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Office of Management and Budget
725 17th Street NW
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Submitted via www.regulations.gov

RE: Regulation for Federal Financial Assistance, OMB-2026-0034

Lambda Legal Defense & Education Fund, Inc. ("Lambda Legal") appreciates the opportunity to submit these comments in response to the Notice of Proposed Rulemaking, "Regulation for Federal Financial Assistance," [Docket OMB-2026-0034] ("Proposed Rule" or "NPRM"), published in the Federal Register on May 29, 2026, by the Office Management and Budget ("OMB").

Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") people and everyone living with HIV through impact litigation, policy development and advocacy, and public education. At the core of Lambda Legal's mission is recognition that members of our communities have been and remain marginalized and vulnerable due to pervasive discrimination both within our legal system and throughout our American society. Too often, members of our communities are denied access to vital resources and services because of who they are or who they love. Too often, those denials are despite program directives from Congress to serve populations of greatest need in order to alleviate poverty and human suffering, and to enhance the health, productivity, and thriving of the American public.[1] Given the disparities that continue to affect LGBTQ+ populations, Lambda Legal has a profound interest in ensuring that federal financial assistance and grants intended to meet identified social needs are administered to agencies and programs lawfully and in accordance with clear statutory and constitutional mandates, including nondiscrimination mandates.

[1] In comments submitted to multiple federal agencies in opposition to rule changes for social services funding proposed by the first Trump administration, Lambda Legal provided extensive evidence of the discrimination and resulting health and other adverse disparities affecting LGBTQ+ people. *See*, *e.g.*, Lambda Legal, Comment Letter on HHS Proposed Rule RIN 0991-AC13 (Feb. 18, 2020), 85 Fed. Reg. 2974 (proposed Jan. 17, 2020) (to be codified at 45 CFR 87 and 45 CFR 1050 ("Lambda Legal 2020 HHS Comment"), https://www.regulations.gov/document?D=HHS-OS-2020-0001-22659; Lambda Legal, Comment Letter on VA Proposed Rule RIN 2900-AQ75 (Feb. 18, 2020) 85 Fed. Reg. 82037 (proposed Dec. 17, 2020) (to be codified at 2 CFR 3474, 6 CFR 19, 7 CFR 16, 22 CFR 205, 24 CFR 5, 24 CFR 92, 24 CFR 578, 28 CFR 38, 29 CFR 2, 34 CFR 75, 34 CFR 76, 38 CFR 50, 38 CFR 61, 38 CFR 62, 45 CFR 87, 45 CFR 1050) ("Lambda Legal 2020 VA Comment"), https://www.regulations.gov/document?D=VA-2020-VACO-0003-4889.

Lambda Legal emphatically urges that the Proposed Rule be withdrawn in its entirety because it would have devastating effects on the communities we serve, and especially on transgender, nonbinary, and gender diverse ("TNGD") people, on LGBTQ+ people who are Black, Indigenous, or other people of color ("BIPOC"), and on people living with HIV. This is because it would impose sweeping, government-wide restrictions that would bar federal grant and contract recipients from acknowledging the existence and providing respectful, culturally competent treatment of TNGD people—what the NPRM and other administration policies characterize as unlawful "gender ideology"—and from implementing diversity, equity, and inclusion ("DEI") initiatives to reduce the many harmful effects of illicit discrimination. While OMB purports to justify the Proposed Rule as "eliminating wasteful spending" and "improving American lives," the reality is the opposite. It is the epitome of ideology-driven Executive Branch overreach and, were it to be adopted, it would profoundly worsen American lives by systematically defunding, destabilizing, and degrading critical public health, educational, and carceral safety infrastructures nationwide. Lambda Legal strongly urges OMB to rescind the Proposed Rule.

Given the staggering breadth of this NPRM, Lambda Legal makes no attempt to provide an exhaustive analysis of the myriad legal failings of the proposed rule, nor to provide a comprehensive survey of the many ways in which the proposed rule would, if implemented, harm LGBTQ+ people and those living with HIV. Instead, what follows are some concrete examples of how the NPRM would violate the Administrative Procedures Act, agencies' authorizing legislation, and the United States Constitution.

This comment first addresses how implementation of the NPRM would cause agencies and programs to defy the programmatic policies explicitly enacted by Congress — such as the Ryan White HIV/AIDS Treatment Extension Act, the Older Americans Act, and the Prison Rape Elimination Act — in other words, to violate the very laws the agencies are charged with executing. Doing so would inflict immediate, irreparable harm on many marginalized populations — including low-income people living with HIV, LGBTQ+ seniors, students, and vulnerable incarcerated individuals, and even more so for BIPOC LGBTQ+ people. OMB lacks the authority to use its funds-dispensing role this way.

Next, the comment outlines the numerous other statutory and constitutional violations threatened by the Proposed Rule, including that the proposed targeting of TNGD people would violate the Equal Protection Clause, that the proposed impounding of congressionally directed funds would be *ultra vires*, and that the proposed conditioning of congressionally directed funds on viewpoint-discriminatory speech would violate the First Amendment. And, last, the proposal to favor funding recipients that claim categorical religious exemptions, and the tacit permission to discriminate against program beneficiaries based on their religion or non-religion, would violate both statutory and constitutional religious freedom guarantees.

Because the core commands of the NPRM are not reconcilable with governing provisions of federal law, including our Constitution, it should be withdrawn in its entirety.

I. People Who Are LGBTQ+ and/or Who Are Living with HIV Constitute Vulnerable Populations with Many Elevated, Population-Specific Needs.

LGBTQ+ people and people living with HIV experience widespread discrimination, denials of care, inadequate care, and related health disparities, as well as disproportionate levels of poverty, food scarcity, homelessness, and other needs that are targeted by federal social

service funding.[2] Like Lambda Legal, the National Center for Transgender Equality (now known as Advocates for Trans Equality), provided extensive evidence of the elevated rates of discrimination and service-access barriers experienced by transgender people, drawing from the organization's 2015 U.S. Transgender Survey. That survey was the largest survey to that date of transgender people, and it found this population facing "enormous disparities across a wide range [of] social health indicators and risk factors that [HHS's] programs seek to address."[3] The 2015 survey showed that the disparities resulted from widespread social stigma, rejection, discrimination, and violence against transgender people.[4] Together with multiple professional and community partners, Advocates for Trans Equality conducted an even larger survey in the fall of 2022, collecting responses from more than 92,000 transgender-identifying people.[5] Across measures of health, housing, and other indicia of wellbeing, the 2022 findings confirm that this population continues to experience alarmingly high levels of discrimination, ostracism, violence, and poverty.[6] The discussion below provides additional illustrations of the current and continuing needs and vulnerabilities of these populations, which would be exacerbated were the process changes proposed in the NPRM to be adopted.

LGBTQ+ people in the United States constitute a small minority population. The research scholars at UCLA School of Law's Williams Institute have calculated that just 5.5% of the U.S. population identifies as LGBT, for an estimated 13.9 million adults.[7] The Institute's researchers also calculate that 2.8 million people ranging from thirteen years old through adulthood identify as transgender, comprising 1% of that age group in the U.S. population.[8] The adult population (18 years and older) who identify as transgender is calculated to be 2.1 million people or 0.8% of the total adult population.[9] The race and ethnicity distribution of adults and youth who identify as transgender appears similar to the U.S. population as a whole.[10]

Consistent with the information provided in our 2020 comments, LGBTQ+ people remain subject to widespread and harmful discrimination, specifically including workplace

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[2] *See* Lambda Legal 2020 HHS Comment at 4-22.

[3] Nat'l Ctr. for Transgender Equal., Comment Letter on HHS Proposed Rule RIN 0991-AC13 at 16 (Feb. 18, 2020), 85 Fed. Reg. 2974 (proposed Jan. 17, 2020) (to be codified at 45 CFR 87 and 45 CFR 1050 NCTE 2020 HHS Comment"), https://www.regulations.gov/comment/HHS-OS-2020-0001-19973.

[4] *Id.*

[5] Sandy E. James, *et al.*, *Early Insights: A Report of the 2022 U.S. Transgender Survey* 6, NAT'L CTR. FOR TRANS EQUAL. (2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

[6] *Id.* at 16-23.

[7] Andrew R. Flores & Kerith J. Conron, *Adult LGBT Population in the United States*, UCLA SCH. OF L. WILLIAMS INST. (Dec. 2023), https://williamsinstitute.law.ucla.edu/publications/adult-lgbt-pop-us/. *See also* Jody L. Herman & Raksha Kopparam, *U.S. Census Snapshots 2020: Same-Sex Couples*, UCLA SCH. OF L. WILLIAMS INST. (Sept. 2025), https://williamsinstitute.law.ucla.edu/publications/us-census-snapshots/.

[8] Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States*, UCLA SCH. OF L. WILLIAMS INST. (Aug. 2025), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/.

