” provision by organizing an advisory panel which represents a wide variety of race and educational background, beliefs, and aesthetic views). The Court found that [Finley] did not allege discrimination in any particular funding decision. *Id.* at 2178. “In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants.” *Id.*

⁷⁸ Independent Commission, Report to Congress on the National Endowment for the Arts 83, 89, 3 Record, Doc. No. 151, Exh. K. (Sept. 1990) (recommending procedural changes to enhance the role of advisory panels and a statute which would affirm “the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us”).

⁷⁹ *Id.* at 89.

is rejected, the applicant may claim unfairness and bias.⁸⁰ Because 20 U.S.C. § 954 is a federal statute and it is binding on every state, the general standards of “decency and respect” will be measured with the beliefs and values of the general American public.⁸¹ This presents a problem because it may be very difficult for a person from California to evaluate his work and consider whether it is respectful and decent for a person from Alaska.⁸² Even if the committee that recommends the art work is diverse enough to carry various perspectives, backgrounds, and appreciation for the arts, there will be problems.⁸³

B. Tolerating Vagueness

The Court in *Grayned v. City of Rockford*⁸⁴ provided that vague statutes and regulations violate important values.⁸⁵ First, the regulation will not provide an innocent individual appropriate warning as to unlawful or impermissible conduct.⁸⁶ Second, because the courts enforce statutes or regulations, a regulation that is vague will have a discriminatory impact on innocent people.⁸⁷ Third, a regulation that is vague will inhibit people from exercising their constitutional freedoms, such as freedom of expression.⁸⁸

The NEA plays a strong and influential role in the financial affairs of artistic funding in the United States.⁸⁹ Most private funding sources believe that when NEA denies a

⁸⁰ 20 U.S.C. § 954(d)(1)(1995); *see also* *Miller v. California*, 413 U.S. 15, 30 (1973). The Court determined whether the obscenity standards should be based upon community or national standards. *Id.* The Court was very concerned about applying national standards from one state to another because the Nation is so diverse in backgrounds that it would be too abstract to require a national formulation. *Id.* Each state should be viewed as an entity with its own communal personality and standards. *Id.* It would be unfair, vague, and unrealistic to apply the “personality and standards” from one state upon another. *Id.* The Court believed that enforcing a national standard would impose on the people of this Nation the heavy burden of trying to understand the standards of one state with respect to their own. *Id.*

⁸¹ *Miller*, 413 U.S. at 30.

⁸² *Miller*, 413 U.S. at 33 (“[P]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity”).

⁸³ *Id.*

⁸⁴ 408 U.S. 104 (1972).

⁸⁵ *Id.* at 108.

⁸⁶ *Id.*

⁸⁷ *Id.* at 108-09 “[A] vague law impermissibly delegates basic policy matters to . . . [government officials] for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”)

⁸⁸ *Id.* (“[U]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked”).

⁸⁹ *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (1991) (“[B]ecause the NEA provides much of its support with conditions that require matching or co-funding

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 grant, it means that the artist's work is deficient of artistic merit and value.⁹⁰ Thus, once the NEA denies a grant to an applicant, the applicant may stand in a disadvantageous position in terms of attracting private funding sources.⁹¹ Thus, it is very important that the NEA construe its standards of review as clearly and specifically as possible.⁹²

Indeed, the Supreme Court argued in *Finley* that because the nature of art is open to different interpretations, to ask Congress to enact precise guidelines for evaluating grant applications is literally impossible.⁹³ As Chief Justice Warren stated, no individual could

from private sources, the NEA's funding involvement in a project necessarily has a multiplier effect in the competitive market for funding of artistic endeavors").

