AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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Appraisal Subcommittee of the Federal Financial Institutions Examination Council
Marine Mammal Commission
Millennium Challenge Corporation
National Credit Union Administration

Re: Regulation for Federal Financial Assistance; Docket No. OMB-2026-0034 (RIN 0348-AB88)

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To Whom It May Concern:

The American Civil Liberties Union ("ACLU") submits this comment in response to the above-docketed notice ("Proposed Rule") concerning proposed revisions to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards ("Uniform Guidance") and related agency rules.[1] The ACLU strongly opposes the Proposed Rule and urges the Office of Management and Budget ("OMB") and all agencies to withdraw it in its entirety.

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 law 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, disability, national origin, citizenship status, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. The ACLU also has a long history of defending First Amendment freedoms from government restriction, including upholding the principle of viewpoint neutrality in government funding of private speech. The ACLU works in the legislatures and courts to ensure that LGBTQIA+ people can live openly without discrimination and enjoy equal rights, personal autonomy, and freedom of expression and association. The ACLU has a long, proud history of vigorously defending reproductive freedom as well, including against discriminatory funding restrictions that target abortion care. The ACLU has continuously advocated to restore comprehensive abortion coverage for everyone, regardless of their income level or insurance type. Moreover, the ACLU and its affiliates have long relied on and advocated for disparate impact liability to protect equal access to housing, employment, education, and other essential opportunities. The ACLU has advocated against the current administration's unlawful bans on diversity, equity, inclusion, and accessibility ("DEIA"), gender ideology, gender-affirming care, and reproductive health care that, by design and in practice, undermine civil rights and civil liberties. The ACLU represents many clients who would be impacted by this Proposed Rule, including non-profit organizations who serve transgender and gender nonconforming people, researchers and scientists, Head Start agencies and families, community health centers, artists and arts organizations, and other recipients of federal funding.

The ACLU strongly opposes the Proposed Rule for several reasons. First, the Proposed Rule is a thinly veiled attempt to usurp congressional authority and consolidate power over all federal funding programs within the Executive Office of the President in order to aggressively impose the administration's political agenda over congressionally established mandates. The Proposed Rule runs afoul of the U.S. Constitution, including separation of powers principles, the Spending Clause, federalism principles, and the First, Fifth, and Fourteenth Amendments. Many

[1] Regulation for Federal Financial Assistance, 91 Fed. Reg. 32198 (May 29, 2026) (hereinafter, "Proposed Rule"), https://www.federalregister.gov/documents/2026/05/29/2026-10817/regulation-for-federal-financial-assistance. The ACLU submits this comment to OMB and all executive award-making agencies who have "joined this proposed rulemaking." *Id.* at 32205.

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of the proposed provisions also conflict with congressionally established mandates and requirements under federal statutory law, raising further legal concerns under the Administrative Procedure Act. And most critically, the Proposed Rule will lead to widespread and devastating harms, costs, and burdens for agencies, pass-through entities, and recipients and subrecipients of federal funding, will disrupt essential federal programs, benefits, and services, will alter and fundamentally undermine scientific research, will penalize and suppress the expression of disfavored viewpoints by private speakers, and will inflict significant harms on the American public, particularly for historically marginalized and otherwise vulnerable communities. The ACLU urges that OMB and all executive agencies withdraw the Proposed Rule in its entirety.[2]

I. The Proposed Rule Is a Thinly Veiled Attempt to Usurp Power and Impose the Administration's Political Agenda Over Congressional Mandates.

a. The Proposed Rule upends settled expectations of the communities that the ACLU serves by abruptly reversing OMB's longstanding policies and practices related to federal financial assistance.

For over two decades, OMB has made clear that its policies regarding federal financial assistance are "guidance, not regulation."[3] The Introduction to the Uniform Guidance provides: "Publication of the OMB guidance in the [Code of Federal Regulations ("CFR")] does not change its nature – *it is guidance, not regulation*. . . . OMB guidance is *not regulatory*."[4] Federal award-making agencies may choose to adopt and "give regulatory effect to the OMB guidance, to the extent that the agency regulations require compliance with all or portions of the OMB guidance."[5] The Proposed Rule reverses this longstanding policy and purports to "clarify the status of the 2 CFR regulatory text as an OMB regulation," failing to clearly acknowledge or provide any reasonable explanation for its abrupt change in position.[6]

Prior to the establishment of the Uniform Guidance, OMB provided oversight over federal financial assistance through policy directives known as "circulars." In 2004, title 2 of the CFR was established as a central location for OMB's guidance and federal award-making agencies' regulations related to federal financial assistance.[7] In response to comments that publication of its guidance in the CFR "could blur the important distinction between guidance and regulations,"

[2] The ACLU believes that the Proposed Rule should be withdrawn in its entirety for myriad reasons, many of which are addressed in this comment. The fact that particular provisions, statements, proposals, reasoning, or other actions by OMB, award-making agencies, or the current administration are not addressed herein does not indicate or concede that the ACLU agrees with such provisions, statements, proposals, reasoning, or particular aspects of the Proposed Rule or other actions by OMB, award-making agencies, or the current administration.
[3] 2 CFR §§ 1.105(b)-(c), 1.220, 1.305, 182.15. *See also* Office of Management and Budget ("OMB"), Establishment of CFR title for policy guidance for grants and agreements, 69 Fed. Reg. 26276 (May 11, 2004), https://www.federalregister.gov/documents/2004/05/11/04-10351/governmentwide-guidance-for-grants-and-agreements-federal-agency-regulations-for-grants-and.
[4] 2 CFR § 1.105(b)-(c) (emphasis added).
[5] 2 CFR §§ 1.105(c), 1.220, 1.305, 182.15.
[6] Proposed Rule, at 32200. *See also id.* at 32199, 32205–06.
[7] OMB, Establishment of CFR title for policy guidance for grants and agreements, 69 Fed. Reg. 26276 (May 11, 2004), https://www.federalregister.gov/documents/2004/05/11/04-10351/governmentwide-guidance-for-grants-and-agreements-federal-agency-regulations-for-grants-and.

OMB agreed with the "suggestion that we preface any OMB guidance published in the CFR with statements that clearly make that distinction"—including the existing language that OMB's policies are "guidance and not regulation" and "not regulatory" in subtitle A.[8] Moreover, in response to commenters who "suggested developing uniform government-wide regulations," OMB stated:

> Regarding the development of uniform government-wide regulations, *there is great variety in Federal program purposes, in the needs and preferences of the different types of recipients* (*e.g.*, State or local government agencies, institutions of higher education, or other nonprofit organizations) *that receive awards under those programs, and in Federal agencies' organizational approaches to carrying out assistance award and administration functions.* Developing uniform, government-wide regulations for some parts of the OMB guidance (*e.g.*, parts where differences in program purposes and recipients are most important) could have an unintended effect of broadening to all agencies, programs, and their recipients more requirements than needed.[9]

OMB's position that its policies are "guidance, not regulation" has remained consistent through multiple revisions to title 2 of the CFR. In 2013, OMB published in the Federal Register a "Final guidance" titled "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" ("Uniform Guidance"), which kept intact provisions clarifying that it was "guidance, not regulation," and would not have regulatory effect until its adoption by federal award-making agencies.[10] Since then, OMB has repeatedly recognized that only federal award-making agencies can give regulatory effect to the Uniform Guidance, explaining as recently as 2024 that it is up to "[f]ederal agencies to implement all of its provisions . . . consistent with their legal authority and the particular statutes and regulations governing each of their Federal financial assistance programs."[11] OMB's existing approach has properly accounted for various needs and requirements across the myriad different programs, recipients, authorizing statutes, and regulations administered by over 40 award-making agencies.[12] The Proposed Rule runs roughshod over these different agencies' programs and requirements and proposes an unworkable, "one size fits all" approach to regulations that will leave agencies, pass-through entities, recipients, and subrecipients with the difficult task of divining which regulations do or do not apply to any particular program. And OMB imposes this approach with an iron fist, establishing that OMB's

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[8] *Id.*

[9] *Id.* (emphasis added).

[10] OMB, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (hereinafter, "2013 Guidance"), 78 Fed. Reg. 78590 (Dec. 26, 2013), https://www.federalregister.gov/documents/2013/12/26/2013-30465/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards.

[11] OMB, Guidance for Federal Financial Assistance, 89 Fed. Reg. 30046, 30075 (Apr. 22, 2024), https://www.govinfo.gov/content/pkg/FR-2024-04-22/pdf/2024-07496.pdf.

[12] *Id.* at 30067 (acknowledging that "[t]he range of Federal programs, recipient types, and program activities is diverse and not all Federal programs would warrant or benefit from" blanket requirements).

regulations, once adopted by agencies, would govern when they conflict with other regulatory provisions that aren't otherwise required by federal statute.[13]

The Proposed Rule also departs from OMB's prior positions regarding the limited scope of the Uniform Guidance, including as it relates to the interpretation of nondiscrimination laws. In responding to comments—including "that OMB lacks legal authority to impose a nondiscrimination policy with respect to all Federal financial assistance programs," OMB clarified in its 2024 Uniform Guidance: "The determination of whether any kind of discrimination is prohibited in any individual Federal financial assistance program *depends on the laws applicable to that program*, . . . and *agencies* will make relevant assessments on *a program-by-program basis*."[14] Accordingly, OMB made clear that it "[wa]s not purporting to interpret any particular [] discrimination statute," leaving it to the agencies administering the programs to enforce nondiscrimination laws "as appropriate."[15]

Despite this history, OMB now appears to suggest that its Uniform Guidance has *always* been regulatory, without clearly addressing or providing any reasonable explanation for its sudden reversal of its explicit and longstanding position. Although it cites the text in 2 CFR § 1.105, OMB asserts that the Proposed Rule simply "intend[s] to *clarify the status of the regulatory text* in subtitle A, rather than constituting a fundamentally new approach or change in direction"—disregarding the Proposed Rule's departure from decades-long policy.[16] In addition, the Proposed Rule seeks to impose vague and harmful bans on so-called diversity, equity, inclusion, and accessibility ("DEIA"), gender ideology, and gender-affirming care based on "OMB's interpretation of Federal anti-discrimination laws," without even acknowledging its change in position that it is up to award-making agencies—and not OMB—to interpret the application of anti-discrimination statutes to federal funding programs.[17] This sudden reversal, without any reasonable explanation, is unprecedented in OMB's history, undermines the legitimacy of the Proposed Rule, and will cause profound disruptions and harms. *See infra* Section IX.

b. The Proposed Rule attempts to usurp power over all federal funding programs to impose the administration's political agenda over congressional mandates.

The Proposed Rule is a thinly veiled attempt to seize congressional authority and consolidate power over all federal funding programs within the Executive Office of the President to unilaterally impose the administration's political agenda over statutory mandates. Indeed, this expansion of OMB's authority is consistent with the administration's express goal of dismantling executive agencies[18] and OMB Director Russell Vought's proclamation in Project 2025: "Once its

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[13] Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees, 91 Fed. Reg. 32245 (July 7, 2026) (proposed § 200.101(d)(2)).
[14] OMB, Guidance for Federal Financial Assistance, 89 Fed. Reg. 30046, 30075 (Apr. 22, 2024) (emphasis added), https://www.federalregister.gov/documents/2024/04/22/2024-07496/guidance-for-federal-financial-assistance.
[15] *Id.*
[16] Proposed Rule, at 32206 (emphasis added).
[17] *Id.* at 32220.
[18] Laura Barrón López, Ali Schmitz, & Taylor Bowie, *Democrats Ask OMB Nominee Vought About Goals of Replacing Civil Servants With Appointments*, PBS News (Jan. 15, 2025), https://www.pbs.org/newshour/show/democrats-ask-omb-nominee-vought-about-goals-of-replacing-civil-servants-with-appointees; *see also* Andy Kroll, *The Technocrat*

reputation as the keeper of 'commander's intent' is established, then and only then does OMB have the ability to shape the most efficient way to pursue an objective."[19]

The Proposed Rule also puts politics over people through its politicization of essential federal funding programs. Proposed Section 200.205, for example, would require all applicants for federal funding to undergo a pre-issuance review by political appointees to evaluate whether the proposals are consistent with "Federal agency priorities[] and the national interest"—subjecting applicants to arbitrary denials based on political bias.[20] Proposed Section 200.339 also puts recipients and subrecipients at risk of coordinated and politically motivated attacks by broadening agencies' authority to withhold, suspend, or terminate funds without ensuring adequate notice and process, as well as permitting agencies to "cooperate with individuals or organizations in their pursuit of private causes of action and civil remedies based on the failure of a recipient or subrecipient to comply" with federal laws or the terms and conditions of a federal award.[21] These provisions leave recipients vulnerable to political targeting and retaliation by the administration and raise serious legal concerns under federal law, as discussed below.

II. The Proposed Rule Raises Significant Separation of Powers, Spending Clause, and Federalism Concerns.

a. The Proposed Rule runs afoul of separation of powers principles and the Spending Clause.

The Proposed Rule implicates separation of powers principles and the Spending Clause, which allocate to Congress—and not the Executive—the power to direct how federally appropriated funds should be spent and what conditions are attached to that spending.

First, under separation of powers principles, an Executive agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). For agencies charged with administering statutes, "[b]oth their power to act and how they are to act is authoritatively prescribed by Congress." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). That is because "[a]dministrative agencies are creatures of statute," and "accordingly possess only the authority that Congress has provided." *NFIB v. OSHA*, 595 U.S. 109, 117 (2022). OMB has failed to establish that it has congressionally delegated authority to

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Engineering a Vast Expansion of Trump's Power, The New Yorker (Oct. 17, 2025), https://www.newyorker.com/magazine/2025/10/27/russell-vought-profile-donald-trump; Michael Sozan & Ben Olinsky, *Project 2025 Would Destroy the U.S. System of Checks and Balances and Create an Imperial Presidency*, Center for American Progress (Oct. 1, 2024), https://www.americanprogress.org/article/project-2025-would-destroy-the-u-s-system-of-checks-and-balances-and-create-an-imperial-presidency/.

[19] Russ Vought, *Executive Office of the President of the United States*, Project 2025: Mandate for Leadership: The Conservative Promise, The Heritage Foundation (2023) (hereinafter, "Project 2025"), at 45, https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf; *see also* Laura Barrón López, Ali Schmitz, & Taylor Bowie, *Democrats Ask OMB Nominee Vought About Goals of Replacing Civil Servants With Appointments*, PBS News (Jan. 15, 2025), https://www.pbs.org/newshour/show/democrats-ask-omb-nominee-vought-about-goals-of-replacing-civil-servants-with-appointees.

[20] Proposed Rule, at 32212, 32248–49.

[21] *Id.* at 32225, 32258.

issue the Proposed Rule. None of the authorities cited in the Proposed Rule contains an express delegation of authority to OMB to issue these sweeping government-wide regulations on all federal funding programs.[22] Moreover, the Proposed Rule is entirely silent as to the statutory authorities relied on by the over 40 federal award-making agencies.[23] The absence of any express delegation by Congress is especially glaring, as the Proposed Rule raises many "major questions" of great political and economic significance that require an express delegation by Congress. *See Learning Resources, Inc. v. Trump*, 607 U.S. 229, 243 (2026) (quoting *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022)). "[U]nder our system of separation of powers, neither good intentions nor pressing policy problems can substitute for an agency's lack of statutory authority to act." *Kaweah Delta Health Care Dist. v. Becerra*, 123 F.4th 939, 944 (9th Cir. 2024). In asserting this power, OMB raises serious concerns that it arrogates for itself the powers the Constitution allocates to Congress.

The Proposed Rule also raises separation of powers concerns by imposing conditions on congressionally-appropriated funds that run directly counter to express requirements and directives Congress imposed through the statutes governing the impacted federal funding programs. *See, e.g.*, *Child Trends, Inc. v. U.S. Dep't of Educ.*, 795 F. Supp. 3d 700, 727 (D. Md. 2025) ("Where Congress has spoken in mandatory terms and appropriated funds accordingly, the Executive's refusal to carry out such programs does not represent merely a failure to comply with statute but usurps Congress's authority with the Executive's own policy preferences in violation of the Constitution."); *Chicago Women in Trades v. Trump*, 778 F. Supp. 3d 959, 990-91 (N.D. Ill. 2025); *Washington v. U.S. Dep't of Health & Hum. Servs.*, No. 6:25-CV-01748-AA, 2025 WL 3002366, at *21 (D. Or. Oct. 27, 2025).

Some examples of these direct conflicts are discussed further below, *see* Section III(b), illustrating how the Proposed Rule "ignore[s] statutory mandates . . . merely because of policy disagreement with Congress," something that even the President may not do. *See In re Aiken Cnty.*, 725 F.3d 255, 260, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.). In enacting regulations that ignore statutory mandates, the Executive Branch "takes measures incompatible with the expressed or implied will of Congress," without the constitutional power to do so. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Indeed, multiple courts have already enjoined provisions of President Trump's executive orders on "gender ideology" on precisely these grounds. *See, e.g.*, *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405, 432 (D. Md. 2025); *Washington v. Trump*, 768 F. Supp. 3d 1239, 1261 (W.D. Wash. 2025).

In addition, the Proposed Rule raises Spending Clause concerns by attaching conditions to the receipt of federal funds that are vague and ambiguous and do not bear a relationship to the purpose of the federal spending, as discussed further below. *See generally South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *New York v. United States,* 505 U.S. 144, 167 (1992). When an agency's interpretation creates ambiguity, it makes it impossible for recipients to decide whether to "accept [the] funds and the obligations that go with those funds." *See Arlington Cent. Sch. Dist. Bd. of Educ. V. Murphy*, 548

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[22] *See* 31 U.S.C. § 503(a).
[23] *See* Proposed Rule, at 32198–32305.