[9] *Id.*

[10] *Id.*

discrimination.[11] Just under half of LGBTQ+ workers report having experienced discrimination or harassment at work at some point, with transgender and nonbinary employees, and LGBTQ+ employees of color, reporting discrimination at even higher rates.[12]

It is well-recognized that anti-LGBTQ+ workplace discrimination negatively impacts both employees' health and success at work and company costs, productivity, and other determinants of business success.[13] The workplace discrimination that confronts workers who are transgender is significantly more intense than that experienced by lesbian, gay and bisexual workers. A recent Williams Institute study that compared employment experiences of workers who identify as transgender with workers who identify as lesbian, gay, or bisexual ("LGB") and non-transgender, found that 47% of the transgender workers reported having experienced discrimination or harassment during the prior year alone compared with only fifteen percent for the LGB respondents.[14] The study also found that 60% of the transgender employees made less than $50,000 annually.[15] These findings confirm both the adverse impacts of hostile workplace settings and the resulting social and economic vulnerabilities and needs of the populations. Hate crime data provide an even more dramatic measure of the social hostility and risks that create vulnerability for LGBTQ+ people. They are five times more likely than non-LGBTQ+ people to be victims of violent crime, and nine times more likely to experience violent *hate* crimes than non-LGBTQ+ people.[16]

Given these employment and social dynamics, it should be no surprise that economic disparities persist between LGBTQ+ and non-LGBTQ+ people. A higher percentage of LGBTQ+ people have incomes below the federal poverty level, and BIPOC LGBTQ+ people experience poverty at greater rates than White LGBTQ+ people. In addition, among BIPOC

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[11] *See, e.g.*, M.V. Lee Badgett, *Letter to the Senate Judiciary Committee Regarding the Equality Act, S. 393/H.R. 5*, UCLA SCH. OF L. WILLIAMS INST. (March 17, 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-LGBT-Employment-Mar-2021.pdf.

[12] Brad Sears, *et al.*, *LGBTQ People's Experiences of Workplace Discrimination and Harassment*, UCLA SCH. OF L. WILLIAMS INST. (Aug. 2024), https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination/.

[13] David M. Frost, *et al.*, *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 J. BEHAV. MED. 1, 7 (Feb. 2015) (stress resulting from prejudice and stigma puts sexual minorities at increased risk for health problems, including cancer, flu, and hypertension), https://williamsinstitute.law.ucla.edu/publications/minority-stress-physical-health/; M.V. Lee Badgett, *et al.*, *The Business Impact of LGBT-Supportive Workplace Policies*, UCLA SCH. OF L. WILLIAMS INST. (2013), https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-supportive-workplaces/.

[14] Brad Sears *et al.*, *Workplace Experiences of Transgender Employees*, UCLA SCH. OF L. WILLIAMS INST. 18 (Nov. 2024) (comparisons done using 2023 survey data), https://williamsinstitute.law.ucla.edu/publications/transgender-workplace-discrim/.

[15] *Id.* at 3.

[16] Ilan H. Meyer & Andrew R. Flores, *Anti-LGBT Victimization in the United States*, UCLA SCH. OF L. WILLIAMS INST. (Feb. 2025) (calculations done using 2022 and 2023 National Crime Victimization Survey data and finding that, among LGBTQ+ people, Black LGBTQ+ people experienced the highest rates of violent crime victimization), https://williamsinstitute.law.ucla.edu/publications/anti-lgbt-victimization-us/. *See also* Andrew R. Flores, *et al.*, *Hate Crimes Against LGBT People*, UCLA SCH. OF L. WILLIAMS INST. (Dec. 2022), https://williamsinstitute.law.ucla.edu/publications/hate-crimes-against-lgbt-people/.

people, those who identify as LGBTQ+ have higher poverty rates than non-LGBTQ+ people.[17] And just one measure of the impact of these social and economic factors on the daily lives of LGBTQ+ people is the elevated rates of food insecurity and hunger affecting this population. [18] Elevated rates of debt and eviction are two more.[19]

The health disparities resulting from discrimination against LGBTQ+ people in society at large, and especially in medical settings, are longstanding, well documented, and continue.[20] As just one example, in a recent survey, seventeen percent of the transgender and nonbinary participants reported having been subjected to verbal abuse from healthcare providers.[21] But it is the deliberate, medical-science defying campaign of this administration to foreclose gender-affirming medical care for transgender youth[22] — which this NPRM proposes to further implement society-wide through federal funding coercion — that would be immeasurably harmful and conscionable.[23] The Williams Institute calculates that more than 300,000 young people age 13-17 identify as transgender.[24] This is a small and intensely vulnerable population. Decades of clinical research have established that gender-affirming medical care is effective for most of these youth and have established clear standards for this care. [25] Our nation's expert

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[17] Bianca D.M. Wilson, *et al.*, *LGBT Poverty in the United States*, UCLA SCH. OF L. WILLIAMS INST. (Feb. 2023), https://williamsinstitute.law.ucla.edu/publications/lgbt-poverty-us/.

[18] Bianca D.M. Wilson, *et al.*, *"We're Still Hungry": Lived Experiences with Food Insecurity and Food Programs Among LGBTQ People*, UCLA SCH. OF L. WILLIAMS INST. 15 (June 2020) *("We're Still Hungry"),* https://williamsinstitute.law.ucla.edu/publications/lgbtq-experiences-food-bank/. *See also* Brad Sears, *et al.*, *Food Insecurity and Reliance on SNAP Among LGBT Adults*, UCLA SCH. OF L. WILLIAMS INST. (July 2025), https://williamsinstitute.law.ucla.edu/publications/lgbt-food-insecurity-snap/.

[19] Stephanie M. Hernandez, *et al.*, *Sexual Orientation, Gender Expression and Socioeconomic Status in the National Longitudinal Study of Adolescent to Adult Health*, 78 J. EPIDEMIOLOGY CMTY. HEALTH 121, 121-128 (Nov. 2023), https://pubmed.ncbi.nlm.nih.gov/38053260/.

[20] Lambda Legal 2020 HHS Comment at 4-22; Alex Montero, *et al.*, *LGBT Adults' Experiences with Discrimination and Health Care Disparities: Findings from the KFF Survey of Racism, Discrimination, and Health*, KFF (April 2, 2024), https://www.kff.org/racial-equity-and-health-policy/lgbt-adults-experiences-with-discrimination-and-health-care-disparities-findings-from-the-kff-survey-of-racism-discrimination-and-health/.

[21] Jordon D. Bosse, *et al.*, *Healthcare Mistreatment is Associated with Psychological Distress, Suicidality, and Substance Use Among Transgender and Nonbinary Emerging Adults*, UCLA SCH. OF L. WILLIAMS INST. (Dec. 2024), https://williamsinstitute.law.ucla.edu/publications/healthcare-mistreatment-tnb/.

[22] *Protecting Children from Chemical and Surgical Mutilation*, Exec. Order No. 90 Fed. Reg. 8771 (Feb. 3, 2025).

[23] *See* discussion in Elana Redfield & Ishani Chokshi, *Impact of the Executive Order Redefining Sex on Transgender, Nonbinary, and Intersex People*, UCLA SCH. OF L. WILLIAMS INST. (Jan. 2025), https://williamsinstitute.law.ucla.edu/publications/impact-eo-redefine-sex-tbi/.

[24] Elana Redfield, *Impact of Ban on Gender-Affirming Care on Transgender Minors*, UCLA SCH. OF L. WILLIAMS INST. (Jan. 2025), https://williamsinstitute.law.ucla.edu/publications/impact-gac-ban-eo/.

[25] *See e.g.* Stephanie L. Budge, *et al.*, *Gender Affirming Care Is Evidence Based for Transgender and Gender-Diverse Youth*, 75 J. ADOLESCENT HEALTH 851 (2024), www.jahonline.org/article/S1054-139X(24)00439-7/fulltext; Meredithe McNamara, *et al.*, *An Evidence-Based Critique of "The Cass Review" on Gender-Affirming Care for Adolescent Gender Dysphoria*, YALE L. SCH. (2024), https://law.yale.edu/sites/default/files/documents/integrity-project_cass-response.pdf. *See generally,* E.

medical community has spoken firmly against efforts to block this care based on politics and in defiance of the medical consensus.[26]

People living with HIV also face health challenges exacerbated by social stigma, which undermines engagement in care, which in turn undermines health and increases transmission risk and the related impacts on public health.[27] As of 2024, 43% of US adults held stigmatizing beliefs about people living with HIV, with those beliefs based both in blame and in fear.[28] The adverse impacts of HIV stigma are recognized as being distinct by sub-population. For example, social dynamics within African American communities are observed to create specific types of stigma and negative emotional impacts for Black sexual minority men living with HIV.[29] Consequently, to be effective, approaches to HIV stigma reduction must be specific to the community.

Older LGBTQ+ people also constitute a population with specific, disproportionate needs due to increased levels of social isolation, economic insecurity, difficulties accessing medical and social services, and discrimination by service providers as well as family members and neighbors.[30] As of 2023, approximately seven percent of LGBTQ+ adults (roughly 794,000 people) in the United States are age 65 or older, including roughly 172,000 older adults who are transgender.[31] These elders should be among the populations prioritized for funded services because the Older Americans Act ("OAA") requires that federal funding be directed to populations of "greatest social need."[32] Prior to the current administration, older LGBT people *were* properly recognized as such a population, and states seeking funding via the OAA were required to engage in outreach calculated to reach and serve them effectively.[33]

Coleman, *et al.*, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT. J. TRANSGENDER HEALTH S1 (2022) (also known as the "World Professional Association for Transgender Health Standards of Care"), https://wpath.org/publications/soc8/.

[26] *See, e.g., AMA to States: Stop Interfering in the Health Care of Transgender Children*, AM. MED. ASS'N (Apr. 26, 2021), https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children.

[27] Valerie A. Earnshaw, *et al.*, *HIV stigma mechanisms and well-being among PLWH*, 17 AIDS AND BEHAV. 1785 (2013), https://pmc.ncbi.nlm.nih.gov/articles/PMC3664141/.

[28] Jordan Grasso, *et al.*, *HIV Stigma is Pervasive and Increasing Among U.S. Adults*, UCLA SCH. OF L. WILLIAMS INST. 4 (Feb. 2026) (using data from the General Social Survey), https://williamsinstitute.law.ucla.edu/publications/hiv-stigma-us/.

