The Pas de Deux Between Unionization and Federal Arts Funding: Why Congress Must Address Its Overcorrection That Impeded the Freelance Dance Industry

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Abstract

Freelance dancers do not receive adequate workplace protections. This problem is largely attributable to two interrelated causes: the dancers' inability to unionize as well as a choreographer's inability to access sufficient funding. The inability to join existing performing arts unions leaves the freelance dancer with limited power to secure better protections. A shortage of sufficient funding opportunities available to choreographers inhibits a choreographer's ability to improve conditions for his or her dancers. These unionization and funding problems must be remedied concurrently to establish adequate workplace conditions in the freelance dance industry.

A current bill in Congress, the Richard L. Trumka Protecting the Right to Organize Act (PRO Act), may provide freelance dancers with the ability to unionize by amending the National Labor Relations Act (NLRA) so that freelance dancers are captured within the NLRA's definition of "employee." The dancers' newfound ability to unionize would alone be an insufficient and detrimental remedy to the problem, however, without simultaneously addressing the scarce avenues of available dance funding. The National Endowment for the Arts (NEA) provides a basis for increasing funding opportunities. The NEA once gave independent grants to choreographers through choreographers' fellowships and allowed for more widespread use of subgranting NEA funds. In response to controversial and obscene photographic works in the late 1980s, however, Congress eliminated choreographers' fellowships and greatly restricted subgranting. This Comment argues that Congress must reinstate choreographers' fellowships and expand eligibility for subgrants so that choreographers can gain access to the funding necessary to respond to their dancer's needs and to create better working conditions in the freelance dance industry.

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Introduction

Imagine being offered the opportunity to dance for a well-known department store in a large holiday campaign.[1] You arrive on set, get your hair and makeup styled by professional artists, and have your clothing picked out by a professional stylist.[2] You are directed to showcase your talents and abilities in a self-choregraphed piece and, afterwards, are fervently congratulated for the tremendous show you put on.[3] Now, imagine that out of the "four people on hair and makeup, two stylists, multiple photographers and videographers, directors, editors and their assistants," you are the only one in the production who is not paid.[4] This is precisely what happened to one young dancer.[5]

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1. Anonymous, *I Took an Unpaid Job with a Major Company & I Have Regrets*, Dance Mag. (Oct. 29, 2018), https://www.dancemagazine.com/dancer-pay [https://perma.cc/KL45-9DWS].
2. *See id.*
3. *See id.*
4. *Id.*
5. *Id.*

Next, picture working as a dancer in one or more professional productions that require you to perform anywhere from once a month to several times a week.[6] On top of this unpredictable schedule, you are forced to hold one or more side jobs to make ends meet.[7] You commute several hours each day from the home you share with your family or a roommate because you must cut back on expenses.[8] Freelance dancers living in different cities across the United States face these challenges every day.[9] Unlike company, Broadway, or commercial dancers, who can benefit from union protections,[10] freelance dancers are solely responsible for negotiating wages, regulating hours worked, and advocating for safe working conditions.[11]

Freelance dancers have been denied proper workplace protections largely for two interconnected reasons: the dancers' own inability to unionize and their choreographer's limited access to funding. While the Richard L. Trumka Protecting the Right to Organize Act[12] (PRO Act) would provide a necessary, partial remedy by empowering freelance dancers to unionize, it would fail to address the full scope of problems that exist within the freelance dance profession. To ensure that the efficacy of unionization genuinely improves workplace protections for freelance dancers, Congress must also act to reinstate choreographers' fellowships, and must increase subgranting[13] through the National

6. *See* Ali Castro, *What It Takes to Thrive as a Freelance Dancer – In Any City*, Dance Mag. (Aug. 13, 2017), https://www.dancemagazine.com/freelance-dancers [https://perma.cc/5GZZ-AS8Y].
7. *See id.*; *see also* Alyssa Robinson, Op-Ed, *Why Freelance Dancing is Undervalued & Underfunded*, Dance Mag. (Dec. 21, 2017), https://www.dancemagazine.com/freelance-dancers-undervalued-underfunded [https://perma.cc/V32K-UT85] ("Most freelance dancers get by through living with family or taking on a side hustle—sometimes both."); Laura Di Orio, *The Freelance Game: Could You Be a Freelance Dancer?*, Dance Informa (May 5, 2015), https://www.danceinforma.com/2015/05/05/working-as-a-freelance-dancer [https://perma.cc/G63P-P36G] (discussing freelance dancers being paid through stipends, hourly rates, or performance fees and needing to supplement income through other work); Gibney, *Town Hall: A Freelance Dancers' Union?*, Vimeo (May 26, 2020), https://vimeo.com/431926402 (showing the results of poll inquiring into the range of hourly wages that reflected freelance dancers' pay, in which 53 percent of participants responded that they made less than minimum wage).
8. *See* Castro, *supra* note 6.
9. *See* Castro, *supra* note 6 (discussing dancers from Miami, San Francisco, Washington, D.C., and Boston).
10. *See infra* Subpart 1– .
11. *See* Evvie Allison, *Do Freelance Dancers Need A Union?*, Dance Mag. (June 26, 2018), https://www.dancemagazine.com/freelance-dancers-union [https://perma.cc/964Z-9N8D]; *see also Mission: Collective Action in Community*, Dance Artists' Nat'l Collective, https://danceartistsnationalcollective.org/mission [https://perma.cc/KTR9-EB9E].
12. Richard L. Trumka Protecting the Right to Organize Act of 2023, S. 567, 118th Cong. (2023).
13. *Grants for Arts Projects: Frequently Asked Questions*, Nat'l Endowment for the Arts, https://www.arts.gov/grants/grants-for-arts-projects/frequently-asked-questions

Endowment for the Arts (NEA) so that choreographers may have restored access to available government arts funding.

Part I of this Comment will highlight how freelance dancers' lack of power in the workplace and insufficient funding have caused the dancers to be excluded from receiving adequate workplace protections. Part II will discuss the history of federal funding of the arts and the role it has played in funding the dance industry specifically. Part III will examine the positive effects that the PRO Act would have on a freelance dancer's ability to unionize, but also how the passing of the PRO Act alone would be insufficient to effectively protect freelance dancers without the additional creation of increased funding opportunities for choreographers. Finally, Part proposes that Congress must legislate to expand the scope of the NEA's funding to restore choreographers' fellowships as independent grants and increase the number of organizations eligible for subgranting.

I. Why Freelance Dancers Are Denied Workplace Protections

Freelance dancers have been excluded from receiving adequate workplace protections. This is attributable in part to an industry movement away from concert dance to freelance dance which reinforces the lack of power dancers have over their wages and working conditions. Insufficient funding within the freelance dance profession additionally perpetuates this problem.

A. *The Movement from Dance Companies to Freelance Dance*

When most people envision a dance production, they likely imagine a dance company. There are ballet companies, such as the New York City Ballet[14] and American Ballet Theatre,[15] and modern dance companies like The Martha Graham Dance Company[16] and Paul Taylor Dance Company,[17] as well as countless others. These dance companies have been industry staples for decades.[18] The dance industry, however, shifted away from a traditional company model toward a freelance dance market.[19] The National Ballet of

#subgranting [https://perma.cc/FW32-C4GK] ("Subgranting is defined as regranting funds to an individual or organization for activities that are conducted independently of your organization and for the benefit of the subgrantee's own program objectives. A subgrantee is not directly employed by or affiliated with your organization.").

14. *About Us*, N.Y.C Ballet, https://www.nycballet.com/about-us [https://perma.cc/JL5R-SVT3].
15. *The Company: Our History*, Am. Ballet Theatre, https://www.abt.org/the-company/about [https://perma.cc/Y5WP-X9RT].
16. *Our History*, Martha Graham, https://marthagraham.org [https://perma.cc/CAF7-B8RS].
17. *About Us*, Paul Taylor Dance Co., https://paultaylordance.org/discover/about-us [https://perma.cc/T32J-TFNB].
18. *See supra* notes 14–17 and accompanying text.
19. *See* Allison, *supra* note 11; *see also Dance Artists' National Collective's Statement in Support of the PRO Act, May 2021*, Dance Artists' Nat'l Collective, https://danceartistsnationalcollective.org/in-support-of-the-pro-act [https://perma.cc/Z2L6-BZ86].

Canada describes dancing for a ballet company as a type of hierarchy—one begins dancing in the Corps de Ballet, works his or her way up to being a Soloist, and may ultimately become a Principal Dancer.[20] This hierarchal system demonstrates a company dancer's commitment to a single dance company—a commitment that is unlike the freelance dancer's, whose career consists of a varied assortment of dance gigs.[21] Freelance dancers largely credit the company-to-freelance shift to a dancer's desire to explore different interests, be one's own manager, and have increased autonomy over which dance jobs to take or choreographers to work for.[22]

The COVID-19 pandemic further perpetuated the industry movement towards freelance dance.[23] A traditional company is often headed by a single choreographer with an unchanging group of dancers, and typically these companies have their own rehearsal spaces.[24] The cost of maintaining studio spaces with no offsetting revenue from performances or classes hit many dance companies hard, with some ultimately shutting down.[25] The struggles faced by dance companies during the pandemic have propelled a number of dancers to leave traditional company work in exchange for freelance dance gigs, "where a choreographer hires a group of dancers only for a limited set of shows."[26] This industry shift plays a critical role in the persistence of inadequate workplace conditions suffered by freelance dancers.

B. *A Dancer's Lack of Power*

The current state of unionization in the performing arts, a lack of collective bargaining power, and dance industry norms all contribute to the lack of control that a freelance dancer has over his or her workplace conditions.

1. Performing Arts Unions that Accept Dancers

Three sister unions are available for dancers to join: the American Guild of Musical Artists (AGMA), the Actors' Equity Association (AEA), and the Screen Actors Guild–American Federation of Television and Radio Artists

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20. *See Learn About Ballet: Frequently Asked Questions*, The Nat'l Ballet of Can., https://national.ballet.ca/Explore/Learn-About-Ballet/FAQ [https://perma.cc/ZYH5-SNTJ].
21. Castro, *supra* note 6; Di Orio, *supra* note 7.
22. *See* Sarah L. Kaufman, *The Pandemic Was the Final Blow for Some Dance Companies. How Do the Survivors Stay Nimble?*, Wash. Post (Oct. 29, 2021, 6:00 AM), https://www.washingtonpost.com/entertainment/theater_dance/dance-companies-folded-pandemic/2021/10/28/d1466e98-36a8-11ec-9bc4-86107e7b0ab1_story.html [https://perma.cc/N62V-YKJJ]; Di Orio, *supra* note 7.
23. *See* Kaufman, *supra* note 22.
24. *Id.*
25. *See id.* (discussing the demise of Taylor 2, Aspen Santa Fe Ballet, Rioult Dance, and others due to the pandemic).
26. *See id.* (discussing a prior Taylor 2 company dancer now working as a freelancer after the pandemic shut down the company).