U.S. 291, 296 (2006). And when funding conditions conflict with statutory objectives and bar that which is required or at least permitted and encouraged by the enabling statutes, the conditions "do not 'bear [a] relationship to the purpose of the federal spending.'" *San Francisco Unified Sch. Dist. v. AmeriCorps*, 789 F. Supp. 3d 716, 750 (N.D. Cal. 2025) (quoting *New York,* 505 U.S. at 167). As a result of these defects, the Proposed Rule runs afoul of the Spending Clause. *See, e.g.*, *New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 568 (S.D.N.Y. 2019) (finding violation of Spending Clause where agency rule imposed "uncertain ground rules for compliance," including by imposing standards that conflicted with relevant laws); *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 532 (N.D. Cal. 2017) (finding Spending Clause violation where executive order's "vague language [did] not make clear what conduct it proscribes or give jurisdictions a reasonable opportunity to avoid its penalties"); *San Francisco Unified Sch. Dist.*, 789 F. Supp. 3d at 745, 750 (holding anti-DEIA directive's "new conditions are highly ambiguous" and "conflict with [the] overall statutory purpose" and thus likely violate the Spending Clause).

b. The Proposed Rule raises serious federalism concerns, requiring a federalism assessment.

While the Proposed Rule proclaims that it "would not have sufficient federalism implications to warrant the preparation of a federalism assessment" since it "is inherently national in scope and significance,"[24] the Proposed Rule in fact raises substantial federalism concerns and requires a federalism assessment in accordance with Executive Order 13132.[25] In accordance with the Constitution's division of governmental responsibilities between the federal government and the states, Executive Order 13132 requires agencies to "carefully assess the necessity for" any action that "would limit the policymaking discretion of the States."[26] Such actions include regulations "that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[27] As OMB acknowledges, the Proposed Rule would affect state, local, and territorial governments, that account for over one-third of unique federal funding recipients,[28] and affect a broad range of activities and conduct traditionally regulated by states with the support of federal funding.

For example: In seeking to restrict the provision of gender-affirming care through proposed Section 200.300 ("Gender-Affirming Care Ban"),[29] the Proposed Rule encroaches on an area of traditional state regulation and the states' sovereign prerogative to "direct control of medical practice." *Linder v. United States*, 268 U.S. 5, 18 (1925); *cf. Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (rejecting argument that Congress implicitly delegated to "a single executive officer the power to effect a radical shift of authority from the States to the Federal Government to define

[24] Proposed Rule, at 32235.
[25] Executive Order 13132, 64 Fed. Reg. 43255 (Aug. 10, 1999) (hereinafter, "Executive Order 13132"), https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf.
[26] *Id.* at 43256.
[27] *Id.* at 43255.
[28] OMB, A Regulatory Impact Analysis of Proposed Revisions to 2 CFR 200, OMB-2026-0034-0038 (May 29, 2026), at 6-7, https://www.regulations.gov/document/OMB-2026-0034-0038.
[29] Proposed Rule, at 32235.

general standards of medical practice in every locality" with respect to physician-assisted suicide). The Constitution dictates that "state lawmakers, not the federal government," are "the primary regulators of professional [medical] conduct." *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004) (quoting *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002)), *aff'd sub nom. Gonzales*, 546 U.S. 243; *see also Oregon v. Kennedy*, No. 6:25-CV-02409-MTK, 2026 WL 1048354, at *11 (D. Or. Apr. 18, 2026) (quoting *Ashcroft*, 368 F.3d at 1124) (same, in rejecting HHS Secretary Kennedy's declaration effectuating EO 14187). "States, not the federal government, traditionally have regulated the practice of medicine," and "[c]hoosing what treatments are or are not appropriate for a particular condition is at the heart of the practice of medicine." *Judge Rotenberg Educ. Ctr., Inc. v. U.S. Food & Drug Admin.*, 3 F.4th 390, 400 (D.C. Cir. 2021) (citations omitted).

The Gender-Affirming Care Ban dramatically upsets that federal-state balance. Gender-affirming medical care for transgender adolescents is lawful in the majority of states, and many states and the District of Columbia have enacted laws affirmatively protecting access to such care.[30] Yet the Gender-Affirming Care Ban would usurp these states' historical authority over the practice of medicine and interfere with their prerogative to protect gender-affirming care "within [their] borders." *In re Admin. Subpoena No. 25-1431-019*, 800 F. Supp. 3d 229, 238-39 (D. Mass. 2025); *see also In re Subpoena No. 25-1431-014*, 810 F. Supp. 3d 555, 563 (E.D. Pa. 2025) ("The Framers reserved the police power, and with it the authority to set standards of medical care, to the states[.]").

Given the scale of this disruption, OMB would require—at minimum—Congress to have spoken clearly when delegating such broad and unprecedented authority to it. *See Sackett v. EPA*, 598 U.S. 651, 679 (2023) ("[T]he EPA must provide clear evidence that it is authorized to regulate in the manner it proposes."). But 31 U.S.C. § 503(a)(2), which OMB cites as the source of its authority here, contains no such clear statement that Congress intended for the agency to "encroach[] upon [this] traditional state power" in this manner. *See SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *see also Bond v. United States*, 572 U.S. 844, 858 (2014) (courts presume that Congress does not nullify state law absent clear evidence of that intent). Indeed, the statutory text fails to evince *any* intent to disturb states' regulation of the practice of medicine—let alone *clearly* so. Requiring such clarity is doubly important here, as Congress has elsewhere explained that agencies should refrain from "exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided."[31]

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[30] *See Equality Maps: Bans on Best Practice Medical Care for Transgender Youth*, Movement Advancement Proj., http://www.mapresearch.org/equality-maps/healthcare/youth_medical_care_bans; Movement Advancement Proj., Healthcare Laws and Policies: "Shield" or "Refuge" Laws Protecting Access to Transgender Health Care 3 (Jan. 1, 2026), https://perma.cc/3K7S-GJ9D.

[31] 42 U.S.C. § 1395. The Gender-Affirming Care Ban also runs afoul of separation of powers principles because it raises major questions of great political and economic significance with significant consequences across the country. *See United States v. Skrmetti*, 605 U.S. 495, 525 (2025) (noting the provision of gender-affirming medical care for transgender minors has provoked "fierce" policy debates, and the "implications for all are profound"). *See also Learning Resources, Inc. v. Trump*, 607 U.S. 229, 242-43 (2026); *Gonzales*, 546 U.S. at 267 (rejecting argument that Congress implicitly delegated authority to Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide, even where legal under state law, because "[t]he importance of the issue of physician-

III. The Proposed Bans on DEIA, Gender Ideology, and Gender-Affirming Care Are Unjustified and Raise Significant Legal Concerns.[32]

The Proposed Rule seeks to impose a sweeping and government-wide ban on the use of federal awards to "fund, promote, encourage, subsidize, or facilitate" the following:

- Diversity, equity, inclusion, and accessibility ("DEIA") policies, principles, and practices, including "racial preferences" or "activities where race or intentional proxies for race will be used as a selection criterion for employment or program participation" ("DEIA Ban");[33]
- Gender ideology, including "theories or ideologies that deny the biological reality of sex or the sex binary," or "endorse or advocate for the notion that sex is a chosen or mutable characteristic" ("Gender Ideology Ban");[34] and
- The "'transition' of a child under 19 years of age from one sex to another, including the chemical and surgical mutilation of children" ("Gender-Affirming Care Ban").[35]

The DEIA, Gender Ideology, and Gender-Affirming Care Bans run afoul of federal law, including the First, Fifth, and Fourteenth Amendments to the U.S. Constitution. As discussed above, *see supra* Section II, the Bans also raise serious concerns under separation of powers principles, the Spending Clause, and federalism principles, as well as the Administrative Procedure Act, by directly conflicting with congressionally established requirements in myriad authorizing statutes for federal funding programs. Moreover, the Bans are not based on reasonable justifications and will inflict widespread harms, costs, and burdens, particularly for historically marginalized and otherwise vulnerable communities.[36]

a. The DEIA, Gender Ideology, and Gender-Affirming Care Bans run afoul of the U.S. Constitution.

i. *If adopted by agencies that offer grants to fund private expression, the Bans and related provisions would violate the First Amendment.*

The DEIA, Gender Ideology, and Gender-Affirming Care Bans would require that, "to the maximum extent permitted by law," every listed agency must ensure that its awards are not used

assisted suicide, which has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect") (citations and quotation marks omitted).

[32] For the same reasons set forth herein, the ACLU strongly opposes other proposed revisions to award-making agencies' regulations, including, but not limited to, the proposed recission of HHS's nondiscrimination requirements (*see* 2 C.F.R. § 300.300) without any acknowledgement or reasoning. *See* Proposed Rule, at 32264.

[33] Proposed Rule, at 32253.

[34] *Id.*

[35] *Id.*

[36] Relatedly, proposed Sections 200.205, 200.318, and 200.321 remove requirements to provide opportunities to underserved groups, including veterans, women, minorities, people with barriers to employment, and people residing in high-poverty, disadvantaged communities. These sections require expansive recruitment efforts to ensure that everyone has access to opportunities. Broadening the pool of well-qualified applicants does not undermine merit; OMB's equation of inclusion with mediocrity, without any evidentiary support, will perpetuate harmful stereotypes.

to "promote" DEIA, "[g]ender ideology" or "[t]he so-called 'transition' of a child."[37] Similarly, proposed Section 200.205 would require each agency, "to the extent consistent with applicable law," to ensure that awards are not used to "promote" "racial preferences," "[d]enial by the recipient of the sex binary in humans," "illegal immigration," or "[a]ny other initiatives that . . . promote anti-American values."[38] Given the full list of agencies considering implementation of these provisions, this would include barring funding for everything from litigation to art to biomedical research on the basis of viewpoint.

The full universe of messages prohibited or disfavored by these provisions is hard to pinpoint—for example, what exactly constitutes "promoting racial preferences" or what would be deemed "anti-American values"—but it is clear that adoption of the provisions would bar funding for projects that express views disfavored by the government. And, as numerous courts considering similar viewpoint-based penalties or prohibitions in government grantmaking for private speech have recently made clear, that would violate the First Amendment. *See, e.g.*, *Thakur v. Trump*, 176 F.4th 1187 (9th Cir. 2026) (enjoining termination of grants because of their perceived connection to "diversity, equity, inclusion, and accessibility" and the "promotion of gender ideology"); *RILA v. NEA,* 800 F. Supp. 3d 351, 362 (D.R.I. 2025) ("*RILA*") (enjoining NEA's policy of disfavoring projects that "promote gender ideology" in federal arts grantmaking); *Schiff v. U.S. Off. of Pers. Mgmt.*, 784 F. Supp. 3d 380, 393–94 (D. Mass. 2025) (noting that implementation of similar policy involved refusing to support speech "that acknowledged the existence of people who identify themselves as transgender"). *Cf. Nat' l Educ. Ass'n v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 149, 194 (D.N.H. 2025) ("*NEA*") (addressing coercion of schools to suppress disfavored viewpoints in violation of the First Amendment); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Such policies would be "viewpoint based, because [they would] assign[ ] negative weight to the expression of certain ideas on the issue of gender identity," race, immigration, and more. *See RILA*, 800 F. Supp. 3d at 362. Any policy "to disfavor applications that promote [perspectives disfavored by the government] precisely because they promote [such perspectives] . . . promises to penalize [grant applicants] based on their speech." *Id.* at 368. For all agencies that offer funding to facilitate private speech, these provisions would violate the First Amendment.

"Viewpoint discrimination . . . represents an egregious form of content regulation, and governments in this country must nearly always abstain from it." *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (citation modified). And, contrary to the First Amendment defense offered in the proposed rule, this prohibition on viewpoint discrimination governs in the funding context. "[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). "[E]ven in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (citation modified) (quoting *Regan v. Tax'n With Representation of Wash*., 461 U.S. 540, 550 (1983)). The Supreme Court has made clear that, when the government creates a program "designed to facilitate private speech, not to promote a governmental message," it cannot pick and

[37] Proposed Rule, at 32253.

[38] *Id.* at 32249.

choose which projects to fund, or what recipients can say with the funding, based on viewpoint. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). This First Amendment rule governs across all government funding for private speech—whether the funded expression takes the form of, for example, litigation, *id.*, artistic works, *see Finley*, 524 U.S. at 587, or research in the university setting, *see Rust v. Sullivan*, 500 U.S. 173, 199–200 (1991).

That the government seeks to impose the same ideological prohibitions across agencies, "regardless of the programs . . . which they . . . fund" makes the First Amendment violation particularly clear. *See Thakur*, 176 F.4th 1187, at 1202-03. This is far from properly "defin[ing] the limits and purposes of [any particular] program." *Id.* at 1202 (quoting *Velazquez*, 531 U.S. at 543). *See also Schiff*, 784 F. Supp. 3d at 395 (holding that the government's decision to remove articles that discuss health disparities for LGBTQ individuals from government website about patient safety was unlawful in part because it "had [nothing] to do with patient safety" and, "[t]o the contrary . . . undermine patient safety"). To the contrary, this proposal reflects an effort by the government to use the full weight of its alleged power to impose viewpoint conformity across all agencies and programs. That would clearly "leverage [the government's] power to award subsidies . . . into a penalty on disfavored viewpoints." *Thakur*, 176 F.4th 1187, at 1202 (quoting *Finley*, 524 U.S. at 587).

ii. *The Bans raise serious due process and vagueness concerns in conflict with the Fifth Amendment.*[39]

1. The Bans fail to define key terms or the conduct prohibited.

The DEIA and Gender Ideology Bans are unconstitutionally vague, in violation of the Fifth Amendment, because they "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [they] prohibit[]" and "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The Bans do not provide fair notice by failing to define key terms, including "DEIA" and "gender ideology," or clarify what conduct would constitute impermissible "promotion," "encouragement," "subsidization," or "facilitation."[40] Without objective standards that can be consistently applied, the Bans are "so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991); *see also Sessions v. Dimaya,* 584 U.S. 148, 175 (2018) (Gorsuch, J., concurring in part) (noting that vague measures "can invite the exercise of arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."). First, the DEIA Ban entirely fails to define "DEI," "DEIA," or DEI/DEIA "policies, principles, or practices." In failing to define these key terms, the DEIA Ban leaves agencies, pass-through entities, recipients, and subrecipients to guess what could be

[39] The ACLU opposes the incorporation of the DEIA Ban, 2 C.F.R. § 200.300, in 2 C.F.R. §§ 200.205, 200.403, and 1122.1 for the same reasons.

[40] The vagueness of the Bans is not remedied by OMB's reliance on recent Executive Orders, which also provide vague descriptions of so-called "DEIA" and "gender ideology." *See* Executive Order 14168, at 2(f), 90 Fed. Reg. 8615 (Jan. 20, 2025) (hereinafter, "EO 14168") ("'Gender ideology' replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true" and "includes the idea that there is a vast spectrum of genders that are disconnected from one's sex.").

prohibited and invites arbitrary and discriminatory enforcement in violation of the Fifth Amendment.

As courts have recently held in challenges to similarly undefined DEI/DEIA prohibitions in the Department of Education's Dear Colleague Letter: "[W]here 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 prohibition on vagueness.") (same); *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.").

The Proposed Rule's claim that the Ban "does not expand the scope of applicable" anti-discrimination law does not remedy this vagueness. The Trump administration has broadly invoked the terms "DEI" and "DEIA" to prohibit any consideration of race, gender, disability, sexual orientation, or inequality, even when statutorily mandated for particular programs. 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. *Am. Pub. Health Ass'n v. Nat'l Insts. of Health*, 791 F. Supp. 3d 119, 164–65 (2025) ("*APHA*"). 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 undefined terms like DEI and DEIA "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).[41] 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 to do with the promotion of science or research." *Id*. at 131. Respondents subject to the Proposed DEIA Ban now face similar concerns, held to a standard that leaves DEIA undefined yet under suspicion, across every federally funded program.

Likewise, the Gender Ideology Ban fails to define "gender ideology." While the Proposed Rule refers to Executive Order 14168's definition thereof, the Executive Order itself is devoid of a sufficiently specific definition to survive a vagueness challenge. This "lack of clarity" is a textbook feature of a provision that is unconstitutionally vague because it "leaves recipients guessing as to what conduct will violate the Challenged Condition[] and leaves recipients vulnerable to arbitrary enforcement[.]" *Commonwealth of Massachusetts v. U.S. Dep't of Agric.*, No. 26-11396-MJJ, 2026 WL 1815807, at *21 (D. Mass. June 24, 2026); *see also id.* ("For example, the Gender Condition states that '[n]o funding shall be used to promote gender ideology.' . . . Would using those funds to hire researchers who identify as non-binary or transgender violate the Gender Condition?"); *City of Fresno v. Turner*, No. 25-CV-07070-RS, 2025 WL 2721390, at *1, 15 (N.D. Cal. Sept. 23, 2025) (finding that a grant condition "requiring grantees to certify they will prohibit the promotion of . . . gender ideology" is "impermissibly vague because [it] incorporate[s] the equally vague language of the EOs themselves"). Even assuming that there is a definition that would not raise the legal issues discussed herein, OMB's failure to define "gender ideology" subjects the Ban to the same risk of broad and inconsistent enforcement as the DEIA Ban. *See id.* at *16 ("Since the EO Grant Conditions leave it 'unclear as to what fact[s] must be proved' to comply while Defendants make clear their intent to 'vigorously enforce' them, Plaintiffs are likely to succeed on the merits of their claims that the EO Grant Conditions are impermissibly vague under the Fifth Amendment.") (citation omitted).

