November 29, 2023

Office of Federal Financial Management
Office of Management and Budget
Submission Electronically Via www.regulations.gov

Re: Docket ID OMB–2023–0017, Guidance for Grants and Agreements, Section 2 CFR § 200.300

Citizens Defending Freedom ("CDF") submits this comment on the Notice of Proposed Rulemaking ("NPRM") by the Office of Federal Financial Management ("OFFM"), Office of Management and Budget ("OMB") on Guidance for Grants and Agreements under Docket ID OMB–2023–0017. The submission is provided specifically under Section 2 CFR § 200.300, "Statutory and national policy requirements."

CDF is a non-profit organization that educates citizens to defend their faith and freedom, including religious liberty, which in its nature is an unalienable right that is endowed by our Creator and guaranteed by America's founding documents. Among others, the NPRM raises significant issues under both the Free Speech and Free Exercise Clauses of the First Amendment to the United States Constitution, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq. ("RFRA").

Removal of the Explicit Rule to Protect Free Speech and Religious Liberty and Misapplication of Bostock v. Clayton County

The foundational principle of religious liberty is of enduring importance in our constitutional republic, enshrined in our Constitution and reflected throughout the history and traditions of the United States. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be protected in all levels of government activity, including agency programming germane to the administration of Federal grants and awards.

As proposed, the NPRM in section 2 CFR § 200.300 paragraph (a) intentionally removes the explicit rule "protecting free speech" and "religious liberty" in the administration of Federal grants and awards. The intentional removal of the explicit constitutional protection of free speech and religious liberty is evidence of the intent to explicitly or implicitly approve of government activity that targets religious conduct and suppress the free exercise thereof.

Additionally , NPRM section 2 CFR § 200.300 paragraph (b) is predicated upon the incorrect legal application of the United States Supreme Court's holding in *Bostock v. Clayton County*.[1] The question in *Bostock* was "whether an employer who fires someone simply for being homosexual or transgender" violates Title VII of the Civil Rights Act of 1964 [2] the federal law that makes it unlawful for certain employers to "discriminate against" an employee because of the employee's "race, color, religion, sex, or national origin."[3] The Supreme Court explicitly limited *Bostock* to hiring and firing under Title VII and 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.[4] Moreover, the *Bostock* majority did not adopt gender identity as a protected category, stating that its decision did not turn on whether the definition of sex "captured more than anatomy" or "reached at least some norms concerning gender identity and sexual orientation."[5]

As proposed, the NPRM in section 2 CFR § 200.300 paragraph (b) is in direct conflict with the explicit reasoning of *Bostock* by concluding:

> "Federal awards that are subject to Federal statutes prohibiting discrimination based on sex, the Federal agency or pass-through entity must ensure that the award is 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)."

Under this rational, NPRM section 2 CFR § 200.300 paragraph (b) asserts authority to conditionally administer grants based on the flawed misapplication of *Bostock* by expanding the Supreme Court's reasoning far beyond hiring and firing decisions under Title VII. Moreover, the NPRM supplants the Supreme Court by adopting gender identity as a universally protected category without lawful authority granted by Congress. The Constitution's vesting of the lawmaking power in Congress precludes those federal lawmakers from writing regulatory blank checks to agencies. [6] The framers meant to keep the "power to enact laws restricting the people's liberty" with the people and their representatives—not shift it to unelected administrators.[7] As a result of the NPRM, grant and award administration would intentionally weaponize programmatic decisions contrary to the religious liberty of faith-based organizations based upon perceived sexual orientation or gender identity discrimination.

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[1] 140 S. Ct. 1731 (2020)
[2] *Id*. at 1753
[3] 42 U.S.C. § 2000e–2(a)(1)
[4] *Bostock*, 140 S. Ct. at 1753
[5] *Id.* at 1739
[6] *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019)
[7] *Id*. at 2134 (Gorsuch, J., dissenting)

The "government may not compel a person to speak its own preferred message."[8] Nor may the federal government "burden" a person's "religious exercise by putting [him] to the choice" of following federal law or "approving" behavior "inconsistent with [his] beliefs."[9] The NPRM compels faith-based organizations to choose between the tenuous options of abandoning their sincerely held religious beliefs regarding biological sex and gender identity issues or abandoning the public they serve with the opportunity to compete for resources provided by Federal grants and awards. Faith-based organizations should be protected against making such a choice based upon their unalienable religious rights. Faith based organizations should be protected from such actions and full participation in government programs on an equal basis with nonreligious organizations should be the standard, not an exception. The NPRM should not attempt to place conditions on grants and awards that causes interference in the internal governance affairs of faith-based organizations or to limit those organizations' otherwise constitutionally protected activities. The NPRM effectively does both by relinquishing the constitutional and statutory protections for faith-based organizations by prohibiting participation in programs for those organizations, and targets those that do not align with the government approved sexual orientation or gender identity beliefs of the government.

The Religious Freedom Restoration Act

In *Bostock*, the Supreme Court stated that it is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution"—a "guarantee" that "lies at the heart of our pluralistic society"—and flagged three doctrines protecting religious liberty it thought relevant to the question. [10] The Court then discussed RFRA as a "super statute" that "might supersede Title VII's commands in appropriate cases.[11] RFRA, passed with overwhelming bipartisan support and signed into law by President Bill Clinton, "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest."[12] The NPRM will substantially burden faith-based organizations exercise of religion even though the RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration.

The NPRM seemingly disregards the RFRA, and in fact indicates that *Bostock* applies broadly across the federal government for perceived discrimination based on sexual orientation or gender identity. The complete disregard for RFRA in this context is consistent with the

[8] *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023)
[9] *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021)
[10] Bostock, 140 S. Ct. at 1754.
[11] *Id.*
[12] *Id.* (citing 42 U.S.C. § 2000bb-1)

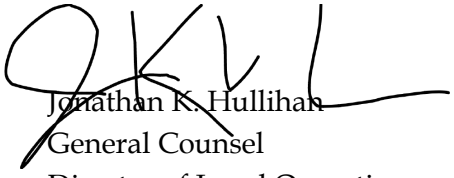
removal in the NPRM of the explicit rule in paragraphs (a) of 2 CFR § 200.300, requiring "protecting free speech" and "religious liberty" in the administration of Federal grants and awards.

Conclusion

Religious liberty is enshrined in our Constitution and specifically under the statutory authority of RFRA which passed with overwhelming bipartisan Congressional support. These protections encompass the right of all Americans to exercise their religion freely, without being coerced or forced to abandon sincerely held beliefs. Religious liberty includes the right of all Americans to express their religious beliefs, subject to the same narrow limits that apply to all forms of speech.

In the United States, the free exercise of religion is not a mere policy preference to be traded at the expense of American liberty. Nowhere in the U.S. Constitution is "sexual orientation" or "gender identity" mentioned, while the right to religious freedom and the free exercise thereof, is clearly enumerated as an unalienable right that is endowed by our Creator. It is a fundamental right recognized to avoid the very sort of religious persecution that led to the founding of the United States. For these reasons, CDF appeals to OMB to recognize and properly apply the holding in *Bostock* and the statutory protections of RFRA in paragraphs (b) and (c) of 2 CFR § 200.300. Additionally, CDF implores OMB to recommit to the protection of our foundational principles of protecting free speech and religious liberty in the administration of Federal grants and awards for all Americans by retaining the explicit rule in paragraphs (a) of 2 CFR § 200.300.

Very Respectfully,



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