



March 30, 2026

SUBMITTED VIA REGULATIONS.GOV

Technology Transformation Services
General Services Administration

**Re: Information Collection 3090-0290, System for Award Management
Registration Requirements for Financial Assistance Recipients, Docket No.
F2026-0001; Sequence No. 2**

We write to you on behalf of the American Civil Liberties Union Foundation (“ACLU”) to submit this comment in response to the above-docketed notice concerning a collection of information making changes to the pre-award registration requirements for Prime Financial Assistance Recipients, which was published in the Federal Register on January 28, 2026.¹ The proposed Financial Assistance General Representations and Certifications (“Proposed Certification”) do not comply with the Constitution or federal laws.² It is beyond the scope of the General Services Administration’s (“GSA”) authority, impermissibly vague, and imposes a significant burden on the recipients of federal financial assistance. We strongly oppose the Proposed Certification.

For over 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in the country. With more than seven million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all fifty states, Puerto Rico, and Washington, D.C., for the right of every individual to access opportunity free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. We have advocated against vague, unlawful policies, packaged as “anti-DEI,” that, in fact, undermine our civil rights and equal opportunity, at the federal, state, and local level.

The ACLU leads litigation challenging attempts to treat diversity, equity, and inclusion (“DEI”)³ efforts as unlawful in schools, early childhood education, and research. In *National Education Ass’n. v. U.S. Department of Education*, 779 F. Supp. 3d 149 (D.N.H. 2025) (“*NEA*”), the ACLU successfully blocked enforcement of the Department’s February 14, 2025 Dear

¹ System for Award Management Registration Requirements for Financial Assistance Recipients, 91 Fed. Reg. 3726 (proposed Jan. 28, 2026) [hereinafter, “Registration Requirements”].

² GSA System for Award Management Registration Requirements for Financial Assistance Recipients OMB Control No: 3090-0290, Justification Part A Supporting Statement (Feb. 18, 2026), <https://www.regulations.gov/document/GSA-GSA-2026-0001-0007> [<https://perma.cc/W53G-4US9>] [hereinafter, “GSA Supporting Statement”].

³ For purposes of this comment, the term “DEI” refers to diversity, equity, and inclusion efforts as well as diversity, equity, inclusion, and accessibility (“DEIA”) efforts.

Colleague Letter, which threatened to treat DEI efforts as unlawful and to withhold federal funding from schools. In *Washington State Ass’n. of Head Start & Early Childhood Assistance & Education Program v. Robert F. Kennedy, Jr.*, the ACLU obtained a preliminary injunction against the enforcement of the U.S. Department of Health and Human Services’ (“HHS”) diversity, equity, inclusion, and accessibility (“DEIA”) ban in Head Start early education programs. No. 25-cv-00781-RSM, 2026 WL 35858 (W.D. Wash. 2026) (“*Head Start*”). The ACLU also represents biomedical researchers in *American Public Health Ass’n. v. National Institutes of Health*, in which the district court held that the National Institutes of Health’s (“NIH”) purge of research on disfavored topics and populations—including purported “DEI” research—violated the Administrative Procedures Act. 791 F. Supp. 3d 119 (D. Mass. 2025) (“*APHA*”).

The Proposed Certification is rife with constitutional and procedural infirmities, plaguing the quality, utility, and reliability of the information collected. Further, compliance with the U.S. Constitution and relevant laws, guidance, and regulations is already assured through the current certification.⁴ The primary purpose of the Proposed Certification is to add new obligations not contained in the current certification. To minimize the burden of the collection of information on those who are to respond, the GSA should retain the current certification instead of imposing the Proposed Certification. There are significant legal concerns with the quality and clarity of the information to be collected, as discussed in detail below.

I. The Proposed Certification Adds New Certification Provisions.

The Proposed Certification seeks to modify the currently operative general certifications used in connection with the System for Award Management (“SAM”) portal by federal funding recipients. The pertinent change in the Proposed Certification is the incorporation of three new certification provisions, which add additional certifications relevant to specific areas of law.⁵

This comment addresses the first, the “Anti-DEI Provision” at proposed subsection (6),⁶ which requires funding recipients to certify that they:

⁴ GSA Supporting Statement, *supra* note 2, at 8–10, §§ (5), (9).

⁵ The Proposed Certification also adds a provision that reads:

To the extent that any of the certifications or representations on this page are the subject of an active court order or injunction that is legally binding on the recipient and the relevant awarding agency, and prohibits enforcement of such requirements, the affected certifications or representations will be deemed inapplicable to that recipient. All other certifications and representations not directly affected by such order shall remain in full force and effect.