Even where agencies have attempted to define "gender ideology" through examples, this has not been enough to cure vagueness in the attempt to regulate an idea or way of thinking. For instance, in *Washington v. U.S. Department of Health and Human Services*, the U.S. Department of Health and Human Services ("HHS") sought to impose new grant conditions on non-discretionary health education grants, including by threatening to terminate these grants if states "fail[ed] to remove 'gender ideology' from program curricula[.]" No. 6:25-CV-01748-AA, 2025 WL 3002366, at *1 (D. Or. Oct. 27, 2025). While HHS argued that this grant condition was not impermissibly vague to specific terms and conditions laid out in its directive letters (*e.g.*, "teaching

[41] 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).

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that 'gender identity is distinct from biological sex or boys can identify as girls and vice versa, or that there is a vast spectrum of genders that are disconnected from one's sex'"), the "range of material" identified was still too "broad" to survive a vagueness challenge, especially because "the term ['gender ideology'] lacks scientific or any other discernable basis," making it essentially "undefinable." *Id.* at *23 (concluding proposed condition was "too vague to give Plaintiff States notice of what [HHS subagency] expects from them"). So too here. The Gender Ideology Ban is devoid of a definable scope or clear line between prohibited and permissible conduct in conflict with the Fifth Amendment.

Finally, the Bans fail to clearly define the particular conduct they prohibit, instead broadly restricting the use of federal awards to "fund, promote, encourage, or facilitate" so-called DEIA, gender ideology, and gender-affirming care. The Proposed Rule offers no objective guidelines to determine what actions would constitute "promotion," "encouragement," or "facilitation." Such defects are impermissible under the Fifth Amendment. In *Keyishian v. Board of Regents of University of State of New York*, for example, the Supreme Court struck down prohibitions on "mere[] advoca[cy] of a doctrine in the abstract" as unconstitutionally vague, noting the inability to discern the line between permissible and prohibited conduct, as well as reasonable probability that mere expression of belief would be penalized. 385 U.S. 589, 599-602 (1967), The Bans fare no better.

2. <u>The DEIA Ban does not define unlawful "proxies" for race and incorporates examples that conflict with law.</u>

The DEIA Ban prohibits "activities where race or intentional proxies for race will be used as a selection criterion for employment or program participation,"[42] but does not elaborate on how an agency would determine that a race-neutral factor was actually an intentional proxy for race. Moreover, the Proposed Rule's reference to proxies could lead funding recipients or applicants to consult other federal materials that discuss the concept of "proxies" for race, and those materials offer examples that are at odds with federal antidiscrimination law, as interpreted by the courts.

In justifying this revision, the Proposed Rule cites to the July 29, 2025 "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" issued by the Department of Justice ("2025 DOJ Guidance"), which only underscores the shortcomings of this approach.[43] Confusingly, the 2025 DOJ Guidance describes "cultural competence requirements," "'overcoming obstacles' narratives," and "diversity statements" as potentially unlawful proxies.[44] However, these activities are both permissible and, indeed, required by other agencies' anti-discrimination implementing regulations or other federal law, as discussed *infra*. 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.

[42] Proposed Rule, at 32253.
[43] *See* Proposed Rule, at 32203 (citing U.S. Dep't of Just., Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination (July 29, 2025) [hereinafter, "2025 DOJ Guidance"], https://www.justice.gov/ag/media/1409486/dl [https://perma.cc/8H9X-GUBE]).
[44] 2025 DOJ Guidance, at 5.

Supp. 3d 1224, 1249 (W.D. Wash. 2025) (citation modified). 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.*

Even though the 2025 DOJ Guidance lists cultural competence as a potentially unlawful proxy for race,[45] 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 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 DEIA Ban.

The 2025 DOJ Guidance also lists the use of "'overcoming obstacles' narratives, or 'diversity statements'" as examples of possible violations.[46] 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 ("SFFA")* 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 DEIA Ban 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.

3. <u>The qualifier "to the maximum extent permitted by law" does not rescue the Bans' vagueness.</u>

The qualifier that the Bans will be applied "to the maximum extent permitted by law" is confounding, given the Proposed Rule's failure to define "DEIA" or "gender ideology." There is no way to know what OMB and award-making agencies will interpret as "DEIA" or "gender ideology," as further demonstrated by the fact that many of the examples of unlawful proxies in the 2025 DOJ Guidance do not expressly mention those terms.

iii. *The Bans run afoul of the Equal Protection Clause.*

The Equal Protection Clause of the Fourteenth Amendment prohibits governmental discrimination on the basis of race,[47] and Title VI of the Civil Rights Act of 1964 prohibits

[45] 2025 DOJ Guidance, at 5.
[46] 2025 DOJ Guidance, at 5.
[47] U.S. Const. Amend. XIV, § 1.

recipients of federal financial assistance from discriminating on the basis of race, color, and national origin.[48]

Contrary to OMB's assertion, the DEIA Ban is not justified, much less required, by *SFFA*. It runs afoul of the Supreme Court's acknowledgement that consideration of the impact of race remains constitutional and its approval of race-neutral measures that the 2025 DOJ Guidance misleadingly frames as unlawful proxies. In *SFFA*, the Supreme Court held that generally, institutions could not consider an applicant's race in making admissions decisions; the Court explained that institutions could continue to consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." 600 U.S. at 230. And crucially, as federal courts have reinforced, the Court did not prohibit the use of race-neutral measures—such as those that take account of socioeconomic factors—to promote student body diversity. *See, e.g.*, *Am. Fed'n of Tchrs.*, 796 F. Supp. 3d at 106; *NEA*, 779 F. Supp. 3d at 199. On the contrary, three of the concurring opinions in *SFFA* signaled support for such measures. *See, e.g.*, *SFFA*, 600 U.S. 181 (2023) (Kavanaugh, J., concurring; Thomas, J., concurring; Gorsuch, J., concurring).

Both the Gender Ideology and Gender-Affirming Care Bans also run afoul of the Equal Protection Clause. The former receives heightened scrutiny because it clearly facially classifies based on sex and transgender status.[49] "By singling out grants that *serve* transgender people," the Bans require federal agencies to "necessarily single[] out *transgender people* and exclude[] them from being able to benefit from federal funds." *San Francisco A.I.D.S. Found. v. Trump*, 786 F. Supp. 3d 1184, 1216 (N.D. Cal. 2025) (*"SFAF")* (referring originally to EO 14168). This type of classification receives heightened scrutiny. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017) ("Heightened scrutiny . . . attends all gender-based classifications."); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610-11 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (applying heightened scrutiny to classification based on sex and transgender status); *see also Talbott v. United States*, 176 F.4th 720, 743(D.C. Cir. 2026) (attempt "to 'force conformity with sex' or 'evinc[ing] sex-based stereotyping' would be considered a classification based on sex" and the *Skrmetti* "Court strongly implied" as much) (citing *Skrmetti*, 605 U.S. at 516, and *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644 (2020)).

Even if it lacked such a facial classification, the Gender Ideology Ban is underscored by an invidious discriminatory purpose that would independently merit heightened scrutiny: to deny the existence of transgender people. It is difficult to "fathom discrimination more direct than the plain pronouncement of a policy resting on the premise that the group to which the policy is directed does not exist," but that is precisely what the Ban does. *PFLAG*, 769 F. Supp. 3d at 444 (enjoining HHS and its subagencies from effectuating EOs 14187 and 14168); *see also id.* at 443 ((EO 14168 "appears . . . to deny the existence of transgender persons altogether."); *SFAF*, 786 F.

[48] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.

[49] The Supreme Court's recent decision in *West Virginia v. B.P.J. by Jackson*, No. 24–38, 2026 WL 1868739 (U.S. June 30, 2026), does not disturb this conclusion. *See id.* at *14 ("In these cases, we need not definitively resolve whether rational basis review or intermediate scrutiny applies to transgender classifications."). The *B.P.J.* court applied heightened scrutiny West Virginia and Idaho laws that, like the Gender-Affirming Care and Gender Ideology Bans here, classify on the basis of "biological" sex. *Id.* at *6,

Supp. 3d at 1216 (EO 14168's "stated purpose is to deny the existence of transgender persons entirely."). The Gender-Affirming Care Ban also receives heightened scrutiny because, even assuming it is facially neutral, it is animated by substantially the same discriminatory purpose: requiring federal agencies to oppose the existence of transgender people by seeking to curtail, if not outright end, access to medically necessary gender-affirming care for transgender adolescents and young adults. Neither provision survives the demanding standard of heightened scrutiny that consequently applies.

To survive heightened scrutiny, the government "must establish an 'exceedingly persuasive justification'" for its action, show that it "serves important governmental objectives," and demonstrate "that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982)). "The burden of justification is demanding and it rests entirely on the State." *Id.* at 533.

Both the Gender Ideology and Gender-Affirming Care Bans plainly fail to survive this exacting standard.[50] OMB suggests that "gender ideology," as defined in EO 14168, and gender-affirming medical care, as targeted by EO 14187, have "diminished the rights, dignity, safety, and well-being of women; infringed on fundamental religious liberties; and caused life-long harm to vulnerable children."[51] But it points to *no evidence of this beyond citations to the EOs*, neither of which contain any evidence to this effect. *Cf. PFLAG*, 769 F. Supp. 3d at 447-48 (finding unavailing government's arguments that gender-affirming medical care is harmful to children in defense of EOs 14168 and 14187). OMB cannot merely parrot EOs 14168 and 14187 as evidence of the harm done to women and children when the EOs themselves contain no proof of harm.

The only purported evidence cited by OMB to support the notion that gender-affirming care "harm[s]" children is the 2025 HHS review of the literature on gender-affirming medical care for minors.[52] But the HHS Review was written by a panel of individuals hand-selected by this administration, none of whom are experts in gender dysphoria or gender-affirming medical care, but who have all publicly criticized this care and whose names were not initially disclosed at publication in contravention of standard practices. It cherry-picks studies disparaging gender-affirming medical care, fails to account for the views of pediatric gender care experts, misrepresents the evidence surrounding the benefits of gender-affirming medical care while omitting the risks of *not* treating gender dysphoria, and disregards the perspectives of transgender youth and their medical providers. Unsurprisingly, it has been strongly criticized by

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[50] The only interest for which OMB offers citations beyond the Executive Orders themselves is its assertion that "government-sponsored efforts 'to eradicate the biological reality of sex' . . . do significant harm to public trust in government." Proposed Rule, at 32221. Yet a recent poll showed that only 8% of voters rated transgender rights issues a top concern—and 65% of respondents reported feeling that politicians use transgender people as a distraction from other issues. *See GLAAD Poll: Supermajority of Americans Support Brands Participating in Pride; Reject Political Attacks on Transgender People*, GLAAD (June 1, 2026), https://glaad.org/glaad-poll-supermajority-of-americans-support-brands-participating-in-pride.
[51] Proposed Rule, at 32219.
[52] *See* U.S. Dep't Health & Hum. Servs., Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices (May 1, 2025; revised Nov. 19, 2025), https://opa.hhs.gov/sites/default/files/2025-11/gender-dysphoria-report.pdf ("HHS Review"); *see also* Proposed Rule, at 32222 n.96 (citing HHS Review).

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major national medical organizations.[53] Moreover, although the HHS Review criticized the strength of the evidence supporting the *efficacy* of gender-affirming medical care for minors, it did not identify any high-quality evidence indicating that this care is *harmful*. Even the HHS Review itself characterized the evidence of harms as "sparse."[54] OMB cannot demonstrate that the Gender-Affirming Care Ban is substantially related to its interest in protecting children from harm based solely off one mention of this methodologically unsound review that does not even conclude this care results in harm.[55]

b. The DEIA, Gender Ideology, and Gender-Affirming Care Bans would conflict with myriad congressional mandates.

In proposing the DEIA, Gender Ideology, and Gender-Affirming Care Bans, OMB and the award-making agencies have failed to consider or even acknowledge the broad and diverse range of impacted federal funding programs, the types of recipients for each program, the particularized impacts on the individuals and communities served by those programs, or how the Bans conflict with many of the statutory mandates and requirements established by Congress for each program.[56] While such conflicts are too numerous to review within the inadequate 45-day comment period, the following examples illustrate just a few of these conflicts.

i. *Ryan White HIV/AIDS Program*

The Gender-Affirming Care Ban would run afoul of essential federal programs, including the HRSA-administered Ryan White HIV/AIDS Program established by the Ryan White

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[53] *See, e.g.*, *APA Statement on Access to Treatment for Transgender, Gender Diverse, and Nonbinary People*, Am. Psychological Ass'n (May 1, 2025), https://updates.apaservices.org/statement-on-access-to-treatment-for-transgender-gender-diverseand-nonbinary-people ("The lack of transparency regarding authorship, expertise, and methodology in the recent HHS report undermines scientific rigor and contradicts standards for evidence-based policymaking. Policies should be developed through open scientific discourse rather than opaque processes that prevent proper evaluation of potential biases.").

[54] HHS Review, *supra*, at 13.

[55] Even under rational-basis review, these provisions would still not pass muster. "The Constitution's guarantee of equality must at the very least mean that a bare [] desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 570 U.S. 744, 770 (2013). Here, the Bans' text makes clear that they are "premised, at least in part, on a non-legitimate state interest to harm the politically unpopular group of transgender persons." *Talbott*, 176 F.4th at 746.

[56] As discussed throughout this Comment, the ACLU and its partners have challenged many of the administration's attempts to implement similar bans that conflicted with the authorizing statutes for federal programs. *See, e.g.*, *RILA*, 800 F. Supp. 3d at 370, 372 (holding that "the NEA's authorizing statute does not empower the Chairperson to categorically disfavor applications for promoting certain views," and that it is "impossible to square [a viewpoint-based policy] with the NEA's authorizing statute"); *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405 (D. Md. 2025) (issuing preliminary injunction against using EO 14187 to condition federal funding for medical institutions on the denial of gender-affirming care to transgender patients age 19 and under, finding in part that the challenged actions were likely ultra vires as violating the Affordable Care Act and Public Health Service Act); *Washington State Ass'n of Head Start & Early Childhood Assistance & Educ. Program v. Kennedy*, 820 F. Supp. 3d 1178, 1195-96 (W.D. Wash. 2026) (preliminarily enjoining ban on DEIA in Head Start programs because the administration failed to consider how the policy has "frustrated or made it impossible for [Head Start agencies and families] to function as they are statutorily required" and created a "Hobson's choice" between complying with the anti-DEIA ban and fulfilling statutory requirements under the Head Start Act).

Comprehensive AIDS Resources Emergency Act of 1990.[57] The Act's purpose is to "make financial assistance available to States and other public or private nonprofit entities to provide for the development, organization, coordination[,] and operation of more effective and cost efficient systems for the delivery of essential services to individuals and families with HIV disease" and to "provide emergency assistance to localities that are disproportionately affected by the [HIV/AIDS] epidemic."[58] In furtherance of that purpose, the Act requires that funding be provided to establish a comprehensive system of care for low-income individuals living with HIV/AIDS who lack sufficient health coverage or financial resources.[59] The Act further mandates that funding be used to provide "core medical services" and "support services" that improve access to and retention of comprehensive medical care, increase viral suppression, and improve overall health outcomes for low-income individuals living with HIV.[60] Core medical services include "outpatient and ambulatory health services," as well as medical care for treatment of "co-occurring conditions" in these individuals.[61]

Ryan White funds are regularly used to cover gender-affirming care both because it is a "core medical service" and because its provision serves the broader Ryan White mandate, since it is critical to ensuring access to and retention in HIV medical care. First, gender-affirming care qualifies as a "core medical service" under the Program to treat the often co-occurring condition of gender dysphoria (and sometimes other associated co-occurring mental health conditions, such as depression and anxiety resulting from gender dysphoria). Second, as the medical and public-health consensus confirms, effective HIV care for transgender populations requires a "comprehensive" and "whole-person" approach that integrates biomedical treatment with interventions addressing social determinants of health, stigma, and gender affirmation.[62] Gender-affirming care thus falls within the Act's requirement to provide comprehensive services to underserved populations.[63] Additionally, since transgender people are among the populations most disproportionately affected by HIV in the United States,[64] Ryan White recipients must design services that are aimed at reaching and retaining them, since the statute requires prioritization of such underserved and disproportionately affected populations.[65] Given all of these factors, federal public-health authorities have previously expressly recognized that "[p]roviding gender-affirming

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[57] *Cf.* Compl., ECF No. 1, *Am. Acad. of HIV Med. et al. v. Health Resources & Servs. Admin.*, No. 1:26-cv-12638-WGY (D. Mass. 2026).

[58] 42 U.S.C. § 300ff.

[59] *See* 42 U.S.C. § 300ff–11(a); 42 U.S.C. § 300ff-21; *id.* § 300ff-29a; *id.* § 300ff-51; *id.* § 300ff-71.

[60] *See* 42 U.S.C. § 300ff-14(c)–(d); *id.* § 300ff-22(a); *id.* § 300ff-29a; *id.* § 300ff-51(b); *id.* § 300ff-71.

[61] *See id.* §§ 300ff-14(c)(3)(A), 300ff-22(b)(3)(A), 300ff-51(c).