⁹⁰ *National Endowment for the Arts v. Finley* 118 S. Ct. 2168, 2177-78 (1998) (explaining that as a result of the limited funds available to the NEA, even if the agency wished to grant all applications, it could not realistically do so); *see, e.g., Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (holding that Congress may fund some specific activities over others so long as it is in the public interest and it does not discriminate on the basis of viewpoint). "In [choosing one activity over the other], the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* When the NEA turns down an application, it should not be viewed as blacklisting the denied applicants as artists with indecent or disrespectful work that is unworthy of merit. *Id.* Just because universities grant scholarships to meritorious students does not mean that the student who was turned down is not likely to succeed or unworthy of recognition. *Id.* The NEA, just like universities, can only do so much and they should not be condemned as violating an applicant's First Amendment rights when it denies an application. *Id.*

⁹¹ *Bella Lewitzky Dance Found.*, 754 F. Supp. at 783. In *Bella*, a nonprofit corporation applied for an NEA grant and brought an action challenging the constitutionality of requiring that grant recipients certify that funds awarded would not be used to promote or produce obscene material. *Id.* at 773. The applicants claimed that the vagueness of the certification forced grant recipients to avoid even "coming close to the line between what is merely provocative and what is proscribed." *Id.* at 782. The applicant believed that many legitimate artistic projects would not be undertaken for fear of violating the vague terms of the certification. *Id.* The court found that "the creative expression of . . . [the applicant] would necessarily be tempered were [the applicant] to sign the certification and then take seriously [the applicant's] pledge not to promote, disseminate or produce anything that the NEA in its judgment might find obscene." *Id.* at 783. The court also stated that the chilling effect of the certification would be multiplied by the fact that the NEA occupies an influential role in the world of art. *Id.* "Most non-federal funding sources regard the NEA award as an imprimatur that signifies the recipient's artistic merit and value." *Id.*

⁹² *Id.* at 783.

⁹³ *Finley*, 118 S. Ct. at 2179 (stating that because artists are in a country where different people of different backgrounds, ideas, and morals live, Congress must establish guidelines that are as clear and specific as possible to help artists understand their rights and limits.); *see also Miller v. California*, 413 U.S. 15, 28 (1973) (finding that in order to create harmony and attention to the political and social opinions from the people, it is necessary to provide guidelines enabling people to know and understand their rights; each person's rights end

require the government to choose between absolute freedom of expression or complete repression.⁹⁴ The Supreme Court has consistently held that “lack of precision in [obscenity statutes] is not in itself offensive to the requirements of due process.”⁹⁵ Thus, the issue is whether the NEA’s “respect and decency” standard conveys sufficient warning as to the proscribed conduct when measured by common understanding and practices.⁹⁶

Nevertheless, the Supreme Court has also recognized that the regulation of speech or any form of expression carries an “inherent danger” of chilling speech.⁹⁷ The statutes that regulate expression must be drafted carefully and specifically limited to regulate obscenity.⁹⁸ Since literary and artistic work is a form of speech that is open to many different interpretations or points of view, it is important that the artist express his thoughts and emotions, keeping in mind how other people will view and react to this form of speech.⁹⁹

where others begin).

⁹⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren C. J. dissenting) (“No government . . . should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law.”).

⁹⁵ *Miller*, 413 U.S. at 28; *United States v. Petrillo*, 332 U.S. 1, 7-8 (1877) (“The Constitution does not require impossible standards . . . [All that is required is that] the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices.”).

⁹⁶ *Miller*, 413 U.S. at 28.

⁹⁷ *Miller*, 413 U.S. at 18-19 (acknowledging that the States have a legitimate interest in controlling the dissemination of obscenity when the vehicle of dissemination will reach and offend the sensibilities of individuals such as children and juveniles).

⁹⁸ *Id.* at 25. This case established basic guidelines for a trier of fact to determine whether a work of art is obscene:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. This case extended the definition of obscenity to include those works which are “utterly” without social value, but which do not have “serious” value. *Id.* The case also presented several examples of materials which could be banned such as “patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” *Id.* at 26-7.

⁹⁹ *Id.* at 27.