Id. at 10. The Proposed Certification makes several other edits not touched on here.

⁶ The Proposed Certification also includes an “Immigration Provision” at subsection (7) and a “Public Safety Provision” at subsection (8). *Id.* at 9. The ACLU opposes these provisions for the same reasons as the Anti-DEI provision.

(6) Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs (See Titles VI and VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and 2 C.F.R. § 200.303 Internal controls). Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs. Entities that receive federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race or color. Examples of practices that may violate applicable Federal anti-discrimination laws include:

- (i) Granting preferential treatment based on race or color, such as race-based scholarships or programs, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity, including through the use of “cultural competence” requirements, “overcoming obstacles” narratives, or “diversity statements;”
- (ii) Segregation based on race or color, such as race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility;
- (iii) Other unlawful use of race or color as criteria, such as race-based “diverse slate” policies in hiring, race-based selection for contracts, or race-based program participation or resource allocation;
- (iv) Training programs that stereotype, exclude, or single out individuals based on protected characteristics or create a hostile environment; or
- (v) Retaliation by taking adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws. Protected activities include raising concerns or filing complaints about, or objecting to or refusing to participate in, discriminatory programs, trainings, or policies;⁷

In its Federal Register notice, GSA states that these amendments are intended to update the current certifications “to align with updated executive branch guidance including”⁸ the July 29, 2025 “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination”

⁷ *Id.* at 8–9, § (6).

⁸ Registration Requirements, *supra* note 1, 91 Fed. Reg. at 3726.

issued by the U.S. Department of Justice (“2025 DOJ Guidance”),⁹ as well as Executive Order (“EO”) 14173 of January 21, 2025, titled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.”¹⁰ GSA describes the Proposed Certification as “applicable to all entities receiving grants, cooperative agreements, and financial assistance such as loans, insurance, and direct appropriations.”¹¹ The Federal Register notice estimates it will take respondents 2.75 hours per response to complete the certification,¹² compared to the 2.5 hours estimated for the current version of the certification, which was implemented in 2018.¹³

GSA cites the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, as authority for its proposed Information Collection.¹⁴ The Proposed Certification does not change the procedures for collecting general certifications in connection with the use of SAM.

II. The Proposed Certification Is Inconsistent With The Paperwork Reduction Act.

The purpose of the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* (1995), is to streamline the collection of information by or for the federal government, including the minimization of paperwork burden and the improvement of the government’s productivity, efficiency, and effectiveness. *Id.* Amongst other goals, it seeks to create, collect, maintain, use, disseminate, and retain information for the public benefit of information. *Id.*

The Paperwork Reduction Act was not intended to create new substantive obligations, and GSA has not identified any independent authority for the Proposed Certification. The Paperwork Reduction Act “does not authorize *what* information an agency may collect, but rather governs the process of authorizing *how* any agency collects information that suits its objectives. It prescribes a framework to ensure oversight, not to expand substantive power.” *Steele v. United States*, 144 F.4th 316, 323 (D.C. Cir. 2025). If the Proposed Certification merely duplicates existing legal obligations, it runs contrary to the requirements of the Paperwork Reduction Act to *minimize* unnecessary and inefficient burdens on the public.

⁹ U.S. DEP’T OF JUST., GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION (July 29, 2025), <https://www.justice.gov/ag/media/1409486/dl> [<https://perma.cc/8H9X-GUBE>] [hereinafter, “2025 DOJ Guidance”].

¹⁰ Exec. Order No. 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 31, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-01-31/pdf/2025-02097.pdf> [<https://perma.cc/GF3X-3XAH>] [hereinafter, “Ending Illegal Discrimination”].

¹¹ Registration Requirements, *supra* note 1, 91 Fed. Reg. at 3726.

¹² *Id.*

¹³ System for Award Management Registration Requirements for Prime Grant Recipients, 83 Fed. Reg. 51955, 51957 (Oct. 15, 2018) [hereinafter, “2018 Registration Requirements for Prime Grant Recipients”].

¹⁴ Registration Requirements, *supra* note 1, 91 Fed. Reg. at 3726.

III. The Proposed Certification Is Not Necessary.

- a. To the extent that the Proposed Certification is merely duplicative of existing obligations, it is unnecessary.