[62] See, e.g., Andre Dailey et al., HIV Surveillance Report: Diagnoses, Deaths, and Prevalence of HIV in the United States and 6 Territories and Freely Associated States, 2022, Vol. 35, CTRS. FOR DISEASE CONTROL & PREVENTION (2023), https://tinyurl.com/2nmm4kf5 [https://perma.cc/XRN7-38PB]; Kathryn Lee et al., Factors Associated with Use of HIV Prevention and Health Care Among Transgender Women—Seven Urban Areas, 2019–2020, 71 MORBIDITY & MORTALITY WKLY. REP. 673, 673–79 (2022), https://tinyurl.com/asvwvxa3 [https://perma.cc/T8T6-UHNH] (finding access to healthcare provider with whom transgender patients feel comfortable discussing gender-related health needs is associated with increased uptake of HIV testing, prophylaxis, and treatment, in addition to improved clinical outcomes such as viral suppression).

[63] *See* 42 U.S.C. §§ 300ff-12(b)(1), 300ff-12(b)(4)(B)(ii).

[64] *See* Mary Spink Neumann et al., *Comprehensive HIV Prevention for Transgender Persons*, 107 AM. J. PUB. HEALTH 207 (2017).

[65] *See id.* §§ 300ff-12(b)(1), 300ff-12(b)(4)(B)(ii).

care is an important strategy to effectively address the health and medical needs of transgender people with HIV" with respect to the purpose of the Ryan White program.[66]

The Gender-Affirming Care Ban violates this congressional command by prohibiting recipients from using Ryan White funds to provide gender-affirming care to people age 19 or under living with HIV. In other words, the Ban prevents this funding from achieving its purpose of providing comprehensive care for an overrepresented and particularly vulnerable subset of the target patient population, including specifically for a common co-occurring condition. The Ban thus imposes an agency policy that is "incompatible with the expressed or implied will of Congress," *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015), and unconstitutionally intrudes upon the congressional prerogative to control the public fisc. Similarly, the Gender Ideology Ban runs afoul of Congress's will in passing the Act by preventing recipients of Ryan White funding—who both do and must treat transgender patients, as they constitute a significant and indeed underserved portion of the population of individuals with HIV—from even acknowledging transgender patients by their correct pronouns. Such ignorance contravenes Congress's command to employ a "comprehensive" and "whole-person approach" when providing care to patients with HIV using Ryan White funds. For these same reasons, the Gender-Affirming Care and Gender Ideology Bans are arbitrary and capricious under the APA.

ii. *The Violence Against Women Act*

The Violence Against Women Act ("VAWA") authorizes a number of federal funding programs that address domestic violence, dating violence, sexual assault, sex trafficking, and stalking—forms of abuse that disproportionately affect women.[67] In enacting VAWA, Congress recognized that domestic violence and sexual assault "require a coordinated response that extends beyond" the criminal legal system and includes comprehensive services for survivors, "particularly those who face compounding barriers . . . because of their race, ethnicity, immigration status, age, disability, primary language, economic status, sexual orientation, or gender identity, as well as those living in rural areas."[68] VAWA-authorized funding programs are administered by the DOJ's Office on Violence Against Women ("OVW"), and are provided to a broad range of recipients, including states, territories, tribes, counties, cities, non-profit organizations, and service providers.[69]

These Bans—and particularly the DEIA and Gender Ideology Bans—run afoul of VAWA's statutory requirements, as well as other federal statutory and regulatory provisions. In 2013, Congress reauthorized VAWA and added statutory protections prohibiting recipients from discriminating on the basis of sex, gender identity, or sexual orientation, among other protected

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[66] *See* Health Res. & Servs. Admin., *Gender-Affirming Care in the Ryan White HIV/AIDS Program*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (Dec. 16, 2021)..

[67] U.S. Dep't of Justice, *2024 Biennial Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act* (Dec. 13, 2024) ("2024 DOJ Biennial Report"), https://www.justice.gov/ovw/media/1385821/dl?inline=.

[68] *Id.* at 2.

[69] *Id* at 3.

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characteristics.[70] By prohibiting recipients from acknowledging gender identity, the Gender Ideology Ban runs afoul of these express statutory requirements and related anti-discrimination provisions, forcing recipients to navigate conflicting obligations and chilling recipients from seeking certain streams of funding to the detriment of the survivors they serve. Moreover, Congress has authorized many OVW-administered federal funding programs that expressly require targeted outreach to "underserved populations," including Grants for Outreach and Services to Underserved Populations Program, LGBT Specific Services Program, and Tribal Access Program.[71] For example, Congress established a federal grant program to "enhance culturally specific services for victims of domestic violence, dating violence, sexual assault and stalking," which dedicates funds to support the provision of "culturally relevant and linguistically specific services and resources to culturally specific communities."[72] The Proposed Rule's DEIA and Gender Ideology Bans may conflict with these congressionally established requirements, particularly because VAWA defines "underserved populations" to include "populations underserved because of . . . religion, sexual orientation, gender identity, underserved racial and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age)."[73] Such conflicts run afoul of the APA and raise other constitutional concerns, as discussed above. *See supra* Sections II-III(a).

iii. *The Head Start Act*

Although the 2025 DOJ Guidance lists "the use of 'cultural competence' requirements" as an example of a practice that may violate the law, cultural competence is a legal *requirement* for Head Start programs.[74] As one example, "[c]ultural competence" specifically has been promoted by HHS as an important aspect of Head Start programs, which is generally 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."[75] 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

[70] 34 U.S.C. § 12291(b)(13)(A) ("No person in the United States shall, on the basis of actual or perceived . . . sex, gender identity . . . , [or] sexual orientation . . . be excluded from participation in, be denied the benefits of, or be subjects to discrimination under any program or activity funded in whole or in part with funds made available under [VAWA], and any program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.").

[71] *See* 2024 DOJ Biennial Report. *See also* 34 U.S.C. § 12291(a)(46) (defining "underserved populations" to mean "populations who face barriers in accessing and using victim services," and to include "populations underserved because of geographic location, religion, sexual orientation, gender identity, underserved racial and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age), and any other population determined to be underserved" by the Attorney General or HHS Secretary).

[72] 34 U.S.C. § 20124(a)(1). *See also* 34 U.S.C. §§ 12291(a)(8)-(9).

[73] 34 U.S.C. § 12291(a)(46).

[74] 2025 DOJ Guidance, at 5.

[75] *See, e.g.*, US Department of Health and Human Services, The Office of Minority Health – What Is Cultural Competency, NCHAM (https://www.infanthearing.org/coordinator_toolkit/section10/36_cultural_competency.pdf).

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.* at § 1302.91(e)(6)(ii) (home visitors must "[d]emonstrate competency . . . to build respectful, culturally responsive, and trusting relationships with families").

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."[76] But 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 with the Proposed Rule and its efforts to ban "DEIA" and "DEI."

c. <u>The Bans are not based on reasonable legal or factual justifications.</u>

As discussed above, *see* Section III(a), the Proposed Rule's legal justifications for the Bans are misplaced and misguided. Moreover, the Proposed Rule relies on research that fails to support the adoption of these Bans. For example, to the extent the Gender-Affirming Care Ban is based on the HHS Review—which, as discussed in Section III(a)(iii), is the only evidence outside EO 14187 (itself devoid of evidence) cited by OMB to justify the provision—it is arbitrary and capricious because the HHS Review does not support the agency's decision. *See Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1336 (4th Cir. 1995); *City of Columbus v. Kennedy,* 796 F. Supp. 3d 123, 167-68 (D. Md. 2025). The HHS Review is not a clinical practice guideline, as it admits, *see* HHS Review, *supra* note 10, and lacks evidence to support OMB's assertions that gender-affirming medical care for transgender youth and young adults is "harmful." *See supra* Section III(a)(iii).

The Gender-Affirming Care Ban is also arbitrary and capricious with respect to the HHS Review because the Review failed to meet the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. § 1001 *et seq*. Agency action based on such procedural irregularities is arbitrary and capricious. *See, e.g.*, *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 19-21 (1st Cir. 2020). Under the FACA, an "advisory committee" used by a federal agency to obtain advice or recommendations must be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. § 1004(b)(2), (c). An agency violates this mandate when it "skew[s] the composition" of an advisory committee to exclude the viewpoint of impacted groups, *Concerned Scientists*, 954 F.3d at 20, or selects members who lack the requisite qualifications and experience relevant to the committee's function. *See Am. Acad. of Pediatrics v.*

[76] 2025 DOJ Guidance, at 1, 9.

Kennedy, 823 F. Supp. 3d 141, 165-68 (D. Mass. Mar. 16, 2026). Yet HHS skewed the composition of its Review Committee to produce a report that supports the Gender-Affirming Care Ban and EO 14187. The Committee was devoid of anyone with expertise in gender dysphoria or gender-affirming medical care, but unanimous in its members' opposition to this care. *See supra* Section III(a)(iii). Because of the Committee's failure to adhere to FACA's procedural requirements,[77] stakeholders were denied the opportunity to scrutinize the HHS Review Committee's deeply flawed and unscientific report. To the extent the Gender-Affirming Care Ban is based on the HHS Review, it constitutes arbitrary and capricious agency action given the Review's production by an illegally assembled advisory committee.

Third, both the Gender-Affirming Care and Gender Ideology Bans are arbitrary and capricious because they amount to wholesale departures from OMB's past policy and practice without adequate explanation and fail to take into account stakeholders' reliance interests. OMB has never sought to regulate what medical care patients obtain through its authority under 31 U.S.C. § 503(a)(2). Nor has it previously used this authority to deny acknowledgments of and services to an entire class of people. Yet OMB neither acknowledges nor adequately explains its change in position. Moreover, an enormous number of stakeholders, from healthcare entities to educational institutions and beyond, rely on federal funds to provide social services to transgender people. These stakeholders include transgender people and their families who often decide where to live based off access to this healthcare and these services. But the Proposed Rule does not acknowledge any of these reliance interests nor make any effort to "incorporat[e] measures to limit the harm to the relying parties" as the law requires. *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 981 (9th Cir. 2023). This failure of consideration constitutes arbitrary and capricious agency action.

d. <u>The DEIA, Gender Ideology, and Gender-Affirming Care Bans would inflict significant harms, costs, and burdens, particularly for funding recipients and the communities they serve.</u>

i. *DEIA Ban*

The DEIA Ban jeopardizes essential programs that fulfill the mission of numerous institutions because they could be interpreted as DEIA. The quality of education is undermined when teachers can no longer rely on their pedagogical training to lead "students to question, analyze, and think critically about the world around them" because their actions could be interpreted as "DEIA" if the instruction touches upon racism or sexism.[78] The broad interpretation of "DEIA" encompasses the range of instruction, from the incorporation of diverse narratives and authors that engage students to the ability to provide services and instructional materials for

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[77] In addition to the fair-balance mandate, HHS also failed to adhere to myriad other statutory mandates for advisory committees. It did not publish a notice of the committee's establishment in the Federal Register, 41 C.F.R. § 102-3.65(a); release a public copy of the committee's charter, 5 U.S.C. § 1008(c)(3); nor facilitate public participation by hosting open meetings, posting notices of public meetings, and allowing the public to inspect committee documents, *id.* § 1009.

[78] Second Amended Compl., at ¶¶ 157, 160, 163, ECF No. 79, *Nat'l Educ. Ass'n. v. U.S. Dep't of Educ.,* No. 25-cv-00091-LM (D.N.H. 2025).

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multilingual learners to accommodations for students with disabilities.[79] Beyond instruction, the DEIA Ban imperils field trips, cultural celebrations, and even suicide prevention efforts to ensure students' wholistic development.[3] In science, as described above in more detail, life-saving research has been stopped, even in late stages, because it focused on minority health conditions and other populations that experience health disparities. *APHA*, 791 F. Supp. 3d at 164-65.

The DEIA Ban will require grantees to closely scrutinize the vague prohibitions to attempt to discern their meaning and 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 DEIA Ban, they will need to spend additional time revising their programs to attempt to comply. This entire process will likely require consultation with legal counsel, OMB, and other federal agencies, as respondents will undoubtedly be unsure as to the scope of the DEIA Ban's reach.

In a similar context, where schools and educators attempted to assess compliance with anti-DEI provisions in the U.S. Department of Education's now-vacated February 14, 2025 Dear Colleague Letter, 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."[80] Teachers considering whether they might need to adapt their curriculums described doing so as "akin to fixing a plane while flying"[81] and being "extremely disruptive to not only my time but also to students."[82] To put it plainly, "[i]mpossible requirements imposed by an agency are perforce unreasonable." *All. for Cannabis Therapeutics v. Drug Enf't Admin.*, 930 F.2d 936, 940 (D.C. Cir. 1991).

In the context of the federal government's administration of the Head Start program, HHS's implementation and enforcement of EO 14173 and EO 14151[83] through similar anti-DEI policies has reached a variety of legitimate and legally required programs. *See Washington State Ass'n of Head Start & Early Childhood Assistance & Educ. Program v. Kennedy,* 820F. Supp. 3d 1178, 1196 (W.D. Wash. 2026) ("*Head Start")*, (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").[84] For example, one Head Start agency "identified at least eight

[79] *Id.* at ¶¶ 146-94.
[80] Decl. of John Shea in Supp. of Mot. for TRO, at ¶ 16, ECF No. 56-15, *id*.
[81] Decl. of NEA Member A in Supp. of Mot. for Prelim. Inj., at ¶ 27, ECF No. 34-11, *id*.
[82] Decl. of NEA Member B in Supp. of Mot. for Prelim. Inj., at ¶ 26, ECF No. 34-12, *id*.
[83] 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].
[84] 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

programs in its grant that may be viewed as DEI related, which likely cannot be overcome by mere changes to the descriptions."[85] The agency noted that compliance with a DEIA ban would require changing "core aspects of their programs."[86] 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."[87] 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.'"[88] *Id.* at 1196-97.

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."[89] 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."[90] *Id.* at 1196.

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 histories, contributing to DEI by amplifying marginalized voices."[91] 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."[92] 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."[93]

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other similar requirement" *Head Start*, 820 Supp. 3d at 1198-99. Any effort to require Head Start agencies to agree to the Anti-DEIA Provision would violate the plain text of this injunction.

[85] 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 (W.D. Wash. 2026).

[86] *Id.* at ¶ 34.

[87] Decl. of Lauri Morrison-Frichtl in Supp. of Pls.' Mot. for Prelim. Inj., at ¶ 28, ECF No. 41, *id.*

[88] *See also* Decl. of Joel Ryan in Supp. of Pls.' Mot. for a Prelim. Inj., ECF No. 42, at ¶ 78, *id.* (Head Start agency required to remove training on compliance with the Americans with Disabilities Act).

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

[90] *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.*

[91] 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-03923-CM (S.D.N.Y. 2026), https://www.mla.org/content/download/192790/file/248-1.pdf [https://perma.cc/6HBQ-PKE7].

[92] *Id.* at 190:5–7.

[93] *Id.* at 220:9–18.

These examples demonstrate how broadly and inconsistently anti-DEIA prohibitions have been applied by the federal government, an issue that will be exacerbated if all grants are subject to pre-issuance review from political appointees instead of issue experts, as proposed by Section 200.205. Funding recipients have good reason to fear that the DEIA Ban will result in similarly harmful arbitrary and illegal enforcement.

ii. *Gender Ideology Ban*

In addition to many of the harms discussed above, the Gender Ideology Ban will result in an additional slate of harms for transgender people, grantees, and the broader community.[94] This sweeping Ban requires grantees to deny the existence of transgender people, and thus, makes it impossible for any federal grant recipient to provide services to transgender people. To comply with the provision, each federal agency would "require [its] grantees, who provide specialized services to transgender persons, to remove references to those persons—as well as the characteristics that caused those persons to need the services in the first place." *SFAF* 786 F. Supp. 3d at 1215 . Such a requirement is at best unworkable: "It is as difficult to imagine how this would work as it is to imagine a pediatrician not acknowledging the existence of children or a gerontologist denying the existence of the elderly." *Id.* Federal agencies could even deny funds to service providers who do not specialize in serving transgender people simply because they address sexual assault victims by their pronouns, *see Rhode Island Coal. Against Domestic Violence v. Kennedy*, 812 F. Supp. 3d 180, 197 (D.R.I. 2025), or provide housing to transgender people, *see Hous. Auth. of City & Cnty. of San Francisco v. Turner*, No. 25-CV-08859-JST, 2025 WL 3187761, at *13-14 (N.D. Cal. Nov. 14, 2025). More likely, federal agencies' compliance with the Gender Ideology Ban will be disastrous. This provision would make it impossible to administer grants in states and localities that prohibit discrimination against transgender people in public services and accommodations. The Gender Ideology Ban conscripts recipients of federal funding into denying the existence of—and thus denying public services to—transgender people. In so doing, the Ban works to remove transgender people from public life.

iii. *Gender-Affirming Care Ban*

Gender-affirming medical care is essential, medically necessary, and often life-saving care to treat gender dysphoria in transgender people, including and especially transgender young people. As decades of research and clinical experience have shown, gender-affirming care has proven critical to the physical and psychological wellbeing of transgender persons of all ages—particularly teens. Transgender youth contemplate or attempt suicide more than twice as frequently as their cisgender peers due to lack of access to hormone replacement therapy or other forms of gender-affirming care.[95] The receipt of gender-affirming medical care has proven highly effective at reducing these levels of mental health risk among transgender adolescents.[96]

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[94] 91 Fed. Reg. 32198, 32215 (May 29, 2026).

[95] *See To Protect Evidence-Based Medicine and Promote Health Justice, Protect Gender-Affirming Medical Care*, Ass'n of Am. Med. Colls. (Mar. 13, 2023), https://www.aamchealthjustice.org/news/research/gamc-trans-youth.