[29] Chenglin Hong, *et al.*, *The Associations Between HIV Stigma and Mental Health Symptoms, Life Satisfaction, and Quality of Life among Black Sexual Minority Men with HIV*, 32 QUALITY LIFE RSCH. 1693 (2023), https://pubmed.ncbi.nlm.nih.gov/36648570/.

[30] Will Tentindo, *et al.*, Comment Letter on Proposed Rule to Modernize the Implementing Regulations of the Older Americans Act of 1965 at 5-16 (Aug. 15, 2023), https://www.regulations.gov/comment/ACL-2023-0001-0437.

[31] *Id*. at 2-3.

[32] *See*, *e.g.*, 42 U.S.C. §§ 3027(a)(4), 3027(a)(16) (2023).

[33] 42 U.S.C. § 3027(a)(30)(A) (2023); 89 Fed. Reg. 11657 (Feb. 14, 2024) ("Greatest social need, as used in this part, means the need caused by noneconomic factors, which include: …(iv) Sexual orientation, gender identity, or sex characteristics"); *see also What Does the OAA Regulatory Update Mean for*

Moreover, LGBTQ+ youth also face unique challenges due to bullying and other forms of harassment.[34] Here, too, adverse impacts have been found to be notably different along racial lines, with twice as many BIPOC LGBTQ+ adults as White LGBTQ+ adults reporting that negative treatment at school had impeded their academic success.[35] Moreover, poverty and related food insecurity also exacerbate challenges at school for LGBTQ+ youth.[36] According to a 2023 Williams Institute study, lack of food at home had caused twenty percent of LGBTQ+ high school students to experience hunger in the prior month.[37] This study also found disparities along racial lines, with Black LGBTQ+ students reporting hunger at more than twice the rate of White LGBTQ+ students.[38]

In addition to difficulties at school, research indicates that LGBTQ+ young people are disproportionately criminalized in the United States and often are subjected to abuse in correctional facilities. Specifically, these youth report higher rates of sexual victimization compared to their heterosexual peers.[39] They disproportionately show negative mental health indicators and face greater risks of suicidal ideation, suicide attempts, and self-harm.[40] Accordingly, it is recognized that interventions to safeguard these youth—for whom the government has responsibility as long as they are held in these facilities—must recognize who they are and be tailored to their unique stresses and vulnerabilities if they are to be effective.[41]

II. The Proposed Rule Is Contrary to Law Because It Violates Authorizing Statutes by Failing to Serve the Populations the Agencies Are Charged to Assist, Is Arbitrary and Capricious, and Is Outside the Scope of OPM's Authority.

The proposed restrictions would be invalid throughout their application because they would not achieve the stated goals but would cause failure of Congress's authorized programs. The Proposed Rule threatens to inflict immediate, irreparable harm on marginalized populations

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LGBTQ+ People and People Living with HIV?, SAGE USA (2024), https://lgbtagingcenter.org/wp-content/uploads/sites/6/2025/08/Advocate-OAARegUpdateResource-FINAL.pdf.

[34] Yu-Chi Wang, PhD & Shweta Moorthy, PhD, *The 2025 National School Climate Survey: School Experiences of LGBTQ+ Youth in the U.S.* (Glisten, 2026), https://glisten.org/nscs2025/.

[35] Kerith J. Conron, *et al.*, *Educational Experiences of LGBTQ People of Color*, UCLA SCH. OF L. WILLIAMS INST. (Feb. 2023), https://williamsinstitute.law.ucla.edu/publications/higher-ed-people-of-color/.

[36] Diana F. Jyoti, *et al.*, *Food Insecurity Affects School Children's Academic Performance, Weight Gain, and Social Skills*, 135 J. NUTRITION 2831 (2005), https://pubmed.ncbi.nlm.nih.gov/16317128/.

[37] Moriah L. Macklin, *et al.*, *Food Insecurity Among LGBTQ Youth*, UCLA SCH. OF L. WILLIAMS INST. (June 2023) (based on data from the Youth Risk Behavior Survey and other sources), https://williamsinstitute.law.ucla.edu/publications/food-insecurity-lgbtq-youth/.

[38] *Id.*

[39] Bianca D. M. Wilson, *et al.*, *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, 46 J. YOUTH & ADOLESCENCE 1547 (2017), https://pubmed.ncbi.nlm.nih.gov/28093665/.

[40] Kirsty A. Clark, *et al.*, *Mental Health Among Sexual and Gender Minority Youth Incarcerated in Juvenile Corrections* 150 PEDIATRICS 1 (Dec. 2022), https://publications.aap.org/pediatrics/article/150/6/e2022058158/190072/Mental-Health-Among-Sexual-and-Gender-Minority?autologincheck=redirected.

[41] *Id.*

— including low-income people living with HIV, LGBTQ+ seniors, students, and vulnerable incarcerated individuals — and forces federal agencies to violate the very laws they are charged with executing.

The Proposed Rule does not merely exceed OMB's powers, it actively attempts to subvert clear legislative directives and intent. Congress has explicitly embedded equity-related mandates, nondiscrimination parameters, and targeted community-outreach requirements directly into the enabling and authorizing text of numerous federal financial assistance programs. When the Executive branch attempts to withhold or condition funds in a manner that defeats the operational purpose of the underlying statute, it inflicts a severe separation-of-powers violation by frustrating the will of Congress.

This section delves into several examples of statutes and program mandates that would be circumvented, if not fully ignored. Congress intentionally constructed targeted programs such as these that focus on the needs of the communities most impacted by an issue. By superimposing a restrictive, uniform ideological ban on what local grantees may say or implement, OMB effectively blocks these agencies from identifying and addressing the unique vulnerabilities and documented health or other needs disparities faced by marginalized communities that are particularly difficult to reach, to assist, and to resource.

A. The Proposed Rule Is Contrary to Law with Regard to the Ryan White HIV/AIDS Program and Federal HIV Policy.

The Ryan White HIV/AIDS Program ("Ryan White") is the primary source of federal funding for HIV care and treatment in the United States. Serving more than half of all people diagnosed with HIV nationwide, Ryan White provides comprehensive medical care and support services to low-income individuals living with HIV who lack adequate health coverage or financial resources. Because Ryan White funding supports a substantial portion of the nation's HIV care infrastructure, any government-wide restrictions on grant funding that affect Ryan White recipients will have significant consequences for people living with HIV and the providers who serve them.

1. The Proposed Rule's Restrictions Conflict with the Text, Structure, and Purpose of the Ryan White HIV/AIDS Program.

Congress enacted Ryan White to improve the quality, availability, and organization of health care and support services for low-income individuals living with HIV who lack sufficient health coverage or financial resources.[42] Congress repeatedly has reaffirmed that the program exists to address unmet care and treatment needs through comprehensive primary healthcare and support services that enhance access to and retention in care.[43] Ryan White is a targeted public health intervention designed to respond to an epidemic that disproportionately affects particular communities and populations. Congress consistently has required Ryan White recipients to assess unmet needs, identify disparities in care, and prioritize resources for populations experiencing the greatest burden of HIV.[44] The statute reflects Congress's recognition that

[42] 42 U.S.C. §§ 300ff-11(a), 300ff-21.

[43] H.R. REP. NO. 109-695, at 2 (2006).

[44] *See, e.g.*, 42 U.S.C. §§ 300ff-12(b), 300ff-27(b), 300ff-111(a).

successful HIV policy requires directing resources where the epidemic is most severe and where barriers to care are greatest.

Communities of color have long borne a disproportionate share of the HIV epidemic. Likewise, federal public health authorities have consistently recognized that transgender people — particularly transgender women of color — experience disproportionately high rates of HIV infection and face significant barriers to healthcare access.[45] The Proposed Rule is particularly problematic because it appears to treat efforts directed toward populations disproportionately affected by HIV as suspect "DEI" activities. In the context of Ryan White, that approach is incompatible with the statute Congress enacted. Congress did not create a population-blind HIV program. To the contrary, the statute's allocation formulas, planning requirements, and priority-setting mechanisms are premised on identifying disparities and directing resources to populations experiencing the greatest burden of disease. Efforts to identify, engage, and retain low-income communities of color, transgender people, and other highly impacted populations are not ancillary to Ryan White: they are central to the program's statutory design.

If efforts to reach populations disproportionately affected by HIV are deemed prohibited "DEI" activities, Ryan White recipients would be placed in the untenable position of choosing between compliance with the Proposed Rule and compliance with the statutory objectives Congress imposed. Agencies may not adopt regulations that effectively prohibit conduct Congress specifically contemplated, encouraged, or required.

2. Congress Designed Ryan White to Provide Comprehensive Care Necessary to Keep People Living with HIV Engaged in Treatment.

The Proposed Rule is also contrary to law because its restrictions conflict with Congress's intentionally broad conception of HIV care. Ryan White was never limited to antiretroviral medications or treatment of HIV in isolation. Rather, Congress created a comprehensive care model that includes outpatient and ambulatory health services, support services, and other interventions necessary to improve access to care, retention in care, adherence to treatment, and viral suppression.[46]

Congress understood that successful HIV treatment requires addressing the full range of medical and social factors that affect health outcomes. The Ryan White Program's success stems from its comprehensive approach, which combines medical care with services that address barriers to treatment engagement and retention.[47]

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[45] *See Fast Facts: HIV and Transgender People*, CTR. FOR DISEASE CONTROL AND PREVENTION (Mar. 28, 2024), https://www.cdc.gov/hiv/data-research/facts-stats/transgender-people.html; Elana Morris, *et al.*, *Characteristics Associated with Pre-Exposure Prophylaxis Discussion and Use Among Transgender Women Without HIV Infection — National HIV Behavioral Surveillance Among Transgender Women, Seven Urban Areas, United States, 2019–2020*, 73 MORBIDITY AND MORTALITY WEEKLY REP. 9(2024), https://www.cdc.gov/mmwr/volumes/73/su/su7301a2.htm.