Applicants for and recipients of federal financial assistance are already required to certify compliance with the Constitution, federal laws, and applicable executive orders governing federal financial assistance. Additionally, many agencies already require applicants and recipients of federal financial assistance to certify compliance with anti-discrimination laws in OMB Form 424b, belying GSA's representation that this information will be provided to the government once and used several times.¹⁵ If the Anti-DEI Provision merely reiterates existing obligations without expansion, it is unnecessarily duplicative and runs afoul of the Paperwork Reduction Act's obligation to reduce the burden of information collection. *See supra* Part II; 44 U.S.C. § 3501.

- b. Any attempt to extend substantive obligations through the Proposed Certification is flawed.

The Anti-DEI Provision would improperly broaden substantive obligations on federal financial assistance recipients. It incorporates the 2025 DOJ Guidance and EO 14173, characterizing DEI and DEIA as “discriminatory practices.”¹⁶ The Anti-DEI Provision then provides five examples of practices that it declared “may violate applicable Federal anti-discrimination laws,” including, as discussed *supra* Part I, activities that are statutorily required or have been cited approvingly by the Supreme Court.¹⁷

As such, the Proposed Certification is a substantive change that prescribes new anti-discrimination obligations; it does not only collect information pursuant to existing obligations.

- c. The Proposed Certification cannot be necessary because it exceeds GSA's authority over procurement.

The Federal Property and Administrative Services Act of 1949 (“Property Act”) gives the GSA authority over procurement for executive agencies, including “contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting.” 40 U.S.C. § 501(b)(1)(A). The E-Government Act of 2002 required GSA to “maintain and promote an integrated Internet-based system of providing the public with access to Government information and services.” Pub. L. No. 107-347, § 204, 116 Stat. 2899, 2913 (2002). Pursuant to this authority, the GSA

¹⁵ GSA Supporting Statement, *supra* note 2, at 2.

¹⁶ *Id.* at 8, § 6.

¹⁷ *Id.*

consolidated “government-wide acquisition and award support systems into SAM.”¹⁸ GSA noted that SAM would “streamline[] Federal acquisition business processes . . . [and] improve[] the efficiency of doing business with the Government.”¹⁹

1. The Property Act only authorizes GSA to take actions that improve the economy, efficiency, or service of the federal government.

The GSA should not replace its current certification with the Proposed Certification because the Property Act is limited to the collection of information that improves the economy, efficiency, or service of the government. 40 U.S.C. § 501(a)(1)(A); *see also State v. Su*, 121 F.4th 1, 9 (9th Cir. 2024) (acknowledging the Property Act does not provide “unrestrained authority to issue any procurement policy”); *Commonwealth v. Biden*, 57 F.4th 545, 553 (6th Cir. 2023) (invalidating rule promulgated pursuant to the Property Act that bore “no necessary relationship to whether the government’s system of entering into contracts for . . . goods and services will be more efficient”); *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981) (emphasizing the need for “a reasonably close nexus between the efficiency and economy criteria of the [Property] Act and any exactions imposed on federal contractors by Executive Orders promulgated under its authority”).

However, GSA provides no explanation of how the proposed addition of new certifications serves economy and efficiency. Rather, the GSA’s Supporting Statement only speaks to the need for the Information Collection, the reason for the Information Collection, and the burdens imposed by broadly referencing the collection of general certifications as a practice.²⁰ But nothing in this proposed Information Collection changes the procedures or practice of collecting certifications through the generalized form. The Information Collection serves instead to incorporate new provisions regarding specific and selective areas of federal law. Neither the Federal Register notice nor the Supporting Statement provides any explanation of how these changes would impact efficiency and economy.

2. GSA has no authority to dictate antidiscrimination law and policy beyond procurement.

Notably, GSA is statutorily authorized to streamline procurement, not to create new anti-discrimination law and policy applicable to programs outside of its authority. *See Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (explaining that “an agency literally has no power to act . . . unless and until Congress confers power upon it”). The Proposed Certification would have a significant impact on programs and activities unrelated to procurement. While GSA may properly require certification with existing anti-discrimination law, GSA has no

¹⁸ System for Award Management Name Change, Phase 1 Implementation, 78 Fed. Reg. 37676 (June 21, 2013).

¹⁹ *Id.*

²⁰ GSA Supporting Statement, *supra* note 2, at 1–3, 6–7.

authority to impose new understandings of anti-discrimination law that go beyond and conflict with the current law. *See infra* Part IV(b).