(SAG-AFTRA).[27] Each of these unions falls under an "umbrella union" called the Associated Actors and Artistes of America (4As).[28] Union membership is determined according to the nature of the dancer's work: AGMA represents concert dancers,[29] AEA represents dancers in musical theater, and SAG-AFTRA represents dancers in film and television.[30] Accordingly, dancers in large dance companies are represented by AGMA, Broadway dancers are represented by the AEA, and commercial dancers[31] are represented by SAG-AFTRA[32]—no union represents freelance dancers. These sister unions "stand in solidarity with one another" and do not allow members of one union to accept work from an employer within the jurisdiction of a different sister union if the employer has not contracted with the sister union.[33]

The members of one sister union may be able to join another based upon a reciprocity process.[34] SAG-AFTRA explains the reciprocity process in the following way: "[p]erformers may join SAG-AFTRA if the applicant is a paid-up member of an affiliated performers' union such as . . . AEA [or] AGMA . . . for a period of one year, and has worked and been paid for at least once as a principal performer in that union's jurisdiction."[35] A comparable agreement is in place with the AEA.[36] AGMA is different, however, as it has a reciprocal agreement only with the AEA that allows AEA members to join

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27. Nicole Loeffler-Gladstone, *Unions 101: What You Need to Know About the Dance World's Worker Organizations*, Dance Spirit (Mar. 7, 2016), https://dancespirit.com/unions-101 [https://perma.cc/489J-CXEK].
28. *Id.*
29. *See* Suzannah Friscia, *Is the Line Between Concert and Commercial Dance Finally Fading?*, Dance Mag. (June 22, 2020), https://www.dancemagazine.com/concert-dance-vs-commercial-dance [https://perma.cc/9BGE-PZHZ] ("A concert dancer would . . . train in a conservatory from an early age with the goal of joining a full-time company, their work mostly encompassing traditional ballet and modern styles."). Examples of concert dance include American Ballet Theatre, New York City Ballet, or Alvin Ailey American Dance Theater. Gibney, *supra* note 7.
30. *See* Allison, *supra* note 11.
31. *See* Friscia, *supra* note 29 ("A commercial dancer's movement might be largely dominated by hip-hop and street styles, and their goal would be to find an agent and work gig to gig."). Commercial dancers are often the dancers one may associate with a music video or live concert. *See* Lauren Wingenroth, *What It Takes to Make It as a Commercial Dancer*, Dance Mag. (Feb. 27, 2018), https://www.dancemagazine.com/how-to-be-commercial-dancer [https://perma.cc/NCG7-FV2N].
32. *See* Loeffler-Gladstone, *supra* note 27.
33. *Do Not Work*, Actors' Equity Ass'n, https://www.actorsequity.org/resources/DoNotWork [https://perma.cc/N4EE-RNYD].
34. *Membership & Benefits: Steps to Join*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/steps-join [https://perma.cc/H3DH-UP6E].
35. *Id.*
36. *See Join Equity*, Actors' Equity Ass'n, https://www.actorsequity.org/join [https://perma.cc/4J2T-F4UU] ("Membership is . . . available by virtue of prior membership in a performing arts sister union: SAG-AFTRA [or] AGMA").

or audition with AGMA and AGMA members to join or audition with the AEA.[37] AGMA does allow union members to take nonunion work, whereas AEA and SAG-AFTRA require that members only take work that is covered by the union.[38]

Additionally, these sister unions all have different signatories.[39] AGMA's signatories are predominantly dance companies and opera houses,[40] AEA's are theaters,[41] and SAG-AFTRA's are producers.[42] These unions are unlike traditional labor unions which have "established workforces, product lines, and permanent facilities."[43] Rather, for the sister unions, it is normal to have "executed collective bargaining agreements . . . when the employer has only one or no employees covered by that agreement."[44] Further, while the common union security clause[45] requires application for union membership after thirty days, the performing arts unions differ.[46] For example, SAG-AFTRA requires application "[thirty] days after an individual's 'first employment as a performer in the motion picture industry.'"[47] Nevertheless, despite all that the sister unions have to offer and their collaborative interactions, the unions' organization excludes freelance dancers from union protections because the freelancer does not fall into a commercial, theater, or company dance label.

Freelance dancers may soon be empowered to form a new performing arts union. A bill has been introduced to Congress—the Richard L. Trumka

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37. *See About AGMA: Union Dues and Reciprocal Agreements*, Am. Guild of Musical Artists, https://www.musicalartists.org/union-dues [https://perma.cc/7GVB-Y95Q].
38. *Information for New and Prospective Members*, Am. Guild of Musical Artists 3 (2018); Actors' Equity Ass'n, *supra* note 33; *Global Rule One*, SAG-AFTRA, https://www.sagaftra.org/contracts-industry-resources/global-rule-one [https://perma.cc/Z6XN-TKQG].
39. A signatory is "[a] person or entity that signs a document . . . and thereby becomes a party to an agreement." *Signatory*, Black's Law Dictionary (11th ed. 2019).
40. *See Signatories*, Am. Guild of Musical Artists, https://www.musicalartists.org/about-agma/signatories [https://perma.cc/NU6Z-T3WV].
41. *See Contracts & Codes*, Actors' Equity Ass'n, https://www.actorsequity.org/resources/contracts [https://perma.cc/TNE7-A4M4] ("Equity negotiates and administers multi-employer national and regional collective bargaining agreements, as well as single-employer agreements with theatrical employers."); Backstage Staff, *Equity Contracts*, Backstage (Mar. 25, 2013), https://www.backstage.com/magazine/article/equity-contracts-41295 [https://perma.cc/BU5T-YV9K] (compiling AEA contracts and breaking down minimum salaries required based on a theater's size and type).
42. *See* Howard D. Fabrick, *Unique Aspects of Labor Law in the Entertainment Industry*, 31 Ent. & Sports L. 1, 32 (2015).
43. *Id.* at 31.
44. *Id.*
45. *Union Security Clause*, Black's Law Dictionary (11th ed. 2019) ("A provision in a union contract intended to protect the union against employers, nonunion employees, and competing unions.").
46. *See* Fabrick, *supra* note 42, at 32.
47. *Id.*

Protecting the Right to Organize Act (PRO Act).[48] It has the capacity to broaden the scope of workers that may be eligible for unionization by changing the definition of "employee" under the National Labor Relations Act (NLRA) through the implementation of an "ABC" test, discussed in Part III of this Comment. The PRO Act was first introduced and passed in the House of Representatives in early 2020 with the purpose of reexamining the antiquated labor laws that existed within the United States.[49] Despite the bill's initial success in the House, the Senate refused to act in 2020 and the bill did not pass.[50] On February 4, 2021, the PRO Act was again introduced in the House and the Senate,[51] and the bill passed in the House "with a 225–206 vote."[52] The bill was again left languishing in the Senate.[53] In February 2023, the PRO Act was introduced in Congress for a third time.[54]

Union leaders view the PRO Act as a necessary step in combating inequalities that have dominated the workplace, such as the disparities in wealth and wages due to laws favoring big businesses.[55] Labor and employment law professionals consider the PRO Act to be "the most significant labor law reform" since the Wagner Act and Taft-Hartley Act.[56] The Wagner Act created the National Labor Relations Board (NLRB) and empowered employees with the ability to unionize,[57] whereas the Taft-Hartley Act later imposed limitations on

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48. Richard L. Trumka Protecting the Right to Organize Act of 2023, S. 567, 118th Cong. (2023).
49. *See* Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Unions*, Wash. Post (Feb. 6, 2020), https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions [https://perma.cc/C5UV-EL3D].
50. Robert J. Simandl, *Labor Law Reform on the Horizon: Ten Things to Watch Under the PRO Act*, Nat'l L. Rev. (Feb. 16, 2021), https://www.natlawreview.com/article/labor-law-reform-horizon-ten-things-to-watch-under-pro-act [https://perma.cc/V2BB-VB4A].
51. *Id.*
52. Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts [https://perma.cc/3RJG-QQR9].
53. *See* Everett Kelley, *Renewed Support for Union Belies Anti-Labor Laws in Most States*, The Hill (Jan. 1, 2022), https://thehill.com/blogs/congress-blog/labor/588043-renewed-support-for-unions-belies-anti-labor-laws-in-most-states. [https://perma.cc/JEV9-G27K].
54. Richard L. Trumka Protecting the Right to Organize Act of 2023, S. 567, 118th Cong. (2023); Richard L. Trumka Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. (2023).
55. *See* Gonyea, *supra* note 52; *see also* Sen. Patty Murray & Chairman Bobby Scott, *Protecting the Right to Organize Act: Fact Sheet*, Educ. & Lab. Comm (2019).
56. Simandl, *supra* note 50; *see also* Rosenberg, *supra* note 49. This will be discussed in more detail below. *See infra* Subpart A.
57. *See 1935 Passage of the Wagner Act*, Nat'l. Lab. Relations Bd., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/AY7P-EEAV].

the power of labor unions.[58] After the Taft-Hartley Act was passed, the percentage of private workers who were unionized plummeted from thirty-four to six percent.[59] If the PRO Act were enacted, it would have a far reaching impact like the Wagner and Taft-Hartley Acts—it would restore robust unionizing power and could enable freelance dancers to unionize.