[46] *See* 42 U.S.C. §§ 300ff-22, 300ff-23, 300ff-51; H.R. REP. NO. 109-695, at 2, 15 (2006).

[47] *The Ryan White HIV/AIDS Program: The Program's Parts Work Together to Make It Effective*, O'NEILL INST. (May 2025), https://oneill.law.georgetown.edu/wp-content/uploads/2025/05/ONL_QT_Ryan_White_HIV_Effective_P11_A-KJ.pdf.

Gender-affirming medical care fits within this framework when provided as part of a comprehensive HIV treatment strategy designed to improve retention in care, treatment adherence, and viral suppression. HRSA has long recognized that Ryan White funding supports comprehensive primary care and treatment of co-occurring conditions through integrated models of care.[48]

Scientific evidence supports this approach. Research demonstrates that integrating gender-affirming hormone therapy into primary care settings improves HIV-related outcomes and supports continued engagement in care.[49] Federal HIV treatment guidelines likewise recognize the importance of integrating HIV treatment and gender-affirming care for transgender patients.[50]

The Proposed Rule would replace Congress's broad and flexible model of comprehensive HIV care with categorical restrictions untethered from the Ryan White statute. Nothing in the Ryan White Act authorizes OMB to prohibit providers from using evidence-based interventions that help people living with HIV remain engaged in care.

3. Congress Deliberately Channeled Priority-Setting Authority to State and Local Ryan White Bodies.

The Proposed Rule is also contrary to law because it overrides Congress's decision to vest priority-setting authority in state and local Ryan White entities. Congress understood that the HIV epidemic differs dramatically across jurisdictions. Accordingly, it established a system that relies on local planning councils, consortia, providers, and state and local health authorities to determine how best to allocate Ryan White resources in response to local conditions.[51]

Many local Ryan White planning bodies have determined that effective HIV prevention and treatment requires targeted interventions for communities of color, transgender people, and other populations disproportionately affected by HIV. Those bodies have developed outreach programs, integrated care models, provider training initiatives, and other interventions tailored to local epidemiological realities.

The Proposed Rule would displace these local determinations with a uniform federal prohibition based not on HIV epidemiology, local needs assessments, or medical evidence, but on ideological considerations unrelated to the statutory objectives of Ryan White. Congress

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[48] *See Policy Notice 21-02: Determining Client Eligibility & Payor of Last Resort in the Ryan White HIV/AIDS Program*, HEALTH RES. & SERVS. ADMIN. HIV/AIDS Bureau (Oct. 19, 2021), https://ryanwhite.hrsa.gov/sites/default/files/ryanwhite/grants/pcn-21-02-determining-eligibility-polr.pdf.

[49] *See* Sari L. Reisner, *et al.*, *HIV seropositivity and viral non-suppression in transgender, non-binary, and gender-diverse people in primary care receiving gender-affirming hormone therapy in the USA between 2013 and 2019 (LEGACY): an observational, longitudinal, cohort study*, 12 Lancet HIV e283 (2025), https://pmc.ncbi.nlm.nih.gov/articles/PMC12355900/.

[50] *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV*, HHS PANEL ON ANTIRETROVIRAL GUIDELINES FOR ADULTS AND ADOLESCENTS (Sept. 2024), https://clinicalinfo.hiv.gov/sites/default/files/guidelines/archive/adult-adolescent-arv-2024-09-12.pdf.

[51] *See* 42 U.S.C. §§ 300ff-12, 300ff-28; Ryan White Care Act Amendments of 2000, 146 CONG. REC. S10030 (2000) ("The bill remains primarily a system of grants to State and local jurisdictions, thereby ensuring that grantees can respond to local needs.")

chose local expertise and local priority setting as central features of the Ryan White Program. OMB cannot override those statutory choices through an inconsistent government-wide grants regulation.

4. The Proposed Restrictions Are Contrary to Established Federal HIV Policy and Scientific Evidence.

Finally, the proposed restrictions are contrary to decades of federal HIV policy and scientific evidence. For decades, federal HIV policy has recognized and repeatedly reconfirmed that successful HIV treatment depends on patient-centered, comprehensive care that promotes engagement in treatment and long-term retention in care. Ryan White's success is attributable to this approach. According to HRSA, 91.4 percent of Ryan White clients receiving medical care achieved viral suppression, substantially exceeding national averages.[52]

Federal HIV policy has also consistently recognized the unique barriers facing transgender people living with HIV. CDC surveillance data, HHS treatment guidelines, and Ryan White program guidance all acknowledge that stigma, discrimination, and barriers to affirming healthcare negatively affect engagement in HIV care.

The scientific evidence likewise demonstrates that integrated gender-affirming care improves retention in care, adherence to antiretroviral therapy, and viral suppression among transgender people living with HIV.[53] Federal HIV programs have incorporated these findings into program administration and clinical guidance for years.

The Proposed Rule does not meaningfully engage with this evidence. Instead, it would prohibit or significantly discourage practices that federal HIV programs have long recognized as effective tools for improving HIV outcomes. By restricting interventions that improve retention in care and by discouraging efforts directed toward populations disproportionately affected by HIV, the rule, if adopted, would undermine the very public health objectives Congress directed Ryan White to achieve.

For these reasons and as discussed further below, Lambda Legal opposes any proposal to implement the administration's DEI and Gender Ideology restrictions with respect to the Ryan White HIV/AIDS Program as contrary to the text, structure, purpose, and longstanding administration of that Program.

B. The Proposed Rule Undermines the Authorizing Purpose of the Older Americans Act.

The Older Americans Act ("OAA") is a primary vehicle for the organization and delivery of critical safety-net services to older adults and their caregivers.[54] Any rule concerning treatment and services for this population that prohibits agencies and their staff from explicitly

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[52] *Ryan White HIV/AIDS Program Annual Client-Level Data Report*, HEALTH RES. AND SERS. ADMIN. (2024), https://ryanwhite.hrsa.gov/sites/default/files/ryanwhite/data/2024-ryan-white-annual-data-report.pdf.

[53] *See* Reisner et al., *supra* n.49; *Guidelines*, *supra* n.50.

[54] *Older Americans Act*, ADMIN. FOR CMTY. LIVING (Feb. 13, 2025), https://acl.gov/about-acl/authorizing-statutes/older-americans-act.

acknowledging and assessing the needs of LGBTQ+ people is fundamentally at odds with the OAA's core purpose of addressing the needs of isolated older adults.

One of the basic tenets of the OAA is to focus services on individuals who have the greatest social need, which can be caused by cultural, social, or geographic isolation.[55] Assessing and acknowledging social needs — including, for example, the particular needs of LGBTQ+ older adults who are more likely to live alone and less likely to have children[56] — is the type of necessary consideration that furthers this core public purpose of the OAA. As the Administration for Community Living has acknowledged, "research indicates that LGBTQI+ older adults are at risk for poorer health outcomes and have lived through discrimination, social stigma, and the effects of prejudice, impacting their connections with families of origin, lifetime earnings, opportunities for retirement savings, and ability to trust health care professionals and aging services providers."[57]

For these reasons, the OAA requires outreach efforts to populations that experience greatest social need, including LGBTQ+ individuals and others (such as people with chronic conditions or housing instability), both of which affect LGBTQ+ elders at elevated rates), while allowing state agencies to further refine their priorities based on local conditions in their communities.[58]

Although the Proposed Rule purports to ensure that agencies give due consideration to the applicable authorizing legislation, it directly frustrates this core OAA goal by mandating adherence to an ideology that ignores the existence and increased, particularized needs of LGBTQ+ older Americans.

C. The Proposed Rule Undermines the Authorizing Purposes of the Prison Rape Elimination Act and the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act.

The Proposed Rule seeks to prohibit agencies from explicitly acknowledging and addressing the needs of LGBTQ+ people and thereby conflicts with and drastically impedes federal legislation such as the Prison Rape Elimination Act ("PREA") and its funding for PREA implementation, training, certification, and auditing.

PREA, passed unanimously by Congress, requires states to take measures to eliminate sexual abuse of people in custody. These measures are described in PREA's standards, which outline processes and trainings that protect particularly vulnerable people from likely aggressors. That transgender women in male facilities are amongst these most vulnerable is beyond well established.

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[55] 42 CFR § 1321.3.

[56] *Improving the Lives of LGBT Older Adults*, MOVEMENT ADVANCEMENT PROJECT (Mar. 2010), https://mapresearch.org/report/improving-the-lives-of-lgbt-older-adults/.

[57] 89 FED. REG. 11566 (codified as 45 C.F.R. §§ 1321-4) (2024), https://www.federalregister.gov/documents/2024/02/14/2024-01913/older-americans-act-grants-to-state-and-community-programs-on-aging-grants-to-indian-tribes-and.

[58] *Id.* at 11596 (citing 45 C.F.R. §§ 1321.27(d), 1321.65(b)(2)).

