UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, WILLIAM GOLDSTEIN, ELIZABETH KADETSKY, VALERIE ORLANDO, KATALIN BALOG, BENJAMIN HOLTZMAN, LEE JASPERSE, and NICOLE JENKINS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL ENDOWMENT FOR THE HUMANITIES, et al.,

Defendants.

Case No. 1:25-cv-03923

Consolidated with No. 1:25-cv-03657

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Following this Court's permanent injunction restoring class members' grants and preserving funds for class members' benefit, the Authors Guild Plaintiffs plan to seek attorneys' fees under the common-fund doctrine. Plaintiffs' request will be for a modest percentage no higher than 15% of the benefit to the class—far less than the "standard fee … where plaintiffs counsel have achieved a good recovery for the class," which "ranges from 20 to 50 percent" of the recovery. *Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (McMahon, J.). The named plaintiffs fully support the anticipated request, which will also be for a lower percentage than each of them agreed to at the start of the case. *See* Ex. A, Declaration of Jamie Crooks ("Crooks Decl.") at ¶¶ 5-6, 16; Ex. B, Declaration of Mary Rasenberger ("Rasenberger Decl.") at ¶¶ 9-12; *see also Fleisher v. Phx. Life Ins. Co.*, 2015 WL 10847814, at *17 (S.D.N.Y. Sep. 9, 2015) (McMahon, J.) (noting that "the Court's ultimate task is to approximate the reasonable fee that a competitive market would bear").

This motion is necessary because Plaintiffs expect that Defendant National Endowment for the Humanities ("NEH") will resume making grant payments in the very near future—before the time for appeal has run and, therefore, before a fee request can be filed or adjudicated. *See* Crooks Decl. ¶¶ 12-13. In these circumstances, Second Circuit precedent advises that "plaintiffs should seek a preliminary injunction to set aside a portion of the common fund, in order to ensure the availability of common fund monies pending a determination by a court as to whether a fee award is warranted." *Savoie v. Merchs. Bank*, 84 F.3d 52, 54 (2d Cir. 1996). Following that advice, Plaintiffs respectfully request a preliminary injunction requiring NEH to reserve 15% of grant disbursements to class members to ensure the availability of funds for any award the Court may issue.

Plaintiffs satisfy the requirements for a preliminary injunction under *Savoie*. First, they are likely to succeed on their fee motion. When counsel's efforts create or preserve a source of funds for the common benefit of class members, counsel is "entitled to a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Res.*, 209 F.3d 43, 47 (2d Cir. 2000). That principle applies in cases against the federal government, which has "waived [its] sovereign immunity for attorney's fee awards encompassed under common law exceptions to the American rule, including the 'common fund' exception." *Puerto Rico v. Heckler*, 745 F.2d 709, 711 (D.C. Cir. 1984); *see* 28 U.S.C. § 2412(b). And it applies not only when money is physically deposited with the court, but whenever the litigation "confer[s] a substantial benefit on the members of an ascertainable class." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970). The Court's injunction does exactly that: it restores class members' awards and prohibits Defendants from "reallocat[ing], obligat[ing], or otherwise dispos[ing] of funds associated with those awards on the basis of the Mass Termination or the unlawful grounds adjudicated in this Opinion and Order." Opinion and Order Granting Plaintiffs' Motion for Summary Judgment ("SJ Order"), ECF 291, at 142.[1]

Plaintiffs are also likely to demonstrate that the Second Circuit's *Goldberger* factors are satisfied. Class Counsel's efforts led to an exceptional result, providing complete relief to the class. On the law, Class Counsel navigated a fast-changing jurisdictional landscape, complex doctrines of constitutional law, a notoriously difficult *ultra vires* claim, and bad faith defenses for unlawful conduct. On the facts, Class Counsel had to fight for the record itself, winning multiple motions to compel documents and depositions and obtaining the crucial evidence that revealed the Mass Termination's true nature. Class Counsel took on substantial risk in achieving this result, and not

[1] Unless otherwise noted, ECF references are to the docket in No. 25-cv-03657.

merely typical contingent financial risk. At a time when many law firms are refusing to challenge the Trump Administration for fear of retaliation, Class Counsel never wavered from their commitment to fight for class members, restore their grants, and ensure that the general public would not be deprived of their important scholarly works. This is precisely the kind of case in which a fee award will serve its purpose to "encourage skilled counsel to represent those who seek redress for injury and thereby discourage future misconduct of a similar nature." *Fleisher*, 2015 WL 10847814, at *14.