[96] *See id.* (citing Annelou L.C. de Vries et al., Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment, 134 Pediatrics 696, 696-704 (2014).

Under the Gender-Affirming Care Ban, federal agencies administering grants will likely cause providers to stop providing this care and/or patients and their families who rely on this medically necessary care to abandon healthcare providers they already trust, if those providers used federal grants to provide this care. This reliance is likely, since federal funds account for a plurality of healthcare expenditures.[97] . Beyond generating problems with access to care, the Gender-Affirming Care Ban is also likely to complicate the delivery of care. Physicians will "be forced to provide increasingly difficult treatment for LGBTQ patients who arrive with more acute conditions, either because they refrain from being fully transparent with their external providers given their heightened fears of discrimination, or because such apprehension causes them to delay seeking necessary care entirely." *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 56 (D.D.C. 2020). This "delayed provision of care" will increase costs, frustrate the provision of health care, and strain the resources of alternative providers, *id.*, who already are grappling with the federal government's other actions that have affected access to gender-affirming medical care. *See, e.g.*, *QueerDoc, PLLC v. U.S. Dep't of Just.*, 807 F. Supp. 3d 1295, 1303 (W.D. Wash. 2025) (canvassing "Administration's explicit agenda" to "'downsize or eliminate' all gender-affirming care" by enumerating laundry list of examples, including Executive Orders, administrative subpoenas, and White House announcements*)*. The Proposed Rule considers none of these costs.

Additionally, to the extent the Gender-Affirming Care Ban relies on EOs 14168 and 14187 and is effectuated by HHS and/or any of its subagencies, the Proposed Rule violates the preliminary injunction issued in *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405 (D. Md. 2025). There, the court enjoined HHS and its subagencies (e.g., HRSA, NIH, NSF) "from conditioning, withholding, or terminating federal funding under Section 3(g) of Executive Order 14,168 and Section 4 of Executive Order 14,187, based on the fact that a healthcare entity or health professional provides gender-affirming medical care to a patient under the age of nineteen[.]" *Id.* at 455. As the court recognized in issuing the preliminary injunction, plaintiffs in *PFLAG* would be irreparably harmed by the federal agency's denial of federal funds based on the provision of gender-affirming medical care to transgender youth and young adults. *See id.* at 449-50.

IV. The Proposed Rule's English Language Mandate Raises Serious Legal Concerns and Would Harm Marginalized Communities.

Proposed Section 200.111 ("English Language Mandate") would remove agency discretion to issue or translate awards and other materials in languages other than English and in terms other than U.S. dollars.[98] In addition to raising many of the same legal concerns discussed herein, the English Language Mandate may conflict with existing legal obligations for federal agencies, pass-through entities, and funding recipients under federal law. The Mandate would also harm

[97] *See, e.g.*, *NHE Fact Sheet*, CMS.gov (2024), https://www.cms.gov/data-research/statistics-trends-and-reports/national-health-expenditure-data/nhe-fact-sheet (finding federal government accounts for 31% of total health spending in United States); *Key Facts About Hospitals*, KFF (Feb. 19, 2025), https://www.kff.org/health-costs/key-facts-about-hospitals (federal government supplies $1.5 trillion in health care funding per year, approximately one-third of national health expenditures and more than any other source).
[98] Proposed Rule, at 32246.

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historically marginalized and otherwise vulnerable communities, including people with disabilities and communities of color, and the recipients who serve those communities.

a. The English Language Mandate may run afoul of federal legal obligations and the congressionally established purposes of certain programs.

The proposed Mandate that all federal financial assistance announcements and information must be in the English language may run afoul of federal disability-related protections. For example, it fails to reflect the affirmative obligation of federal agencies and recipients of federal financial assistance to ensure that communications with applicants, program participants, and others with disabilities are as effective as communications with those without disabilities. This obligation to provide equally effective communication, which is required by Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, as well as the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq, may require that information be communicated in American Sign Language (ASL) or other languages used by people who are deaf. A rigid English-only requirement would deprive federal agencies and funding recipients alike of the flexibility needed to comply with their legal obligations to communicate effectively with disabled individuals.

In addition, Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act, and other civil rights protections[99] prohibit recipients of federal funding from discriminating based on national origin, including by using language as a vehicle to do so. Courts have recognized that national origin discrimination may include discrimination against individuals with limited English proficiency, as language can be a close and meaningful proxy for national origin. *See, e.g.*, *Rivera v. NIBCO*, 701 F. Supp. 2d 1135, 1141 (E.D. Cal. 2010) ("Language-based discrimination is often closely aligned with national origin discrimination, and has been recognized as being worthy of close scrutiny by the courts."); *CNY Fair Hous., Inc. v. Swiss Vill., LLC*, No. 5:21-CV-1217, 2022 WL 2643573, at *7 (N.D.N.Y. July 8, 2022). For similar reasons, the English Language Mandate may raise serious concerns under the Equal Protection Clause. *See, e.g.*, *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (statute prohibiting keeping of account books in any language other than English or Spanish denies equal protection of law to Chinese merchants).

Moreover, the English Language Mandate may conflict with the congressionally established purposes of many federal grant programs, including those targeted at reaching underserved communities where English is not the primary language. For example, as discussed further in Section III(b)(ii), Congress has established a federal grant program to "enhance culturally specific services for victims of domestic violence, dating violence, sexual assault and stalking," administered by the DOJ's Office on Violence Against Women.[100] Congress appropriated these funds to support community-based programs providing "culturally specific services," which is defined as "community-based services that include culturally relevant and

[99] The English Language Mandate also may run afoul of state-level language access laws. *See* Alisha Rao, Drishti Pillai & Samantha Artiga, *Designating English as the Official Language of the United States Could Impact Millions with Limited English Proficiency*, KKF (Oct. 10, 2025),https://www.kff.org/racial-equity-and-health-policy/designating-english-as-the-official-language-of-the-united-states-could-impact-millions-with-limited-english-proficiency/ .
[100] 34 U.S.C. § 20124(a)(1).

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linguistically specific services and resources to culturally specific communities [*i.e.*, racial and ethnic minority groups]."[101] Prohibiting agencies from translating materials would undermine these statutory purposes of this critical program, as well as other programs aimed at supporting underserved and vulnerable communities.

b. The English Language Mandate will harm historically marginalized and otherwise vulnerable communities, including people with disabilities and communities of color, and the recipients who serve them.

Requiring the exclusive use of English in notices and related materials would unjustly limit access to federal programs, benefits, and services for many individuals, families, and communities—and particularly for people with disabilities, communities of color, and immigrant families. As OMB recognized in adopting the existing Rule, allowing agencies to issue or translate materials in languages other than English supports many federal programs dedicated to supporting communities who are already underserved and who already face heightened barriers to accessing critical services and benefits.[102] A recent report found that over 27 million people in the United States have limited English proficiency and may be adversely affected by decreased access to language access services, with disproportionate impacts on people who are Asian (30 percent), people who are Hispanic (29 percent), people who are immigrants (47 percent), and people with lower incomes (13 percent).[103] Such decreased access can lead to significant challenges, such as increased barriers to accessing health care[104] and difficulties navigating the legal system.[105]

In addition, the English Language Mandate would harm many recipients and subrecipients who serve historically marginalized and otherwise vulnerable communities. This requirement would effectively exclude a wide range of qualified organizations from applying for or carrying out federal grant programs, particularly those serving deaf/disabled communities and communities where English is not the primary language. For example, many organizations in Puerto Rico—where Spanish is one of the official languages, and nearly 75 percent of residents speak English "less than 'very well'"—may be unable to or face increased barriers to applying for essential federal programs.[106] Moreover, the Mandate would unfairly deny the same opportunity to engage

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[101] *Id. See also* 34 U.S.C. §§ 12291(a)(8)-(9).
[102] Guidance for Federal Financial Assistance, 89 Fed. Reg. 30046, 30067 (Apr. 22, 2024), https://www.govinfo.gov/content/pkg/FR-2024-04-22/pdf/2024-07496.pdf.
[103] Alisha Rao, Drishti Pillai & Samantha Artiga, *Designating English as the Official Language of the United States Could Impact Millions with Limited English Proficiency* (Oct. 10, 2025), https://www.kff.org/racial-equity-and-health-policy/designating-english-as-the-official-language-of-the-united-states-could-impact-millions-with-limited-english-proficiency/. This report analyzed 2023 American Community Survey (ACS) data. "Limited English proficiency" is defined as "speaking a language other than English at home and speaking English less than very well." *Id.*
[104] Alisha Rao, Drishti Pillai & Samantha Artiga, *Designating English as the Official Language of the United States Could Impact Millions with Limited English Proficiency*, KFF (Oct. 10, 2025),https://www.kff.org/racial-equity-and-health-policy/designating-english-as-the-official-language-of-the-united-states-could-impact-millions-with-limited-english-proficiency/.
[105] American Translators Ass'n, *Leading Language Organizations Oppose Executive Order 14224, Warn of Potential Consequences* (Mar. 14, 2025), https://www.atanet.org/advocacy-outreach/leading-language-organizations-oppose-executive-order-14224-warn-of-potential-consequences/.
[106] *See* U.S. Census Bureau, Selected Social Characteristics in Puerto Rico (2024), https://data.census.gov/table/ACSDP5Y2024.DP02PR?g=040XX00US72&hidePreview=true.

on federal policy issues to individuals and communities who speak a language other than English. As a result of the Mandate, many pass-through entities, recipients, and subrecipients may face increased translation and interpretation costs and other administrative burdens to access federal programs. The Proposed Rule fails to acknowledge or address these harms or to provide any reasonable justification for its departure from prior policy.

V. The Proposed Rule's Disparate Impact Provision Mischaracterizes the Law and Chills Civil Rights Enforcement.

Proposed Section 200.218 ("Disparate Impact Provision" or "Provision) is yet another blatant attempt by this administration to mischaracterize and dismantle essential and longstanding protections against discrimination, including laws prohibiting disparate-impact discrimination (or "disparate impact laws").[107] These laws protect individuals from discriminatory policies and practices that appear neutral on their face but have an unjustified and unlawful disparate impact based on a prohibited characteristic like race, sex, disability, or national origin. The Provision makes the false claim that disparate impact liability "gives rise to an automatic or near-insurmountable presumption" of unlawful discrimination based on disparities in outcomes alone. To the contrary, courts apply a comprehensive burden-shifting framework to evaluate disparate-impact claims to determine whether a challenged policy or practice rises to the level of unlawful discrimination. The Disparate Impact Provision is not only unjustified and unfounded, but also inconsistent with well-established legal standards adopted by Congress and the Supreme Court.

a. <u>The Disparate Impact Provision's proposed definition of "disparate impact liability" is unfounded and mischaracterizes well-established legal standards.</u>

As the Supreme Court explained in its 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." 576 U.S. 519, 540 (2015). Further, disparate impact liability "has always been properly limited in key respects that avoid . . . serious constitutional questions." *Id.* Contrary to the Provision's claims, statistical disparities alone do not establish unlawful disparate impact discrimination. *Id.* Instead, courts apply a comprehensive burden-shifting framework to evaluate whether a policy or practice that has a disparate effect based on a protected characteristic rises to the level of unlawful discrimination. *See id* at 527. For example, plaintiffs bringing FHA disparate-impact claims must meet a "robust causality requirement" by pointing to a specific policy causing a disparity, and defendants will not be found liable if they can "prove [the challenged policy] is necessary to achieve a valid interest." *Id.* at 541–42. Similarly, Title VII permits plaintiffs to establish disparate impact liability only if they can identify a specific practice causing the disparate impact and the employer cannot establish the necessity and job-relatedness of that practice, or if they can identify "an available alternative . . . practice that has less disparate impact and serves the [employer's] legitimate needs." *Id.* at 533 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)).

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[107] Linda Morris & Ashley Johnson, *Trump is Attacking a Crucial Fair Housing Rule that Protects Against Discrimination*, ACLU News & Commentary (Mar. 13, 2026), https://www.aclu.org/news/womens-rights/trump-is-attacking-a-crucial-fair-housing-rule-that-protects-against-discrimination.

And where disparate impact liability is found, the remedy is to "eliminat[e] the offending practice" through neutral means, rather than "impose [] targets or quotas." *Id.* at 544–45.

The Disparate Impact Provision ignores this reality and adopts a definition of "disparate impact liability" that both distorts and contradicts the Supreme Court's clear pronouncements regarding the legality of disparate impact liability. Specifically, the Provision defines "disparate impact liability" as:

> a theory under which a facially neutral policy or practice (for example, a merit-based employment policy or practice) gives rise to an automatic or near-insurmountable presumption of the existence of unlawful discrimination on the basis of federally protected characteristics (such as race or sex) where there are any differences or disparities in outcomes (for example, disproportionate effects) among different races, sexes, or similar groups. Under a theory of disparate-impact liability, this presumption would apply even if there is no facially discriminatory policy or practice, there is no discriminatory intent involved, and equal opportunity is provided. Discriminatory intent is irrelevant in a disparate-impact claim. Disparate-impact liability effectively mandates consideration of federally protected characteristics, such as race or sex, and incentivizes racial balancing, contrary to principles of equal treatment and merit-based opportunity.[108]

This definition is unfounded and entirely inconsistent with well-established legal standards and fails to acknowledge the burden-shifting framework set forth by the Supreme Court, Congress, and executive agencies to evaluate disparate impact liability, as discussed further below. And it is this mischaracterization of disparate impact liability, rather than existing disparate impact standards, that the Proposed Rule proposes to prohibit.

b. <u>The Disparate Impact Provision is unjustified and inconsistent with existing federal and state laws and standards governing disparate impact liability.</u>

The Proposed Rule, including the Provision's confusing definition of "disparate impact liability," is inconsistent with statutory and regulatory law and controlling legal authority defining how disparate impact liability is proven. Consequently the provision may be interpreted to conflict with existing disparate impact standards for federal civil rights protections, including Title VII, the Age Discrimination in Employment Act ("ADEA"), the Fair Housing Act ("FHA"), the Equal Credit Opportunity Act ("ECOA"), and the Americans with Disabilities Act ("ADA").[109] These civil rights laws have long protected against discriminatory policies and practices that appear neutral but create unjustified obstacles that prevent people from accessing jobs, housing, credit, and other essential opportunities.

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[108] Proposed Rule, at 32252.
[109] The Proposed Rule also fails entirely to consider or address potential conflicts with existing state and local civil rights protections, including those that expressly prohibit disparate impact discrimination.

i. *Title VII*

Both Congress and the Supreme Court have recognized that Title VII prohibits disparate-impact discrimination. Over 50 years ago, the Supreme Court recognized disparate impact liability under Title VII in *Griggs v. Duke Power Co.*, when it found that an employer may be liable for requiring employees to pass tests that were not related to job performance and that disproportionately excluded Black employees. 401 U.S. 424 (1971). The Supreme Court described Congress's goal in passing Title VII as including "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. Congress codified these protections when it amended Title VII as part of the Civil Rights Act of 1991 to set out the burden-shifting framework in disparate impact cases. *See* 42 U.S.C. § 2000-e2(k). The statutory text makes clear that employers may avoid liability by "demonstrate[ing] that the challenged practice is job related for the position in question and consistent with business necessity," and that once an employer makes this showing, liability would only be imposed if the complaining party could point to an alternative employment practice that serves the employer's needs while causing less discriminatory impact. *Id* at (k)(A)(i).

The Equal Employment Opportunity Commission ("EEOC") and other agencies responsible for enforcing federal employment laws have issued guidance that further clarified the disparate impact liability standards under Title VII.[110] For decades, until recent political shifts, the EEOC has enforced Title VII's protections against disparate impact discrimination. Now, the EEOC and the current administration have abandoned decades of precedent by refusing to investigate disparate impact claims[111] and, most recently, taking the legally unsupported position that the EEOC's Title VII guidance is unconstitutional.[112]

ii. *The Fair Housing Act*

Disparate impact liability also has served as an essential civil rights enforcement tool in the fight against housing discrimination and residential segregation. Since 2013, the U.S. Department of Housing and Urban Development ("HUD") has recognized disparate impact liability, defining "[d]iscriminatory effect" as a practice that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[113] In doing so, HUD explained that eliminating disparate impact discrimination and residential segregation was necessary for the FHA's "intended goal to advance equal housing opportunity and achieve integration to be realized."[114] As applied by HUD and federal courts, the

[110] *See, e.g.*, Uniform Guidelines on Employee Selection Procedures, 43 FR 40223 (Sept. 11, 1978).
[111] Claire Savage & Alexandra Olson, *Civil rights agency drops a key tool used to investigate workplace discrimination*, AP News (Sept. 30, 2025) https://apnews.com/article/trump-discrimination-ai-eeoc-disparate-impact-a2e8aba11f3d3f095df95d488c6b3c40.
[112] Constitutionality of Disparate-Impact Liability Under Title VII, 50 Op. O.L.C. (June 9, 2026) https://www.justice.gov/olc/media/1444871/dl?utm_medium=email&utm_source=govdelivery.
[113] Dep't of Hous. & Urban Dev., *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460, 11463 (codified at 24 C.F.R. § 100.500(a)).
[114] *Id.* at 11466.

existing legal framework for disparate impact liability provides "clear, uniform standard[s]" that provide clarity and reduce costs and burdens for regulated entities.[115]

Contrary to OMB's assertions, disparate impact liability is consistent with the FHA and over fifty years of legal precedent interpreting the FHA.[116] In *Inclusive Communities*, the Supreme Court affirmed HUD's position that disparate impact claims are cognizable under the FHA. In the more than ten years since *Inclusive Communities* was decided, courts have interpreted and applied the Supreme Court's discussion of disparate impact claims in a variety of contexts, none of which disturb its holding or suggest that disparate impact liability is inconsistent with nondiscrimination laws. Most recently, in January 2026, the Supreme Court denied certiorari of a Second Circuit decision affirming a verdict in favor of Black homeowner plaintiffs who were victims of reverse redlining lending practices,[117] including the defendants' request that the Supreme Court consider the question of whether *Inclusive Communities* "has proven unworkable."[118] The denial of certiorari indicates that the Second Circuit and other circuits' application of *Inclusive Communities* raises no major legal concerns.

iii. *The Equal Credit Opportunity Act*

ECOA recognizes disparate impact liability, modelled on Title VII's disparate impact standards,[119] to ensure that no one is unfairly denied credit because of unjustified and discriminatory policies and practices. The legislative history reveals that Congress understood the importance of disparate impact liability in combatting discrimination in lending when it passed ECOA. For example, the congressional testimony preceding ECOA's passage discussed the arbitrary and systemic barriers that women faced obtaining credit, including credit requirements that excluded women who took their husbands' last names, who relied on their husbands' credit history, or who worked part-time.[120]

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[115] 78 Fed. Reg. at 11472 (Feb. 15, 2013).