The Supreme Court, declined to read statutory text to grant extraordinary powers to an administrative agency absent “clear congressional authorization” in *West Virginia v. EPA*, for reasons that apply here. 597 U.S. 697, 700 (2022). The Anti-DEI Provision extends beyond the narrow scope of the GSA’s authorization over procurement actions that improve economy, efficiency, or service to an endless breadth that encompasses the promulgation of new anti-discrimination law or policy. *Id.* at 728. “It is a fundamental canon of construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Id.* at 721 (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)).

Administrative agencies have authority to make anti-discrimination policy with regard to their own programs and are also equipped with subject matter expertise. They are better suited to make such policy, rather than the GSA, which has “no comparative expertise.” *Id.* at 729. Finally, “the last place one would expect to find” the ability to impose new anti-discrimination obligations is buried in the Property Act’s certifications. *Id.* at 730. Because the Property Act lacks any clear authorization related to anti-discrimination law or policy, the Proposed Certification must fail.

IV. The Proposed Certification Lacks Practical Utility.

The Proposed Certification lacks practical utility for purposes of the collection of information because it is impermissibly vague. The Anti-DEI Provision is undefined in scope, conflicts with current law, and is likely to increase chill and uncertainty amidst this federal administration’s many efforts to eliminate and malign programs related to DEI.

a. The Proposed Certification is undefined in scope.

The Anti-DEI Provision entirely fails to define DEI,²¹ leaving readers to guess what types of programs the administration might have in mind for purposes of this certification. This raises critical Fifth Amendment due process and Spending Clause concerns.

i. The Proposed Certification raises Fifth Amendment due process and vagueness concerns.

As courts have recently held in challenges to similarly undefined DEI prohibitions in the Department of Education’s Dear Colleague Letter, “where a law regulates conduct based on ‘wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings,’ it is likely to be void for vagueness.” *NEA*, 779 F. Supp. 3d at 187 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)) (finding a likelihood of success on Plaintiffs’ due process claim against the U.S. Department of Education’s DEI prohibitions); *see also NAACP v. U.S. Dep’t of Educ.*, 779 F. Supp. 3d 53, 66 (D.D.C. 2025) (“threatening penalties . . . without sufficiently defining the conduct that might trigger liability, violates the Fifth Amendment’s

²¹ *See id.* at 8, § (6).

prohibition on vagueness.”) (same finding); *Am. Fed’n of Tchrs. v. U.S. Dep’t of Educ.*, 796 F. Supp. 3d 66, 118 (D. Md. 2025) (vacating the Department of Education’s DEI prohibitions because “the terms at issue are so broad and involve inherent value judgments, they leave regulated persons without proper notice of what conduct they must certify they are not engaging in, and they empower the government to enforce the Certification Requirement arbitrarily.”).

Absent a workable, robust definition of DEI, the Trump administration has broadly construed the term to prohibit any consideration of race or inequality, even when statutorily mandated. In the analogous context of federal grants issued by the NIH, enforcement of similar undefined anti-DEI provisions resulted in the abrupt bulk termination of hundreds of rigorously-vetted research projects on some of America’s most pressing public health needs. *APHA*, 791 F. Supp. 3d at 164–65. Terminated grants included research on minority health conditions and other populations that experience health disparities—despite the fact that Congress has *mandated* that NIH fund such research. *See, e.g.*, 42 U.S.C. § 285t(a); *see also id.* §§ 285t(b), 282(h). Examples of purported “DEI studies” terminated by NIH include:

- A Multi-level Intervention to Reduce Kidney Health Disparities
- Sexual orientation-related disparities in obstetrical and perinatal health
- 3T-Prevent: Piloting a multi-level, combination intervention strategy to expand HIV and bacterial STI prevention
- Elucidating the high and heterogeneous risk of gestational diabetes among Asian Americans: an integrative approach of metabolomics, lifestyles, and social determinants
- Assessing Cervical Cancer Healthcare Inequities in Diverse Populations: The ACHIEVE Study
- LINC: A Culturally Adapted Care Coordination Suicide Detection and Intervention Model for Black Youth

In July 2025, the district court declared NIH’s actions unlawful, finding that NIH’s reliance on an undefined term like DEI “allow[ed] the [Public Officials] to arrive at whatever conclusion [they] wish[] without adequately explaining the standard on which [their] decision is based.” *APHA*, 791 F. Supp. 3d at 180 (citation omitted).²² The court emphasized that this lack of clarity is “wholly unfair to the career-HHS and NIH personnel . . . Without a definition of DEI, they embarked on a fool’s errand resulting in arbitrary and capricious action.” *Id.* The court found that, by blacklisting “DEI studies” without any meaningful definition, NIH had “weaponize[ed] what should not be weaponized—the health of all Americans through its abuse of HHS and the NIH systems, creating chaos and promoting an unreasonable and unreasoned agenda of blacklisting certain topics, that on this Administrative Record, has absolutely nothing