Plaintiffs will be irreparably harmed absent the requested preliminary relief. Once grant funds are distributed, Plaintiffs would have no practical means of recovering any court-authorized percentage of those funds. The Second Circuit has recognized that where any after-the-fact method of collecting appropriate attorneys' fees would be "so impractical as to be infeasible," the movant has demonstrated a likelihood of irreparable harm. *Kickham Hanley P.C. v. Kodak Retirement Income Plan*, 558 F.3d 204, 209 (2d Cir. 2009).

Plaintiffs therefore respectfully request that the Court enter a preliminary injunction requiring NEH to reserve 15% of grant disbursements to class members pending adjudication of Plaintiffs' anticipated motion for fees, which Plaintiffs will file promptly after such a motion becomes ripe.[2]

FACTUAL AND PROCEDURAL BACKGROUND

In early April 2025, operatives from the Department of Government Efficiency ("DOGE") arrived at the National Endowment for the Humanities and, within days, terminated over 1,400 grants representing over $100 million in congressionally appropriated funds already awarded to

[2] On May 26, 2026, Plaintiffs asked counsel for Defendants whether they oppose the requested relief. As of the time of filing, Defendants have not indicated their position. *See* Crooks Decl. ¶ 18.

scholars and institutions across the country. *See* SJ Order at 1.[3] Every grantee received the same boilerplate termination letter: a form notice stating that the grant "no longer effectuates the agency's needs" and citing five Executive Orders, with no explanation of which grants implicated which orders or why. *Id.* at 29-30. That was all the grantees knew.

The Authors Guild soon approached Fairmark Partners ("Class Counsel"), seeking representation in a potential lawsuit challenging the Mass Termination. *See* Crooks Decl. ¶ 4. Class Counsel immediately undertook an intensive investigation that involved interviewing affected grantees, reviewing grant documents and termination notices, conducting extensive legal research, and consulting with putative class members about their injuries and available legal theories. *Id*. Class Counsel and The Authors Guild also jointly organized and hosted widely attended webinars for affected grantees at which Class Counsel answered grantees' questions about process, legal theories, and what affected grantees could or should do to protect their rights. *Id*. Class Counsel were ultimately retained by The Authors Guild and seven individual scholars (collectively, "Plaintiffs") almost entirely on contingency, with each client's retention letter authorizing Class Counsel to collect 25% of any restored grant awards. *See id.* ¶¶ 5-6.

On May 12, 2025, approximately one month after the Mass Termination, Plaintiffs filed a complaint asserting claims under the APA, the First Amendment, and the *ultra vires* doctrine. Anticipating the Supreme Court's later decision in *Trump v. CASA*, 606 U.S. 831 (2025), Plaintiffs pled the case as a class action rather than relying on the then-standard "universal injunction" remedy, which the Supreme Court subsequently held "falls outside the bounds of a federal court's

[3] Plaintiffs will not seek any fee award with respect to the roughly $51 million in outstanding grant awards for members of the plaintiff organizations in the *ACLS* case, as they are not part of the certified class represented by Class Counsel. *See* SJ Order at 131 ("The [class] definition excludes American Council of Learned Societies and its members; American Historical Association and its members; and Modern Language Association and its members.").

equitable authority." *Id.* at 847; *see* ECF 1 (No. 25-cv-03923) at ¶ 133. Similarly, in recognition of the Supreme Court's just-issued order in *Dep't of Educ. v. California*, 604 U.S. 650 (2025), and anticipating the Supreme Court's later decision in *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658 (2025), Plaintiffs did not request money damages or rely exclusively on the Administrative Procedure Act—despite the government's clearly arbitrary and capricious process—instead asserting additional claims to ensure this Court's continued jurisdiction. ECF 1 (No. 25-cv-03923) at ¶¶ 161-79.

Plaintiffs moved for a preliminary injunction shortly after filing. *See* ECF 65. The Government opposed the injunction and moved to dismiss, arguing among other things that this action belonged in the Court of Federal Claims—a jurisdictional argument it would press repeatedly throughout the litigation. *See* ECF 76, 77, 81. The parties also provided supplemental briefing, at the Court's request, about the impact of the Supreme Court's June 27, 2025, decision in *Trump v. CASA, see* ECF 105, 106, 107, 108, which was issued after Plaintiffs had moved for the preliminary injunction. Plaintiffs prevailed on the bulk of the issues, and on August 6, 2025, the Court entered a preliminary injunction against the Mass Termination enjoining the Government from re-obligating the terminated grant funds pending final resolution of the action. Specifically, the Court "direct[ed] that [the terminated grant] funds not be re-obligated *pendente lite* – essentially, … that these funds be 'escrowed' until we can hold a trial." ECF 116 at 80-81.