2. Lack of Collective Bargaining Power for Dancers

Without access to AGMA, AEA, or SAG-AFTRA, and with the PRO Act delayed in Congress, freelance dancers are left without collective bargaining power to improve their working conditions and wages. Dancers and choreographers are among the lowest-paid artists, with those working full-time making, on average, $31,200 annually.[60] Further, dancers often feel replaceable due to the availability of dancers outnumbering the quantity of jobs, which creates a reluctance to demand sufficient wages or assurances of safety from employers.[61]

Insufficient pay and inability to assure workplace safety are the primary reasons why freelance dancers are interested in unionizing; a union, such as AGMA, AEA, or SAG-AFTRA,[62] would allow for the negotiation and demand of "wages, health care, and safe working conditions[.]"[63] For example, when a dancer is contracted under AGMA, dancers are guaranteed a five-minute break for every hour of rehearsals and daily class time,[64] assurances that are crucial to a dancer's health and safety given the strenuous labor of the profession. These unions—and, by extension, their protections—however, cannot reach freelance dancers who are unable to be classified within a commercial, company, or theater dance label.[65] A dancer can join AGMA either by being hired by a company that is covered by the union or by buying into the union,[66]

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58. *See 1947 Taft-Hartley Substantive Provisions*, Nat'l. Lab. Relations Bd., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions [https://perma.cc/L6YM-CW4A].
59. Phil Ciciora, *Do Labor Laws Need To Be Modernized with Rise of Gig Economy?*, Ill. News Bureau (Mar. 1, 2021, 8:00 AM), https://news.illinois.edu/view/6367/991142313 [https://perma.cc/VD7K-FE8X].
60. *Artists and Other Cultural Workers: A Statistical Portrait*, Nat'l Endowment for the Arts 29 (2019).
61. *See* Dance Artists' Nat'l Collective, *supra* note 19.
62. *See* Allison, *supra* note 11; Loeffler-Gladstone, *supra* note 27.
63. *See* Allison, *supra* note 11.
64. *See id.; cf.* Erin E. Bahn, *To Labor in the Dancing World: Human Rights at Work*, 7 Buff. Hum. Rts. L. Rev. 105, 109 (2001), ("Ballet Metropolitan's Collective Agreement . . . states that: 'The Artist shall not be penalized for refusal to rehearse and/or perform on a concrete or carpeted floor even though it may be covered with linoleum.'").
65. *See supra* Subpart 1; Allison, *supra* note 11.
66. While an independent artist can buy into AGMA, this would still not allow for collective bargaining power; thus buying into AGMA is an insufficient solution to the freelancer

and dancers can only join the AEA or SAG-AFTRA if hired for a job that is covered by one of the unions.[67] Thus, a freelance dancer is not afforded the opportunity to join a union to collectively bargain when working several gigs with smaller companies and choreographers that are not union-contracted.[68] This lack of union access and inability to collectively organize contributes to the freelance dancers' lack of power over their workplace conditions.

3. Dance Industry Norms

While the inability to unionize and insufficient collective bargaining power are largely responsible for the freelance dancer's lack of power, dance industry norms further perpetuate the problem. The "sheer heterogeneity of jobs" that exist within the freelance dance profession cause dancers to struggle advocating for themselves, as the job can vary greatly from one dancer to the next.[69] Additionally, scarcity mindsets and competitive attitudes permeate the industry of dance.[70] These mindsets and attitudes arise from freelance dancers' knowledge that they are fungible commodities, as well as a limiting belief that dancers in the industry today should be grateful for the abundance of opportunities afforded to them, in part because those who came before forged on in the face of adversity, paving the way.[71]

Moreover, there is a perception within the performance industry that dancers are not worthy of adequate pay.[72] A common question posed to a dancer is whether he or she is willing to perform "in exchange for exposure."[73] This topic recently received attention during Super Bowl LVI when professional dancers expressed outrage over requests to perform for free at the halftime show starring Snoop Dogg, Mary J. Blige, Eminem, Dr. Dre, and Kendrick Lamar.[74] SAG-AFTRA successfully ensured that professional dancers under its union were compensated for participation in the halftime show after a meeting with the show's producers.[75] Nevertheless, many questions

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dancer's pursuit for unionization. *See* Loeffler-Gladstone, *supra* note 27; Gibney, *supra* note 7.

67. Loeffler-Gladstone, *supra* note 27.
68. *See* Allison, *supra* note 11.
69. *See id.*
70. *See id.*
71. *See* Robinson, *supra* note 7.
72. *See e.g.*, Anonymous, *supra* note 1; Jennifer Stahl, *Please Stop Asking Dance Artists to Perform "in Exchange for Exposure"*, Dance Mag. (July 31, 2018), https://www.dancemagazine.com/in-exchange-for-exposure [https://perma.cc/Z33F-9LPH].
73. *See* Stahl, *supra* note 72 (arguing this is an absurd question because "if [the opportunity is] truly good exposure, it generally means there is a budget, and it won't be done for free"); Robinson, *supra* note 7.
74. *See* Gia Kourlas, *What Do Dancers Bring to a Halftime Show? They Complete the Picture*, N.Y. Times (Feb. 13, 2022), https://www.nytimes.com/2022/01/28/arts/dance/super-bowl-halftime-show-volunteer-dancers-pay.html [https://perma.cc/2XVM-PKRV].
75. *See id.*

remain unanswered, such as whether there were nonunionized professional dancers who were not paid and what types of movement constitutes "choreography."[76] Thus, while the exchange-for-exposure narrative may be in the process of changing,[77] it is not a straight-forward progression. Moreover, even with monetary compensation, freelance dancing often does not sufficiently cover living expenses.[78]

In May 2020, Gibney Dance[79] hosted a virtual freelance dancers town hall where a co-founder of Dance Artists' National Collective[80] and the Director of Organizing and Outreach for AGMA led a discussion on how freelance dancers can create better working conditions and push for unionization.[81] During the town hall, the question of each average hourly wage was posed to a group of approximately ninety-six dancers; fifty-three percent of the respondents reported making below minimum wage for dance gigs over the past three years.[82] Only two percent of the participants reported making anywhere

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76. *See id.* (explaining the complexity of determining when movement becomes choreography because "pedestrian movement very much counts as choreography"). Another remaining question is whether those who volunteer for the halftime show are actually dancing. There are two categories of people performing at the halftime show—professional dancers and volunteers. The professional dancers are paid but the volunteers are not because they "cheer[] on the musical artists and mov[e] to the beat as enthusiastic audience members." *Id.* (A volunteer from Super Bowl LV described his experience as including rehearsals for eight to ten hours a day for ten days and the movements being "more structured than . . . TikTok dancing.").
77. *See* Castro, *supra* note 6 (two out of four interviewed freelance dancers say that they will never dance for free); *but see* Sarah Parker, *Dancer Spotlight: Austin Goodwin Uses Humor to Tell It Like It Is*, Dance Mag. (Jan. 20, 2022), https://www.dancemagazine.com/austin-goodwin [https://perma.cc/CS3Z-5S39] ("In one of [Austin's] wittiest Instagram videos, he asks his landlord if he can pay rent with 'exposure,' since that's the form of payment he often accepts from freelance jobs").
78. *See* Robinson, *supra* note 7; Castro, *supra* note 6; *see also How Much Does It Really Cost to Be a Freelance Dancer in NYC? One Dancer Broke Down a Week of Spending*, Dance Mag. (Jan. 9, 2020), https://www.dancemagazine.com/freelance-dancer-pay-nyc/?rebelltitem=2#rebelltitem2 [https://perma.cc/V3HS-T9SG] (Freelance dancer made roughly $25,000 in annual income with only twenty percent of this income reflective of money earned from dance gigs with three companies).
79. Gibney Dance consists of both a company and a center that "serve[s] the dance field by offering space rentals; world-class training and performances; artistic residencies; digital technology and entrepreneurship training; and more." *Center*, Gibney Dance, https://gibneydance.org/center [https://perma.cc/FK2H-U782]; *Company*, Gibney Dance, https://gibneydance.org/company [https://perma.cc/MF7F-3TEV].
80. Dance Artists' National Collective is a group of dancers who have joined together to collectively advocate for better working conditions. *Mission*, Dance Artists' Nat'l Collective, *supra* note 11.
81. *See DIGITAL: Town Hall: A Freelance Dancers' Union?*, Gibney, https://gibneydance.org/event/town-hall-a-freelance-dancers-union [https://perma.cc/ST3A-C4G2].
82. Gibney, *supra* note 7.

over forty dollars per hour for their work.[83] Inadequate wages disproportionately impact freelance dancers because choreographers are not bound by a guaranteed minimum wage and may hire dancers to work for free, whereas other dancers performing with union protections have guaranteed wages and overtime pay negotiated on their behalf.[84] These performance industry norms further buttress the inadequate workplace protections that freelance dancers face.

C. *Insufficient Funding for Choreographers*

In addition to union inaccessibility and unhelpful dance industry norms, freelance dancers struggle to receive adequate pay in part due to choreographers' lack of prevalent funding opportunities.[85] Freelance dancers typically bear the costs of "shoes, dancewear, studio time" and more.[86] Forms of payment for freelance dancers vary, but may include stipends or hourly rehearsal rates with an additional payment for performances.[87] Given the high costs and the inconsistent pay, one thing is clear: it is almost guaranteed that a career as a freelance dancer requires working side jobs to cover living expenses[88]—a system which can result in dance projects surrendering to the call of more lucrative work.[89] After all, a dancer's income is wholly dependent upon his or her choreographer-employer's access to funding—funding that is both scarce and unreliable.[90]

This inconsistency in pay, as well as the insufficient amount of payment, can be attributed to the insufficient funding opportunities available to choreographers. A choreographer's primary way to receive funding is through applications for grants or fellowships.[91] The choreographer's funds from these grants are typically only enough to cover expenses related to a single project,

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83. *Id.*
84. *See* Allison, *supra* note 11.
85. *See infra* Part .
86. Robinson, *supra* note 7.
87. *See* Di Orio, *supra* note 7.
88. *See id.*; Castro, *supra* note 6.
89. *See* Robinson, *supra* note 7. Part of this Comment, below, will further address why the pursuit of more lucrative work is unfavorable for dancers and society. Indeed, there is much social and economic value gained by ensuring that artists remain in their industries. *See infra* Subpart .
90. *See infra* notes 91–94 and accompanying text.
91. *See* Kimberly Bartosik, *It's Time to Reimagine Dance Funding*, Dance Mag. (Feb. 24, 2021), https://www.dancemagazine.com/reimagining-dance-funding/?rebelltitem=1#rebelltitem1 [https://perma.cc/2WQN-JNAP]; *Funding for Choreographers*, Int'l Consortium for Advancement in Choreography, Inc., https://www.danceicons.org/resources/?p=160525155240 [https://perma.cc/DCP6-NS5W]. The scope of the granting organizations varies, with some targeting the nation or regions while others are for a specific purpose. The NEA is one of the funders of many of the existing organizations. *See* Int'l Consortium for Advancement in Choreography, Inc., *supra*.

as the grants are not intended to supply long-term funding.[92] Moreover, these smaller projects are at a disadvantage financially compared to large companies because the companies often own studio space that can then be utilized to teach classes to outside patrons or for conducting an entire school of dance.[93] This advantage for large companies creates an alternate funding opportunity which small companies and choreographers cannot pursue. What all dance companies and choreographers do have in common, however, is the need to solicit money from private donors.[94] Consequently, the insufficient funding that freelance dancers receive is largely a result of scarce funding opportunities available for all dance companies, but for independent choreographers who are less renowned, this struggle is acute. Therefore, because the choreographers that employ freelance dancers do not have adequate means of funding, the dancers, by extension, struggle to be compensated appropriately for the work that they do. Accordingly, the insufficient funding opportunities available to choreographers must be resolved concurrently with the dancers' access to unionization.