[116] For further discussion about the extensive legal precedent supporting existing disparate impact standards, the ACLU incorporates by reference the extensive discussion of such precedent in the ACLU's prior comments in response to HUD's rulemakings. *See, e.g.*, American Civil Liberties Union & Impact Fund, Comment on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard Docket No. FR-6540-P001 (Feb. 12, 2026), https://www.regulations.gov/comment/HUD-2026-0034-0469; American Civil Liberties Union, Comment on Reinstatement of HUD's Discriminatory Effects Standard, Docket No. FR-6251-P-01 (Aug. 24, 2021), https://perma.cc/AG2V-9BRT; American Civil Liberties Union, Comment on Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, HUD Docket No. FR-6111-P-02 (Oct. 17, 2019), https://perma.cc/7W3M-PJY2; American Civil Liberties Union, Comment on Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-A-01 (Aug. 19, 2018), https://perma.cc/PUU9-6HPJ.

[117] *Emigrant Mortg. Co. v. Saint-Jean*, No. 25-229, 2026 WL 79895, at *1 (U.S. Jan. 12, 2026).

[118] Petition for A Writ of Certiorari, Emigrant Mortgage Company, Inc., and Emigrant Bank, Petitioners, v. Jean Robert SAINT-JEAN, et al., Respondents., 2025 WL 2491762, at *I.

[119] Francesca Lina Procaccini, Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition, 9 HARV. L. & POL'Y REV. S43, S54 (2015), https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2013/11/9.2_Procaccini.pdf.

[120] Winnie F. Taylor, The ECOA and Disparate Impact Theory: A Historical Perspective, 26 J. L. & Pol'y 576, 601-611 (2018), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1566&context=jlp; *see also Miller v. Am. Exp. Co.*, 688 F.2d 1235, 1239 (9th Cir. 1982) (recognizing that "ECOA was meant to protect women, among others, from arbitrary denial or termination of credit").

Disparate impact liability, with its focus on the effects of facially neutral policies, is essential to removing barriers to credit opportunities not only against women, but also for other protected classes. Research has shown that Black and Latine applicants are more likely to be denied mortgage loans than white applicants with similar credit backgrounds.[121] Another study found that lenders in 2019 were 80 percent more likely to deny home loans to Black applicants and 70 percent more likely to deny Native American applicants than to white applicants with similar financial backgrounds.[122] The ability to use disparate impact liability to target facially neutral practices that disproportionally harm communities of color, therefore, remains crucial, as discussed further in the ACLU's comment opposing changes to the CFPB's Regulation B to eliminate ECOA's disparate impact liability.[123]

iv. *The Americans with Disabilities Act and Other Disability Laws*

The Americans with Disabilities Act ("ADA") also contains provisions that recognize disparate impact as a form of prohibited discrimination, including the same burden-shifting framework for proving such discrimination found in other statutes that recognize disparate impact. *See, e.g.*, 42 U.S.C. § 12112(b)(6) (including as a form of prohibited discrimination "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity").

Moreover, numerous disability laws mandate that covered entities take disability into account and eliminate disability-related barriers when conducting their activities, and such affirmative consideration of disability is at odds with the Proposed Rule's broad definition of disparate impact liability. As discussed above, the Proposed Rule sweeps within the concept of "disparate impact liability" any proactive steps to remove or mitigate the impact that a "facially neutral policy or practice" would otherwise have on the basis of a federally protected trait. But this proactive approach to nondiscrimination and inclusion is enshrined throughout disability rights laws. Long-recognized provisions in the ADA, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA), all impose affirmative obligations on covered entities to take account of disability and remove disability-related barriers to equal opportunity. The obligation of employers, public entities, and places of public accommodation to make reasonable accommodations, for example, requires covered entities to make changes to facially neutral policies or practices to provide access for people with disabilities. 29 U.S.C. § 794(a); 42 U.S.C. §§ 12112(b)(5), 12131(2), 12132, 12182(b)(2)(A)(ii). The ADA requires places of public accommodation to remove architectural and transportation barriers in existing facilities, and

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[121] Miguel Miguel, *American Dream Deferred: The Effects of Credit Worthiness on Mortgage Access for Racialized Minorities in Los Angeles County*, UCLA LATINO POL'Y & POL. INST. (June 7, 2023), https://latino.ucla.edu/wp-content/uploads/2023/06/american-dream-deferred_06.07.2023.pdf.

[122] See, e.g., Emmanuel Martinez & Lauren Kirchner, The Secret Bias Hidden in Mortgage-Approval Algorithms, THE MARKUP (Aug. 25, 2021), https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms./.

[123] Lawyers' Committee for Civil Rights Under Law & American Civil Liberties Union, Comment on Equal Credit Opportunity Act (Regulation B); Docket No. CFPN 2025-0039 or RIN 3170-AB54 (Dec. 15, 2025) https://www.lawyerscommittee.org/wp-content/uploads/2025/12/ECOA-Regulation-B-Comment.pdf.

communication barriers that are structural in nature, where doing so is readily achievable, or otherwise to provide goods and services through an alternative method that does not present such barriers. *Id.* § 12182(b)(2)(A)(iv)-(v). IDEA requires states and public school districts to identify children with disabilities and treat them differently, through individualized special education. 20 U.S.C. § 1400 et seq. By adopting these protections, Congress recognized again that what the Proposed Rule describes as disparate impact liability is essential to combatting disability discrimination.

c. The Disparate Impact Provision raises serious legal concerns.

In addition to its inconsistencies with existing federal civil rights protections and related legal issues, *see supra* Section III, the Disparate Impact Provision runs afoul of federal constitutional and statutory law, including the First and Fifth Amendments to the U.S. Constitution.[124]

i. *The Provision would violate the First Amendment.*

Much like the Bans, discussed *supra* Sections III(a)(i) and VIII, the Disparate Impact Provision would violate the First Amendment if adopted by agencies that fund private speech. The proposal makes the speech implications explicit: it defines the prohibition on "promot[ing] or support[ing] the use of disparate-impact liability" to include "disparate-impact studies" and "disparate-impact litigation."[125] As explained above, such a viewpoint-based prohibition in the administration of funds designed to facilitate private speech—from art to academic writing to scientific research—would violate the First Amendment.

And the proposed limitation on litigation by government-funded attorneys would directly fly in the face of the Supreme Court's decision in *Velazquez*. There, the Court struck down Congress's attempt to prohibit Legal Services attorneys from challenging welfare laws in court, explaining that "the Constitution does not permit the Government to confine litigants and their attorneys" from challenging "the Government's interpretation of the [law]"—even with government funds. 531 U.S. at 548. It advised that courts "must be vigilant when [the government] imposes rules and conditions which in effect insulate its own laws [and practices] from legitimate judicial challenge." *Id.* The Proposed Rule's limitations on government-funded litigation would be precisely that.

ii. *The Provision would impose vague restrictions and invite arbitrary enforcement in conflict with the Fifth Amendment.*

The Disparate Impact Provision imposes a series of vague and confusing restrictions, raising many of the same due process concerns discussed further in Section III(a)(ii). For example, the Provision requires agencies to "eliminate the use of disparate-impact liability in all contexts

[124] The Disparate Impact Provision also raises concerns under separation of powers principles and the Spending Clause. *See supra* Section II.
[125] Proposed Rule, *supra* note 1, at 32252.

relevant to Federal awards."[126] It further requires agencies and pass-through entities to ensure federal funds "are administered in a way that does not promote or support the use of disparate-impact liability," including that funds are not used "in support of disparate-impact studies, disparate-impact litigation, or other related activities; and that Federal award activities based on the assumed risk of disparate-impact liability are not allowed."[127] The Provision also prohibits agencies and pass-through entities from "adopt[ing], issu[ing], or enforce[ing] terms and conditions, guidance, or other policies and procedures related to Federal financial assistance that promote, support, or otherwise include the use of disparate-impact liability"[128] and requires agencies and pass-through entities to take steps "to ensure alignment" with these prohibitions.[129]

The Provision similarly prohibits recipients and subrecipients from "adopt[ing], issu[ing], or enforc[ing] disparate-impact liability standards in administering programs or activities supported by" and to "ensure alignment" with these prohibitions in their policies.[130] The Provision purports to create an exception for "conducting statistical or demographic analysis for internal program evaluation, research, or other purposes," but only if the recipient does not use federal funds for such analyses *and* such analyses are not "used in connection with or applied to activities" under the federal award.[131] This suggests that recipients may not conduct such analyses as long as they are somehow "connect[ed] with or applied to" federally funded activities, even if they use non-federal funds for such analyses. The Provision's purported exception also sets forth two vague examples of prohibited reasons for conducting analyses, including "[t]reating individuals unequally based on federally protected characteristics, such as race or sex, regardless of individual strengths, effort, or achievement," or "[a]djusting activities or performance under the Federal award based on theories, or the assumed risk of, disparate-impact liability."[132] No further guidance or examples are provided.

However, the Proposed Rule fails to define many key terms—such as "promote," "support," "the use of disparate-impact liability," "disparate-impact studies," or "related activities"—or to provide objective guidelines to determine what conduct would be prohibited, raising many of the legal issues discussed above. *See supra* Section III(a)(ii). The absence of such clarity and guidance is particularly concerning, given that the Proposed Rule indicates that the administration views disparate impact liability as violating federal anti-discrimination laws and the Equal Protection Clause.[133]

[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 32213, 32252.

d. The Disparate Impact Provision would chill civil rights enforcement and inflict devastating harms, particularly for historically marginalized communities.

The Disparate Impact Provision will inflict significant harms, costs, and burdens on recipients and subrecipients of federal funding, those they serve, and the broader community, including by disrupting efforts to address harmful disparities, undermining and even chilling civil rights enforcement, and emboldening bad actors to engage in discrimination.

First, the Provision would likely disrupt ongoing efforts to identify and address harmful discriminatory policies and practices based on its vague and confusing restrictions related to the "promot[ion]" or "support" of disparate impact liability and statistical and demographic analyses, even in cases where such work is required by the relevant programs.[134] For example, these restrictions may jeopardize the work of health disparities and education researchers to assess harmful patterns in outcomes,[135] Head Start providers to evaluate barriers to access,[136] domestic violence advocates to determine underserved populations,[137] and fair housing organizations to analyze local impediments to housing choice.[138] By impeding access to such critical information, these disruptions will exacerbate harmful inequities that Congress specifically sought to address in establishing many federal funding programs.

The Disparate Impact Provision also would undermine and even chill civil rights enforcement by causing confusion and fear that enforcing federal and state protections against disparate impact discrimination would be barred by the Proposed Rule. Indeed, many federal funding recipients and subrecipients have played a critical role in enforcing civil rights protections, including state and local governments, fair housing organizations, and legal service providers. For example, many state and local government entities receive federal funding through HUD's Fair Housing Assistance Program to investigate complaints of housing discrimination and enforce federal, state, and local protections.[139] HUD also awards federal funding through its Fair Housing Initiatives Program to private non-profit fair housing enforcement organizations to investigate violations of fair housing rights, including by carrying out testing and other investigative activities, discovering and remedying discrimination in real estate markets, advocating with regulated entities to prevent and address discriminatory policies and practices, and providing training and technical

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[134] *Id.*

[135] *See, e.g.*, Anil Oza, *Health equity researchers fear unseen level of scrutiny under White House proposal*, STAT NEWS (June 22, 2026), https://www.statnews.com/2026/06/22/health-disparity-research-new-dei-rule-threat-nih-grants [https://perma.cc/HH4E-UW25].

[136] *See, e.g.*, *Head Start United: Removing Barriers to Access for Children and Families*, NAT'L HEAD START ASS'N (Apr. 2022), https://nhsa.org/wp-content/uploads/2022/04/Head-Start-United-Removing-Barriers-to-Access-for-Children-and-Families-1.pdf?__cf_chl_f_tk=W6AXhE6u2Ws7Y5Trypg0DigTVb8g_Xq4mX7KnSBUl4w-1782794993-1.0.1.1-ZjIek8r6wwXWoDJtYs8E57D8RYhH4lU8z9SxxKPx45o [https://perma.cc/YFT7-7NY3].

[137] *See, e.g.*, *2020 VAWA Report to Congress: Grants for Outreach and Services to Underserved Populations*, VAWA MEI (Aug. 2022), https://www.vawamei.org/wp-content/uploads/2022/08/2020ReportToCongressUnderservedChapter.pdf [https://perma.cc/KF9H-P5NA].

[138] *See, e.g.*, U.S. Dep't of Hous. And Urb. Dev., Off. of Inspector Gen., Audit Rep. No. 2024-BO-0002, Fair Housing Initiatives Program Organizations Promoted Equity in the Education and Outreach Initiative (Feb. 16, 2024), https://www.hudoig.gov/sites/default/files/2024-02/2024-BO-0002.pdf [https://perma.cc/8FH2-HTGK].

[139] U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING ASSISTANCE PROGRAM, https://www.hud.gov/stat/fheo/assistance-program#FHAP1 [https://perma.cc/34N3-UX5E] (last visited July 7, 2026).

assistance to local organizations.[140] In addition to undermining the congressional mandates for these programs, the Proposed Rule's broad restrictions on the "use," "promotion," or "support" of disparate impact liability will interfere with recipients' ability to enforce critical civil rights protections.

By undermining and chilling civil rights enforcement, the Disparate Impact Provision would leave many individuals and families more vulnerable to discriminatory treatment and its devastating consequences, but without the same level of access to supportive programs and services. For example, disparate impact liability is critical to combatting some of the most pervasive and pernicious forms of housing discrimination, including overbroad and arbitrary restrictions based on prior criminal and eviction history that disproportionately exclude women of color from housing and crime-free and chronic nuisance ordinances that unfairly jeopardize housing for survivors of domestic violence, people of color, and people with disabilities. In employment, disparate impact liability protects applicants and employees from unjust exclusion from employment opportunities based on unnecessary and arbitrary criminal history bans, credit checks, educational requirements, and other unreasonable requirements that are unrelated to business needs. Critically, such discrimination often results in a cascade of negative consequences, such as financial hardship and instability, disruptions in employment and education, physical and mental health issues, housing insecurity, and even homelessness.[141]

VI. The Proposed Rule's Abortion Restriction is an Unauthorized Attempt to Expand the Hyde Amendment.

Section 200.477 of the Proposed Rule ("the Abortion Restriction") states that "Costs associated with elective abortions are unallowable, except as expressly authorized by Federal law."[142] The Abortion Restriction is unlawful to the extent it (1) purports to enforce the Hyde Amendment, an annual appropriations rider that is attached solely to the Departments of Labor, Health and Human Services, and Education, and Related Agencies ("LHHS") appropriations, against virtually all recipients of federal financial assistance, as defined in the Proposed Rule, and (2) uses terminology that has no definition or common understanding in federal law (or otherwise) to modify the meaning, if not expand the scope, of the Hyde Amendment and/or any other statutory abortion funding restriction.[143] As such, like the rest of the Proposed Rule, the Abortion Restriction, at minimum, conflicts with the expressed will of Congress, *see also supra* Section I, raises serious constitutional questions, including, but not limited to, separation of powers and Spending Clause concerns, *see also supra* Sections II–III and *infra* Section VIII, and is vague and subject to arbitrary and discriminatory enforcement, *see also supra* Section III(a)(ii). In short, even

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[140] 42 U.S.C. § 3616a.

[141] *See, e.g.*, Josephina Navar, *How Eviction Brands Renters With a Scarlet Letter*, ACLU NEWS & COMMENT. (July 25, 2023), https://www.aclu.org/news/racial-justice/how-eviction-brands-renters-with-a-scarlet-letter [https://perma.cc/A4UN-Z2K5]; Jenny R. Yang & Jane Liu, *Strengthening accountability for discrimination*, ECON. POL'Y INST. (Jan. 19, 2021), https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/.

[142] Proposed Rule, *supra* note 1, at 32232, 32263.

[143] *See id.*

if the Proposed Rule was based on any legitimate rulemaking authority at all, the Abortion Restriction plainly exceeds it and is otherwise unlawful.