Discovery was hard-fought. The Government took the position that Plaintiffs were entitled to nothing beyond an administrative record which, according to the Government, contained fewer than 30 documents, one of which contained substantial redactions under a claim of deliberative process privilege. After several rounds of meet-and-confers and exchanges of legal authorities, Plaintiffs convinced the Government to withdraw the deliberative process privilege assertion, which revealed the Government had tried to withhold the NEH Chair's "*it's your decision*" email to DOGE operatives that would later prove crucial to Plaintiffs' *ultra vires* claim. *See* SJ Order at 80. The Government, however, continued to insist that no additional discovery was warranted, so Plaintiffs moved to compel on December 9, 2025. ECF 157. The Court ruled in Plaintiffs' favor nine days later, overruling the Government's objections in their entirety and authorizing document discovery and depositions. ECF 168, 169. The Government then asserted privilege over nearly 400 communications, including those between the DOGE operatives terminating the class's grants and the U.S. DOGE Service, withholding those communications on the eve of four key depositions. Plaintiffs moved to compel again on January 21, 2026, ECF 188, and the Court granted the motion in full on February 5, 2026, ECF 203, overruling every asserted ground for withholding. The Government moved for reconsideration, ECF 207, and the motion was denied, ECF 234.

The Government ultimately produced approximately 4,500 documents across two rounds of court-ordered production. Having also initially refused to produce its own officials for deposition, the Government was ordered to make four witnesses available: DOGE operatives Justin Fox and Nate Cavanaugh, NEH Acting Chair Michael McDonald, and NEH employee Adam Wolfson. ECF 169. All four depositions were completed within a two-week window in January, very shortly after the Government made its court-ordered document productions on January 16, 2026. Those depositions produced some of the most consequential evidence in the record: testimony that the DOGE operatives had used ChatGPT to screen grants for DEI content, that Fox's working definition of DEI encompassed any grant touching a minority group, and that the NEH's own acting chair had disagreed with the terminations and been sidelined by DOGE. *See* SJ Order at 15-31.

After the close of discovery, Plaintiffs filed their class certification motion. ECF 242, 243. The proposed class consisted of all grantees whose awards were issued during the Biden Administration and then terminated as part of the Mass Termination, carving out grantees who were members of the plaintiff organizations in the consolidated case ("ACLS"), *i.e.*, members of the American Council of Learned Societies, the American Historical Association, and the Modern Language Association of America. *Id.* Plaintiffs then filed, jointly with the ACLS plaintiffs, a summary judgment motion in early March 2026. ECF 246, 247. The Government cross-moved on March 27, 2026, and briefing followed on both motions. ECF 268, 271, 278, 283, 285, 290. On May 7, 2026, four days shy of one year from the filing of the complaint, the Court issued a 143-page Opinion and Order granting summary judgment in Plaintiffs' favor on all counts, denying the Government's cross-motion, and certifying the class. SJ Order, ECF 291. The Court entered a permanent injunction requiring the Government to rescind all termination notices and treat them as without legal effect, and prohibiting it from "reallocat[ing], obligat[ing], or otherwise dispos[ing] of funds associated with those awards on the basis of the Mass Termination or the unlawful grounds adjudicated in this Opinion and Order." *Id.* at 142. The docket in the Authors Guild matter (No. 25-cv-3923) contains 169 entries: an average of more than one filing every two days over the course of the litigation.

Throughout the case, Plaintiffs were represented by Class Counsel at Fairmark Partners. *See* SJ Order, ECF 291 at 139 (appointing Fairmark as Class Counsel). The case presented novel jurisdictional issues; constitutional questions at the intersection of First Amendment, Equal Protection, and separations of powers doctrine; and was litigated on an accelerated timeline against the full resources of the Department of Justice. Class Counsel undertook this representation despite significant professional, reputational, and financial risk; litigated it to a successful conclusion in under one year; and secured all of the relief the Complaint sought: a certified class and a permanent injunction on behalf of hundreds of grantees whose congressionally appropriated grants had been unlawfully terminated.

ARGUMENT

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law." Fed. R. Civ. P. 23(h). The common law common-fund doctrine authorizes "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client … to [receive] a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The lawsuit need not "bring money into the court as a prerequisite to the court's power to order reimbursement of expenses"; rather, a common-fund award is authorized in any case "where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills*, 396 U.S. at 393-94; *see also Vozzolo v. Air Canada*, 2021 WL 5113387, at *4 (S.D.N.Y. Nov. 3, 2021) ("Case law is clear that the court's equitable power to award fees is preserved even where a party does not formally establish a fund.").

