November 29, 2023

Office of Federal Financial Management
Office of Management and Budget
VIA REGULATIONS.GOV

RE: Guidance for Grants and Agreements
Docket ID OMB–2023–0017
Specifically 2 CFR § 200.300 [200.300]

Alliance Defending Freedom (ADF) submits these comments on the Guidance for Grants and Agreements, Docket ID OMB–2023–0017, specifically with respect to 2 CFR § 200.300 [200.300]. ADF is a nonprofit alliance-building legal organization that advances the God-given right to live and speak the Truth. We contend for the Truth in law, policy, and the public square, and equip the alliance to do the same. Since its launch in 1994, ADF has handled many legal matters involving the First Amendment, gender identity non-discrimination rules, athletic fairness, student privacy, the conscience rights of health care providers, the Religious Freedom Restoration Act, and other issues raised by the Guidance.

We urge OMB to eliminate proposed paragraphs (b) and (c) of § 200.300, and to restore paragraph (a)'s explicit protection of free speech and religious liberty.

I. The Guidance will harm intended beneficiaries of federal programs.

The Guidance will harm participants in federally funded programs. Paragraphs (b) and (c) of 2 CFR § 200.300 impose a restriction on funding programs that Congress did not impose, namely, nondiscrimination on the basis of sexual orientation and gender identity. A restriction limits the scope of the program. In particular, faith-based recipients of funds will be less able to serve beneficiaries where this restriction prohibits them from participating in programs. Ejecting faith-based groups from programs such as foster care and adoption will lead to fewer children served, not more children served.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), a faith-based foster care agency (CSS) was kicked out of a program by imposition of a sexual orientation nondiscrimination condition. Several justices noted that "the City took this step even though it threatens the welfare of children awaiting placement in foster homes. There is an acute shortage of foster parents, both in Philadelphia and in the country at large. By ousting CSS, the City eliminated one of its major sources of foster homes." *Id.* at 1886 (Alito, J., concurring).

ADF serves a large number of non-profit organizations covered or potentially covered by the Guidance because they receive or participate in federal grants or agreements. Many have belief-based policies and practices that might be deemed

inconsistent with the Guidance's view that all agencies should administer funded programs to eliminate what the Guidance calls discrimination on the basis of sexual orientation and gender identity or a lack of equal protection on those grounds. Accordingly, the Guidance's incorrect interpretation of law and of agencies' legal authority to impose these policy restrictions will inflict substantial burdens on large numbers of dissenting organizations. This raises significant issues under the First Amendment, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., and the Administrative Procedure Act (APA), e.g., 5 U.S.C. §§ 553, 706.

To the extent OMB contends this Guidance is not subject to the APA, it is incorrect. Various agencies state in their grant conditions that recipients must comply with the Uniform Guidance, and they incorporate 2 CFR Part 200 by reference. Consequently, this rule is subject to notice and comment and to suit under the APA. The administration cannot avoid judicial review by "smurfing" its mandates into multiple, supposedly nonbinding parts that together impose policy. *Texas v. U.S. Dep't of Health & Hum. Servs.*, No. MO:23-CV-00022-DC, 2023 WL 4629168 at *1 (W.D. Tex. July 12, 2023). If this rule is finalized, OMB and the agencies incorporating it can be sued under 5 U.S.C. Ch. 7.

II. The Guidance is based on explicit legal error.

By basing the Guidance and the resulting agency actions on legally flawed applications of *Bostock* and the constitution, the policy would be contrary to law and arbitrary and capricious under the Administrative Procedure Act.

A. *Bostock* does not extend beyond hiring and firing under Title VII.

Proposed paragraph (b) of 2 CFR § 200.300 is based on legal error. Under it, agencies would take the position that " Federal awards that are subject to Federal statutes prohibiting discrimination based on sex" must be "administered in a way that does not unlawfully discriminate based on sexual orientation or gender identity, consistent with the Supreme Court's reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)."

This contradicts *Bostock*, where the Supreme Court rejected the argument that its decision encompassed "other federal or state laws that prohibit sex discrimination," and warned that considering the meaning of those laws would require separate arguments and adjudication. *Id.* at 1753.

The Guidance contradicts the rulings of several federal courts that have affirmed *Bostock*'s explicit limitations to hiring and firing under Title VII. See, for example, *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) ("that text-driven reasoning applies only to Title VII, as *Bostock* itself and many subsequent cases make clear"), and *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022) ("the Supreme Court expressly declined to address the issue of sex-separated bathrooms and locker rooms").

B. The Guidance misapplies the Equal Protection Clause.

Proposed paragraph (c) of 2 CFR § 200.300 is based on constitutional error. The Guidance says "the Federal agency must take account of the heightened constitutional scrutiny that may apply under the Constitution's Equal Protection clause for government action that provides differential treatment based on sexual orientation or gender identity."

