ETHICS AND PUBLIC POLICY CENTER

December 4, 2023

Via Federal eRulemaking Portal

Deidre A. Harrison,
Deputy Controller
Office of Federal Financial Management
Office of Management and Budget
The White House
1600 Pennsylvania Ave NW
Washington, DC 20500

RE: EPPC Comment on OMB Proposed "Guidance for Grants and Agreements," Specifically 2 CFR § 200.300, Docket No. OMB–2023–0017

Dear Deputy Controller Harrison:

I write in response to the Office of Management and Budget's (OMB) proposed "Guidance for Grants and Agreements,"[1] and specifically proposed **2 CFR § 200.300**. I am a scholar at the Ethics and Public Policy Center (EPPC), where I serve as a Fellow and Director of EPPC's HHS Accountability Project. I am also a former attorney at the Equal Employment Opportunity Commission.

Under 2 CFR § 200.300, which establishes statutory and national policy requirements for federal awards, OMB proposes removing references to free speech and religious liberty protections in section (a), while simultaneously proposing to add references to alleged requirements not to discriminate based on sexual orientation and gender identity in sections (b) and (c). In short, proposed § 200.300 is contrary to law and arbitrary and capricious. OMB provides no explanation for its proposed removal of references to free speech and religious liberty protections in section (a). Section (b) cites to the Supreme Court's decision in *Bostock* in support of sexual orientation and gender identity nondiscrimination requirements, but *Bostock* was a limited holding. As the Supreme Court made clear, *Bostock* was limited to hiring and firing decisions based on sexual orientation and transgender status under Title VII. It did not address other employment issues, "gender identity" as a protected class, related conduct, or other sex discrimination laws. *Bostock* also acknowledged statutory and constitutional religious liberty protections, which the proposed guidance ignores. Section (c) states that the Equal Protection clause *may* require heightened scrutiny for sexual orientation and gender identity, but the Supreme Court has never so held. OMB's proposed guidance will harm faith-based organizations

[1] 88 Fed. Reg. 69390 (Oct. 5, 2023), *available at* https://www.federalregister.gov/documents/2023/10/05/2023-21078/guidance-for-grants-and-agreements.

and federal agencies. OMB should reject proposed sections (b) and (c) and restore section (a)'s explicit references to free speech and religious liberty protections.

I. Summary of proposed 2 CFR § 200.300.

OMB proposes making several significant changes to 2 CFR § 200.300, which details statutory and national policy requirements for federal awards. OMB summarily explains that it is offering this proposal to "streamline section 200.300 and to reinforce existing nondiscrimination requirements under the Constitution and other applicable law, consistent with Executive Order 13988 of January 20, 2021 ("Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation"), and Executive Order 14075 of June 15, 2022 ("Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals").[2]

Currently, § 200.300(a) states:

> The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, and public policy requirements: **Including, but not limited to, those protecting free speech, religious liberty**, public welfare, the environment, and prohibiting discrimination. The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.[3]

OMB proposes to amend section (a) to read as follows:

> The Federal agency or pass-through entity must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, applicable Federal statutes (including statutes that prohibit discrimination) and regulations, and the requirements of this part. The Federal agency or pass-through entity must communicate to a recipient or subrecipient all relevant requirements, including those contained in general appropriations provisions, and incorporate them directly or by reference in the terms and conditions of the Federal award.[4]

Notably and without any explanation, OMB's proposed section (a) drops the reference to free speech and religious liberty (as well as public welfare and the environment). Significantly, it retains a modified reference to statutes that prohibit discrimination.

OMB also proposes to add new sections (b) and (c), which state:

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[2] *Id.* at 69395.

[3] Emphasis added.

[4] 88 Fed. Reg. at 69445.

(b) In administering Federal awards that are subject to Federal statutes prohibiting discrimination based on sex, the Federal agency or pass-through entity must ensure that the award is administered in a way that does not unlawfully discriminate based on sexual orientation or gender identity, consistent with the Supreme Court's reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

(c) In administering awards in accordance with the U.S. Constitution, the Federal agency must take account of the heightened constitutional scrutiny that may apply under the Constitution's Equal Protection clause for government action that provides differential treatment based on sexual orientation or gender identity.[5]

OMB proposes relocating current section (b) on whistleblower protections to another regulation. I have no issue with the proposed relocation. My concerns focus on the proposals to drop references to free speech and religious liberty protections under section (a), as well as the addition of proposed sections (b) and (c).

II. Proposed 2 CFR § 200.300 is not in accordance with law.

A. *Bostock* was a limited holding.

Proposed section (b) implies that the Supreme Court's reasoning in *Bostock v. Clayton County*[6] applies to all federal statutes prohibiting sex discrimination such that those statutes prohibit discrimination based on sexual orientation and gender identity. This is legal error.