When money from a common fund may be distributed to class members before any fee motion can be adjudicated, the Second Circuit has advised that "plaintiffs should seek a preliminary injunction to set aside a portion of the common fund, in order to ensure the availability of common fund monies pending a determination by a court as to whether a fee award is warranted." *Savoie*, 84 F.3d at 58. Plaintiffs are now doing exactly that. To obtain a preliminary injunction, the moving party must show a likelihood of success on the merits and irreparable harm.

Green Party v. N.Y. State Bd. of Elections, 389 F.3d 411, 418 (2d Cir. 2004). Plaintiffs satisfy those requirements.

I. Plaintiffs Are Likely To Succeed On Their Fee Request.

A. The Common Fund Doctrine Applies.

When counsel "succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class, … the attorneys whose efforts created the fund are entitled to a reasonable fee – set by the court – to be taken from the fund." *Goldberger*, 209 F.3d at 47; *see also Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (McMahon, J.) ("The Supreme Court has long recognized that where, as here, a class plaintiff successfully recovers a common fund for the benefit of a class, the costs of litigation should be spread among the fund's beneficiaries."). The rationale for the common-fund doctrine "is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47. Common-fund awards also "encourage skilled counsel to represent those who seek redress for injury inflicted on an entire class and thereby discourage future misconduct of a similar nature." *Fleisher*, 2015 WL 10847814, at *14.

While the common fund doctrine often applies in cases with a money damages award or a monetary settlement, it also applies where, as here, a plaintiff "preserv[ed]" funds for the common benefit of others, *Maley*, 186 F. Supp. 2d at 369, or otherwise "conferred a substantial benefit on the members of an ascertainable class," *Mills*, 396 U.S. at 392. As the Supreme Court has explained, the doctrine applies "not only to litigation that confers a monetary benefit on others, but also to litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others." *Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973). Thus, "nothing in [common fund] cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Mills*, 396 U.S. at 392. In *Sprague v. Ticonic Nat'l*

Bank, 307 U.S. 161 (1939), for example, the plaintiff successfully imposed a lien on a bank's bond proceeds to secure her interest in trust funds after the bank's bankruptcy. *Id.* at 163. Even though she did not receive money damages or create a classwide recovery fund, her protection of the bond proceeds for the benefit of similarly situated bondholders placed the case within the common-fund doctrine. *Id.* at 165-67. The Court explained that "the formalities of the litigation … hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." *Id.* at 167.[4]

Along the same lines, courts include the value of non-monetary injunctive relief when calculating the size of a common fund for purposes of fee awards. *See Fleisher*, 2015 WL 10847814, at *15 ("In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class."); *Velez*, 2010 WL 4877852, at *18 (approving settlement that was "21.8 percent of the total relief available through the settlement," which included both "nonmonetary and monetary relief valued at up to $175 million"); *Principles of the Law of Aggregate Litigation*, The American Law Institute, Mar 1, 2010, §3.13 ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.").

Here, Plaintiffs' lawsuit "correct[ed] … an abuse … prejudicial to the rights and interests of ... others," *Hall*, 412 U.S. at 5 n.7, and "result[ed] in the creation, preservation or increase of a common fund in which others have a common interest," *Maley*, 186 F. Supp. 2d at 369. The

[4] The Second Circuit "use[s] the term 'common fund doctrine' somewhat broadly so as to incorporate the 'common benefit' doctrine," which operates in the same way. *See Savoie*, 84 F.3d at 56 n.3; *see also, e.g.*, *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores*, 54 F.3d 69, 70 (2d Cir. 1995) (awarding fees where plaintiffs obtained injunction requiring certain proxy disclosures).

Court's Opinion and Order granting summary judgment invalidated the Mass Termination and required Defendants to preserve the funds that were previously obligated and awarded to class members. Specifically, it prohibited Defendants from "reallocat[ing], obligat[ing], or otherwise dispos[ing] of funds associated with those awards on the basis of the Mass Termination or the unlawful grounds adjudicated in this Opinion and Order." SJ Order at 142. This order made permanent the effect of the Court's preliminary injunction order, which "direct[ed] that those funds not be re-obligated *pendente lite* - essentially, … that these funds be 'escrowed'" to ensure their availability for class members. *Am. Council of Learned Socies. v. McDonald*, 792 F. Supp. 3d 448, 500 (S.D.N.Y. 2025) (ECF 116 at 80-81). Thus, as a result of this litigation, awards are restored and the awarded funds are being held "for the benefit of every member of the class whom [Class Counsel] represent[s]," making it equitable to "spread[] fees proportionately among those benefited by the suit." *Boeing*, 444 U.S. at 479. Whether restored access to the grant funds is conceptualized as the creation of a fund, the preservation of a fund, or the correction of an abuse that had eliminated access to the funds, the litigation "conferred a substantial benefit on the members of an ascertainable class," *Mills*, 396 U.S. at 393-94, making a common-fund award appropriate.