²² While the Supreme Court subsequently issued a partial stay of the court’s order, that partial stay only reached the district court’s jurisdiction over grant termination claims. Indeed, the Supreme Court explicitly declined to stay the portion of the ruling that struck down NIH’s *policy directives*, including their anti-DEI provisions, as arbitrary and capricious. *See Nat’l Insts. of Health v. Am. Pub. Health Ass’n*, 145 S. Ct. 2658 (2025).

to do with the promotion of science or research.” *Id.* at 131. Respondents submitting the Proposed Certification now face similar concerns, held to a standard that leaves DEI undefined yet under suspicion, across every federally funded program.

In the context of the federal government’s administration of the Head Start program, HHS’s implementation and enforcement of EO 14173 and EO 14151²³ through similar anti-DEI policies has reached a variety of legitimate and legally required programs. *See Head Start*, No. 25-cv-00781-RSM at *11 (recognizing Head Start providers “face a ‘Hobson’s choice’ between a penalty or no funding and meeting their statutory diversity requirements and no clarity on how to comply”).²⁴ For example, because of HHS’s enforcement of a DEI prohibition, a Head Start program sought to provide professional development “on working with children with autism to support more than 10% of enrolled children, but [was] forced to remove these plans along with . . . other ‘prohibited’ terms from applications as a ‘condition of grant renewal.’” *Id.*²⁵

Other Head Start providers also had grant applications rejected because a wide range of language in their application was flagged as impermissible because it may be construed to reference DEI terms. For example, a Head Start program in Washington was required to remove the following language: “respect and acceptance for all: recognizing, valuing, encouraging and supporting community and individual differences and perspectives” and “ensur[ing] the unique qualities of each family are affirmed as strengths and staff experience a program where everyone belongs.”²⁶ In fact, nearly 200 words were prohibited from Head Start grant applications, including words like “accessible,” “activism,” “barrier,” “belong,” “disability,” “environmental quality,” “historically,” “female,” “Native American,” “pollution,” “status,” “trauma,” and “victim.”²⁷ *Head Start*, No. 25-cv-00781-RSM at *11.

Another recent example comes from the Department of Government Efficiency’s (“DOGE”) review of whether National Endowment for the Humanities grants were DEI-related. A DOGE employee marked a documentary about Jewish women’s slave labor during the Holocaust as DEI because “[t]he documentary addresses gender-based violence and overlooked

²³ Exec. Order No. 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 20, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-01-29/pdf/2025-01953.pdf> [<https://perma.cc/KK8C-UZ6T>].

²⁴ The preliminary injunction prohibits “Defendants and . . . any person in active concert or participation with them who receives actual notice of this Order . . . from enforcing and/or implementing . . . actions that enforce or implement Executive Orders No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025) or No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025) against any Head Start agencies, program providers, student or family participants, or other similar persons or entities Requiring any Head Start agency to make ‘certifications’ or other representations pursuant to the DEIA Certification or other similar requirement” *Washington State Ass’n. of Head Start & Early Childhood Assistance & Educ. Program v. Robert F. Kennedy, Jr.*, No. 25-cv-00781-RSM, 2026 WL 35858, at *13 (W.D. Wash. 2026) (“*Head Start*”). Any effort to require Head Start agencies to agree to the Anti-DEIA Provision would violate the plain text of this injunction.

²⁵ *See also* Decl. of Joel Ryan in Supp. of Pls.’ Mot. for a Prelim. Inj., ECF No. 42, at ¶ 78 (May 16, 2025), *Head Start*, No. 25-cv-00781-RSM (Head Start agency required to remove training on compliance with the Americans with Disabilities Act).

²⁶ Supp. Decl. of Joel Ryan in Supp. of Pls.’ Mot. for a Prelim. Inj., ECF No. 101, at ¶¶ 4–5 (Aug. 15, 2025), *id.*

²⁷ *See also* Decl. of Mary Roe in Supp. of Pls.’ Mot. for a Prelim. Inj., ECF No. 135-1, at Ex. C (Dec. 5, 2025), *id.*

histories contributing to DEI by amplifying marginalized voices.”²⁸ In defending this decision, he asserted that, because the documentary is a “gender-based story,” it is “inherently discriminatory to focus on this specific group.”²⁹ The DOGE employee also stated that a document would be considered DEI “if it explores historical events that significantly impacted Black civil rights” because “it’s focused on a singular race” rather than being “for the benefit of humankind.”³⁰

These examples demonstrate how broadly and inconsistently anti-DEI prohibitions have been applied by the federal government. Funding recipients have good reason to fear that the Anti-DEI Provision will result in similarly harmful arbitrary and illegal enforcement.

ii. The Proposed Certification raises Spending Clause concerns.