Citing no other sources of authority to promulgate force-of-law rules restricting the use of federal financial assistance to pay for certain abortions, the Proposed Rule claims the Abortion Restriction is "consistent with Executive Order 14182, Enforcing the Hyde Amendment (January 24, 2025)."[144] However, as discussed *supra* Section I, only Congress can delegate rulemaking authority; the executive cannot delegate rulemaking authority to itself via an executive order. *See, e.g.*, *Marin Audubon Soc'y v. Fed. Aviation Admin.*, 121 F.4th 902, 914 (D.C. Cir. 2024) ("[T]he Constitution does not permit the President to seize for himself the 'law-making power of Congress' by issuing an order that, 'like a statute, authorizes a government official to promulgate ... rules and regulations.'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952)); *Am. Fed'n of Gov't Emps. v. Trump*, 139 F.4th 1020, 1033 (9th Cir. 2025). Thus, Executive Order 14182 provides no legal authority at all.

Moreover, the Hyde Amendment is an annual appropriations rider that applies only to LHHS appropriations. Consolidated Appropriations Act, 2026, Pub. L. 119-75, 140 Stat. 173, 317, §§ 506, 507 (2026) ("CAA 2026"). Thus, as an initial matter, the Hyde Amendment is set to expire *before* the Proposed Rule would even take effect (October 1, 2026). *See* CAA 2026 § 5, 140 Stat. at 174 ("Sec. 5 Statement of Appropriations: The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2026."). This turns any notion that Congress intended the Hyde Amendment to delegate the rulemaking authority necessary to promulgate a rule like the Abortion Restriction on its head. *See generally Gonzales v. Oregon*, 546 U.S. 243, 259–264 (2006); *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (recognizing that an agency's statutory authority will "not be lightly presumed").

And, with respect to other federal funding streams outside of LHHS appropriations, Congress has consistently made different choices concerning whether and how to limit the use of certain funds to pay for an abortion, including by using different statutory language than the Hyde Amendment. *Compare, e.g.*, CAA 2026 §§ 506, 507 140 Stat. at 317 (LHHS) *and* Commerce, Justice, Science; Energy and Water Development; and Interior and Environment Appropriations Act, 2026, Pub. L. No. 119-74, 140 Stat. 5, 37, §§ 202, 204 (Department of Justice, Bureau of Prisons) *and* 10 U.S.C. § 1093 (Department of Defense). Thus, even if the Hyde Amendment was the source of some sort of rulemaking authority here, which it plainly is not, that authority could not provide the basis for rulemaking with respect to any agencies *besides* those funded by LHHS appropriations or under *other* statutory abortion funding restrictions, much less *all* of them, as the Abortion Restriction purports to do.

In addition, the Abortion Restriction is unlawful because its text has no basis in federal law. For example, the Hyde Amendment does not use, let alone define, the terms "elective abortion" or "costs associated with elective abortions."[145] Nor are those terms used and/or defined in any other

[144] *Id.* at 32232.
[145] *Id.*

statutory abortion funding restrictions, let alone used or defined in a way that makes them universally applicable to *all* statutory abortion restrictions. *Cf. Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."). The Proposed Rule cannot purport to override the will of Congress, any appropriate delegations of authority, or the discretion of individual executive agencies to determine their obligations under these statutory provisions in the first instance, by requiring recipients of federal financial assistance, as defined by the Proposed Rule, to comply with this wholly invented language. This is particularly so where, as here, this invented language has no basis in existing law and therefore fails to provide recipients of such assistance with clear standards to guide their conduct. Thus, the Abortion Restriction is also, at minimum, vague, subject to arbitrary and discriminatory enforcement, and cannot be said to bear a relationship to the purpose of the federal spending it purports to restrict. *See, e.g.*, *New York,* 505 U.S. at 167; *Dimaya,* 584 U.S. at 175 (Gorsuch, J. concurring); *NEA*, 779 F. Supp. 3d at 187.

VII. The Proposed Rule Conflicts with the Congressionally-Mandated Scientific Process.

The Proposed Rule poses a dire threat to science, seeking to wholly subvert and undermine the merit-driven scientific research process mandated by Congress in statutes such as those governing NIH and replacing it with a process that is politicized, to the detriment of public health and scientific progress. The Proposed Rule would mandate a pre-issuance review process whereby political appointees ensure awards "demonstrably advance the President's policy priorities" and do not touch on the current administration's disfavored topics of "racial preferences", "denial . . . of the sex binary," and "illegal immigration."[146] In other words, alignment with the administration's political goals would be envisioned as the core test for whether an award is issued. Moreover, the Proposed Rule introduces vague and undefined concepts by which appointees are to evaluate research and research institutions, creating easy pathways to deny awards to meritorious research where an administration disfavors the research or institution for whatever reason. For example, appointees would evaluate prospective research and institutions based on their commitment to "Gold Standard Science" and research cannot promote "anti-American values," neither of which is defined in the regulations.[147] Peer review, on the other hand, would "remain advisory and . . . not ministerially ratified, routinely deferred to, or otherwise treated as de facto binding by senior appointees or their designees."[148]

These new requirements are fundamentally at odds with the scientific review process and contrary to congressional statutes mandating that process. Taking grantmaking at NIH as an example, Congress has long mandated that grantmaking at NIH follow a rigorous, peer review-centered process to ensure that taxpayer dollars are expended for the most promising and meritorious scientific research. In addition to congressional statutes that set certain research priorities for NIH, such as studying cancer, Alzheimer's disease, or other particular priorities,[149] Congress mandates that NIH and its twenty-seven institutes and centers ("ICs") undergo multiyear,

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[146] *Id.* at 32249.
[147] *Id.* at 32212, 32249.
[148] *Id.* at 32249.
[149] *See, e.g.*, 42 U.S.C. §§ 285a, 11225.

expert-driven strategic planning processes in order to identify public health research priorities and facilitate cross IC collaboration.[150] Applications for research grants are required by statute to undergo "appropriate technical and scientific peer review."[151] Such peer review has historically occurred through "study sections," composed of 20–30 independent researchers with the expertise to review and score applications for scientific and technical merit.[152] For those applications that are selected to precede to the next stage of review, advisory councils for the IC to which the application is directed—also made up of scientists—make recommendations to the IC director as to which application should be funded based on the IC's portfolio and priorities.[153] By statute, IC directors are required to "make the final decision" as to whether to fund the grant.[154] The statute requires that the decision be made "consistent with the peer review process" and sets out the considerations the IC Director is to make, including the IC mission and scientific priorities identified in the statutorily mandated strategic plans, the advice of advisory councils and staff of the IC, and the programs funded on similar topics by other agencies.[155]

The Proposed Rule runs directly counter to this statutorily mandated process. It interjects a political appointee review process that supplants the mandatory authority of IC directors to make final decisions on research grants. It inserts presidential political priorities into the grant making process where they do not belong, superseding the scientific priorities that Congress mandated be identified through rigorous and expert driven IC strategic planning processes. And it undermines the centrality of the peer review process mandated by Congress to serve as the primary touchstone for determining whether an application is scientifically meritorious. The Proposed Rule is therefore unlawful and should not be implemented as drafted.

Notably, while the Proposed Rule is not yet in place, we already know the harmful impact that it will have because, contrary to current HHS regulations and congressional statutes, NIH has already begun to implement a political review process for certain grants. Using a "computational text analysis tool" to screen for terms it disfavors such as "racism" and "gender," NIH has been flagging grants identified through this tool for political review, causing grants to be delayed or held up indefinitely, or forcing researchers to change their proposals to exclude disfavored words or topics at the threat of termination.[156] Grantmaking at NIH has slowed enormously, with NIH awarding for the first six months of this fiscal year less than half the number of grants that it would have awarded in the same amount of time during the previous administration.[157] The interjection of political review into NIH's grantmaking process has meant stalling or stopping life-saving

[150] 42 U.S.C. § 282(m)(1), (3).
[151] 42 U.S.C. §§ 289a(a)(1), 299c–1(a)(1).
[152] U.S. DEP'T OF HEALTH AND HUM. SERVS., NAT'L INSTS. OF HEALTH, FIRST LEVEL: PEER REVIEW, https://grants.nih.gov/grants-process/review/first-level [https://perma.cc/WMG5-42QT] (last visited July 9, 2026).
[153] U.S. DEP'T OF HEALTH AND HUM. SERVS., NAT'L INSTS. OF HEALTH, SECOND LEVEL: ADVISORY COUNCIL REVIEW, https://grants.nih.gov/grants-process/review/second-level [https://perma.cc/9R29-SBLN] (last visited July 9, 2026).
[154] 42 USC § 284(b)(3)(A).
[155] *Id.*
[156] Benjamin Mueller & Irena Hwang, *Pace of N.I.H. Funding Slows Further in Trump's Second Year*, N.Y. TIMES (Apr. 22, 2026), https://www.nytimes.com/2026/04/22/science/trump-nih-funding-research.html [https://archive.is/20260425223515/https://www.nytimes.com/2026/04/22/science/trump-nih-funding-research.html].
[157] *Id.*

research, including on core public health priorities such as cancer, diabetes, and HIV, destabilizing medical research institutions, and NIH failing to make grants at a pace consistent with the money that Congress has appropriated to scientific research.[158]

VIII. Several Other Provisions Would Raise First Amendment Concerns If Adopted.[159]

a. Federal Agency Review of Applicant Risk

Proposed Section 200.206 would require federal agencies to assess applicants for risk, including their "membership in or affiliation with organizations engaged in activities that . . . undermine public safety or national security, or advocate for the overthrow of the United States Government."[160] If the agency identified such risks, it could deny an application or impose "specific conditions that address the assessed risk."[161]

Unlike the provisions discussed above, this is not a limitation on what grantees can do with federal funds; instead, it is a litmus test that turns on speech and association outside the scope of any federal program to determine who can even be funded. "Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion" from such opportunities. *See Keyishian*, 385 U.S. at 606 (holding that individuals could not be barred from public employment on the basis of their associations); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–15 (2013) (holding that the government cannot impose "conditions that seek to leverage funding to regulate speech outside" of the scope of the government program).

And the provision's reliance on vague terms, like "public safety" and "national security," which are susceptible to arbitrary and discriminatory application, only heightens the risk that it will be used as an ideological litmus test for funding opportunities. Just as "dangers fatal to the First Amendment freedoms inhere in the word 'seditious'" and "the word 'treasonable,' if undefined," *Keyishian*, 385 U.S. at 598, concepts like "public safety" and "national security" pose a serious risk of discriminatory enforcement. *See, e.g.*, *In re Washington Post Co*., 807 F.2d 383, 391 (4th Cir. 1986) ("History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions."). An applicant's membership in, or affiliation with, an organization disfavored by the government cannot justify their exclusion from, or differential treatment in, funding opportunities.

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158 *Id*.

159 The Proposed Rule also leads to sweeping religious exemptions for faith-based organizations receiving federal funds that are neither required nor permitted by law, and would weaponize religious liberty to punish lawful conduct and pressure recipients and subrecipients into complying with the administration's preferred policies. The ACLU incorporates by reference the arguments set forth in the comment submitted by the Coalition Against Religious Discrimination.

160 Proposed Rule, *supra* note 1, at 32249–50.

161 *Id.*

b. Prohibition of Discriminatory Event Services Requirement for Non-Public Entities

Proposed Section 200.219 would require that, when it comes to things "within the scope of activities funded by a Federal award," "non-public entities" "must not discriminate on the basis of viewpoint, content, or subject matter of speech . . . in providing services for events, meetings, or other expressive activities."[162] This would include ensuring that grant recipients do not "[d]eny, reduce, or otherwise modify services for events, meetings, or other expressive activities" based on the viewpoint or message of speech; "[i]mpose . . . fees . . . or other administrative burdens" based on the viewpoint or message of speech; or "[o]therwise apply event or facility-use policies in a manner that has the purpose or effect of suppressing lawful expression."[163]

It is not clear *whose* viewpoint or message cannot serve as the basis of discrimination, and it is difficult to understand what this provision means as applied to non-public entities or private grant recipients. To the extent it means that grant recipients cannot limit who attends or speaks at conferences, convenings, film screenings, parades, or other expressive events funded by federal awards based on attendees' or speakers' viewpoints, it would essentially obliterate grantees' ability to use federal funds to put on any expressive events. Ensuring that the public "has access to a wide range of views" is, of course, "a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from tilting public debate in a preferred direction"— "not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others." *Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024) (citation omitted). *See also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 570 (1995) (First Amendment protects the right of private parade organizer to choose who can join in).

c. Prohibition of Public Messaging on Social, Political, or Public Policy Issues or Membership in Issue Advocacy Groups

Proposed Section 200.450 would prohibit using federal funds to engage in "public messaging that promotes or opposes a particular social, political, or public policy position unrelated to the statutory objectives or performance requirements of the Federal award."[164] This restriction is very broad. It would restrict grant recipients from using federal funds to speak publicly about any social, political, or public policy issue "not *necessary* to accomplish the purpose of the Federal award."[165] This could prohibit a project designed to display elementary school artwork from including pictures showing the effects of climate change or the costs or benefits of social media use. It could also mean that funding offered to research childhood obesity could not include a section on lessons for public policy. Determining whether something is "necessary" opens the door to viewpoint discrimination, and the prohibition on "promot[ing] or oppos[ing]"— but not merely discussing or summarizing it—appears to require such discrimination.

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[162] *Id.* at 32214, 32252–53.
[163] *Id.* at 32252–53.
[164] *Id.* at 32231, 32262.
[165] *Id.*

Relatedly, proposed Section 200.454(d) would prohibit grantees from using funds to pay for "membership in organization whose primary purpose is . . . issue advocacy."[166] This provision does not define "issue advocacy," but points to proposed Section 200.450, which bans using funds for the public messaging described above. If the restriction applies to membership in *any* issue advocacy organization, it could have a significant practical impact by effectively precluding organizational membership. Membership in technical and professional organizations helps federal funding recipients to carry out the federally funded program lawfully, effectively, and in coordination with similarly situated providers by providing a space to share best practices, improve understanding of complex grant rules, build partnerships and referral networks, and receive technical assistance and training. Membership organizations are inherently focused on a particular "issue"; it is a shared interest in an issue that brings people together and makes them want to associate. And "advocacy" is an incredibly broad concept as it is defined as "the act or process of supporting a cause or proposal."[167] Thus, it is hard to imagine an organization whose primary purpose does not include issue advocacy. Even if it is limited to advocacy that is "not necessary to accomplish the purposes of the Federal award," it could substantially impair grantees' ability to share and support best practices, potentially on the basis of viewpoint, for the reasons noted above.

d. Prohibition of Costs for Membership and Conferences Absent Prior Approval

Proposed Section 200.454 would require grantees to obtain "prior written approval of the federal agency" before it could use funds to pay for "membership in professional, civic, business, [or] technical organizations."[168] Similarly, proposed Section 200.432(b) prohibits using federal funds to attend conferences without prior express approval by the government.[169] Neither provision offers any standards to govern the agency's approval (or denial), opening the door to arbitrary or discriminatory enforcement. *See Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969) (requiring that government systems of prior approval include "narrow, objective, and definite standards to guide" government actors). Instead, they offer the agencies standardless discretion to decide when a federal grantee can or cannot associate with others, and what topics they can associate about.

Allowing the federal government to put a heavy thumb on the scale in favor of certain associations or conferences and against others could have a significant impact on the marketplace of ideas. For example, agencies could approve payment of membership dues or conference fees to organizations advocating for policies favored by the government and not those opposing them. Right now, that could mean approving membership in organizations or attendance at conferences that advocate for more religiously-based Head Start programs while denying costs for membership or attendance in organizations or conferences aimed at meeting the needs of dual language learners or children with disabilities. But in a future administration, it could mean denying payment dues or fees to an organization or conference advocating against regulations in Head Start and only approving funds for organizations and conferences that support smaller class sizes in Head Start.

[166] *Id.* at 32231, 32262.
[167] Definition and Meaning of Advocacy, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/advocacy (last visited July 7, 2026).
[168] Proposed Rule, *supra* note 1, at 32231, 32262.
[169] *Id.*

The process of requiring prior approval will also reduce the quality, availability, and responsiveness of training programs specifically designed for organizations carrying out federally funded programs, even if attendance at a conference is ultimately approved. If a training provider does not know whether federally funded programs will be allowed to participate in a conference, they will not be able to invest the upfront costs in putting together the conference, such as renting space for the gathering and engaging experts. New topics will be particularly risky for conference organizers, which will disincentivize conferences that are most responsive to emerging issues or that discuss innovative ideas.

e. Prohibition of Actions that Could Significantly Damage Reputations

Proposed Section 200.332(g)(i) requires pass-through entities to ensure that subrecipients do "not take actions that could significantly damage the reputation of . . . the Federal agency making the award, or the Federal Government."[170] To the extent that that prohibition would include criticizing or suing the government, including with non-federal funds, it would violate the First Amendment.

"Since the day the ink dried on the Bill of Rights, the right of an American citizen to criticize public officials and policies . . . [has been] the central meaning of the First Amendment." *McCurdy v. Montgomery Cnty., Ohio*, 240 F.3d 512, 520 (6th Cir. 2001) (citations omitted). The First Amendment was designed "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It reflects a "profound national commitment to the principle that debate on public issues"—including the policy choices and conduct of federal agencies and the federal government—"should be uninhibited, robust, and wide-open." *N.Y. Times*, 376 U.S. at 270. For the reasons described above, if this provision were to reach criticism of the government beyond the scope of the funded program, it would violate the First Amendment. And if it reached speech funded by programs designed to facilitate litigation or other private speech, it would also violate the First Amendment.

IX. The Proposed Rule Will Cause Significant Costs and Burdens, Disrupt Essential Federal Programs and Services, and Harm Historically Marginalized and Otherwise Vulnerable Communities.

a. The Proposed Rule creates unnecessary red tape and requirements that will impose significant costs, burdens, and risks for recipients of federal funding.