These principles apply equally in cases against the federal government. *See Swedish Hosp. v. Shalala*, 1 F.3d 1261, 1270 (D.C. Cir. 1993) (rejecting "the novel proposition that a common fund case such as this one should be treated differently than other common fund cases simply because it successfully challenged illegal *government* action" (emphasis in original)); *see also, e.g.*, *Nat'l Veterans Legal Servs. Program v. United States*, 724 F. Supp. 3d 1, 31 (D.D.C. 2024) (awarding $24 million, amounting to 19% of common fund, in attorney fees); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 102 (D.D.C. 2013) (awarding $90.8 million fee award from common fund in case against federal government). Indeed, it may be especially important to "encourage skilled counsel to represent those who seek redress for injury" and "discourage future misconduct," *Fleisher*, 2015 WL 10847814, at *14, when the wrongdoer is the federal government.

Nor will sovereign immunity be an obstacle: Congress has waived sovereign immunity from common-fund awards in cases like this one. Specifically, 28 U.S.C. § 2412(b) provides that "a court may award reasonable fees and expenses of attorneys … to the prevailing party in any civil action brought by or against the United States … to the same extent that any other party would be liable under the common law." 28 U.S.C. § 2412(b). This provision "waived the federal government's sovereign immunity for attorney's fee awards encompassed under common law exceptions to the American rule, including the 'common fund' exception." *Heckler*, 745 F.2d at 711; *see also Consol. Edison Co. of N.Y., Inc. v. Bodman*, 445 F.3d 438, 446-48, 450 (D.C. Cir. 2006).[5]

In sum, this litigation preserved millions of dollars in grant funds for the benefit of an ascertainable class of grantees who otherwise would have had those funds reallocated away from them permanently. Plaintiffs are likely to succeed on their request for a reasonable fee shared proportionately by those beneficiaries.

B. Plaintiffs' Anticipated Request for up to 15% of the Common Fund is Fair and Reasonable.

"[T]here is a strong consensus -- both in this Circuit and across the country -- in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery." *Maley*, 186 F.

[5] Because the federal government expressly waived its sovereign immunity with respect to common-fund fee awards (and other fee awards under the Equal Access to Justice Act), the Court may award attorneys' fees even though it cannot order the government to pay money damages absent an analogous waiver of immunity.

Supp. 2d at 370. The percentage method is preferred because, unlike the lodestar method, it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005). In contrast, the lodestar "tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Id.* (alterations omitted). The percentage method is also aligned with market practices because it mirrors the practice of contingent fee attorneys who "typically negotiate percentage fee arrangements with their clients." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003).

Courts in this Circuit consider six factors to evaluate the reasonableness of an attorneys' fee award, *Goldberger*, 209 F.3d at 50, all of which are likely to support the request.

First, the requested fee will be reasonable in relation to the settlement. *Goldberger*, 209 F.3d at 50. "The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit." *Velez*, 2010 WL 4877852, at *21; *see also Maley*, 186 F. Supp. 2d at 370 (awarding 33.3% and noting that "[c]ourts in this Circuit have awarded fees ranging from 15% to 50% of the settlement fund"). Here, Plaintiffs' requested percentage will not exceed 15% and will thus be at or below even the low end of the standard range, making it eminently reasonable in light of the excellent result achieved. Given that percentage-of-recovery awards in this Circuit regularly exceed 30% of the recovered benefit, *see Pearlstein v. Blackberry Ltd.*, 2022 WL 4554858, at *10 (S.D.N.Y. Sep. 29, 2022) (McMahon, J.) (awarding 33.3% and collecting cases), and can be far higher than that, *Velez*, 2010 WL 4877852, at *21, Class Counsel's anticipated request for no more than 15% of the recovery will likely be found reasonable..

Moreover, Class Counsel will seek a percentage of only the outstanding award amounts for class members, not of the many intangible benefits Class Counsel's efforts secured. As the Court noted in its preliminary injunction order, "all recipients of NEH grants derive non-financial benefits from their NEH awards…: publication opportunities, including book deals, and honoraria; additional funding from other sources that becomes available because of the prestige of an NEH grant and the confidence that the project has been vetted by professionals; even job opportunities." *Am. Council of Learned Socs.*, 792 F. Supp. 3d at 472 (ECF 116 at 30). Those non-financial benefits were "lost as a result of the Mass Termination of funding," *id.*, which the Court's order invalidates. Class Counsel's requested percentage award will not account for these valuable benefits conferred on the class and will thus be even lower than it appears.