II. The History of Federal Arts Funding

A complex history surrounds federal funding of the arts. This is due to the initial failure of federal funding, as well as the controversy that has arisen from time to time regarding the now-established NEA. Despite its turbulent history, federal funding of the arts has produced many successes, with the field of dance seeing a prosperous past as the recipient of such funding.

A. *Federal Arts Funding and the Formation of the NEA*

President Franklin Roosevelt was the first president in the twentieth century to attempt to establish federal arts funding.[95] In 1935, he created the Works Progress Administration (WPA) and, as a part of that process, created the Federal Arts Project (FAP), which was an effort to assist artists in getting back to work during the Great Depression.[96] The FAP "provided living wages, studios, supplies, and patrons for artists and would-be artists."[97] Unfortunately, the FAP created numerous problems, including a shift in those "claiming to be artists," a "lesser quality" of artwork, and "tensions within the artistic community."[98] Ultimately, the FAP "drove a wedge between artists and the public"

92. *See* Bartosik, *supra* note 91.
93. *See* Kaufman, *supra* note 22 (discussing how RIOULT Dance NY had 250 students enrolled in its school).
94. *See Donate Now*, Paul Taylor Dance Co., https://ptdc.thankyou4caring.org [https://perma.cc/Q4TS-YQHT]; Bartosik, *supra* note 91.
95. Sarah F. Warren, *Art: To Fund or Not to Fund? That is Still the Question*, 19 Cardozo Arts & Ent. L.J. 149, 153 (2001).
96. *Id.*
97. Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73, 113 (1996).
98. *Id.* at 113–14.

because artists were making more money than the general public.[99] By the time World War II began, the WPA was no longer in existence.[100]

The movement for government funding of the arts was reborn during John F. Kennedy's presidency.[101] A strike conducted by the Metropolitan Opera musicians in 1961 led President Kennedy's Secretary of Labor to promote federal funding for the arts to combat a financial crisis within the industry.[102] Accordingly, in 1965, Congress created the NEA.[103] Congress declared that "[d]emocracy demands wisdom and vision in its citizens[,]" and thus bestowed the power within the democracy to "foster and support . . . access to the arts and the humanities[.]"[104] The rationale behind the NEA's creation was the belief that humans, as part of a sophisticated and knowledgeable civilization, must invest in the arts in conjunction with science and technology, so that society can be best equipped to comprehensively examine the world.[105] Since the NEA's enactment in 1965, the Supreme Court has determined that Congress granted the NEA "substantial discretion to award financial grants to support the arts[.]"[106] "[The NEA] identifies only the broadest funding priorities, including 'artistic and cultural significance, giving emphasis to . . . creativity and cultural diversity,' 'professional excellence,' and the encouragement of 'public . . . education . . . and appreciation of the arts.'"[107] With the creation of the NEA, federal arts funding had formally begun.

B. *Issues Faced by the NEA*

The NEA's existence remained largely uncontroversial until the late 1980s,[108] when two separate grants became the subject of nationwide controversy in 1989 due to their perceived provocative content.[109] The NEA awarded a grant to the Southeast Center for Contemporary Art, which it then subgranted to artist Andres Seranno, who used the funding to create his work entitled *Piss*

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99. *Id.* Because of the government funding available, many people who were not artists nonetheless claimed to be. This led to rules and regulations in the distribution of the funding which then resulted in low-quality art. Ultimately, conflicts amongst the artistic community and between artists and the public led to the FAP's demise. *See* Warren, *supra* note 95, at 153.
100. Brenda L. Tofte, *"Baby, It's Cold Outside:" The Chilling Effect of the Decency Clause on the Arts in the Aftermath of National Endowment for the Arts v. Finley*, 22 Hamline L. Rev. 303, 314 (1998).
101. *See* Nancy Coyle, *Towards A More Secure Future: Reauthorization of the National Endowment for the Arts*, 8 DePaul-LCA J. Art. & Ent. L. 349, 350–51 (1998).
102. *Id.*
103. Warren, *supra* note 95, at 154.
104. 20 U.S.C. § 951(4).
105. *See id.* § 951(3).
106. Nat'l Endowment for the Arts et al. v. Finley, 524 U.S. 569, 569 (1998).
107. *Id.* (citing 20 U.S.C. §§ 954(c)(1)–(10)).
108. Warren, *supra* note 95, at 155.
109. *Id.*

Christ—"a photograph of a crucifix immersed in urine."[110] The other subject of controversy was a "homoerotic photograph[]" portfolio by the artist Robert Mapplethorpe, which members of Congress described as pornographic.[111] This portfolio was funded by an NEA grant and was exhibited at the University of Pennsylvania in its Institute of Contemporary Art.[112] Together, these works proved to be the catalyst of a political "culture war" surrounding the arts.[113]

Congress, led predominantly by the Republican party,[114] reacted to these controversies with the 1990 fiscal year appropriations bill.[115] Congress forbade the NEA from providing any future funding toward obscene works, defining obscene as "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."[116] This ban on funding obscene works remains today, although the language defining what qualifies as "obscene" has evolved.[117] Additional responsive action taken through the 1990 appropriations bill included establishing an "independent commission to review the Arts Endowment's grantmaking operation."[118]

Congress's response to the Serrano and Mapplethorpe controversies did not end there. Further changes took place during the NEA's reauthorization in 1990,[119] requiring the NEA "take[] into consideration general standards of

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110. *Id.* at 155–56; *Finley*, 524 U.S. at 574.
111. *Finley*, 524 U.S. at 574.
112. *Id.*
113. *See* Nat'l Endowment for the Arts, National Endowment for the Arts: A History, 1965–2008, at 89–110 (Mark Bauerlein & Ellen Grantham eds., 2009).
114. *See* 135 Cong. Rec. 14,375 (1989) (statement of Rep. John R. Kasich) (allowing "public funds to mock religious beliefs is inexcusable."); *id.* at 14,376 (statement of Rep. Wally Herger) (wanting to send the NEA a "clear message" and cut NEA funding); *id.* at 14,376–77 (statement of Rep. Frank Wolf) (funding of obscene works was "abuse of taxpayer dollars"); *id.* at 14,446 (statement of Rep. John J. Duncan) (arguing that his constituents "do not support Federal funding of pornographic or obscene or anti-Christian artwork.").
115. *See* Nat'l Endowment for the Arts, *supra* note 113, at 93.
116. Act of Oct. 23, 1989, Pub. L. No. 101–121, § 304(a), 103 Stat. 701, 741.
117. 20 U.S.C. § 952(l)(1)–(3) ("The term 'obscene' means . . . the average person, applying contemporary community standards, would find that such project . . . when taken as a whole, appeals to the prurient interest; such project . . . depicts or describes sexual conduct in a patently offensive way; and such project . . . when taken as a whole, lacks serious literary, artistic, political, or scientific value.").
118. Nat'l Endowment for the Arts, *supra* note 113, at 94; Act of Oct. 23, 1989, Pub. L. No. 101–121, § 304(b)(4)(D), 103 Stat. 701, 742.
119. *See* Cara Putman, *National Endowment for the Arts v. Finley: The Supreme Court Missed an Opportunity to Clarify the Role of the NEA in Funding the Arts: Are the Grants A Property Right or an Award?*, 9 Geo. Mason U. Civ. Rts. L.J. 237, 238 (1999); Nat'l Endowment for the Arts et al. v. Finley, 524 U.S. 569, 576 (1997).

decency and respect for the diverse beliefs and values of the American public."[120] Projects that were deemed to be obscene were prohibited from receiving NEA grants because they were "without artistic merit."[121] These provisions of the 1990 reauthorization, the Williams/Coleman Amendment, reflected a bipartisan compromise—a middle ground between a proposal to eliminate the NEA[122] and a proposal to vastly constrain its funding.[123] This legislation led four performance artists, including named plaintiff, Karen Finley, to bring a case against the NEA.[124] Alleging that their applications for NEA funding were improperly denied,[125] the plaintiffs argued that this new legislation, specifically Section 954(d)(1),[126] was unconstitutional[127] because it was "void for vagueness and impermissibly view-point based."[128] The Supreme Court ultimately upheld the legislation in *Nat'l Endowment for the Arts et al. v. Finley*,[129] holding that it was facially constitutional and did not violate First Amendment rights or "vagueness principles."[130] The Williams/Coleman Amendment provisions remain today.

Notwithstanding these legislated restrictions, when Democrats held a majority in Congress in 1992, NEA funding reached a "historic high" for a total of $176 million.[131] This positive trend changed in 1994, however, when the House and the Senate came under Republican control.[132] In 1995, multiple pieces of legislation were introduced in the House to defund the NEA,[133] none of which were successful. At the same time, bipartisan support existed in

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120. 20 U.S.C. § 954(d)(1).
121. *Id.* § 954(d)(2).
122. *Finley*, 524 U.S. at 576.
123. The Rohrabacher Amendment would have prohibited grants to projects that may "'promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion' or 'of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin.'" *Id.*
124. Finley was to "recount[] a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault." Holly Hughes, John Fleck, and Tim Miller were the other plaintiffs. Hughes' project was about her "realization of her lesbianism and reminiscence of her mother's sexuality"; Fleck "confronts alcoholism and Catholicism"; and Miller's performance was about "experiences . . . as a homosexual, and . . . the constant threat of AIDS." *Id.* at 596 n.2.
125. *Id.* at 577.
126. *See* 20 U.S.C. § 954(d)(1).
127. Putman, *supra* note 119, at 238.
128. *Finley*, 524 U.S. at 569.
129. *Id.* at 570.
130. *Id.*
131. *See* NAT'L ENDOWMENT FOR THE ARTS, *supra* note 113, at 111.
132. Many Republicans called for eliminating the NEA while campaigning. *See id.* at 116.
133. *See id.* at 117 (one plan proposed reducing funding each year until the NEA was eliminated by 1998).

the Senate to reauthorize the agency.[134] In 1996, Congress dramatically slashed NEA funding.[135] The NEA received $162,311,000 in 1995, but received only $99,470,000 in 1996,[136] equating to a forty percent budget cut.[137] This massive budget cut led to "sweeping changes" conducted by the NEA chairperson.[138] One of the changes included replacing seventeen discipline-based grants, such as grants for dance, design, or theater, with four granting divisions: "Heritage and Preservation, Education and Access, Creation and Presentation, and Planning and Stabilization."[139] This new structure allowed for a symphony orchestra to compete against a dance company for funding, whereas the discipline-based structure had allocated grants per discipline, thus preventing interdisciplinary competition.[140]