The Proposed Rule's unnecessary and unjustified requirements will impose steep administrative costs, burdens, and other negative impacts, particularly for recipients and subrecipients of federal financial assistance. Indeed, many of the Proposed Rule's changes would require recipients and subrecipients to adopt entirely new systems, policies, and procedures as a condition of funding. For example, proposed Section 200.303(f) mandates that all recipients and subrecipients participate in the Department of Homeland Security's ("DHS") E-verify program—an Internet-based government database of employment-related information— to screen the

[170] *Id.* at 32225, 32246–47, 32257.

eligibility of all employees and contractors hired or performing work in the United States under a federal award.[171] Upon receiving a "Final Non-Confirmation" notice that an employee or contractor is ineligible, recipients and subrecipients must report that information to the agency or pass-through entity and confirm that they "ha[ve] taken appropriate actions consistent with E-verify program requirements" or face termination of federal funding.[172] This mandate would force organizations to expend already-limited resources to set up and train staff on how to use E-verify and its program requirements, ensure their IT systems are equipped to manage the program, undergo audits and cover other compliance costs, and stay informed about related DHS regulations, as well as any applicable state and local laws governing the use of E-verify.[173] Because of these costs and burdens, some employers have warned that E-verify mandates could even drive many companies out of business.[174]

Moreover, requiring recipients to participate in E-verify contributes to substantial risks, costs, and burdens because of the alarming number and frequency of errors in the database, potential for misuse and abuse by employers, discriminatory effects in hiring, and significant privacy and security risks, given the sensitive and personal nature of the information collected and stored in the database.[175] Reports have consistently found that use of E-verify led to the exclusion of eligible workers based on inaccuracies in the database, leading to wrongful job loss for U.S. citizens and work-authorized noncitizens and significant administrative costs and burdens for employers.[176] One study found that, in 2016 alone, over 62,000 U.S. citizens and other authorized workers had to prove their eligibility due to mistakes in the E-verify system.[177] DHS itself has acknowledged that E-verify is not an accurate or trustworthy program, recently claiming that it was "reckless" of an employer to rely on the system as the primary method of verifying an employee's eligibility.[178] These inaccuracies lead to real-world consequences for employers, workers, and beyond. However, the Proposed Rule and its Regulatory Impact Analysis fail to

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[171] *Id.* at 32223, 32253–54.
[172] Id. at 32254.
[173] *See* Alex Nowsrasteh, *The High Cost of E-Verify*, CATO AT LIBERTY (May 11, 2017), https://www.cato.org/blog/high-cost-e-verify [https://perma.cc/7EH7-9JET?type=image]; *see also Mandatory E-Verify: Too Costly for Employers, Workers, and Taxpayers*, NAT'L IMMIGR. L. CTR. (June 2015), https://media.nilc.org/wp-content/uploads/2015/11/E-Verify-issue-brief-2015-06-26.pdf [https://perma.cc/KA7H-FLF3].
[174] Tim Henderson, *E-Verify requirements draw business pushback in some Republican states*, STATELINE (Feb. 26, 2026), https://stateline.org/2026/02/26/e-verify-requirements-draw-business-pushback-in-some-republican-states/ [https://perma.cc/6UD2-9SW2].
[175] *Prove Yourself to Work: The 10 Big Problems with E-Verify*, ACLU (May 2013), https://assets.aclu.org/live/uploads/document/everify_white_paper.pdf [https://perma.cc/6PCA-RS7T]; *see also* Evaluation of the Accuracy of E-Verify Findings, WESTAT (July 2012), https://www.e-verify.gov/sites/default/files/everify/data/FindingsEVerifyAccuracyEval2012.pdf [https://perma.cc/9B5E-WMCF] [hereinafter, "E-Verify Findings"].
[176] *See, e.g.*, Alex Nowrasteh, *Serious Problems with E-Verify*, CATO AT LIBERTY (Nov. 3, 2016), https://www.cato.org/blog/serious-problems-e-verify; E-Verify Findings, *supra* note 155.
[177] David J. Bier, *E-Verify Has Delayed or Cost Half a Million Jobs for Legal Workers*, CATO AT LIBERTY (May 16, 2017), https://www.cato.org/blog/e-verify-has-held-or-cost-jobs-half-million-legal-workers.
[178] Andy Rose, *E-Verify was supposed to make it easy for companies to follow immigration law. Now even the feds say it can't be trusted*, CNN (Aug. 27, 2025), https://www.cnn.com/2025/08/27/us/e-verify-immigration-law [https://perma.cc/HGM4-GBRG].

acknowledge, much less consider, any of these important aspects of the E-verify mandate or any of the myriad costs, burdens, or risks associated with proposed Section 200.303(f).

Proposed Section 200.303(g) also increases unnecessary red tape by requiring all states to conduct "pre-payment verification checks" through the Department of Treasury's ("Treasury") Do Not Pay system or an alternative payment screening process prior to disbursing federal funds to recipients and subrecipients, on top of any existing program-specific screening requirements.[179] Requiring "verification checks" for each and every single request for payment by recipients and subrecipients of federal financial assistance will result in extraordinary costs and burdens on states, who will be forced to expend significant staff time and resources to perform these checks. The increased burdens would likely lead to harmful downstream effects on grantees and the communities they serve, such as payment delays and disruptions to essential programs and services, as discussed further below. Moreover, the administration has released limited information about the Do Not Pay system, leaving many unanswered questions about its implementation, the potential for errors or improper denials, or any safeguards against privacy violations, data misuse, or cybersecurity attacks. This lack of transparency is especially concerning in light of the U.S. Government Accountability Office's recent findings about lack of adequate IT security and privacy safeguards in Treasury's payment systems.[180]

These proposed sections are only a few examples of the many provisions that will impose unjustified expenses, costs, burdens, and harms for agencies, pass-through entities, recipients, and subrecipients of federal funding. The Proposed Rule's unnecessary, costly, and burdensome requirements and increased compliance risks will likely chill participation in federal funding programs. Indeed, many recipients and subrecipients of federal financial assistance are non-profit organizations, direct service providers, and small businesses who operate on tight budgets and limited resources and already face financial challenges. Moreover, the Proposed Rule will lead to particularly staggering costs and burdens for recipients who are states, territories, tribes, and local governments, where these restrictions may require legislative and regulatory changes, extensive coordination, and significant expenditure of financial resources and staff capacity. These costs and burdens are further compounded by the uncertainty and risks caused by the Proposed Rule's apparent and unjustified efforts to increase agencies' discretion to withhold, suspend, or terminate funding,[181] and to limit notice requirements and the ability of recipients and subrecipients to raise objections to or appeal funding terminations.[182]

[179] Proposed Rule, *supra* note 1, at 32223, 32254.
[180] U.S. Gov't Accountability Off., GAO-26-108131, Department of Government Efficiency: Treasury Needs to Fully Implement Data Protection Controls (Apr. 28, 2026), https://www.gao.gov/products/gao-26-108131 [https://perma.cc/9CCX-KCV6].
[181] Proposed Rule, *supra* note 1, at 32258 (setting forth proposed revisions to § 200.340).
[182] *Id.* at 32259–60 (setting forth proposed revisions to §§ 200.341, 200.342).

b. The Proposed Rule will undermine and disrupt essential programs, benefits, and services, particularly for historically marginalized and otherwise vulnerable individuals, families, and communities.

The Proposed Rule would undermine the stability of essential federal programs that Congress established and funded, many of which support underserved, historically marginalized, and otherwise vulnerable communities. If allowed to go into effect, the Proposed Rule will likely lead to disruptions in a broad range of critical services, benefits, and programs across the country, including housing, healthcare, child care, family assistance, food, education, community development, legal aid, and disaster recovery. Indeed, many courts have already recognized the harms of similar restrictions in challenges brought by the ACLU.[183] Nonetheless, the Proposed Rule fails to adequately consider these impacts, including in its Regulatory Impact Analysis.

In addition to the harms discussed above, such disruptions would especially harm women with low incomes, communities of color, people with disabilities, LGBTQIA+ people, immigrant families, families with children, survivors of domestic violence and sexual assault, veterans, pregnant people, and individuals and families with low incomes.

- **Communities of Color.** Disruptions to essential federal programs would have an outsized impact on households of color, who are overrepresented among those receiving the affected services, benefits, and programs due to ongoing systemic inequality and discrimination.[184] Indeed, Congress designed many federal funding programs to specifically address such disparities across the country, including through statutory mandates to direct outreach toward underserved racial and ethnic minority groups. The Proposed Rule (including proposed Sections 200.205, 200.318, and 200.321) also would remove requirements to provide opportunities to underserved groups, including veterans, women, minorities, people with barriers to employment, and people residing in high-poverty, disadvantaged communities. In doing so, the Proposed Rule would require burdensome and expansive

[183] The likely harms, costs, and burdens of the Proposed Rule will be similar to those set forth in existing litigation challenging similar restrictions. *See, e.g.*, *RILA*, 800 F. Supp. 3d at 372 (holding that "the NEA's authorizing statute does not empower the Chairperson to categorically disfavor applications for promoting certain views," and that it is "impossible to square [a viewpoint-based policy] with the NEA's authorizing statute"); *PFLAG, Inc.*, 769 F. Supp. 3d at 405 (issuing preliminary injunction against using EO 14187 to condition federal funding for medical institutions on the denial of gender-affirming care to transgender patients age 19 and under, finding in part that the challenged actions were likely ultra vires as violating the Affordable Care Act and Public Health Service Act); *Wash. State Ass'n of Head Start & Early Childhood Assistance & Educ. Program v. Kennedy*, 820 F. Supp. 3d 1178, 1195 (W.D. Wash. 2026) (preliminarily enjoining ban on DEIA in Head Start programs because the administration failed to consider how the policy has "frustrated or made it impossible for [Head Start agencies and families] to function as they are statutorily required" and created a "Hobson's choice" between complying with the anti-DEIA ban and fulfilling statutory requirements under the Head Start Act).

[184] *See* U.S. DEP'T OF TREASURY, RACIAL INEQUALITY IN THE UNITED STATES (July 21, 2022), https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states [https://perma.cc/E7W2-FCWP]*; see also 2025 Budget Stakes: Cuts Would Widen Economic Disparities for Many People of Color*, CTR. ON BUDGET AND POL'Y PRIORITIES (Mar. 10, 2026), https://www.cbpp.org/research/poverty-and-inequality/2025-budget-stakes-cuts-would-widen-economic-disparities-for-many; ReNika Moore & Rakim Brooks, *To End Systemic Racism, Ensure Systemic Equality*, ACLU NEWS & COMMENT. (Feb. 8, 2021), https://www.aclu.org/news/racial-justice/ending-systemic-racism-requires-ensuring-systemic-equality [https://perma.cc/UG98-WJX9].

recruitment efforts to ensure that everyone has access to opportunities. Broadening the pool of well-qualified applicants does not undermine merit; OMB's efforts to equate inclusion with mediocrity are unsubstantiated.

- **LGBTQ+ Individuals.** LGBTQ+ individuals, and especially transgender and gender nonconforming individuals, face increased risks of experiencing financial instability, housing insecurity, and barriers to accessing health care.[185] As discussed further above, disruptions to essential federal benefits, services, and other programs, as well as increased barriers to accessing gender-affirming care, will be devastating and even life-threatening consequences for LGBTQ+ people. And these harms are further compounded by the administration's broader attacks on transgender and gender nonconforming people, jeopardizing their safety, well-being, and ability to live openly without discrimination.[186]

- **People with Disabilities.** The Proposed Rule's disruptions to federal funding programs will have a particularly harmful impact on children and adults with disabilities and their families.[187] Many federal funding programs specifically serve people with disabilities, including by providing health care and insurance coverage, supportive housing, caregiving services, early childhood education, and employment assistance.[188] The Proposed Rule will lead to critical gaps in services and benefits and result in devastating consequences for people with disabilities, including housing instability and homelessness, worse health outcomes, and deepening inequality.[189]

- **Survivors of Gender-Based Violence.** Many survivors of domestic violence, sexual assault, and other forms of gender-based violence—the vast majority of whom are women—rely on federally funded programs to access emergency shelter, crisis intervention services, transitional housing, physical and mental health care, legal aid, and other critical

[185] *See, e.g.*, S. E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL., 13 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/8EWP-6A8G]; *State of LGBTQ Health: Second Annual National Survey*, NAT'L COAL. FOR LGBTQ HEALTH (Mar. 2024), https://healthlgbtq.org/stateof/lgbtqhealth-2/ [https://perma.cc/MV82-3VH4].

[186] The ACLU discussed many of these harms in its June 29, 2026 comment in opposition to HUD's proposed revisions to its Equal Access Rule and related protections against discrimination based on sexual orientation and gender identity, and hereby incorporates those comments by reference. *See Comment re: HUD's Equal Access to Housing in HUD Programs Revisions; Docket No. FR-6518-P-01 (RIN 2501-AE12)*, AM. CIV. LIBERTIES UNION (June 29, 2026), https://www.aclu.org/documents/aclu-comment-on-huds-equal-access-to-housing-in-hud-programs-revisions [https://perma.cc/CF27-WL9F].

[187] *How Federal Budgets Directly Impact the Lives of Disabled People*, DISABILITY BELONGS (Oct. 6, 2025), https://www.disabilitybelongs.org/2025/10/how-federal-budgets-directly-impact-the-lives-of-disabled-people/ [https://perma.cc/5LNJ-S8D5].

[188] *See, e.g.*, *Comment re: DHS Public Charge Ground of Inadmissibility; Docket No. USCIS-2025-0304*, AM. CIV. LIBERTIES UNION, 31–33 (Dec. 19, 2025), https://assets.aclu.org/live/uploads/2026/01/ACLU-Comment-re-NPRM-Public-Charge-Ground-of-Inadmissibility.pdf [https://perma.cc/E5NX-HQHM].

[189] *See, e.g.*, *2025 Budget Stakes: People With Disabilities Could Lose Vital Health, Food, and Other Assistance*, CTR. ON BUDGET AND POL'Y PRIORITIES (Apr. 24, 2025), https://www.cbpp.org/research/poverty-and-inequality/2025-budget-stakes-people-with-disabilities-could-lose-vital-health.

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services, including those administered by HUD, HHS, DOJ, and USDA.[190] Disruptions to these essential programs would undermine the safety and wellbeing of survivors and their families, including by causing housing insecurity and homelessness, loss of employment and educational opportunities, financial hardship, physical and mental health concerns, and increased risk of future abuse and violence.[191]

- **Women and Children.** The Proposed Rule will disrupt essential programs, benefits, and services that enable women with low incomes, and particularly Black women and other women of color, to provide for the basic needs of themselves and their families, including, but not limited to, child care and family assistance programs, early childhood education, food and nutrition services, and job-related training.[192] Such disruptions, in turn, lead to missed shifts and lost wages, denial of job and educational opportunities, economic insecurity, and widening gender inequities.

- **Pregnant People and People with the Capacity to Become Pregnant**. The Proposed Rule's unauthorized attempt to expand the Hyde Amendment also threatens the health and wellbeing of those who need abortion care. The proposed Abortion Restriction will disproportionately impact low-income families, immigrants, and women of color who rely on government-funded health care, as well as other groups who rely on the federal government for health care, including but not limited to, servicemembers and military dependents, people under the jurisdiction of the Bureau of Prisons, and federal employees.

X. Conclusion

For these reasons, the ACLU opposes the Proposed Rule and urges that OMB and award-making agencies withdraw it in its entirety. If you have any questions regarding this comment, please contact Linda Morris at the ACLU Women's Rights Project (LindaM1@aclu.org).

Sincerely,
The American Civil Liberties Union

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[190] *See, e.g.*, *Deep Cuts in Presidential "Skinny Budget" Threaten Safety of Domestic Violence Survivors Nationwide*, NAT'L NETWORK TO END DOMESTIC VIOLENCE (May 7, 2025), https://nnedv.org/latest_update/deep-cuts-in-presidential-skinny-budget-threaten-safety-of-domestic-violence-survivors-nationwide/ [https://perma.cc/C6YE-YCLS]; *Sudden Federal Grant Terminations Threaten Lifesaving Domestic Violence Resources*, NAT'L NETWORK TO END DOMESTIC VIOLENCE (Apr. 24, 2025), https://nnedv.org/latest_update/sudden-federal-grant-terminations-threaten-lifesaving-domestic-violence-resources/ [https://perma.cc/JJD9-NTSF].

[191] *See, e.g.*, Women's Rights Project, *Domestic Violence and Homelessness*, AM. CIV. LIBERTIES UNION (Mar. 2006) https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf [https://perma.cc/C29Y-EH7Z]; Danielle Chiaramonte et al., *Examining contextual influences on the service needs of homeless and unstably housed domestic violence survivors*, 50 J. OF CMTY. PSYCH. 1831 (June 19, 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8684560/ [https://perma.cc/W3H3-QHAR].

[192] *See, e.g.*, *By the Numbers: Data on Key Programs for the Well-Being of Women, LGBTQI+ People, and Their Families*, NAT'L WOMEN'S L. CTR. (May 9, 2025), https://nwlc.org/resource/by-the-numbers-data-on-key-programs-for-the-well-being-of-women-lgbtqi-people-and-their-families/ [https://perma.cc/6367-2QUF]; Robin Bleiweis, Diana Boesch & Alexandra Cawthorne Gaines, *The Basic Facts About Women in Poverty*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/article/basic-facts-women-poverty/ [https://perma.cc/KE7T-5HNC].