Bostock was a limited holding. In *Bostock* the Supreme Court held that under *Title VII of the Civil Rights Act of 1964* "an employer who *fires* someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"[7]

1. *Bostock* was limited to hiring and firing under Title VII.

The Supreme Court specifically cabined its decision in *Bostock* to the hiring and firing context under Title VII, explaining that the Court was not addressing other nondiscrimination laws, or even other employment issues under Title VII, such as sex-specific bathrooms, locker rooms, and dress codes.[8] While the Court acknowledged concerns by some that its decision could make sex-segregated bathrooms, locker rooms, and dress codes "unsustainable" and "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," the Court expressly chose not to address those concerns, leaving them for "future cases."[9] The Court further explained that it would not prejudge those issues because "none of th[o]se other laws

[5] *Id.*
[6] 140 S. Ct. 1731 (2020).
[7] *Id.* at 1737 (emphasis added).
[8] *Id.* at 1753.
[9] *Id*.

[we]re before [them].”[10] As the Sixth Circuit observed, “Bostock extends no further than Title VII.”[11]

By implying that *Bostock* extends generally to all sex discrimination statutes, not just Title VII, OMB is doing explicitly what the Supreme Court chose not to do—prejudging issues not addressed in *Bostock*. In doing so, OMB’s proposed guidance is contrary to “the Supreme Court’s reasoning in *Bostock*.” The Supreme Court was clear that *Bostock* did not decide any issue beyond hiring and firing under Title VII. It is arbitrary and capricious for OMB to ignore *Bostock*’s limitations by implying that the reasoning in *Bostock* extends to every other federal law prohibiting sex discrimination despite the Supreme Court’s admonition that *Bostock* did no such thing.

OMB must consider the implications of court decisions striking down “*Bostock* guidance” issued by agencies to extend *Bostock* to issues and laws it did not address.[12] Failing to address the reasoning and impact of such cases is arbitrary and capricious.

Not all sex discrimination laws are the same. For example, as explained in EPPC’s comment on the Department of Education’s proposed Title IX rule, Title IX—which prohibits sex discrimination in educational programs and activities that receive federal financial assistance—and its implementing regulations “recognize the fact of biological sexual difference and clearly presuppose “sex” as a binary classification (male or female).”[13] As a federal court observed, “Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each ‘sex.’”[14] It is arbitrary and capricious for OMB to assume all sex discrimination laws as equivalent and that *Bostock* applies to them all.

2. *Bostock* was limited to “transgender status” and did not extend to “gender identity.”

Throughout the *Bostock* opinion, the majority used the term “transgender” or “transgender status,” not “gender identity.” Significantly and contrary to the underlying assumption of propose § 200.300(b), *Bostock* did not adopt “gender identity” as a protected class. Many view “gender identity” as a broader concept that “transgender status.” Does OMB share that view? If not, then OMB should have no problem using the same term the Supreme Court used in *Bostock*—transgender status. Since gender identity is a broader concept than transgender status, OMB’s guidance is not supported by *Bostock*.

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[10] *Id.*
[11] *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021).
[12] *See, e.g.*, *Texas v. Equal Emp’t Opportunity Comm’n*, 2:21-CV-194-Z, at *4 (N.D. Tex. Oct. 1, 2022 (striking down EEOC and HHS *Bostock* guidance).
[13] EPPC Scholars Comment Opposing “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” RIN 1870-AA16, Docket ID ED-2021-OCR-0166, at 7 (Sept. 12, 2022), https://eppc.org/wp-content/uploads/2022/09/EPPC-Scholars-Comment-Opposing-Title-IX-Proposed-Rule.pdf (listing provisions that mention “both sexes,” “boy and girls,” etc.).
[14] *Neese v. Becerra*, 2:21-CV-163-Z, 22 (N.D. Tex. Apr. 26, 2022).

3. *Bostock* was premised on biological distinctions between male and female which is incompatible with "gender identity."

Notably, the *Bostock* Court premised its decision on the assumption that "sex" refers only to the "biological distinctions between male and female." [15] A biological view of sex is incompatible with a gender spectrum or fluidity, which is promoted through use of the phrases "gender identity." To be consistent with *Bostock*, any application of sex discrimination must likewise assume "sex" refers to "biological distinctions between male and female." As such, for OMB to suggest that *Bostock* supports interpreting sex discrimination statutes to prohibit gender identity discrimination, it is in error.

4. *Bostock* was cabined to "status" and does not extend to "correlated conduct."