Congress continued to impose limitations on how the NEA could distribute its funds.[141] Grants for individual artists[142] and subgranting were both largely restricted.[143] These restrictions were to ensure that obscene works that could "offend[] the public" were "totally eliminated."[144] Congress determined that independent grants to individual artists was "where many of the [offensive] problems" occurred, and thus the Senate originally planned to eliminate all grants except literature fellowships.[145] The final law, however, did allow for

134. *See id.* at 117–18 (the Committee on Labor and Human Resources took up NEA reauthorization).
135. *See National Endowment for the Arts Appropriations History*, Nat'l Endowment for the Arts, https://www.arts.gov/about/appropriations-history [https://perma.cc/5Y2S-ANYA].
136. *Id.*
137. *See* Nat'l Endowment for the Arts, 1996 Annual. Report 4 (1996).
138. *See* Nat'l Endowment for the Arts, *supra* note 113, at 119.
139. *See* Nat'l Endowment for the Arts, *supra* note 113, at 119; *see also* Nat'l Endowment for the Arts, *supra* note 137, at 2–3.
140. Nat'l Endowment for the Arts, *supra* note 137, at 4.
141. *See* Nat'l Endowment for the Arts, *supra* note 113, at 120.
142. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. 104–134, § 328(a) (1996); *see also* Nat'l Endowment for the Arts, *supra* note 113, at 119. Individual grants, unlike grants to non-profit organizations or state and local agencies, were unmatched and went to "artists of exceptional talent." Nat'l Endowment for the Arts, 1995 Annual Report 9 (1995).
143. "[N]o funding provided through a grant, except a grant made to a State or regional group, may be used to make a grant to any other organization or individual to conduct activity independent of the direct grant recipient." Department of the Interior and Related Agencies Appropriations Act, Pub. L. 104–134, § 328(b) (1996).
144. *See* 141 Cong. Rec. 11982 (1995) (statement of Sen. Jim Jeffords) ("[W]e [] changed the law such that the chance of having the American public offended by grants for projects that they consider less than acceptable is totally eliminated."); *see also* 141 Cong. Rec. 11989 (1995) (statement of Sen. Kay Bailey Hutchison) ("[Funding will not go] to individual artists that might do things that would offend the conscience of mainstream America."). Choreographers' fellowships were wholly eliminated by this decision. *See* Department of the Interior and Related Agencies Act, Pub. L. 104–134, § 328(a) (1996).
145. 141 Cong. Rec. 11982 (1995) (statement of Sen. Jim Jeffords).

the National Heritage Fellowship[146] and American Jazz Masters Fellowships.[147] Distinctive from independent grants, subgranting includes "[a]wards and prizes," "[p]ayment . . . to obtain training or technical assistance for [an individual or organization's] own benefit," or "[p]roduction funds awarded . . . through a competitive review process."[148] The latter two often occur with little oversight from the subgranting organization[149] and can be given to an individual or organization.[150] A subgranting organization is considered a "pass-through" entity[151] which requires that funding for subgrants be used in compliance with the federal law surrounding the federal funds.[152] Congress determined that problems arose because of the distance between the NEA and the use of subgrants; the NEA was sometimes unaware of how the money was going to be used.[153] Despite "administrative expenses" being the predominant use of subgranted funds, Congress decided to restrict subgranting so that the NEA would no longer get a bad name in the event "something occurs which is offensive."[154] The narrow remnants of subgranting allowed for certain "State Arts Agencies," "Regional Arts Organizations," or "Local Arts Agencies" to engage in the practice.[155] These increased limitations on grant recipients, compounded with drastic budget cuts, ultimately caused public outcry and proved to be damaging to the arts community.[156]

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146. These fellowships "recognize[] recipients' artistic excellence, lifetime achievement, and contributions to our nation's traditional arts heritage." *National Heritage Fellowships*, Nat'l Endowment for the Arts, https://www.arts.gov/honors/heritage [https://perma.cc/43B6-BXCR].

147. Department of Interior and Related Agencies Appropriations Act, Pub. L. 104–134, § 328(a) (1996). *See generally* 141 Cong. Rec. 11996 (1995) (statement of Sen. Jeff Bingaman) (proposing that the National Heritage Fellowship and American Jazz Fellowship Awards be included alongside the literature fellowship because artists could only be nominated for receipt of these awards, and they had never generated controversy).

148. Nat'l Endowment for the Arts, *supra* note 13.

149. *See Specific Terms and Conditions for Local Arts Agencies Eligible to Subgrant*, Nat'l Endowment for the Arts (2021).

150. Nat'l Endowment for the Arts, *supra* note 13.

151. 2 C.F.R. § 200.1 (2013) ("Pass-through entity (PTE) means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.").

152. *See* 2 C.F.R. § 200.332(a)(2) (2013).

153. *See* 141 Cong. Rec. 11982 (1995) (statement of Sen. Jim Jeffords).

154. *Id.*

155. Nat'l Endowment for the Arts, *supra* note 149; *see also* Nat'l Endowment for the Arts, *supra* note 13 ("Congress prohibits the NEA from making grants for subgranting activity, with exceptions only for state arts agencies, regional arts organizations, and local arts agencies designated to operate on behalf of local governments.").

156. *See* Diane Jean Schemo, *Endowment Ends Program Helping Individual Artists*, N.Y. Times (Nov. 3, 1994), https://www.nytimes.com/1994/11/03/arts/endowment-ends-program-helping-individual-artists.html [https://perma.cc/6ANC-G3LF] (discussing an artist who could not even afford materials, let alone afford to apply to the NEA for a grant). The American Film Institute lost $705,000 in grants. *See* Jacqueline Trescott & Eric Brace, *NEA Takes Heat for Cuts*, Wash. Post (Oct. 31, 1994), https://www.

Attempts to defund and eradicate the NEA continued through the late 1990s,[157] though this began to change with the naming of Bill Ivey as a new chairman in 1998.[158] Ivey implemented several programs that targeted underserved populations with NEA funding, and by 2000, the NEA was receiving bipartisan Congressional support.[159] In fact, the NEA's funding had increased to $115.2 million for the 2002 fiscal year due in large part to the programs targeting neglected communities.[160] Seemingly, this was a mission of the NEA's which both parties could support. Today, the NEA has surpassed its pre-1996 funding, having received $207 million for the 2023 fiscal year.[161] Despite facing uncertainty again under the Trump Administration,[162] the NEA is now viewed as "indispensable" under the Biden Administration.[163] Political polarization, however, need not be a prerequisite for federal funding of the arts.[164] Indeed, regardless of which party has a majority in Congress or controls the White House, it is possible to harmonize concerns about appropriate usage of taxpayer dollars while cultivating a robust American arts scene.[165]

C. *The NEA's Funding of Dance*

Federal funding of dance has fluctuated greatly throughout the NEA's turbulent history; nevertheless, between 1966 and 2018, the NEA had granted a total of $281 million in direct awards to dance.[166] In 1966, the NEA awarded its first choreographers' fellowships to Alvin Ailey, Merce Cunningham, Martha Graham, José Limón, Alwin Nikolais, Anna Sokolow, and Paul Taylor, all of

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washingtonpost.com/archive/lifestyle/1994/10/31/nea-takes-heat-for-cuts/2e481bd3-f161-4839-9d60-a37f75c666c8 [https://perma.cc/285V-22M7] ("The cuts are being leveled at the most fragile part of the field.").

157. *See* Nat'l Endowment for the Arts, *supra* note 113, at 121–23.
158. *See id.* at 127–35.
159. *See id.* at 127–33.
160. *See id.* at 134.
161. There has been additional emergency relief funding for the arts in recent history due to the COVID-19 pandemic, but that is not the funding being addressed by this Note. *See* Nat'l Endowment for the Arts, *supra* note 135.
162. *See* Travis M. Andrews, *Behind the Right's Loathing of the NEA: Two "Despicable" Exhibits Almost 30 Years Ago*, Wash. Post (Mar. 20, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/20/behind-the-loathing-of-the-national-endowment-for-the-arts-a-pair-of-despicable-exhibits-almost-30-years-ago/ [https://perma.cc/8PAZ-CBRH].
163. *See* Tim Walker, *President Biden Addresses NEA Representative Assembly*, NEA Today (July 3, 2021), https://www.nea.org/advocating-for-change/new-from-nea/president-biden-addresses-nea-representative-assembly [https://perma.cc/RK7B-A848]. President Biden attended the NEA Representative assembly, the first President to do so since President Clinton.
164. *Cf.* Tofte, *supra* note 100, at 304 ("[T]he politization of art is a restrictive, discriminatory, and dangerous concept that inhibits the free exchange of ideas.").
165. *See infra* Subpart .
166. *Dance: Fact Sheet*, Nat'l Endowment for the Arts (2019).

whom are now indispensable dance industry icons.[167] These choreographers' fellowships were "awarded to professional choreographers for their artistic development."[168] Funding from the NEA also provided more than money to smaller dance projects; it provided recognition.[169] The successful impact of NEA funding from 1965 to 1995 is evidenced by an increase in dance companies from thirty-seven to over 400 across the United States.[170]

The last time the NEA granted money for choreographers' fellowships was in 1994 and 1995—years with robust dance funding.[171] In 1994, the NEA awarded over $7.2 million to dance, with forty-nine awards granted toward choreographers' fellowships, totaling $848,000.[172] While funding for dance remained nearly the same in 1995, there was an increased grant of just over $1.2 million toward choreographers' fellowships, totaling ninety-three awards.[173] This increased funding in 1995 was the NEA's response to a dance scene that was thriving artistically, but that was simultaneously weathering an "eroded infrastructure" due to issues like fewer performance opportunities as well as decreased public and private funding compounded by the AIDS epidemic.[174] A survey of Dance Magazine obituaries between 1986 and 1990 demonstrated that 305 men in dance had died due to complications from AIDS[175]—a stark figure of approximately seventy-six men a year. Indeed, the epidemic took some of the biggest names of the industry at the time: Alvin Ailey, Michael Bennett, Robert Joffrey, Arnie Zane, and many more.[176] The world of dance suffered from an astonishing blow and the NEA responded accordingly. Ultimately, however, choreographers' fellowships ended in 1996 after Congress