The U.S. Department of Justice ("DOJ") promulgated the comprehensive PREA standards in May 2012 after nine years of study and commentary by experts.[59] These PREA standards impose a mandatory obligation on the federal Bureau of Prisons ("BOP") to protect vulnerable people inside carceral facilities, with rules on prevention, training, screening, and reporting. These standards take care to consider the specific vulnerabilities transgender people, amongst others, are subject to. For example, the BOP must screen incarcerated individuals to assess their risk of being sexually abused by other prisoners upon their initial intake screening, and if transfer to another facility is warranted.[60] Prison officials must assess an incarcerated person's risk of sexual victimization by considering "[w]hether the inmate is or is perceived to be ... transgender," "[t]he inmate's own perception of vulnerability," and "[w]hether the inmate has previously experienced sexual victimization."[61] Under the Standards, an agency "deciding whether to assign a transgender . . . inmate to a facility" must consider "on a case-by-case basis whether a placement would ensure the inmate's health and safety."[62] PREA also requires prisons and jails to train staff specifically on searching transgender people, about communication with transgender people, and how to assess during incident reviews whether a person was targeted based on transgender status.[63] Carceral authorities must also ensure that transgender people are given safe opportunities to shower separately from others and must require staff to perform cross-gender searches only under specific circumstances.[64]

Grants are essential to the proper implementation of these standards and training for staff. First and foremost, untrained staff increase the risk of and are often the cause of the sexual assaults that transgender individuals experience while incarcerated.[65] Secondly, while the Standards are binding on the BOP and are expressly incorporated into BOP policies, they are primarily enforced through the process of distributing and withholding grants.[66] States that are not in full compliance with PREA risk losing federal funding from the Bureau of Justice Assistance ("BJA"). If this Proposed Rule effectively prevents the BJA from awarding PREA grants for implementation of the Standards, it will significantly disincentivize state facilities from meeting PREA standards. Removing the only accountability measure for state compliance

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[59] *See Press Release: Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape,* U.S. DEP'T OF JUST. (May 17, 2012) (hereinafter "Standards"), https://www.justice.gov/archives/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape.

[60] 28 C.F.R. § 115.41(a).

[61] 28 C.F.R. § 115.42.

[62] 28 C.F.R. § 115.42.

[63] 28 C.F.R. §§ 115.15, 31, 86.

[64] 28 C.F.R. § 115.15(d).

[65] Pascal Emmer, *et al.*, *This is a Prison, Glitter is Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania's Prison Systems,* THE HEARTS OF WIRE COLLECTIVE 31 (2011), https://www.prisonpolicy.org/scans/thisisaprison.pdf; Federica Coppola, *Gender Identity in the Era of Mass Incarceration: The Cruel and Unusual Segregation of Trans People in the United States*, 21 INT'L J. CONST. L. 649, 656 (2023), https://academic.oup.com/icon/article/21/2/649/7175197.

[66] *See* 34 U.S.C. § 30307(b); *see also Sexually Abusive Behavior Prevention and Intervention Program*, FED. BUREAU OF PRISONS (June 4, 2015) (incorporating standards), https://www.bop.gov/policy/progstat/5324_012.pdf.

through grant restriction would be contrary to PREA's purpose of eliminating sexual abuse in prisons across the country, with obviously unconscionable and unlawful results.

Government wide restrictions to PREA grants would also encourage state actors to violate the Eighth Amendment. In *Farmer v. Brennan,*[67] the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. A prison official acts with deliberate indifference when the official knows of and disregards an excessive risk to an inmate's health or safety; the official must be aware of facts from which the official can infer that a substantial risk of serious harm exists, and the official must actually draw that inference.[68] The existence and wide use of PREA standards make prison officials aware of the substantial risk of sexual violence that transgender, LGBTQ+, young, and disabled incarcerated people face. PREA standards set an explicit floor for mitigating that excessive risk and failure to meet PREA standards is evidence of a prison official's deliberate indifference.[69] The proposed restrictions to grantmaking, if adopted, would increase the likelihood of constitutional violations, which in and of itself is contrary to PREA's goals. One of the stated purposes of PREA is to "protect the Eighth Amendment rights of Federal, State, and local prisoners."[70]

The Proposed Rule also would undermine the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, which expanded the 1968 United States federal hate-crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability. Grants pursuant to this Act are issued to support community organization and law enforcement partnerships, amongst other arrangements. These partnerships can prevent and respond to hate crimes without relying exclusively on prosecution. When Congress passed this law, it did so with the intent to protect vulnerable minority groups. Consequently, the proposal to restrict funds because they are deemed somehow related to 'unlawful DEI' is entirely inconsistent with Congress's intention to protect people who are targeted based on these characteristics. In fact, current grant restrictions under this law that withhold funding from programs that "treat people differently based on race or [other] protected characteristics" already make it more difficult for organizations serving racially diverse groups and LGBTQ+ communities to receive funding.[71]

In sum, the Proposed Rule must be withdrawn because it would render the entire Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act ineffective by making groups most vulnerable to hate crimes unable to access funds that were created for their safety.

D. The Proposed Rule Is Outside the OMB's Scope of Authority Regarding Health Care and Is Arbitrary and Capricious.

As noted above, the Proposed Rule states as among its main purposes to implement the anti-transgender executive order and the anti-DEI executive order. Doing so throughout

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[67] 511 U.S. 825 (1994).

[68] *Id.* at 837.

[69] *See, e.g., Zollicoffer v. Livingston*, 169 F. Supp. 3d 687 (S.D. Tex. 2016).

[70] 34 U.S.C. §§ 30302(6)-(7).

[71], *BJA FY25 Matthew Shepard and James Byrd, Jr. Hate Crimes Program,* BUREAU OF JUST. ASSISTANCE 8 (2005), https://www.ojp.gov/funding/docs/bja-2025-172491.pdf.

congressionally established programs, as proposed, would violate governing non-discrimination mandates both in numerous federal statutes and in the Constitution, as well as other governing constitutional protections. Because access to appropriate health care is an essential human need, the obvious legal failings and even more obviously problematic harms to patients—the intended program beneficiaries—this area offers a powerful example of why the NPRM is ill-conceived at its core, cannot be cured by revision, and must be wholly withdrawn.

Section 200.300(b)(3) seeks to limit federal awards and subawards used to "fund, promote, encourage, subsidize, or facilitate" gender-affirming medical care for minors pursuant to Executive Order 14187. This restriction is contrary to law because it infringes on Congress's authority to enact law. It also violates the Administrative Procedure Act because it is arbitrary, capricious, and against the weight of scientific evidence. Furthermore, it discriminates on the basis of sex and transgender status.

1. OMB Lacks the Authority to Issue Section 200.300(b)(3).

The Executive Branch cannot use centralized grant coordination to impose sweeping ideological conditions that Congress never enacted. OMB leans heavily on Executive Orders 14187 and 14168 as authority for its proposed rule, along with OMB's general grants of management authority. But, as the Proposed Rule itself acknowledges, executive orders "do not supersede statutes."[72] An executive order must be grounded in a valid grant of authority from Congress to carry the force of law.

Under established, foundational principles of administrative law, when an executive agency seeks to impose a sweeping condition that fundamentally alters the nature of federal programs across multiple independent sectors, including public healthcare, education, and carceral safety, it must be able to point to clear, explicit statutory authorization from Congress. No such authorization or delegation exists here. The statutory provisions governing OMB's housekeeping, administrative management, and budgetary oversight functions are strictly limited to technical, procedural, and fiscal coordination. They do not contain hidden, unbridled authority to enact nationwide, viewpoint-based restrictions on speech or to restrict the programmatic operations of substantive federal grants. Because Congress has not clearly authorized OMB to impose ideological litmus tests as a prerequisite for federal financial assistance, the proposed restrictions are fundamentally *ultra vires* and unlawful.

As relevant here, the Proposed Rule fails to identify a single legislative provision that supports a categorical ban on this care. It asserts instead that a gap in the law somehow confers an affirmative authority to ban related funding. But the absence of a statute requiring funding is not equivalent to a statute prohibiting it. And adding the phrase "to the maximum extent permitted by law" to address conflicts with the proposed prohibition raises more questions than it answers.[73] This qualifier concedes that some programs provide such care. The Proposed Rule also refers vaguely to ensuring funding is only "used for authorized public purposes."[74] Such

[72] 91 FED. REG. 32217.

[73] 91 FED. REG. 32217.

[74] 91 FED. REG. 32221.

opaque instructions fail to provide sufficient clarity to funded entities, and it demonstrates that the proposed rule itself acknowledges the problems regarding the scope of OMB's authority.[75]

In addition, the attempt to extend regulatory force to an executive order is deeply problematic because doing so conflicts with the major questions doctrine. When an agency makes decisions that have a serious impact, courts do not defer to such authority without the presence of a clear congressional authorization.[76] The Supreme Court has identified certain factors to be considered to determine whether there is a "major question" at issue. They are whether there was a serious economic significance, whether there was a political significance and controversy, whether there was a claim of authority in a new context, and whether there was a novel assertion of authority that stretches what the statute could support.[77]

Here, there is enormous economic significance at stake with regard to funding, there is a claim of authority in a new and unique context, there is an assertion of authority that exceeds what the statutory text supports, and OMB makes no attempt to hide the deeply political context given the use of charged terms such as a "***left-wing*** foreign aid entitlement that attempted to promote abortion" and accusations that federal agencies were using their programs "to serve a ***'woke'*** policy agenda."[78] The Proposed Rule is certainly a new context given that OMB has never, absent congressional support, used its financial management authority to impose categorical prohibitions on funding certain health care practices in the past.[79] Again, in deciding whether there is a major questions issue, the key question is whether Congress clearly authorized a certain kind of action. The answer here is no. Congress has simply never addressed whether OMB can impose an ideologically driven condition on grant recipients through its financial management authority. A government-wide prohibition on funding activities remotely connected to provision of gender-affirming health care is precisely the kind of major question that would require a clear congressional authorization.

The restrictions outlined in the NPRM replicate administrative maneuvers that have been repeatedly rejected by federal courts as flagrant violations of statutory text and the core principle of separation of powers. By directing agencies to withhold, restrict, or deny federal financial assistance based on whether a recipient implements DEI initiatives or recognizes "gender ideology," the Proposed Rule establishes a mechanism for systematic, unauthorized impoundments. Under the Impoundment Control Act of 1974 ("ICA"), an impoundment is defined as any action or inaction by an officer or employee of the United States government that precludes the obligation or expenditure of budget authority enacted by Congress.