Further, the Spending Clause, U.S. Const. art. I, § 8, cl.1, requires that any conditions attached to the receipt of federal funds are unambiguous and clearly stated in advance, so that recipients considering acceptance of those funds can do so knowingly and voluntarily. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The conditions here fall far short of these requirements because the lack of a definition of DEI means recipients are “unable to ascertain” the conditions, and thus cannot knowingly decide whether to “accept [the] funds and the obligations that go with those funds.” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

To start, the Anti-DEI Provision requires certification broadly to “the U.S. Constitution, all Federal laws, and relevant executive orders.”³¹ It does not identify specific Executive Orders or refer at all to guidance. And yet, the GSA’s Federal Register notice states that the changes to the certification are intended to “align with updated executive branch guidance” including both the 2025 DOJ Guidance as well as EO 14173.³² GSA appears to require compliance with these specific two documents, without explicit reference to them in the Anti-DEI Provision. It is impossible for respondents to know from the face of the Proposed Certification that these documents were incorporated.

Uncertainty about the scope and mandatory nature of the incorporated documents deepens the Anti-DEI Provision’s vagueness. The 2025 DOJ Guidance explicitly states that it offers only “non-binding suggestions” rather than “mandatory requirements.”³³ And EO 14173 makes only vague references to “illegal DEI” without providing any examples or definitions of

²⁸ Dep. of Justin Fox Tr., Ex. 1, ECF No. 248-1, 187:3–6 (March 6, 2026), *The Authors Guild v. Nat’l Endowment for the Humanities*, No. 25-cv-03657-CM (S.D.N.Y. 2026), <https://www.mla.org/content/download/192790/file/248-1.pdf> [<https://perma.cc/6HBQ-PKE7>].

²⁹ *Id.* at 190:5–7.

³⁰ *Id.* at 220:9–18.

³¹ GSA Supporting Statement, *supra* note 2, at 8, § (6).

³² Registration Requirements, *supra* note 1, 91 Fed. Reg. at 3726.

³³ 2025 DOJ Guidance, *supra* note 9, at 1, 9.

what types of programs or conduct would constitute illegal DEI.³⁴ However, the Proposed Certification requires assurance of compliance.

Taken together, the Proposed Certification’s requirements are entirely unclear, negating any potential utility and raising significant constitutionality concerns.

b. *The Proposed Certification conflicts with current law.*

In addition to the salient vagueness and arbitrary enforcement concerns, the Anti-DEI Provision appears to prohibit activities that are both permissible and, indeed, required by law and other agency’s anti-discrimination implementing regulations.

For example, the Anti-DEI Provision lists “the use of ‘cultural competence’ requirements” as an example of a practice that may violate the law.³⁵ However, cultural competence is a legal *requirement* for certain programs. For example, “[c]ultural competence” specifically has been promoted by HHS as an important aspect of Head Start programs, which they defined as “a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals that enables effective work in cross-cultural situations.”³⁶ Additionally, Head Start agencies must provide “linguistically and culturally appropriate” services that foster children’s learning and development. 42 U.S.C. §§ 9836a(a)(2)(A), (b)(2)(A). As part of this requirement, Head Start agencies must implement policies and practices that support the unique learning needs of children with limited English proficiency and dual language learners. *See, e.g.*, 45 C.F.R. §§ 1302.30, 1302.90(d). Also, under the Head Start Act, both HHS and Head Start agencies are obligated to “develop and implement a program of outreach to recruit and train professionals from diverse backgrounds to become Head Start teachers.” 42 U.S.C. § 9843(c). Agencies must “ensure” that all their staff “are familiar with the ethnic backgrounds and heritages of families in the program and are able to serve and effectively communicate” 45 C.F.R. § 1302.90(d)(1); *see id.* § 1302.33(c)(2)(iii) (requiring those who “conduct[] the screening or assessment know and understand the child’s language and culture”); *id.* § 1302.91(e)(6)(ii) (home visitors must “[d]emonstrate competency . . . to build respectful, culturally responsive, and trusting relationships with families”).