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It is necessary to consider a “common sense” analysis for statutory interpretation.¹⁰⁰ For instance, in *Broadrick, et al. v. Oklahoma*,¹⁰¹ the Oklahoma State Personnel Board charged state employees with actively participating in political activities in violation of the State Merit System Act.¹⁰² Although appellants acknowledged the benefits of this policy as it guaranteed the employee a work environment free from wrongful political impositions and extortion,¹⁰³ they brought this action claiming that two paragraphs of the Act were invalid because of overbreadth and vagueness.¹⁰⁴

The Supreme Court found that those paragraphs gave adequate warning and “explicit standards” to the state employees.¹⁰⁵ However, although the English language provides so many words to express ideas, the Court found that the Act was written in such a way that an ordinary individual using his ordinary common sense could sufficiently understand and comply with the provisions of the Act.¹⁰⁶

Balancing all arguments presented in this Note, artists have a legitimate concern that their views will be misinterpreted.¹⁰⁷ Decency and respect vary from person to person and fall within a gray area, making it difficult for an artist to keep in mind these two factors when creating their work.¹⁰⁸ When an educational institution promotes “excellence” by providing scholarships, there are factors that give an individual a good idea of what “excellence” means, such as academic performance, community services, personal experiences, and personal development.¹⁰⁹ But when the government must use its discretion in determining what art it will fund, imposing upon artists a decency and respect criterion when evaluating their work is too vague and a heavy burden.¹¹⁰ Thus,

¹⁰⁰ *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).

¹⁰¹ *Id.*

¹⁰² *Id.* Section 818, paragraph six, provided that “no classified service employee ‘shall directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose.’ ” *Id.* at 606. The seventh paragraph provided that no service employee “shall belong to any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office.” *Id.*

¹⁰³ *Id.* at 606.

¹⁰⁴ *Id.* at 607.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Finley v. Nat’l. Endowment for the Arts*, 100 F.3d 671, 680-83 (9th Cir. 1996).

¹⁰⁸ *Id.*

¹⁰⁹ *See e.g.*, 2 U.S.C. § 802 (1995) (establishing the Congressional Award Program to “promote initiative, achievement, and excellence among youths in the areas of public service, personal development, and physical and expedition fitness”); 20 U.S.C. § 1134h(a) (1995) (authorizing the Secretary of Education to award fellowships to “students of superior ability selected on the basis of demonstrated achievement and exceptional promise”).

¹¹⁰ *Sabrin, supra* note 60, at 1221 (stating that disqualifying art with specified offensive

in order to prevent the NEA from being a highly visible target of scrutiny, Congress should strike the decency and respect standard.¹¹¹

C. *Dissolving the NEA.*

As a result of the political attacks and budget cuts, the NEA once again has restructured its grant process.¹¹² Under this new approach, the NEA is refraining from granting applications to individuals and instead is focusing on funding arts organizations.¹¹³ However, those who oppose the federal organization believe this approach is only rerouting the problem.¹¹⁴ The NEA's approval and endorsement now will go to an art organization, which in turn will decide which individual projects will get the NEA funding.¹¹⁵ Thus, in the end, NEA grants will continue to negatively affect individual artists.¹¹⁶

Recently, Congress has threatened to dissolve the NEA because it has failed to formulate an adequate framework on which the NEA may base their grant decisions.¹¹⁷

If the NEA is dissolved, there will be no more issues before the courts as to whether the NEA is violating an individual's rights by holding moral beliefs within certain parameters the government finds appropriate.¹¹⁸ Also, artists will be able to express

viewpoints as artistically not meritorious will generate inconsistent outcomes because it is open to subjective interpretation). "One man's vulgarity is another's lyric." *Id.* (citing *Cohen v. California*, 403 U.S. 15, 25 (1971)).