The ICA provides the exclusive statutory framework under which the Executive Branch may seek to defer or rescind funding. This act explicitly forbids the Executive branch from substituting its own policy priorities for the spending decisions enacted into law by the Legislative Branch. When Congress appropriates funds for specific programmatic purposes, whether for public health, educational grants, or civil rights enforcement, executive agencies are

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[75] *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (requiring Congress to explicitly state the conditions attached to federal grants).

[76] See *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 700 (2022).

[77] *Id*. at 716.

[78] 91 FED. REG. 32202 (emphasis added).

[79] 91 FED. REG. 32200.

legally mandated to execute those obligations. The OMB cannot invent extra-statutory, ideological compliance hurdles to congressionally appropriated funding streams simply because a particular administration disagrees with a grantee's internal equity policies, terminology usage, or the communities it serves.

Crucially, the Supreme Court firmly established the illegality of policy-based executive spending freezes in *Train v. City of New York*.[80] In *Train*, the Court ruled that the Executive branch lacks the authority to withhold or ration funds fully allocated by Congress under a statutory program, holding that the executive's mandate is to execute the program as written rather than superimposing its own fiscal or political discretion. By forcing blanket funding prohibitions based on whether an entity conforms to the administration's stance on "DEI principles" or "gender ideology," OMB attempts the exact type of paternalistic, policy-based spending refusal that *Train* expressly forbids.

Furthermore, the Government Accountability Office ("GAO") has repeatedly issued formal legal opinions reinforcing that the Executive Branch cannot pause or withhold appropriated funds over policy disagreements without adhering to the strict procedural mechanisms of the ICA. The GAO has routinely determined that blocking or delaying enacted funding streams, ranging from infrastructure allocations to emergency services, constitutes an illegal deferral when used to achieve policy mandates not authorized by Congress. By institutionalizing a government-wide mandate to freeze or deny grants to entities that fail an ideological litmus test, the OMB is attempting to authorize a regime of rolling, policy-based impoundments. Because the ICA strictly prohibits the Executive Branch from refusing to spend funds based on policy disagreements with Congress, the proposed restrictions are statutorily invalid and must be completely withdrawn.

The Proposed Rule's other appeals to authority also fail. The NPRM refers to sections 31 U.S.C. 503 (general financial management authority), 31 U.S.C. 6307 (authority to issue guidelines promoting the consistent use of grants), and 31 U.S.C. 6304-5 (requiring awards to carry out a public purpose that is consistent with existing law) as authority for the Proposed Rule. But OMB's discretion under statutes such as 31 U.S.C. 503 is pertinent only to financial management discretion. It does not, however, grant the agency sweeping powers to condition funding based on certain healthcare policy conditions. And 31 U.S.C. 6304-5's language regarding a "public purpose" is not for the Executive Branch to decide. Many federally funded programs have supported gender-affirming care and there are no program statutes that exclude such treatment.

This issue has already been intensively litigated. For example, in *PFLAG v. Trump*, the Court held that there was no statutory authority for conditioning federal grants on the denial of gender affirming care — despite the reliance of the government on certain executive orders.[81] In *PFLAG*, the United States District Court for the District of Maryland granted a preliminary injunction against enforcement of Executive Order 14168 and Executive Order 14187, which are the same Executive Orders whose terms proposed § 200.300(b)(2) and § 200.300(b)(3) seek to implement through federal grant conditions. The *PFLAG* court found a strong likelihood of success on three independent constitutional grounds: separation of powers, conflict with existing

[80] 420 U.S. 35 (1975).

[81] *PFLAG v. Trump*, 769 F. Supp. 3d 405 (D. Md. 2025).

federal anti-discrimination statutes, and equal protection. The Court further held that the challenged executive orders "place significant conditions on federal funding that Congress did not prescribe," and that "[t]his, the Constitution simply does not allow."[82]

This *PFLAG* holding applies with equal force to proposed section 200.300(b)(3). OMB cannot accomplish through rulemaking what the executive orders cannot accomplish without congressional authority. The Executive Branch simply does not have the authority to condition federal grants on substantive policy terms that Congress did not authorize.

Article I, Section 9, Clause 7 of the U.S. Constitution vests the 'power of the purse' exclusively in Congress. The Appropriations Clause elucidates Congress' duty and responsibility to control and dictate the terms of federal spending, as explicitly clarified nearly a century ago in *Cincinnati Soap Co. v. United States*[83]: "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[84] The Appropriations Clause is a crucial check on executive power, being foundational to the separation of powers that are needed to prevent any one branch of government from obtaining too much power. The NPRM proposes to defy these principles and to usurp the power of the purse, thereby negating congressional will and flouting Supreme Court precedent. It would allow for unconstitutional and unlawful executive interference in a duty explicitly allotted to Congress.

To be clear, administrative agencies possess only the authority delegated to them by Congress. Executive Branch agencies, including OMB, possess no inherent authority to create policy-based funding restrictions or sweeping ideological exclusions; they are required to execute and manage funds according to congressional directives. By attempting to transform its administrative oversight role into a vehicle for forcing government-wide, substantive policy shifts, OMB is acting *ultra vires* — grossly exceeding the scope of its authority. OMB cannot and must not exploit its limited authority over budgetary efficiency to enact the policy choices of the Executive, and to thwart the funding decisions of Congress.

Because it is untethered from statutory text, the Proposed Rule's attempt to execute the agency's policy preferences is illegitimate. The stakes of major policy decisions about the scope and limits of federal financial expenditures on medical care are obviously high, meaning the role of Congress, not OMB, to make these decisions is that much more important. And here, Congress has given no indication it would resolve this "major policy decision" in line with the Proposed Rule. When Congress intends to impose categorical restrictions on healthcare funding, it does so explicitly. For example, since the mid-1970's Congress has limited the conditions under which federal funds may be used to reimburse the cost of abortion care under the Medicaid program through a provision in the annual appropriations acts commonly known as the Hyde Amendment. Congress remains free to include additional healthcare-related limitations, but each year, it has elected not to do so. This history is but one illustration of the principle that there is "reason to hesitate before concluding that Congress meant to confer [the]authority" as OMB claims.[85]

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[82] *Id*. at 416 (quoting *Clinton v. City of New York*, 524 U.S. 417, 438 (1998)).

[83] 301 U.S. 308 (1937).

[84] *Id.* at 321.

[85] *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 700 (2022) (cleaned up).

2. Section 200.300(b)(3) is Arbitrary, Capricious, And Against the Weight of Scientific Evidence.

a. OMB failed to adequately explain its reversal of position.

The proposed rule's withholding of federal funding is arbitrary and capricious under the Administrative Procedure Act. Agency actions are arbitrary and capricious when they reverse previous policies without sufficient explanation, rely on flawed evidence, disregard important evidence, and/or fail to account for serious reliance interests.[86] All of these deficiencies exist here.

Various agencies, including the U.S. Department of Health and Human Services, have previously recognized that "individuals who are experiencing gender dysphoria . . . have a clinically significant decrease in distress if they have access to medically necessary care."[87] Despite this research-based observation, OMB now seeks to reverse course entirely and deny federal funding despite the prior recognition of the treatment as safe, effective and evidence-based. OMB has failed to acknowledge, much less adequately explain, this change in position among agencies. Its ongoing refusal even to acknowledge this change, let alone address and explain it, shows that the change is arbitrary and capricious.[88]

b. OMB ignored a large body of scientific literature regarding gender diversity and gender-affirming medical care.

The proposed rule concludes without citation to any medical evidence for its assertion, that providing gender-affirming health care to minors causes "life-long harm to vulnerable children."[89] OMB also ignores the significant risks of not treating gender dysphoria.[90] The Proposed Rule thus does not provide any well-founded justification for denying federal funding to entities that provide gender-affirming medical care for adolescents. But an agency must provide "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made."[91] No such rational connection exists here.

In addition, the "gender ideology" provision in § 200.300(b)(2) is arbitrary and capricious for the same reasons. OMB assumes a particular scientific conclusion without a shred of engagement with the scientific evidence. The Proposed Rule assumes as fact that sex is a simple binary and determined by production of gametes, and that any suggestion otherwise is an "ideology." But the recognition of intersex people and people with chromosomal variations is long established and beyond dispute by all major medical organizations. OMB again failed to consider an important aspect of the problem.

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[86] *See, e.g., Encino Motorcars v. Navarro*, 579 U.S. 211, 221-222 (2016).

[87] 89 FED. REG. 37575.

[88] *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency rule is arbitrary and capricious when it "runs counter to the evidence before the agency").

[89] 91 FED. REG. 32219.

[90] *See* Ex. 6 - Expert Decl. of Dr. Armand Antommaria at 24, *Loe v. Kansas*, No. DG-2025-cv-000241 (Kan. 7th Jud. Dist. Ct. filed May 28, 2025), Dkt. No. 6.

[91] *Ohio v. Envt Prot. Agency*, 603 U.S. 279, 292 (2024) (quoting *State Farm*, 463 U.S. at 43).