Similarly, certain Medicare programs must comply with “Culturally and Linguistically Appropriate Services” Standards (“CLAS Standards”) “[t]o ensure that information provided . . . is culturally and linguistically appropriate to the needs of the population being served.” 45 C.F.R. § 155.215(c). These regulations require, among other things, that the entity “[d]evelop and maintain general knowledge about the racial, ethnic, and cultural groups in their service area, including each group’s diverse cultural health beliefs and practices, preferred languages, health literacy, and other needs;” “[r]eceive ongoing education and training in culturally and linguistically appropriate service delivery;” and “[i]mplement strategies to recruit, support, and promote a staff that is representative of the demographic characteristics, including primary

³⁴ Ending Illegal Discrimination, *supra* note 10, 90 Fed. Reg. at 8633–35.

³⁵ GSA Supporting Statement, *supra* note 2, at 8, § (6)(i).

³⁶ *See, e.g.*, OFF. OF HEAD START, ADMIN. FOR CHILD. AND FAMILIES, U.S. DEP’T OF HEALTH AND HUM. SERVS., USING CULTURAL COMPETENCE TO SOLVE PROBLEMS, <https://headstart.gov/culture-language/learning-module/using-cultural-competence-solve-problems> [<https://perma.cc/2BQK-A57W>].

languages spoken, of the communities in their service area.” *Id.* There is no clear way for entities to comply with these legal programmatic requirements as well as the Anti-DEI Provision.

The Anti-DEI Provision also lists the use of “‘overcoming obstacles’ narratives, or ‘diversity statements’” as examples of possible violations.³⁷ However, the use of such tools was specifically identified by the Supreme Court in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* as a potentially permissible admissions practice: “as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” 600 U.S. 181, 230 (2023). The Anti-DEI Provision makes no acknowledgement of this and instead suggests that these tools are suspect and potentially may not be used at all, a position which is beyond the scope of, and inconsistent with, federal anti-discrimination law.

The Proposed Certification’s reference to the 2025 DOJ Guidance fares no better. To start, the 2025 DOJ Guidance similarly casts doubt on cultural competence requirements, overcoming obstacles narratives, and diversity statements,³⁸ which is problematic for the reasons discussed above. One court has even described the 2025 DOJ Guidance as “inconsistent with Supreme Court precedent that has consistently declined to find constitutionally suspect the adoption of race-neutral criteria out of a desire to improve racial diversity and inclusion.” *Martin Luther King, Jr. Cnty. v. Turner*, 798 F. Supp. 3d 1224, 1249 (W.D. Wash. 2025) (quotation and citations omitted). The court went on to find that this “demonstrates that Plaintiffs are at the mercy of Defendants’ interpretation of federal antidiscrimination laws, regardless of how those laws are interpreted by the courts.” *Id.*

The 2025 DOJ Guidance also states that one of the “best practices” is to evaluate performance metrics “without reference to race, sex, or other protected traits.”³⁹ But elsewhere, federal law explicitly requires such collection. For example, the Head Start Act requires Head Start agencies to complete an assessment for which they “collect and utilize data that describes community strengths, needs, and resources and include, at a minimum: Relevant demographic data about eligible children and expectant mothers, including: Race and ethnicity.” 45 C.F.R. § 1302.11(b)(2)(i)(A). Annually, Head Start agencies “update the community assessment to identify any significant shifts in community demographics, needs, and resources that may impact program design and service delivery” and must consider “how the program addresses equity, accessibility, and inclusiveness in its provision of services.” *Id.* § 1302.11(b)(5). These conflicts are irreconcilable.

Without objective standards, these vague and contradictory requirements encourage arbitrary and discriminatory enforcement, including False Claims Act liability.⁴⁰ The False Claims Act’s penalties are severe, permitting treble damages and imprisonment for up to five years. 31 U.S.C. § 3729(a); 18 U.S.C. §§ 287, 1001(a). The False Claims Act also permits private parties to bring civil actions for perceived violations under its *qui tam* provision. 31

³⁷ GSA Supporting Statement, *supra* note 2, at 8, § 6(i).

³⁸ 2025 DOJ Guidance, *supra* note 9, at 5.

³⁹ *Id.* at 1, 9.

⁴⁰ GSA Supporting Statement, *supra* note 2, at 9, § 9(i).

U.S.C. § 3730(b). As one court described, the threat of suits by private actors “rais[es] the specter of a public ‘witch hunt’ that will sow fear and doubt among [respondents] lest they be publicly branded as peddlers of ‘divisive ideologies’ based on the Department’s—or even private parties’—subjective assessments.” *NEA*, 779 F. Supp. 3d at 192 (describing the DEI prohibitions of Department of Education’s 2025 Dear Colleague Letter and enforcement efforts). Such threats undoubtedly increase the confusion and chill that recipients of this Certification will feel.