Lastly on this point, an award of up to 15% is supported by all named plaintiffs and will be substantially lower than the 25% contingency percentage to which all named plaintiffs agreed at the start of the case. *See* Rasenberger Decl. ¶¶ 9-12; Crooks Decl. ¶¶ 5-6, 16. "This fact is highly relevant to determining the appropriateness of the award because the Court's ultimate task is to approximate the reasonable fee that a competitive market would bear." *Fleisher*, 2015 WL 10847814, at *17. Given that "the role of the court in fee award determinations [is] serving as a proxy for the market … on what a sophisticated fee-paying client would have agreed to pay (on a contingent basis)," *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999), the fact that actual clients agreed to pay a 25% contingency fee for Class Counsel's representation is *a fortiori* evidence that a fee of up to 15% will be found reasonable.

Second, the magnitude and complexity of the litigation supports the request. *Goldberger*, 209 F.3d at 50. This case had significant legal complexity, requiring Class Counsel to navigate unsettled jurisdictional questions arising from a fast-moving series of Supreme Court emergencydocket orders addressing the availability of "universal" injunctive relief and district court authority over grant-termination challenges. Class Counsel did so while developing and pressing three independent merits theories—First Amendment viewpoint discrimination in the context of government subsidies, Fifth Amendment equal protection, and *ultra vires* review—against government arguments that Class Counsel revealed to be completely untethered from the factual record the government fought hard to hide. The case also had significant procedural complexity: while many cases against the federal government proceed on the administrative record alone (that is all the Government argued should be produced here), Plaintiffs pursued and prevailed on multiple motions to compel to obtain documents, written discovery responses, and deposition testimony that proved crucial to the case—often doing so on accelerated timelines and in the face of vigorous opposition from Defendants.

Third, the risk of the litigation—often called "the most important *Goldberger* factor"—was substantial. *In re GSE Bonds*, 2020 WL 3250593, at *4 (S.D.N.Y. June 16, 2020). Class Counsel undertook this representation largely on a contingency basis. *See In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."). While Class Counsel received a small non-contingent payment from The Authors Guild, that payment covered work only through May 20, 2025—just eight days after Plaintiffs filed their initial complaint, and before Plaintiffs had even sought a *preliminary* injunction, much less litigated the case. *See* Crooks Decl. ¶ 6. Since then, Class Counsel have pursued this case on a fully contingent basis, with no guarantee of any further recovery. Class Counsel understood that this would be a complex and fast-moving case, requiring substantial attorney time on tight deadlines, but nevertheless committed a significant portion of firmwide resources to this matter over the past year-plus, with no assurance of success or further payment. *Id.* ¶ 7.

This case also presented unusual risks not present in most litigation. The Trump Administration has taken unprecedented actions against law firms and lawyers that take positions adverse to President Trump or his agenda. *See, e.g.*, Mike Scarcella, *Trump targets Jenner & Block in latest executive order aimed at law firms*, Reuters (Mar. 25, 2025). Many law firms capitulated to this intimidation campaign and refused to bring cases, like this one, challenging the Trump Administration: "Dozens of major law firms, wary of political retaliation, have scaled back pro bono work, diversity initiatives and litigation that could place them in conflict with the Trump administration." Mike Spector, et al., *How Trump's crackdown on law firms is undermining legal defenses for the vulnerable*, Reuters (July 31, 2025). Civil rights groups reported that law firms were "hesitating to engage with them, keeping their representation secret or turning them down altogether in the wake of Trump's pressure." *Id.*; *see also* Madiba K. Dennie, *Trump's Attacks On Law Firms Are Hurting Regular People, Too*, Balls and Strikes (Aug. 14, 2025) ("Many BigLaw firms are trying to appease Trump by refusing to help people whose rights are violated by the federal government."); Molly Redden, *Trump's War on Big Law Means It's Harder to Challenge the Administration*, ProPublica (Aug. 6, 2025) ("Some of the country's largest law firms have declined to represent clients challenging the Trump administration …, while others have sought to avoid any clients that Trump might perceive as his enemies.").

Instead of stepping away, Class Counsel stepped up—accepting risks that larger firms were unwilling to bear. By bringing a high-profile challenge to one of the central pillars of the Trump Administration's "Department of Government Efficiency," Class Counsel made themselves a target—and unlike the large firms described above, which likely could absorb government retaliation through sheer institutional size, Fairmark Partners is a small firm for which an executive order or similar retaliatory action could have been existential. Class Counsel accepted that risk knowingly, committing a significant portion of firmwide resources to this representation with no guarantee of full payment and every reason to expect a difficult fight. They never wavered from their commitment to advocate for class members, restore their grants, and ensure that the general public would not be deprived of their important work. *See* Crooks Decl. ¶¶ 7-8, 10; *see also Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 270 (S.D.N.Y. 2020) ("Counsel's fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases, like this one, that serve the public interest.").