This is flawed for three reasons. First, the "Equal Protection Clause" resides in the Fourteenth Amendment, but that amendment applies to the states—not to the federal government. Second, grantees are not government actors by virtue of their receipt of funds, and therefore are not subject to constitutional equal protection limitations. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 832–33, 843 (1982). It is a misnomer to impose equal protection principles on them. Recently, the Education Department stated it is too burdensome to impose federal constitutional protections as a condition of grant compliance. *See* 88 FR at 10861. Third, sexual orientation and gender identity are not properly considered suspect classifications triggering heightened scrutiny under equal protection principles. *See, e.g.*, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013).

III. Agencies lack authority to impose § 200.300(b) and (c).

Agencies lack authority to impose paragraphs (b) and (c) of 2 CFR § 200.300 of the Guidance. If a federal statute does not prohibit sexual orientation and gender identity discrimination, there is no underlying authority for an agency to impose that prohibition as a grant condition. Notably, agencies are prohibited from imposing additional substantive regulations such as these under the Housekeeping Statute, 5 U.S.C. § 301. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979).

As noted above, *Bostock* does not extend beyond hiring and firing under Title VII. Moreover, the Equal Employment Opportunity Commission is the agency specifically tasked with enforcing Title VII. 42 U.S.C. § 2000e-4. Even if § 200.300(b) was limited to Title VII, it would be improper for all of the agencies to subsume Title VII enforcement by adding it to their grant conditions.

IV. The Guidance undermines protections for speech and religion.

A. The Guidance would be illegal for ignoring RFRA.

The Supreme Court has said that failure to "overtly consider" the burdens of a regulation on religious liberty interests, including those protected by RFRA, can render an agency regulation arbitrary and capricious under the APA. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). Yet the Guidance makes no mention and includes no consideration of these burdens.

This is a glaring flaw in light of the Guidance's explicit reliance on *Bostock*. The Supreme Court clearly stated it was "deeply concerned with preserving" the constitutional and statutory rights of religious institutions. 140 S. Ct. at 1753–54.

The court also singled out RFRA, stating that it "operates as a kind of super statute, displacing the normal operation of other federal laws," and therefore that "it might supersede Title VII's commands in appropriate cases." *Id.* at 1754.

In short, *Bostock* did nothing more than apply sexual orientation and gender identity nondiscrimination principles to hiring and firing under Title VII, and even there it explicitly stated RFRA displaces Title VII. This Guidance, in contrast, purports to extend *Bostock* to every federal statute prohibiting sex discrimination, yet the Guidance refrains from requiring RFRA protections *even* for Title VII where *Bostock* said it would apply. The Guidance disregards law both coming and going.

B. The Guidance cherry picks the constitution.

The Guidance also is deeply inadequate with respect to constitutional protections. The existing version of § 200.300 explicitly requires "protecting free speech [and] religious liberty," but the proposed Guidance removes that language without offering an explanation. The Guidance then cherry picks the (inapplicable) Equal Protection Clause, and does so only as to purported heightened scrutiny for sexual orientation and gender identity.

The elimination of free speech and religious liberty from paragraph (a) cannot be explained by the fact that the paragraph still generally requires compliance with the U.S. Constitution, because paragraph (c) goes on to single out the Equal Protection Clause. As a matter of drafting history, this creates two classes of constitutional rights: the disfavored deleted clauses and the favored added clauses. But agencies are not permitted to choose which constitutional provisions to follow.

The Guidance is flawed for deleting requirements to uphold operate programs consistent with religious liberty and the Free Exercise Clause of the First Amendment. Although the Guidance incorrectly attempts to impose heightened scrutiny under the inapplicable Equal Protection Clause, actual *strict* scrutiny applies under RFRA yet the Guidance says nothing about that requirement. Strict scrutiny also applies to these grants regulations under the Free Exercise Clause under the rationale in *Fulton*.

The Guidance further errs by deleting and then failing to address the Free Speech Clause of the First Amendment. Imposing nondiscrimination on the basis of sexual orientation and gender identity gives threatens compulsory speech upon creative professionals and improper pronoun use generally. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 581 (2023), and *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021). Agencies would commit serious neglect by imposing new nondiscrimination requirements while eliminating language protecting free speech and elevating other constitutional clauses for special treatment.

Federal agencies cannot choose which parts of the constitution to favor and comply with, and which ones to disfavor and ignore. The Guidance selectively identifies some constitutional provisions for elimination from the rule, and another

clause for inappropriate emphasis, all while increasing the threat posed to the eliminated rights. Finalizing this change would be the epitome of arbitrary and capricious rulemaking.

V. Conclusion.

For all these reasons, ADF respectfully requests that OMB eliminate paragraphs (b) and (c) of 2 CFR § 200.300, and to restore paragraph (a)'s explicit direction to protect free speech and religious liberty.

Sincerely,

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