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167. *Id.*
168. *See* Nat'l Endowment for the Arts, 1994 Annual Report 5 (1994); Nat'l Endowment for the Arts, *supra* note 142, at 14.
169. Nat'l Endowment for the Arts, *supra* note 113, at 103 ("Being able to move into the main or national funding stream because of the approval of the Endowment opened doors to local agencies, foundations, and community-based funding . . . . This ability to compete for grants, often given only to the more established cultural institutions, allowed what were often considered 'grassroots' or 'community-based' to secure a stronger footing in the field.").
170. *See* 141 Cong. Rec. 11992 (1995) (statement of Sen. Thomas Daschle).
171. *See* Nat'l Endowment for the Arts, *supra* note 168, at 5; Nat'l Endowment for the Arts, *supra* note 142, at 14.
172. Nat'l Endowment for the Arts, *supra* note 168, at 5.
173. Nat'l Endowment for the Arts, *supra* note 142, at 13.
174. *Id.* at 11.
175. Kathleen Kelleher, *Teen Dancers Hear Deadly AIDS Message: Education: The Disease Has Decimated the Dance World, but Teachers' Warnings Often Go Unheeded*, L.A. Times (Apr. 6, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-04-06-ca-1583-story.html [https://perma.cc/GHH3-UENA].
176. *See* Joseph Carman, *The Generation Lost to AIDS*, Dance Mag. (Aug. 21, 2007), https://www.dancemagazine.com/the_generation_lost_to_aids [https://perma.cc/MXK7-CCQQ].

slashed the NEA's budget by forty percent.[177] As a result, the dance grants in 1996 went only to dance companies, special projects, or general services to the dance field,[178] despite choreographers' fellowships being the recipient of ninety-three awards just one year prior.[179]

Unfortunately, along with the enduring elimination of choreographers' fellowships in the present day, contemporary reports have shown that dance funding also remains diminished. Unlike the robust funding that took place in 1994 and 1995, direct grants awarded by the NEA to dance stand reduced by approximately forty-six percent compared to the funding that occurred in 1994 and 1995.[180] Much of the recent funding has gone toward fostering education through festivals or conferences,[181] as well as to large dance companies, such as the Alvin Ailey Dance Foundation, New York City Ballet, and Paul Taylor Dance Foundation.[182] Ironically, those who benefited from the original choreographers' fellowships in 1966, such as Alvin Ailey, Martha Graham, and Paul Taylor,[183] still receive funding from the NEA today[184] because of the large companies these artists went on to establish. In contrast, small choreographers that today stand in the same shoes as those industry icons did in 1966 cannot reap the same benefits of the NEA's funding in 2022.

III. A Necessary Partial Solution: The Enactment of the PRO Act

The PRO Act would empower freelance dancers to unionize because the Act's "ABC" test would expand the definition of "employee" under the NLRA to encompass freelance dancers. A freelance dance union would form out of this Act, but the formation of a union alone remains insufficient in remedying dancers' inadequate working conditions without increased accessibility to funding for choreographers.

A. *The "ABC" Test*

The "ABC" test[185] amendment to the NLRA is the portion of the PRO Act that would most drastically impact the freelance dancer. The PRO Act is a

177. *See supra* Subpart B; Nat'l Endowment for the Arts, *supra* note 137, at 4.
178. Nat'l Endowment for the Arts, *supra* note 137, at 30–37.
179. Nat'l Endowment for the Arts, *supra* note 142, at 13.
180. Nat'l Endowment for the Arts, *supra* note 166 (Dance was granted $3.9 million in 2018).
181. *Id.*
182. Grant Search, Nat'l Endowment for the Arts Nat'l Endowment for the Arts, https://apps.nea.gov/grantsearch (select "2019" from "From Fiscal Year" drop-down menu and "2020" from "To Fiscal Year" drop-down menu) (Paul Taylor received $70,000 in 2019 and $60,000 in 2020; New York City Ballet received $75,000 in 2019 and 2020; Alvin Ailey received $90,000 in 2019 and $95,000 in 2020).
183. *See* Nat'l Endowment for the Arts, *supra* note 166.
184. *See* Nat'l Endowment for the Arts, *supra* note 182.
185. S. 567, 118th Cong. § 101(b)(A)–(C) (2023).

bill currently proposed in Congress that is designed to amend various areas of labor legislation; however, for this Comment's purposes, the scope of the PRO Act discussion is limited to the proposed NLRA amendments.[186] If the PRO Act were passed, the "ABC" test would amend the definition of "employee" and limit the number of workers considered to be independent contractors.[187] This portion of the Act reads, "[a]n individual performing any service shall be considered an employee . . . and not an independent contractor, unless-

> (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
>
> (B) *the service is performed outside the usual course of the business of the employer*; and
>
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[188]

Because these provisions would amend only the NLRA and not all federal legislation concerning employment and labor laws,[189] the definition of "employee" under other statutes, such as the Fair Labor Standards Act or Civil Rights Act, would remain unchanged.[190] The definition under other statutes would not change because many pieces of legislation govern labor and employment in different ways, therefore making it likely that the definition of "employee" within each one will be different.[191]

If the PRO Act were passed, section (B) of the "ABC" test is anticipated to have a tremendous impact on independent contractors.[192] Matt Bruenig of People's Policy Project provides a well-articulated example of this rule in application:

> [I]f a plumbing company hires a plumber and then sends them out on jobs, that plumber could not be an independent contractor because selling plumbing services for money is what the plumbing company does. On the

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186. *Id.*
187. Simandl, *supra* note 50.
188. S. 567, 118th Cong. § 101(b)(A)–(C) (2023) (emphasis added).
189. *Id.*
190. *See* Matt Bruenig, *Clearing Up Confusions About the PRO Act*, People's Pol'y Project (Mar. 26, 2021), https://www.peoplespolicyproject.org/2021/03/26/clearing-up-confusions-about-the-pro-act [https://perma.cc/3FMQ-6TW6].
191. *See id.* Though, this may be inconsistent with the method of statutory interpretation, *in pari materia*, commonly used by textualists and originalists. *See* William J. Vietti, *Statutory Interpretation - Teacher! Teacher! The Court Is Using Extracurricular Interpretations; Luhm v. Board of Trustees of Hot Springs County School District No. 1, 206 P.3d 1290 (Wyo. 2009)*, 11 Wyo. L. Rev. 591, 596 (2011) ("*In pari materia* recognizes that a legislative body gives the same word in different statutes a consistent meaning when the statutes address similar subjects.").
192. *See* Bruenig, *supra* note 190.

> other hand, if an accounting firm hires a plumber to fix their office's burst pipes, that plumber could be an independent contractor since the accounting firm is not in the plumbing business.[193]

This illustration demonstrates how to determine whether one is working within an employer's "usual course of business,"[194] and keenly emphasizes how many workers today may be classified wrongly as independent contractors, including freelance dancers.

Under the PRO Act, freelance dancers would no longer be wrongly classified as independent contractors under the definition of "employee" for the purpose of unionizing.[195] If a freelancer is hired to perform choreography in a dance production or performance, this job will likely be considered work done in the "usual course of business" of the choreographer-employer.[196] A reexamination of the example above[197] demonstrates this change. A plumber hired by a plumbing company would qualify as an employee, and not as an independent contractor.[198] Similarly, when a freelance dancer is hired by a choreographer to perform in his or her dance piece or production, the dancer-employee is working in the choreographer-employer's "usual course of business,"[199] as the business of a choreographer is creating works of dance.[200] Thus, the "employee" classification under the "ABC" test would allow freelance dancers to join together in a union to collectively bargain and provide power to dancers that they currently do not have, as described *supra* in Subpart B. The PRO Act ultimately provides a necessary, partial solution to the freelance dancers' goal of achieving adequate workplace conditions.

B. *Why the PRO Act is a Necessary but Insufficient Solution*

While dancers and other freelance workers support the PRO Act[201] due to the unionizing power it would give to workers, it is an insufficient solution in resolving freelance dancers' inadequate workplace protections. It is a premise that works conceptually but fails in application. Theoretically, a freelance dance union would be most comparable to AGMA, where the dance

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193. *Id.*
194. S. 567, 118th Cong. § 101(b)(B) (2023).
195. S. 567 § 101(b)(A)–(C).
196. *Id.* § 101(b)(B).
197. Bruenig, *supra* note 190.
198. *Id.*
199. S. 567 § 101(b)(B).
200. *Choreographer*, Dictionary.com, https://www.dictionary.com/browse/choreographer [https://perma.cc/QJ2H-LPTA] ("[A] person who creates dance compositions and plans and arranges dance movements and patterns for dances.").
201. *See* Dance Artists' Nat'l Collective, *supra* note 19; *see also* AFL-CIO, *The PRO Act and Freelancers Town Hall*, YouTube (Apr. 27, 2021), https://www.youtube.com/watch?v=V5-KtV13lUw (voicing of support by a freelance writer and freelance documentary photographer for the PRO Act).

signatories of the union are dance companies.[202] As for the freelance dancers, they would likely bargain directly against the choreographer who has hired the dancers to perform the choreographer's work.[203] The union could also utilize SAG-AFTRA's method of allowing producers to contract with the union before hiring performers.[204] In that case, a choreographer could contract with the freelance dance union if it anticipates hiring dancers covered by the union. To ensure that dancers join the union, the freelance dance union could require dancers to join after taking a job with a union contracted choreographer, further replicating a similar model to SAG-AFTRA.[205] Thus, conceptually, it is indeed plausible that a freelance dance union could organize.

The freelance dance union would also likely join the 4As and interact with the existing performing arts unions that cover dancers.[206] Concerns over whether a freelance dancer would be able to expand his or her repertoire after joining the union to include Broadway productions, as covered by an AEA contract,[207] or a music video, as covered by SAG-AFTRA,[208] are unfounded. The sister unions allow for the joining of one another based upon a reciprocity process,[209] so the freelance dance union could elect to allow the dancers to only take unionized work within its jurisdiction as well as to engage in a reciprocity agreement with SAG-AFTRA, AEA, and AGMA. Indeed, this may be a worthwhile option for dancers everywhere because of the traction that freelance dance is gaining throughout the dance industry[210]—dancers could be guaranteed protections for all of the dance work that they do regardless of what label the work is given. Moreover, the freelance dance union could always permit its members to take work that is not union-contracted in a format similar to AGMA.[211] This option may come at a cost, however, because collective bargaining works best when a union can rely upon a "collective agreement to only work for those employers who agree to negotiate with the union."[212] Therefore, while there will be added complexity to the work a dancer may take upon the creation of a freelance dance union, the union would not definitively close doors on other dance contracts. This outcome demonstrates both the necessity and practicality of a freelance dance union and why the PRO Act would provide a partial solution to the inadequate workplace conditions freelance dancers confront.