Fourth, the time and labor expended support the request. *Goldberger*, 209 F.3d at 50. As will be fully detailed in the fee motion, Class Counsel expended significant time and effort, often on accelerated timelines, to achieve this result. Moreover, Class Counsel continues to provide services to class members to ensure their grants are restored, to respond to any inquiries from class members, and to work with Defendants as needed to ensure that changed circumstances affecting grant performance are accommodated.

Fifth, Class Counsel provided high-quality representation throughout the case, prevailing through keen strategic judgment, deep legal knowledge, and vigorous advocacy on behalf of the class. From the beginning, Class Counsel designed and executed a durable legal strategy that anticipated developments to come. For example, Plaintiffs pled the case as a class action instead of relying on the "universal injunction" remedy, anticipating the Supreme Court's later decision in *Trump v. CASA*, 606 U.S. 831 (2025).[6] Plaintiffs also did not rely exclusively on the

[6] *See* Cara Bayles, *Class Actions May Be The New Injunction Bid, And Next Target*, Law360 (Sept. 8, 2025), https://www.law360.com/articles/2385326/class-actions-may-be-the-

Administrative Procedure Act in light of fast-changing law regarding the Tucker Act, or on other untested merits theories. Instead, Plaintiffs sought a preliminary injunction for First Amendment violations, successfully obtaining a preliminary injunction and preserving class members' grant funds *pendente lite*. *See* ECF 116 at 81 ("Authors Guild's Motion for a Preliminary Injunction is GRANTED to the extent described above [and] ACLS's Motion for a Preliminary Injunction is DENIED."). Beyond those initial strategic decisions, Class Counsel researched and persuasively briefed many complex areas of law, prevailing not only on its First and Fifth Amendment arguments but even on the *ultra vires* claim that the Court declined to grant relief on at the preliminary injunction stage—largely thanks to evidence Class Counsel uncovered.

Another key to Plaintiffs' success was Class Counsel's work in discovery. As noted, the Government resisted nearly all discovery, and it was Class Counsel's dogged pursuit of a complete administrative record, document discovery, written discovery, and depositions that brought this case's crucial facts to light. For example, McDonald's "it's your decision" email—one of the key pieces of evidence for Plaintiffs' *ultra vires* claim, *see* SJ Order at 80—was originally withheld under the deliberative process privilege, with its contents revealed only through Class Counsel's efforts. Crooks Decl. ¶ 11. Similarly, the evidence revealing Defendants' use of ChatGPT to identify "DEI" grants, *see* SJ Order at 90-97, was not part of the original Administrative Record, and was produced only as a result of Plaintiffs' successful motion to compel and through deposition testimony. Indeed, much of the deposition testimony on which this Court relied in its summary judgment order was elicited by Class Counsel, including Cavanaugh's testimony that he

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new-injunction-bid-and-next-target ("Some lawyers styled cases as class actions even before *CASA* was decided. Among them is plaintiffs' attorney Jamie Crooks, who represents a putative class of grant recipients whose National Endowment for the Humanities funding was revoked.").

and Fox "both rejected [the NEH Chair's] recommendation," SJ Order at 78; Fox's admission that DOGE, rather than NEH, drafted and sent the termination notices, *id.* at 80; and Fox's admission that DOGE did nothing to "ensure that ChatGPT's conception of DEI [...] wouldn't discriminate on the basis of race" or other constitutionally protected characteristics, *id*. at 124.[7]

Sixth, the public policy considerations here weigh heavily in favor of Class Counsel's likelihood of success on the merits. As *Goldberger* recognized, there is "commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." 209 F.3d at 51. Here, Class Counsel served the public interest on several fronts. Congress created the NEH on an unambiguous mandate: that "it is vital to democracy to honor and preserve its multicultural artistic heritage" and that the Federal Government "must transmit the achievement and values of civilization from the past via the present to the future." 20 U.S.C. § 951(10), (11). Class Counsel secured the restoration of hundreds of humanities projects supporting that mandate—projects that, absent this litigation, would have been permanently lost. In doing so, Class Counsel also resolved significant separation of powers and constitutional questions, establishing that the Executive Branch cannot eliminate a congressionally created grant program without authorization or discriminate against grantees on the basis of viewpoint or affiliation with members of a constitutionally protected class. Finally, discovery produced scores of previously unknown facts and findings about the inner workings of DOGE and the Trump Administration that extend well beyond NEH: DOGE members Fox and Cavanaugh both testified