¹¹¹ *Finley v. Nat'l. Endowment for the Arts*, 795 F. Supp. 1457, 1475 (C.D. Cal. 1992) (stating "professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of 'decency' are not") *aff'd*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 2168 (1997), *rev'd*, 118 S. Ct. 2168 (1998); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575-77 (9th Cir. 1984) (stating that a city may dedicate a public forum to certain categories of expression but may not deny access to performers based on their political views or their unorthodox manner of expression).

¹¹² Priya Sara Cherian, *Promoting the Arts by Dissolving the National Endowment for the Arts*, 4 U. CHI. L. SCH. ROUNDTABLE 129, 145 (1997).

¹¹³ Deborah Bradley, *Government Cuts Grants for Artists; NEA Official Tries to Explain How to Cope*, DALLAS MORNING NEWS, Feb. 23, 1996, at A29.

¹¹⁴ Cherian, *supra* note 112, at 145.

¹¹⁵ *Id.* at 145-146 (stating that even if the NEA is dissolved, the government already has established incentive to those people who voluntarily help the arts by making their donations tax-deductible; thus, it is unnecessary and inadequate to force the American people to participate in art programs which they do not support).

¹¹⁶ *Id.* at 146.

¹¹⁷ Vetter & Roche, *supra* note 46, at 17 ("As Congress trims the budget in keeping with the much publicized 'Contract with America,' the NEA could be abolished or its budget simply not reauthorized.").

¹¹⁸ Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 331 (1995) (stating that it is never appropriate for Congress to regulate a private individual's

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 their thoughts and feelings through their artwork without congressional influence.¹¹⁹ It has been estimated that eliminating the NEA will save \$170 million, or about 68 cents per citizen.¹²⁰ Those who oppose the NEA assert that the government is affecting the art so much, that an artist whose application is rejected will have a much harder time getting funding.¹²¹

However, eliminating the NEA will substantially reduce support to the arts.¹²² Federal support of non-profit organizations and individuals involves financial support, prestige, and it attracts private entities to contribute to the art endorsement.¹²³ Thus, removing the NEA will eliminate financial support from the federal government and private entities will lose motivation to further recognize promising arts.¹²⁴ Although the percentage the NEA contributes to the total funding of a grantee is small, the benefits an organization receives through the exposure and the recognition by the federal government is outstanding.¹²⁵ The federal government helps underrepresented artwork attract collateral funding from local and regional private sources.¹²⁶

D. Possible Solutions

Instead of dissolving the NEA, there are alternative avenues Congress should consider in reaching a resolution between the Constitution and the artist.¹²⁷ First, the

beliefs and behavior if Congress' primary motivation in enforcing the decency clause is to impose the moral beliefs of those in Congress).

¹¹⁹ See *id.*

¹²⁰ Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353, 404 (1995).

¹²¹ Cherian, *supra* note 112, at 146.

¹²² Leff, *supra* note 120, at 404 (stating that since 1978, NEA contributed approximately eleven percent of the total funding to non-profit organizations).

¹²³ *Id.* at 405.

¹²⁴ *Id.* at 404. "Loss of federal funding would also reduce the diversification of non-governmental fundraising by arts organizations and individuals. It would remove the statutory compulsion to seek out matching grants because the prestige of federal support that attracts such private initiatives would be missing." *Id.*

¹²⁵ *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (1991) (citing amicus brief of Theatre Communications Group which called NEA grant awards "critical to the ability of artists and companies to attract non-federal funding sources").

¹²⁶ Leff, *supra* note 120, at 404 (stating that since the NEA was founded in 1966 the number of art organizations helping the nation has increased over ten times).