III. The Proposed Rule Violates the Constitutional Principles of Equal Protection.

A. Sections 200.300(b)(2) and (3) discriminate on the basis of sex and transgender status and are rooted in animus.

Section 200.300(b)(3) discriminates on the basis of sex and transgender status in violation of the Constitution's equal protection guarantee. "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."[92] The Equal Protection Clause prohibits the federal government from treating individuals differently based on protected characteristics without adequate constitutional justification. Classifications based on sex are subject to heightened scrutiny, and courts have likewise recognized discrimination based on transgender status as warranting this review.[93] To survive the required constitutional scrutiny, the government must demonstrate that the classification in question is "substantially related to a sufficiently important government interest."[94] Desire "to harm a politically unpopular group" or mere disagreement with or disapproval of a politically unpopular group can never satisfy this standard as such motives fail even the lowest level of constitutional review.[95]

Section 200.300(b)(2) and (3) both seek to impose significant changes across federal agencies related to the approval and distribution of federal grant funding. The Proposed Rule expressly targets programs that support transgender people and those experiencing gender dysphoria. Rather than adopting neutral standards for governing the administration of federal grants, the NPRM repeatedly characterizes "gender ideology" as an improper governmental objective and describes gender transitioning as "chemical and surgical mutilation." These are not neutral administrative revisions and by their own terms, the proposed amendments single out programs that benefit transgender individuals for disfavored treatment while permitting comparable funding directed toward other populations and viewpoints.

1. These Sections Discriminate on the Basis of Sex and Transgender Status.

Sections 200.300(b)(3)(4) violates the Affordable Care Act which provides that no person shall be subjected to discrimination or be denied benefits in any health program or activity that is receiving federal funding on the basis of sex.[96] Agencies, like the U.S. Department of Health and Human Services that would fall within the scope of Section 1557. And courts have determined

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[92] *Washington v. Davis*, 462 U.S. 229, 239 (1976).

[93] *See*, *e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1200-1201 (9th Cir. 2019).

[94] *Id.* at 1200 (citing *Witt v. Department of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)).

[95] *United States v. Windsor*, 570 U.S. 744, 770 (2013) (cleaned up); *Romer v. Evans*, 517 U.S. 620, 634 (1996).

[96] 42 U.S.C. 1681(a); 42 U.S.C. 18116(a).

that discrimination on the basis of transgender status is discrimination on the basis of sex.[97] This conclusion is consistent with the *Bostock* decision and the recent U.S. Supreme Court decision addressing sports does not change that conclusion.[98] As a result, certain health care entities would be denied funding and excluded from participation, and transgender people would be denied treatment. Furthermore, Sections 200.300(b)(3)(4) discriminate on the basis of transgender status. The U.S. Supreme Court has not decided the appropriate level of scrutiny for such classifications, but lower courts have applied heightened scrutiny.[99]

Even if the Proposed Rule did not facially classify on the basis of sex or transgender status, heightened scrutiny would still apply. Facially neutral regulations merit heightened scrutiny when they act as a pretext for discrimination against transgender people. Compounded by section 200.300(b)(2), 200.205 (allowing political appointees to ensure that grants do not "fund, promote, encourage, subsidize or facilitate" the "denial by the recipient of the sex binary in humans or the notion that sex is a chosen or mutable characteristic") demonstrate that the Proposed Rule's purpose is to express and enforce its disapproval of transgender people. Moreover, the Proposed Rule is part of an obvious, relentless, and widespread attack on transgender people. Whether seeking to deny health care directly or indirectly through funding as this rule seeks to do, to deny emergency housing,[100] to deny the opportunity to serve in the military,[101] to erase legal recognition,[102] or countless other initiatives, this administration has placed transgender people within its cross hairs. The Proposed Rule is simply another attempt in this wide-ranging effort to target transgender people as a class and to unlawfully discriminate against them.

2. Section 200.300(b)(3) Cannot Satisfy Heightened Scrutiny.

OMB asserts interests in promoting accountability, preventing waste, and ensuring equal treatment in federal grantmaking.[103] Those interests, while important in the abstract, do not justify singling out transgender-related programs for exclusion. The Proposed Rule provides no evidence that grants serving transgender individuals are inherently less effective, more wasteful, or less connected to statutory purposes than comparable grants serving other populations. Instead, it assumes that programs relating to gender identity are categorically inconsistent with public interest based on the agency's ideological disagreement with them.

Even if the Proposed Rule were characterized as facially neutral, heighted scrutiny would still apply because its stated rationale and practical operation reveal that it functions as a pretext

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[97] *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (applying the Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020), to a Title IX case); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).

[98] *West Virginia v. B. P. J.*, Nos. 24–38 and 24–43, 2026 WL 1868739 (U.S. June 30, 2026).

[99] *See, e.g., Grimm*, 972 F.2d at 607.

[100] Equal Access to Housing in HUD Programs Revisions, 91 FED. REG. 22799 (Apr. 28, 2026).

[101] Prioritizing Military Excellence and Readiness, Exec. Order 14183, 90 FED. REG. 8757 (Feb. 3, 2025).

[102] *Sex Markers in Passports*, U.S. DEP'T OF STATE (Mar. 16, 2026), https://travel.state.gov/en/passports/apply/unique-needs/sex-markers.html (implementing Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order 14168, 90 FED. REG. 8615 (Jan. 30, 2025) (hereinafter "Gender Order")).

[103] *See* 91 FED. REG. 32198 (May 29, 2026).

for discrimination against transgender individuals. The Proposed Rule repeatedly identifies "gender ideology"[104] as a social harm requiring elimination, describes prior federal funding supporting transgender-inclusive initiatives as "wasteful spending,"[105] and justifies broad restrictions on grant eligibility simply with its ideological opposition to transgender inclusion rather than any evidence that such programs fail to advance statutory objectives.[106] Thus, the Proposed Rule operates not as a neutral funding regulation, but as a part of a broader governmental effort to withdraw legal protections and public support from transgender people because of who they are and their protected status as such.

Ultimately, the Proposed Rule withholds access to federal funding not due to quality or legality of the underlying programs, but because of disapproval of, and hostility to, the identity of the individuals receiving the funding. By conditioning participation in federal grant programs on the exclusion of transgender-inclusive services and programing, the NPRM seeks to impose unequal treatment on transgender individuals and the programs that serve them. Because the Proposed Rule purposefully discriminates on the basis of sex and transgender status and because the OMB cannot demonstrate that doing so is closely enough related to advancing a legitimate and sufficiently important governmental interest, the Proposed Rule violates the equal protection component of the Fifth Amendment.

3. The *Skrmetti* Decision Does Not Apply to This Rulemaking.

The proposed rule also leans heavily on *United States v. Skrmetti* to support the provision's constitutionality. [107] Unlike the statute in *Skrmetti*, which the Court found to classify only based on age and medical use, the Proposed Rule here is expressly couched in terms of sex. Furthermore, *Skrmetti* was decided on constitutional grounds; the case is silent as to statutory sex discrimination claims. Even if *Skrmetti*'s constitutional holdings were relevant, the Court acknowledged that "invidious discrimination" against transgender people may violate the Equal Protection Clause. But regulations that extend beyond particular "medical treatments" and instead seek to "regulate [] a class of persons identified on the basis of a specified characteristic" are impermissible.[108] The *Skrmetti* decision did not address federal spending clause conditions at issue here, and it did not hold that any restrictions on gender-affirming care are automatically constitutional. And it did not overturn *Bostock*.[109]

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[104] *See* Gender Order § 2(f) (defining "gender ideology" as "replac[ing] 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 "includ[ing] the idea that there is a vast spectrum of genders that are disconnected from one's sex").

[105] *Id*.

[106] *Id*.

[107] *United States v. Skrmetti*, 605 U.S. 495 (2025).

[108] *Skrmetti*, 605 U.S. at 519 n.3.

[109] *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

IV. The Proposed Rule Violates First Amendment Principles Because It Uses Terms that Are Unconstitutionally Vague, It Compels Speech, and It Discriminates Based on Viewpoint.

A. Section § 200.300(b)(2) Is Unconstitutionally Vague.

The Proposed Rule fails to explain a host of vague terms. It fails to explain what it means to "deny" biological reality. It ignores the scientific reality of biological complexity, including intersex conditions, chromosomal variations and hormonal differences. It doesn't explain what it means to "advocate" or what "biological reality" is. For example, it is unclear whether someone simply discussing research on gender identity constitute "endorsing" it. Given this vagueness and ambiguity, the rule does not provide sufficient clarity so recipients can knowingly decide whether to accept funds.[110] The definitions in this section abjectly fail that standard. The Proposed Rule's fall back to the Executive Order language is insufficient given the concrete impacts the proposed rule would have on the First Amendment rights of thousands.

B. Section § 200.300(b)(2) Compels Speech and Discriminates Based on Viewpoint.

Section § 200.300(b)(2) imposes a government-wide prohibition applicable across all discretionary awards on any activities that reference gender identity in ways that the administration disfavors. This is viewpoint discrimination. This provision would condition continued access to federal funding on forcing researchers, educators, and public health professionals and countless others to abandon their viewpoints or cease to express them in their work. This is precisely the kind of viewpoint discrimination prohibited because it was "designed to insulate the Government's interpretation of the Constitution from judicial challenge" by excluding one viewpoint.[111] The breadth of the prohibition on "funding, promoting, encouraging, subsidizing or facilitating" any theories that deny the "biological reality" asserted by the administration effectively imposes its own "gender ideology" that is characterized as undisputable, despite the consensus understanding and published positions of myriad major medical organizations concluding otherwise. And there is no safe harbor for viewpoint discrimination that takes place within the context of government spending.[112]

Furthermore, this section creates unconstitutional pressure on funding recipients to adopt the government's unscientific position. The U.S. Supreme Court has held that the First Amendment includes the right not to be compelled to affirm beliefs one does not hold.[113] The coercive effect of this section is especially acute given that the government's preferred viewpoint contradicts the scientific consensus of major medical professional organizations such as the American Medical Association, the American Psychological Association and many others who have taken positions with regard to gender identity that would be characterized by the Proposed Rule as wrongful and harmful "gender ideology." And the breadth and vagueness of the section

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[110] *See Pennhurst*, 451 U.S. (requiring Congress to explicitly state the conditions attached to federal grants).