Bostock focused on status. Indeed, the majority in *Bostock* explained it was not addressing a "broader scope" of conduct.[16] As a federal district court explained, *Bostock*'s holding was cabined to "homosexuality and transgender *status"* and does not extend to "correlated *conduct*—specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices."[17]

It is unclear whether OMB views nondiscrimination based on sexual orientation and gender identity "consistent with the Supreme Court's reasoning of *Bostock*" to extend to issues such as dress codes, bathrooms, pronouns, insurance coverage, etc. Without guidance as to what constitutes discrimination based on sexual orientation and gender identity, agencies will be left to their own, and possibly conflicting, interpretations. Indeed, several agencies purporting to apply *Bostock* have recently indicated that it is gender identity discrimination to "misgender" a person (or not use preferred pronouns that correspond to the person's gender identity) and not allow a person access to sex-specific facilitates that correspond to the person's gender identity.[18]

If OMB retains proposed § 200.300(b), which it shouldn't, I ask that OMB clarify what it views as nondiscrimination based on sexual orientation and gender identity "consistent with the Supreme Court's reasoning of *Bostock.*" What constitutes discrimination based on sexual orientation and gender identity is open for debate and is currently being litigated.

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[15] 140 S. Ct. at 1739.
[16] *Id*.
[17] *Texas v. Equal Emp't Opportunity Comm'n*, 2:21-CV-194-Z, at *4 (N.D. Tex. Oct. 1, 2022.
[18] *See, e.g.*, EEOC, PROPOSED Enforcement Guidance on Harassment in the Workplace, https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace; Letter from Ted Budd, U.S. Senator, and 10 Other Senators, to Antony Blinken, Secretary, U.S. Dep't of State, Oct. 20, 2023, https://www.budd.senate.gov/wp-content/uploads/2023/10/10.20.23-Budd-Letter-to-Blinken-on- Updated-Guidance1.pdf; *Biden's HHS Orders Employees to Obey a Trans Pronoun Mandate: 'Deny Biological Realities*', CBN News (Oct. 13, 20223), https://www2.cbn.com/news/us/bidens-hhs-orders-employees-obey-trans-pronoun-mandate-deny-biological-realities.

B. The Equal Protection Clause does not require heightened scrutiny for sexual orientation or gender identity.

Proposed section (c) states that agencies should consider "heightened constitutional scrutiny that *may* apply under the Constitution's Equal Protection clause for government action that provides differential treatment based on sexual orientation or gender identity" (emphasis added). The Supreme Court has never held that heightened constitutional scrutiny applies to sexual orientation or gender identity, which is presumably why OMB says "may." It is arbitrary and capricious for OMB to even suggest to federal agencies that heightened scrutiny may apply when it does not. Such a requirement, even with a qualifier, is inappropriate and contrary to law.

III. Proposed 2 CFR § 200.300 is arbitrary and capricious for eliminating the reference to free speech and religious liberty.

OMB's proposed removal of the refence to free speech and religious liberty in § 200.300 is arbitrary and capricious. OMB provides no explanation for its proposed removal. Why would OMB remove that language while simultaneously proposing to retain the reference to nondiscrimination statutes and to add sections (b) and (c) on only sexual orientation and gender identity discrimination. Protections for free speech and religious liberty stem not just from federal statutes, but also from the First Amendment to the U.S. Constitution. OMB's guidance should retain the references to free speech and religious liberty.

IV. Proposed 2 CFR § 200.300 is arbitrary and capricious for failing to acknowledge religious liberty protections.

Not only does OMB propose to remove the refence to religious liberty in § 200.300, but it also fails to acknowledge religious liberty protections that may apply to alleged claims of sexual orientation or gender identity discrimination.

The guidance points to *Bostock* but does not acknowledge the *Bostock* Court's discussion of religious liberty protections. In *Bostock*, the Court explained that it is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution"—a "guarantee" that "lies at the heart of our pluralistic society."[19] As such, the Court flagged three doctrines protecting religious liberty it thought relevant to claims of sex discrimination under Title VII:

1. Title VII's religious organization exemption, which allows religious organizations to employ individuals "of a particular religion"[20];

[19] 140 S. Ct. at 1754.

[20] 42 U.S.C. § 2000e-1(a). Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j).

2. The ministerial exception under the First Amendment, which "can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers'"[21]; and

3. The Religious Freedom Restoration Act (RFRA), which the Court described as a "super statute" that "might supersede Title VII's commands in appropriate cases."[22]

OMB's failure to acknowledge protections for religious liberty in its guidance—especially in light of the fact that they were acknowledge by the Court in *Bostock*—is arbitrary and capricious.