¹²⁷ *Cf.*, H.R.Rep. No. 618, 89th Cong., 1st Sess. 5 (1965), reprinted in 1965 U.S.C.C.A.N. 3186, 3190. "[T]he Foundation would serve not only to deepen our understanding of our friends and allies throughout the world, but would strengthen the projection of our Nation's cultural life abroad and enable us better to overcome the increasing 'cultural offensive' being waged by Communist ideologies." *Id.*

Chairperson should document the specific purpose of the award and criteria that the committee members and she followed to reach the conclusion as to whether an application should be granted or denied.¹²⁸ In this manner, if the grant is challenged, there will be sufficient evidence for a court to determine whether the NEA's decision in any way violated the applicant's Constitutional rights.¹²⁹ This way, the committee and the Chairperson will be even more cautious in considering applications.¹³⁰ The committee and the Chairperson will be more aware that their decision may be subject to review by a court.¹³¹ This will encourage them to pay attention to the "artistic merit" of the work.¹³² In the long run, artworks that truly have very little artistic value will not be funded, and the courts and Congress will have fewer reasons to challenge those decisions.¹³³

Second, the decency and respect provisions of the enabling statute should be repealed.¹³⁴ Following the rationale from *Miller* and contrary to the Supreme Court's holding in *Finley*, it is impossible to expect an artist to create artwork keeping in mind a "national community standard" of decency and respect.¹³⁵ The NEA could focus only on the artistic excellence of the work.¹³⁶ Based upon the artist's detailed description of

¹²⁸ Nancy Ravitz, *A Proposal to Curb Congressional Interference with the National Endowment for the Arts*, 9 CARDOZO ARTS & ENT. L.J. 475, 498, (1991) (adding to the requirement that "when applying for a grant, each applicant must provide to the NEA 'a detailed description of the proposed project, production, workshop, or program for which the applicant requests assistance.' ") (citing Dep't of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, §103(g), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 1915, 1964).

¹²⁹ Ravitz, *supra* note 128, at 498.

¹³⁰ *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1264, 1256 (4th Cir. 1974) (stating that an agency has a duty to state the principle and supporting rationale when explaining departure from prior inconsistent decisions).

¹³¹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 409 (1971) ("[T]he Court needed to review findings made prior to litigation to determine whether agency acted within the scope of delegated authority").

¹³² Ravitz, *supra* note 128, at 499.

¹³³ Elizabeth E. DeGrazia, *In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 133, 178 (1994) (stating that creating a legitimate paper trail will provide the artist a better understanding of why he was denied funding and "would give the NEA grantmaking process the legitimacy that it currently does not have.").

¹³⁴ Vetter, *supra* note 46, at 16.

¹³⁵ *Miller v. California*, 413 U.S. 15, 30 (1973).

¹³⁶ DeGrazia, *supra* note 133, at 139 (stating that the review panel composed of art experts was a structural device which would guarantee artistic excellence isolating political influences).

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 the work, the committee members should use their expertise in the arts to resolve whether the artist is entitled to receive taxpayers' money.¹³⁷

Third, the NEA should adopt an open door policy were applicants would have the opportunity to come before the committee members and advocate their work.¹³⁸ The artists should be given the opportunity to be heard and express their reasons why their artwork is entitled to receive the committee's vote.¹³⁹ The advantage of this procedure is that the applicant will have less reason to believe that his artwork was misunderstood or misjudged.¹⁴⁰ Critics to this option have expressed concern that the grants will be based upon the ability of the artist to be eloquent and savvy.¹⁴¹ However, in the legal arena, unless the attorney is savvy, eloquent, and witty, the client will stand little chance of winning.¹⁴² Indeed, arguments are a determinative factor in our judicial system, but it is not the only factor that determines whether the client will win or lose.¹⁴³ For the same reason, this proposed option does not have to be the only determinative factor when approving an application. This option could be implemented along with one or more of the options enumerated in this note.¹⁴⁴

Fourth, based upon the description submitted by the artist and their view and appreciation of the artwork, the committee members and Chairperson should ask: (1) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,¹⁴⁵ and (2) whether the public in general will most likely appreciate and understand the message the artist is trying to convey through his work.¹⁴⁶ In Finley's