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202. *See* Am. Guild of Musical Artists, *supra* note 40.
203. Others have suggested that a freelance dance union would function by creating "[a] floating contract that dancers take from job to job." *See* Allison, *supra* note 11.
204. *See* Fabrick, *supra* note 42, at 32.
205. *See id.*
206. *See supra* Subpart 1.
207. Loeffler-Gladstone, *supra* note 27.
208. *Id.*
209. *See* Actors' Equity Ass'n, *supra* note 36; SAG-AFTRA, *supra* note 34.
210. *See supra* Subpart A.
211. Am. Guild of Musical Artists, *supra* note 38, at 3.
212. *See* Actors' Equity Ass'n, *supra* note 33.

Unfortunately, analyzing the PRO Act against the backdrop of the lens through which the Act has been primarily discussed—that of workers at large companies—reveals that the PRO Act fails on its own to sufficiently remedy the freelance dance problem.[213] Amazon workers have tried to unionize,[214] and indeed, workers at one Amazon warehouse on Staten Island recently won the battle for unionization.[215] Companies like Lyft and Uber may also see their workers attempt unionization despite being currently classified as independent contractors.[216] While the PRO Act may prove to be a sufficient solution for Amazon,[217] Lyft,[218] or Uber workers,[219] it would not have the same remedial effect on freelance dancers working for independent choreographers. Independent choreographers, unlike goliath corporations such as Amazon, Uber, or Lyft, struggle financially to cover the cost of a single production.[220] Empowering the dancers to unionize and demand sufficient wages and working conditions could ultimately prove to be detrimental to a choreographer who can hardly afford the dancers under the standards that already exist.[221] Indeed, if an independent choreographer were required to rent studio space[222] for longer lengths of time so as to provide a mandated five-minute break to dancers for every rehearsal hour or to offer daily class for dancers, as required for dance companies contracted under AGMA,[223] this requirement could cost the choreographer more money than he or she has available. Furthermore, this additional expenditure from the choreographer's limited funding would consequently become unavailable for use as dancer compensation. Therefore, while the PRO Act conceptually provides a necessary remedy in the fight for proper workplace protections of freelance dancers by empowering the dancers to unionize, in practice the Act alone is

213. *See* Tyler Sonnemaker, *Democratic Rep. Andy Levin Says Corporate America Should Support the PRO Act and "Get Excited About Making Money the Old-Fashioned Way*," Yahoo (Apr. 15, 2021, 8:52 AM), https://www.yahoo.com/now/democratic-rep-andy-levin-says-125200804.html?guccounter=1 [https://perma.cc/LP9K-BLT9]; AFL-CIO, *A Fair Shot – How the PRO Act Would've Changed the Amazon Organizing Landscape*, (Apr. 12, 2021), https://aflcio.org/press/releases/fair-shot-how-pro-act-wouldve-changed-amazon-organizing-landscape [https://perma.cc/4Y3W-MYP7]; Rosenberg, *supra* note 49.
214. *See* Sonnemaker, *supra* note 213; *see also* AFL-CIO, *supra* note 213.
215. Jodi Kantor & Karen Weise, *How Two Best Friends Beat Amazon*, N.Y. Times (Apr. 2, 2022), https://www.nytimes.com/2022/04/02/business/amazon-union-christian-smalls.html [https://perma.cc/5Z4X-JP7X].
216. *See* Rosenberg, *supra* note 49.
217. *See* Sonnemaker, *supra* note 213; *see also* AFL-CIO, *supra* note 213.
218. *See* Rosenberg, *supra* note 49.
219. *See id.*
220. *See supra* Subpart C.
221. *See supra* Subpart I.C.
222. In New York City, the cost of studio space can range from ten to 420 dollars per hour. *NYC Studio Space: What's Open Now*, Pentacle nextSteps (June 6, 2022), https://pentacle-nextsteps.org/arts-relief/nyc-studio-space [https://perma.cc/S4YZ-F7XG].
223. Allison, *supra* note 11.

insufficient. It may be detrimental to the scarcely funded dance industry, which could reduce the availability of freelance dance opportunities, or the amount of compensation for freelance dance contracts.

IV. Proposal

A dual solution to the lack of funding in freelance dance necessitates Congress to pass legislation which increases available avenues of dance funding from the NEA. Choreographers' fellowships must be included on the list of permissible independent grants, and expanded qualifications for subgranting organizations must be allowed.

A. *Restore Choreographers' Fellowships and Increase Subgranting*

1. Permit Choreographers' Fellowships as an Independent Grant

To ensure that the freelance dance industry is able to reap the benefits of the NEA's abundant funding, Congress must pass legislation that allows for choreographers' fellowships to be included within the permissible scope of the NEA's individual granting power. This solution is not unheard of; indeed, it was successful once before.[224] Just prior to Congress's dramatic actions taken in the mid-1990s,[225] choreographers, through choreographers' fellowships, had been the recipient of ninety-three NEA grants.[226] The complete eradication of the choreographers' fellowships in 1996 was not only the end of individual opportunities available to choreographers, but was also an abrupt loss of $1.2 million[227] of a choreographer's once reliable avenue of funding.

When compared to the literature fellowship and the NEA's proud recognition of the successes this enduring individual grant has had,[228] the loss of the choreographers' fellowship demonstrates how freelance dance has not been provided the opportunity to flourish in a comparable way. Literature fellowships received $875,000 for the 2019 fiscal year, with many prior recipients having continued on to become "National Book Award, National Book Critics Circle Award, and Pulitzer Prize in Poetry and Fiction" recipients.[229] These accolades prompt one to consider what the freelance dance industry would have evolved into today had the choreographers' fellowships remained throughout the prior decades, particularly given the similar successes achieved by choreographers such as Paul Taylor and Martha Graham—original recipients of the choreographers' fellowships.[230]

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224. *See supra* Subpart C.
225. *See* Nat'l Endowment for the Arts, *supra* note 113, at 116–20.
226. Nat'l Endowment for the Arts, *supra* note 142, at 13.
227. *Id.*
228. *See* Nat'l Endowment for the Arts, 2019 Annual Report 7 (2019).
229. *Id.*
230. *See supra* Subpart C; Nat'l Endowment for the Arts, *supra* note 166.

The reinstatement of the choreographers' fellowships during the next appropriations cycle is a necessary action that must be taken by Congress. This action is possible for two reasons: first, NEA funding has exceeded its pre-1996 total for a figure of $207 million,[231] and second, the prohibition on funding obscene works endures in the NEA's enabling legislation:[232]

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) *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; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that *obscenity is without artistic merit*, is not protected speech, *and shall not be funded*. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.[233]

The inclusion of this language sufficiently addressed Congress's concerns in the 1990s; further NEA restrictions were not warranted. Indeed, the "artistic excellence and artistic merit" criteria[234] were upheld by the Supreme Court in *Finley*[235] and remain today. Therefore, the targeted and arguably punitive action of eliminating most individual grants,[236] including specifically the choreographers' fellowships, has unfairly denied available funding to the dance community. After all, dance was not at the center of the Mapplethorpe and Serrano controversies, as those controversies involved photographs and not choreographic works.[237] It remains unclear why the furor over obscene pho-

231. Nat'l Endowment for the Arts, *supra* note 135.
232. 20 U.S.C. § 954(d)(1)–(2).
233. *Id.* (emphasis added).
234. 20 U.S.C. § 954(d)(1).
235. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 570 (1997).
236. *See* 141 Cong. Rec. 11982 (1995) (statement of Sen. Jim Jeffords) ("we [] changed the law such that the chance of having the American public offended by grants for projects that they consider less than acceptable is totally eliminated"); *see also* 141 Cong. Rec. 11989 (1995) (statement of Sen. Kay Bailey Hutchison) ("[funding will not go] to individual artists that might do things that would offend the conscience of mainstream America").
237. *Finley*, 524 U.S. at 574. While literature was also not a part of these controversies, it seems odd that Congress chose Literature Fellowships to remain, but not choreographer's fellowships, given the current day controversies surrounding efforts to ban books. *See* The Learning Network, *What Students Are Saying About Banning Books from School Libraries*, N.Y. Times (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/learning/students-book-bans.html [https://perma.cc/UU6H-JZEX].

tographic works led Congress to punish the dance industry by eliminating choreographers' fellowships.

Congress must acknowledge the harm it rendered upon the freelance dance industry through its over-corrective actions, and it must allow for choreographers' fellowships to once again be a permissible independent grant. If this avenue of funding is not reopened, the freelance dance industry will continue to suffer; alas, even if freelance dancers are empowered with unionizing capabilities,[238] their employers will still have scarce financial means by which to pay them, rendering the dancers' hard-won right to unionize a hollow victory.[239] Accordingly, because the obscenity concerns are adequately accounted for in the language of the NEA's enabling legislation,[240] choreographers' fellowships should be included as a permissible NEA independent grant so that the freelance dance community may prosper.

2. Expand Qualifications for Subgranting Organizations

In addition to expanding the individual grant recipients of the NEA to include choreographers' fellowships, an increased number of organizations should be approved to engage in the practice of subgranting. Largely similar to its elimination of several independent grants,[241] Congress overreacted to the Mapplethorpe and Serrano controversies[242] by limiting subgranting power to "State Arts Agencies," "Regional Arts Organizations," and "Local Arts Agencies."[243] As previously mentioned, this obscenity concern was already sufficiently resolved through statutory language.[244] Accordingly, Congress must reevaluate the limit imposed on subgranting organizations and widen the scope of those eligible to participate in this process.