[7] Class Counsel litigated this matter alongside counsel for the ACLS Plaintiffs in the consolidated case. While there were some areas on which the parties took different strategic approaches, *see* ECF 259 at 1 n.1 (noting that "The Authors Guild Plaintiffs … had no knowledge of or involvement in publicly disseminating any discovery materials aside from the litigation-related docket filings in this case"), Class Counsel and ACLS Counsel worked collaboratively throughout the case, and ACLS Counsel played a substantial role in achieving the result here on behalf of their clients, who are not part of the certified class.

that similar operating procedures were applied to "every agency that we went to," across the approximately 150 federal agencies under the mandate of DOGE's Small Agencies Team. Fox Dep. 75:3-14; 149:4-15; Cavanaugh Dep. 161:22-162:13. Those findings are now part of the public record and likely relevant not only to the dozens of ongoing and future cases challenging similar DOGE conduct across the federal government, but also to the public's understanding of how DOGE operated and made decisions affecting millions of American lives. *See, e.g.*, Meryl Kornfield, *Judge rules DOGE's cuts to humanities grants were unconstitutional*, Wash. Post (May 8, 2026) (noting the Court's summary judgment decision "revealed new information about DOGE's inner workings and influence over key decisions").

Finally, courts may—but are not required to—employ the lodestar method as a "cross-check" of reasonableness. *Goldberger*, 209 F.3d at 50; *see Ebarle v. Lifelock, Inc.*, 2016 WL 5076203, at *11 (N.D. Cal. Sept. 20, 2016) ("The Court declines to conduct a lodestar cross-check in this case, given that under the percentage-of-the-fund method the fee request was significantly below the 25% benchmark."). The lodestar cross-check largely guards against unjustified windfalls for counsel that settle early for less than full relief. It is less relevant, if at all, where, as here, counsel litigates the matter through judgment and secures full relief for the class. *See Bekker*, 504 F. Supp. 3d at 271 (suggesting that lodestar cross-check should not be applied in a way that would "tempt[] lawyers to run up their hours"). In any event, Class Counsel's request for fees will be within the range of acceptable multipliers; courts "regularly award lodestar multipliers of up to eight times lodestar, and in some cases, even higher multipliers." *Henry v. Little Mint, Inc.*, 2014 WL 2199427, at *16 (S.D.N.Y. May 23, 2014) (McMahon, J.). Moreover, Class Counsel intend to separately pursue a fee award directly against the government under 28 U.S.C. § 2412 and ask that any such award offset (*i.e.*, reduce) the common-fund award, further decreasing the percentage-of-recovery award and associated multiplier.

II. Plaintiffs Would Suffer Irreparable Harm Absent The Requested Relief and The Balance of Hardships Favors Plaintiffs.

To establish irreparable harm, the movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages. *See, e.g.*, *Rodriguez by Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1998). Here, if the funds are not held in reserve, Plaintiffs would have no practical means of recovering any court-authorized fee award except through individualized efforts against hundreds of class members. The Second Circuit has recognized that this constitutes irreparable harm because "[i]f plaintiffs were subsequently awarded attorney's fees but a portion of the common fund had not been set aside, plaintiffs would have had to attempt to seek recovery from each of the" benefitting class members, an alternative which is "so impractical as to be infeasible, and constitutes irreparable harm." *See Savoie*, 84 F.3d at 58; *see also Kickham*, 558 F.3d at 209.

For the same reasons, the balance of hardships weighs in favor of Plaintiffs. If the funds are not reserved, Class Counsel will be without practical recourse to recover any award this Court authorizes. The only burden on NEH will be the mechanics of accounting for the reserved funds. The *Kickham* district court's analysis thus applies equally here: "While the temporary reservation of a fixed percentage of the Plan Payments will no doubt require some additional bookkeeping and accounting efforts on the part of defendant, the loss to plaintiff in the event that the Plan Payments are fully paid out, rendering them nearly unrecoverable in the event that plaintiff is awarded attorneys fees, will be significant." *Kickham Hanley, P.C. v. Kodak Ret. Income Plan*, 574 F. Supp. 2d 314, 317 (W.D.N.Y. 2008), *rev'd on other grounds*, 558 F.3d 204.

CONCLUSION

For the reasons discussed above, Class Counsel respectfully request that the Court enter a preliminary injunction requiring NEH to reserve 15% of grant disbursements to class members pending resolution of Plaintiffs' anticipated fee motion.

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Respectfully submitted,

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