While Title VII's religious organization exemption is limited to Title VII claims and the ministerial exception is limited to employment decisions more generally, the "super statute" RFRA has far broader application. Congress passed RFRA in 1993 in the wake of the Supreme Court's 1990 *Employment Division v. Smith* case. It was passed with overwhelming bipartisan support and signed into law by President Bill Clinton, indicating the strong consensus that the Supreme Court had improperly interpreted the First Amendment Free Exercise Clause. The law's stated purposes are "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and to apply "in all cases." It "applies to all Federal law, and the implementation of that law." RFRA defines "government" to include any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States."

As such OMB, as well as the federal agencies, must consider RFRA in issuing guidance and awarding federal awards.[23] It appears, however, that OMB did not consider RFRA when drafting its proposed § 200.300. Accordingly, OMB must withdraw its proposed guidance and reissue it after considering RFRA's obligations.

To the extent OMB retains references to sexual orientation and gender identity discrimination in proposed sections (b) and (c), which it shouldn't, OMB should add references to specific religious liberty protections, such as the First Amendment and the Religious Freedom Restoration Act (RFRA). These protections are particularly relevant in the context of discrimination claims based on sexual orientation or gender identity, which is inexplicably and disproportionately elevated by OMB. Consider, for example, the 2021 Sixth Circuit decision in *Meriwether v. Hartop* where the court allowed a professor's First Amendment challenge to a university pronoun policy to proceed on free-speech and free-exercise grounds.[24] The case ultimately settled, with the university agreeing to pay $400,000 in damages and attorney's fees.[25]

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[21] *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).
[22] *Id.* (citing 42 U.S.C. § 2000bb-3).
[23] *Cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).
[24] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).
[25] *Meriwether v. Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), press release available at https://adfmedia.org/case/meriwether-v-trustees-shawnee-state-university.

I also ask for OMB to provide clarity in its guidance to the federal agencies and answer the following questions.

- Does OMB acknowledge that religious liberty protections identified in *Bostock* could apply to considerations of discrimination based on sexual orientation or gender identity under Title VII?
- Does OMB acknowledge that religious liberty protections under *Bostock* could apply to considerations of discrimination based on sexual orientation or gender identity under other sex discrimination laws?
- Does OMB acknowledge that other sex discrimination laws have other religious exemptions and exceptions that could apply?
- Which religious liberty protections, if any, does OMB believe could apply to nondiscrimination requirements based on sexual orientation or gender identity?

V. Proposed 2 CFR § 200.300 harms faith-based organizations and federal agencies.

The proposed changes to § 200.300—specifically the removal of references to free speech and religious liberty protections couple with the addition of references to discrimination based on sexual orientation and gender identity—are problematic for both faith-based organizations receiving awards and the federal agency employees that will be tasked with enforcing the guidance.

Religious liberty is a highly specialized area of the law. As such, non-lawyers and even attorneys that do not specialize in this area need detailed guidance from federal agencies so that all parties involved understand their rights and obligations. Staff at federal agencies that operate programs subject to OMB's proposed guidance (or a similar version) might be misled into thinking that they can carry out their jobs and make award determinations without regard to free speech and religious liberty considerations.

Staff might inadvertently deny awards to faith-based organizations under the mistaken impression that federal law does not protect their right to run their organizations according to their religious beliefs and still be eligible for federal awards. As the Supreme Court has recognized, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[26] Unlawful denials of awards to faith-based organizations can result in costly and time-consuming litigation, harming both faith-based organization and federal agencies.

Further, unless OMB articulates clear protections for religious liberty, faith-based organizations might be dissuaded from applying for federal awards. OMB's failure to affirm its obligations under RFRA would thereby result in significant harm to the people these programs are intended to serve. It is unlikely that OMB programs would reach their potential without robust cooperation with the faith-based community, given that faith-based businesses,

[26] *Elrod v Burns*, 427 U.S. 347, 373 (1976).

institutions, and congregations contribute nearly $1.2 trillion of social-economic value to the U.S. economy each year.[27]

Shockingly, OMB claims that this proposal will not have a significant economic impact on a substantial number of small entities.[28] But proposing that federal agencies impose sexual orientation and gender identity nondiscrimination requirements on *all* federal awards will certainly impact a substantial number of small entities, including faith-based organizations.

Conclusion

I urge OMB to reject proposed paragraphs (b) and (c) of 2 CFR § 200.300, and to restore paragraph (a)'s explicit references to free speech and religious liberty protections.

Sincerely,

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[27] Brian J. Grimm, *$1.2 Trillion Religious Economy in U.S.*, Religious Freedom & Business Foundation, https://religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us.

[28] 88 Fed. Reg. at 69400.