Subgranting comes in many forms, benefits both individuals and organizations, and occurs with little oversight from the subgranting organization.[245] If subgranting was solely comprised of federal funds without oversight to subrecipients, then it could be argued that Congress's narrow qualifications for subgranting organizations are justified. These organizations, however, are not

238. *See supra* Part III.
239. *See supra* Subpart C.
240. *See* 20 U.S.C. § 954(d)(1)–(2).
241. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. 104–134 § 328(a) (1996); *see also* Jane Fritsch, *As Slashed Arts Grants Are Unveiled, The Backlash Begins to Take Shape*, N.Y. Times (Dec. 16, 1996) https://www.nytimes.com/1996/12/16/arts/as-slashed-arts-grants-are-unveiled-the-backlash-begins-to-take-shape.html [https://perma.cc/J8R7-P7CX].
242. *See supra* Subpart B.
243. Nat'l Endowment for the Arts, *supra* note 149; *see also* Department of the Interior and Related Agencies Appropriations Act, Pub. L. 104–134 § 328(b) (1996); Nat'l Endowment for the Arts, *supra* note 13.
244. *See* 20 U.S.C. § 954(d)(1)–(2).
245. *See* Nat'l Endowment for the Arts, *supra* note 13.

given federal grants with reckless abandon.[246] Indeed, because any subgranting organization is considered a "pass-through" entity, the organization must ensure that the subrecipient uses its granted funds in compliance with the federal law surrounding the funds.[247] Regarding the NEA, this requirement means that the subgranting organization must abide by the "artistic excellence and artistic merit" criteria included in the NEA's enabling legislation discussed above,[248] therefore ensuring that obscenity concerns can be dispelled regardless of the subgranting organization or subrecipient. By increasing the list of those eligible to become subgranting entities, independent artists—specifically choreographers—will have expanded access to federal arts funding.[249] Indeed, the choreographers' inability to adequately pay freelance dancers is likely not due to a universal lack of arts funding, but instead a deprivation of available avenues of funding to the choreographers.[250]

To implement the subgranting and choreographers' fellowship amendments, Congress should modify the National Endowment for the Arts Grant Guidelines in the next appropriations bill to read as follows:

> Of the funds provided to the National Endowment for the Arts—
>
> (1) The Chairperson shall only award a grant to an individual if such grant is awarded to such individual for a literature fellowship, National Heritage Fellowship, American Jazz Masters Fellowship, *or choreographers' fellowship*.
>
> (2) *The Chairperson shall establish procedures to ensure that funding used to make a grant to any other organization or individual to conduct activity independent of the direct grant recipient meets the standards of artistic excellence and artistic merit*.
>
> (3) No grant shall be used for seasonal support to a group, unless the application is specific to the contents of the season, including identified programs or projects.[251]

By increasing the number of organizations eligible to subgrant NEA funds, combined with the reinstatement of choreographers' fellowships, Congress will once again provide accessibility to NEA funding that the freelance

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246. *See infra* notes 247–248 and accompanying text.
247. 2 C.F.R. § 200.332(a)(2) (2013).
248. Nat'l Endowment for the Arts, *supra* note 149; *see also supra* Subpart 1.
249. *See* Nat'l Endowment for the Arts, *supra* note 149. Organizations would also have increased access to funding; however, the only organizations that qualify as NEA grant recipients are "501(c)(3) nonprofit organizations, units of state or local government, institutions of higher education, or federally-recognized Indian tribal governments." *See id.*
250. After all, the NEA was granted $207 million for the 2023 fiscal year. *See* Nat'l Endowment for the Arts, *supra* note 135.
251. *Cf.* Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 412 (2020) (emphasis added) (demonstrating the original language of the NEA Grant Guidelines before these changes).

dance industry desperately needs. After all, these actions, in conjunction with the lasting prohibition on funding obscene works, will succeed at harmonizing what at times have been two irreconcilable objectives: suitable use of taxpayers' dollars in arts funding, and robust support of the arts.[252]

B. *Related Concerns*

The demand for further federal arts funding requires relevant considerations to be confronted, including whether federal funding of the arts inhibits an artist's creativity[253] or whether there are better uses of taxpayer dollars.[254] While these apprehensions have merit, the value provided through funding the arts and expanding access to federal arts funding ultimately outweighs them.

The American people have not reached a consensus as to whether federal funding of the arts is a proper use of government money.[255] While reasonable minds may differ on the federal government's role in arts funding,[256] it would be difficult for any person to dispute the inherent value of the arts. The arts play an integral role in our society, as they contain both social[257] and economic value.[258]

Societally, the arts provide history, wisdom, creativity, and different ways to listen and learn.[259] Art has the ability to challenge one's preconceived notions by allowing one to "recognize pre-existing world views and []

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252. The solutions proposed in this Comment are made with specifically the freelance dance industry in mind. This narrow focus is due to the scope of the Comment—addressing the ills that exist within the freelance dance industry that cause dancers to have insufficient workplace protections. While this is likely a problem not limited only to freelance dance, a change in subgranting would affect more than just dancers and spread to other forms of art. Moreover, there may be arguments for reinstating additional independent grants beyond choreographers' fellowships.
253. *See* Warren, *supra* note 95, at 151 ("[A]rts funding has been used to thwart artistic expression that threatens governmental power structures, thereby limiting society's exposure to perspectives different from the prevailing political norm.").
254. *See id.* at 178 ("With arts funding, the government also risks inciting public opposition against using taxpayer dollars to fund art that may offend individual notions of decency, and art that is perceived as a desecration of the fundamental beliefs of a particular subgroup of the citizenry.").
255. *Compare id.* at 178–79 (arguing that funding the arts should not be something the government engages in), *with* Symposium, *Art, Distribution & the State: Perspectives on the National Endowment for the Arts*, 17 Cardozo Arts & Ent. L.J. 705, 711 (1999) (statement of Hope O'Keefe) (arguing that the NEA is a "desperately need[ed]" institution); *see also* Putman, *supra* note 119, at 237 ("From the time of the ancient Greeks to the Italian dynasty of the Medicis to the National Endowment for the Arts in the United States today, governments have grappled with their role as patrons of the arts.").
256. *See supra* note 255 and accompanying text.
257. *See infra* notes 259–261 and accompanying text.
258. *See infra* notes 262–268 and accompanying text.
259. *See* David C. Farmer, *Why Should We Support the Arts?*, 6 Haw. B.J., Apr. 2022, at 27 (2002); *see also* Nat'l Endowment for the Arts, *supra* note 166.

defamiliarize and distance [oneself] from [his or her] presumptive world view."[260] Indeed, this is a viewpoint similarly expressed by Congress through the NEA; the arts are an essential contrast to advancements in science and technology, necessary to developing our civilization.[261]

The value of the arts does not merely exist within the abstract; the arts provide an economic benefit to communities as well.[262] As stated to the divisive Congress in 1995 by Senator Claiborne Pell, "[t]he arts, fostered by the national endowment, encourage national and international tourism, attract and retain businesses in our communities, stimulate real estate development, increase the production of exportable copyright materials and . . . contribute to our tax base."[263] Further, the arts have generated more revenue to local economies than both agriculture and transportation have generated,[264] and specifically, federal funding of the arts through the NEA has "each grant dollar matched by up to nine dollars from other funding sources."[265] In 2021, the arts generated $1.02 trillion to the United States economy, totaling 4.4 percent of the gross domestic product.[266] Admissions fees to an arts event are not the only income generated by the arts. In addition to admission tickets, each attendee spends approximately $31 on other things throughout the course of the evening, like "dining out, paying for parking, shopping in local retail stores, enjoying dessert after the show, and returning home to pay the babysitter."[267] These expenses totaled approximately $102.5 billion in 2015, which is projected to have supported "2.3 million jobs, provided $46.6 billion in household income, and generated $15.7 billion in total government revenue."[268]

Thus, despite everlasting debates as to why and whether the federal government should be involved in arts funding,[269] it is evident that the arts are integral to our society. The arts provide us with intangibles, such as creativity

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260. Warren, *supra* note 95, at 150–51.
261. *See* 20 U.S.C. § 951(3).
262. *See* 141 Cong. Rec. H7027 (daily ed. July 31,1995) (statement of Rep. Jerrold Nadler) ("In 1992, the $166 million invested by the National Endowment for the Arts is estimated to have generated local economic activity throughout the country totaling $1.68 billion.").
263. 141 Cong. Rec. S11983 (daily ed. Aug. 9, 1995) (statement of Sen. Claiborne Pell).
264. Nat'l Endowment for the Arts, *supra* note 166 (In 2016, $804.2 billion was contributed to the nation's economy from the arts.).
265. *Id.*
266. *Arts and Culture*, Bureau of Econ. Analysis, https://www.bea.gov/data/special-topics/arts-and-culture [https://perma.cc/Q2NV-XVE8].
267. *Arts & Economic Prosperity 5: National Findings*, Am.'s for the Arts, (2015), https://www.americansforthearts.org/by-program/reports-and-data/research-studies-publications/arts-economic-prosperity-5/learn/national-findings#:~:text=Nationally%2C%20total%20event%2Drelated%20spending,billion%20in%20total%20government%20revenue [https://perma.cc/2XM6-G3CL].
268. *Id.*
269. *See, e.g.*, Warren, *supra* note 95, at 179.

and wisdom,[270] but also produce phenomenal quantities of revenue for the American economy.[271] It is therefore important to ensure that those within artistic vocations are properly accounted for and have access to the means required to prosper; having artists abandoning their careers for more "lucrative" work may not be best for the country given the positive impact of art.[272] Indeed, the severe limitations that Congress imposed on the NEA may have actually created an adverse economic impact on the United States because, if the dance industry was profoundly impaired and limited, other artforms likely suffered too—an impact that would have been palpably felt throughout our national and local economies.[273] The federal government must assume a positive and active role in ensuring that arts communities remain vibrant because a vibrant art presence betters the nation as a whole. Therefore, the benefits that would arise from Congress increasing choreographers' access to existing federal arts funding far outweigh potential apprehensions.

Conclusion

Providing freelance dancers with proper workplace protections is a multi-faceted undertaking that requires addressing both the dancers' ability to unionize as well as a choreographer's access to adequate means of funding. Regarding the dancer, this problem arises from an industry shift to freelance dance and a lack of power held by the dancers due to their inability to join existing performing arts unions. Choreographers have struggled to receive adequate funding due to limited availability of funding sources—a problem largely attributable to Congress's termination of choreographers' fellowships and placing of constraints on subgranting under the NEA.

While the PRO Act would provide a necessary partial solution to this problem by empowering freelance dancers to unionize under the NLRA, it would be an insufficient and potentially even detrimental remedy without simultaneously increasing choreographer access to funding. Accordingly, Congress must reexamine the drastic measures it took in response to obscenity concerns throughout the 1990s. It must increase the number of avenues available to choreographers to receive funding under the NEA by reinstating choreographers' fellowships and providing more organizations with the eligibility necessary to engage in subgranting. This comprehensive, multi-faceted solution will give the freelance dance industry the means to thrive. Freelance dancers will begin to receive appropriate protections for the work that they do through collective bargaining and union contracting with choreographers who themselves have the necessary funding to adequately provide for their dancers' needs.

270. *See* Farmer, *supra* note 259, at 28.
271. *See supra* notes 262–268 and accompanying text.
272. *See supra* Subpart 3 (discussing how dancers may have to leave the profession to seek out more lucrative work).
273. *See supra* notes 262–268 and accompanying text.