¹³⁷ *Id.*

¹³⁸ Lars Etzkorn, *Balancing Art and Politics: The Use of Peer Panels in United States Government Funding the Arts*, 9 ST. LOUIS U. PUB. L. REV. 323, 341 (1990) (stating that the Chairman of the NEA has expressed some concern as to having open panel deliberations because the applicants may pressure the panel or committee members to fund their artwork) (citing Gamarekian, *Endowment Nominee Making Rounds in Capital*, N.Y. TIMES, Sept. 12, 1989, at B17, col. 1 (national ed.)).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ("If the NEA adopted an open door policy an element of politics would be introduced as grant applicants would be better able to lobby for their applications.").

¹⁴² Paul L. Gardner, *Appeal of a Patent Case to the Federal Circuit*, in PATENT LITIGATION 1990, at 491, 508 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3858, 1990).

¹⁴³ *Id.*

¹⁴⁴ See *supra* notes 127-38 and accompanying text.

¹⁴⁵ 20 U.S.C. § 954(a)(2)(1995) (stating that the Act sought to create a climate encouraging freedom of thought, imagination, and conditions facilitating the release of creative talent).

¹⁴⁶ 20 U.S.C. § 951(8)(1995) ("The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.").

case, she never supported why her work was worthy of artistic excellence.¹⁴⁷ It is uncertain whether the public would understand that her monologue in which she coated her bare breasts with chocolate, was meant to symbolize the oppression of women.¹⁴⁸ In short, these options will help the applicant understand the basis upon which the NEA will make its funding.¹⁴⁹

V. CONCLUSION

The Art is the only means many people find that truly expresses their feelings, worries, and thoughts.¹⁵⁰ The “decency and respect” provision that the Supreme Court upheld in *Finley* is not appropriate in federal funding.¹⁵¹ Even if the “decency and respect” provision is only a factor that the NEA may consider when determining who is entitled to receive a grant, it is very likely that it will hamper viewpoints which might be misunderstood.¹⁵² It is impossible to apply a national contemporary standard of decency and respect.¹⁵³ Moral values are very different from state to state and it is wrong to impose values from one state upon the other.¹⁵⁴ Thus, Congress should repeal the “decency and respect” provision and consider artwork for its artistic excellence alone.¹⁵⁵

Factors that may help reduce the amount of speculation, litigation, and censorship against the NEA are: (1) create a paper trail where applicants will understand why their artwork is not being funded;¹⁵⁶ (2) establish an open door policy where the artists will have an opportunity to explain why their work is entitled to receive tax-payers’ money;¹⁵⁷ (3) consider whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value;¹⁵⁸ and (4) consider whether the public in general will most likely appreciate and understand the message the artist is trying to convey

¹⁴⁷ National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2175 (1998).

¹⁴⁸ *Id.*

¹⁴⁹ Chemerinsky, *supra* note 65, at 212 (stating that the NEA must have explicit criteria which will minimize the possibility that the government will be using its authority to suppress unpopular messages).

¹⁵⁰ Walker, *supra* note 1, at 955.

¹⁵¹ *Finley v. Nat’l. Endowment for the Arts*, 795 F. Supp. 1457, 1468-72 (C.D. Cal. 1992), *aff’d*, 100 F.3d 671 (9th Cir. 1996), *cert granted*, 118 S. Ct. 2168 (1997), *rev’d*, 118 S. Ct. 2168 (1998).

¹⁵² *Miller v. California*, 413 U.S. 15, 30 (1973).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Finley*, 795 F. Supp. at 1468-72.

¹⁵⁶ See *supra* note 128 and accompanying text.

¹⁵⁷ DeGrazia, *supra* note 133, at 139 and accompanying text.

¹⁵⁸ 20 U.S.C. § 951(2) (1995).

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through his work.¹⁵⁹ Repealing the “decency and respect” clause and implementing
these factors will be the best solution for artists and the NEA.

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¹⁵⁹ 20 U.S.C. § 951(8) (1995).