Taken together, this administration’s previous efforts to implement and enforce DEI bans, many of which have been successfully prevented through litigation, informs the significant concerns with, and lack of utility of, the Proposed Certification.

V. The Estimated Public Burden Of The Proposed Certification’s DEI Prohibitions Is Inaccurate And Is Not Based On Valid Assumptions And Methodology.

GSA currently estimates that the Proposed Certification will take 2.75 hours for respondents to complete—only 0.25 hours more than the current certification.⁴¹ This is likely a severe underestimate, particularly given the vagueness concerns outlined above. To certify in advance that their federally funded programs do not run afoul of the Proposed Certification’s prohibitions, respondents will have to closely scrutinize the vague prohibitions to attempt to discern their meaning then spend time assessing each of their programs to determine if they might now be prohibited by these new pronouncements. If any of their programs risk conflicting with the unclear reach of the Proposed Certification, they will need to spend additional time revising their programs to attempt to comply. This entire process will likely require consultation with legal counsel, GSA, and other federal agencies, as respondents will undoubtedly be unsure as to the scope of the certification’s reach.

In a similar certification context, where schools and educators attempted to assess compliance with anti-DEI provisions in the U.S. Department of Education’s now-vacated Dear Colleague Letter from February 14, 2025, respondents and impacted employees submitted evidence emphasizing the significant burden that assessing compliance, or modifying their practices to bring them into their best understanding of compliance, would have. One school district superintendent noted: “I cannot possibly evaluate whether all programs may be covered by the Letter given any number of interpretations that the Letter is subject to.”⁴² Teachers considering whether they might need to adapt their curriculums described doing so as “akin to fixing a plane while flying”⁴³ and being “extremely disruptive to not only my time but also to

⁴¹ *Compare* Registration Requirements, *supra* note 1, 91 Fed. Reg. at 3726, *with* 2018 Registration Requirements for Prime Grant Recipients, *supra* note 13, 83 Fed. Reg. at 51957.

⁴² Decl. of John Shea in Supp. of Mot. for TRO, at ¶ 16, ECF No. 56-15, *Nat’l Educ. Ass’n. v. U.S. Dep’t of Educ.*, No. 25-cv-00091-LM (D.N.H. 2025).

⁴³ Decl. of NEA Member A in Supp. of Mot. for Prelim. Inj., at ¶ 26, ECF No. 34-11, *id.*

students.”⁴⁴ To put it plainly, “[i]mpossible requirements imposed by an agency are perform unreasonable.” *All. for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991).

In the Head Start context, one Head Start agency “identified at least eight programs in its grant that may be viewed as DEI related, which likely cannot be overcome by mere changes to the descriptions.”⁴⁵ The agency noted that compliance with a DEIA ban would require changing “core aspects of their programs.”⁴⁶ Another agency stated that compliance with a DEIA ban would force Head Start programs “to scale back the services offered, and in some cases, may be forced to limit enrollment or close entirely.”⁴⁷

These examples make clear that the estimated burden is very likely a vast underestimate, casting doubt on the assumptions and methodology underlying this Proposed Certification.

VI. Conclusion

The Proposed Certification runs afoul of the Constitution and federal law. It would create new anti-discrimination law or policy, which is beyond the scope of the GSA’s authority and unrelated to the Property Act’s mandate to improve economy, efficiency, or service of the federal government. Further, the Proposed Revision is impermissibly vague and conflicts with current anti-discrimination law. It imposes a significant public burden that is not based on valid assumptions or methodology.

Because the Proposed Certification is not necessary, serves no public utility, and is extremely burdensome on the recipients of federal financial assistance, we urge the GSA to retain the current certification instead of imposing the Proposed Certification.

Respectfully submitted,

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⁴⁴ Decl. of NEA Member B in Supp. of Mot. for Prelim. Inj., at ¶ 27, ECF No. 34-12, *id.*

⁴⁵ Decl. of Jennie (Mauer) Maunnamalai in Supp. of Pls.’ Mot. for Prelim. Inj., at ¶ 35, ECF No. 39, *Head Start*, No. 25-cv-00781-RSM.

⁴⁶ *Id.* at ¶ 34.

⁴⁷ Decl. of Lauri Morrison-Frichtl in Supp. of Pls.’ Mot. for Prelim. Inj., at ¶ 28, ECF No. 41, *id.*