[111] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).

[112] *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (holding that the government cannot use the funding relationship to achieve indirectly what it could not do directly).

[113] *West Virginia State Bd. of Ed. v. Barnett*, 319 U.S. 624 (1943).

impose a serious chilling effect given the looseness of terms such as "promoting, encouraging, subsidizing or facilitation."

Lastly, OMB's reliance on *Rust v. Sullivan*[114] to support its assertion that government can decide which activities to fund without implicating the First Amendment is misplaced for several reasons. First, *Rust* involved a specific, congressionally authorized program with a defined purpose and scope. Section § 200.300(b)(2) is a government-wide prohibition applicable across all awards regardless of their individual purpose or congressional authorization. Furthermore, the Supreme Court distinguished *Rust* in *Legal Services Corp. v. Velasquez* [115] because, unlike in *Rust*, the government in *Velasquez* was not funding just one kind of family planning service within a defined program but rather was using funding to suppress speech within "legitimate ongoing discourse." The administration's reliance on *Rust v. Sullivan* here is misplaced in light of the Supreme Court's subsequent *Velasquez* decision's clarification that the government may not use funding conditions to suppress one side of an ongoing scientific and public debate.

C. Section § 200.300(b)(1) Also Is Viewpoint Discrimination.

This section restricts awards to recipients on the condition that they do not fund, promote, encourage, subsidize or facilitate diversity, equity, inclusion, and accessibility policies, principles or practices that violate any applicable federal anti-discrimination laws.[116] As with section (b)(2), this provision is broadly written to prohibit "principles" — but really viewpoints. Prohibiting recipients from "promoting, encouraging, or facilitating" DEI principles prohibits them from expressing a particular viewpoint, such as the view that diversity is important, that there have been inequities historically, that inclusion of underrepresented groups is a legitimate objective, and that addressing structural barriers is a worthy objective. Such views are shared by millions of Americans. It is obvious that, in targeting "principles," the NPRM is actually seeking to regulate ideas and expression of varying perspectives, not simply to control conduct.

D. The Proposed Rule Violates the First Amendment Rights of Students and Educators.

1. Courts Have Already Found These Executive Orders Likely Unconstitutional.

The executive orders underlying this proposed rule's restrictions on DEI policies and gender identity (Executive Orders 14168, 14185, and 14190) have already been enjoined by federal courts as likely unconstitutional violations of the First Amendment rights of students and educators.[117] By intending to incorporate the terms of these executive orders into funding eligibility requirements, the Proposed Rule would require educational institutions, as a precondition of receiving federal funds, to commit themselves to implementing policies that courts have already found likely violate the First Amendment. A funding condition that compels recipients to perpetrate constitutional violations is itself unconstitutional and cannot stand.

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[114] 500 U.S. 173 (1991).

[115] 531 U.S. at 533.

[116] 91 FED. REG. 32198 (May 29, 2026).

[117] *E.K. v. Dep't of Def. Educ. Activity*, 807 F. Supp. 3d 517 (E.D. Va. 2025).

The Department of Education has already confronted this problem directly. Following successful litigation enjoining implementation of its guidance restricting DEI policies and practices rooted in the same executive orders underlying this proposed rule, the Department was forced to withdraw that guidance.[118] The proposed OMB regulation now attempts to achieve the same unconstitutional result through a different mechanism. Rather than implementing the enjoined guidance directly, it would condition federal funding eligibility on compliance with that guidance's terms. This end-run around judicial review does not cure the underlying constitutional defects. A requirement that is unconstitutional when imposed directly does not become constitutional when imposed as a funding condition.

2. The Proposed Rule Places Educational Institutions in an Impossible Legal Position.

The consequences of this approach are already visible in the experience of school districts across the country. For example, the administration required seven school districts in Maine to alter their policies and implement measures that discriminate against transgender students in order to comply with the administration's interpretation of Title IX and the relevant executive orders. Those seven school districts now face litigation brought by the Maine Human Rights Commission for violating state non-discrimination law they were obligated to follow regardless of federal executive preferences. The federal government effectively forced these districts to choose between federal funding and compliance with binding state law, leaving them legally exposed for making that choice.

The administration's attempt to use funding as a coercive tool in Maine extended further still. The United States Department of Agriculture attempted to unilaterally freeze and terminate approximately three million dollars in school funding to compel Maine's ideological compliance with the administration's position. That action was ultimately stopped when it became clear the USDA lacked authority to freeze or terminate funding for this purpose.

The proposed OMB regulation would institutionalize this approach government-wide, embedding it in the grant eligibility framework before funding is awarded rather than attempting to claw it back after the fact. But changing the timing of the coercion does not cure its unlawful character. As the Maine experience demonstrates, using federal funding to compel educational institutions to implement policies that violate state law and students' constitutional rights is unlawful regardless of the mechanism through which that compulsion is applied.

If implemented, this proposed rule would guarantee that the no-win conflict Maine's school districts faced becomes a permanent feature of American education. School districts nationwide would be simultaneously required to violate students' and educators' constitutional rights to remain eligible for federal funding on proper terms, while also bound by state law and district policy to protect those same rights. No school district could comply with both demands if the proposed rule were to make this irresolvable conflict perpetual, to the detriment of students and educators nationwide.

OMB’s proposed regulation would attempt to take the same retaliatory and baseless actions, pre-funding rather than post-funding, but would remain just as unlawful. If implemented, the impact would be the same: the Executive would hold students and educators hostage and

[118] *See Nat'l Educ. Ass'n v. United States Dep't of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025).

choke off nondiscretionary funds until school districts meet the federal administration's lawless ideological demands. But using congressionally designated funding to stifle dissent is not permissible given the basic tenets of our Constitution.

V. The Proposed Rule Violates the Tenth Amendment.

The Tenth Amendment establishes that, as a power not delegated to the federal government, the development, implementation, and operation of school districts is a power left to the states in the absence of direct federal legislation to the contrary. There is no federal legislation that permits the OMB to act as an agent of the Executive to override the state-level development, implementation, and operation of school districts. Yet, this OMB regulation attempts to do just that by predicating funding eligibility on the development, implementation, and operation of certain policies and practices as dictated by the Executive. The power delegated to the federal government is limited to the funding of educational programs per the statutory terms of the funding stream. OMB's attempt to attach extra-legislative riders to the funding streams is an unlawful violation of the 10th amendment and a violation of the rights reserved to the states.

Implementation of this new OMB process would require state-level school systems to choose between compliance with the administration's otherwise non-binding policy preferences to remain funded or compliance with binding state and federal law they are obligated to follow no matter who is in the White House. Elementary, secondary, and post-secondary institutions have all been trapped in an untenable position simultaneously being forced to violate students' and educators' rights to satisfy the whims of the federal Executive and being bound to protect those same rights by state law and district policy. The proposed OMB regulation would guarantee that this impossible conflict becomes perpetual to the detriment of students and educators nationwide.

Among the untenable situations sought by the NPRM is the specter of school districts failing their statutory obligation to provide public education services to all eligible students because they are denied funding by the Department of Education. In order to avoid this unlawful failure, local school districts and the citizens therein will be obligated to forfeit the rights reserved to them by Congress. This forfeiture of rights will have an outsized impact on rural communities, poor communities, and communities serving larger disabled populations as those school systems are more highly dependent on the federal funds Congress has allocated to them to support their students.

Among the most vulnerable of these are students with disabilities. Many of those who need specialized education or attend specialized schools are almost entirely reliant on federal funding to pay for their education. Under the terms of the OMB regulations, those students with disabilities, their families, and their educators will face a potentially life-threatening choice: participate in discrimination against your classmates and colleagues or forfeit your right to a meaningful education.

By predicating vital funding on legally baseless Executive preferences, this NPRM proposes to open the door to extra-statutory demands on school districts nationwide to alter their fundamental day-to-day policies after every presidential election (or possibly more frequently as the OMB has also indicated they intend to implement more-frequent-than-annual compliance reporting). Ostensibly, each compliance report could mandate a different set of expectations for a school to remain in line with ever-shifting administration priorities. This unstable and

unpredictable dynamic cuts counter to the most foundational and agreed-upon principles that students and educators thrive in a setting built upon consistency, reliability, and predictability. By ignoring the directions given by Congress to address the needs of vulnerable students, the proposed regulation would unacceptably and unlawfully weaken educational systems nationwide.

A. The Proposed Rule Threatens the Most Vulnerable Students.

The constitutional and legal defects of the proposed rule would fall most heavily on the most vulnerable students. As directed by Congress, federal funding supports educational programs serving rural communities, low-income communities, and communities with higher proportions of students with disabilities whose schools are most dependent on federal funds and least able to absorb their loss.

LGBTQ+ students and students with disabilities face particular jeopardy. Many students requiring specialized education or attending specialized schools depend almost entirely on federal funding to support their education. The Individuals with Disabilities Education Act guarantees these students a free and appropriate public education, a statutory right that does not disappear because a school district declines to comply with an executive's contrary policy preferences. By conditioning the funding that makes this guarantee meaningful on compliance with those preferences, the proposed rule would place LGBTQ+ students and students with disabilities and their families in an unconscionable position: participate in policies that discriminate against other classmates and colleagues, or forfeit access to the education federal law guarantees you. This is not a permissible funding condition. It is coercion that strikes at the educational rights of students that federal law explicitly protects.

VI. The Proposed Rule Invites Religion-Based Discrimination and Establishment Clause Violations.

The NPRM proposes to add alarmingly open-ended "religious liberty" and "questionable practices" language to the existing financial and performance-competence risk criteria in 2 CFR § 200.206. These provisions seemingly would authorize reviewers of funding applications to approve or reject them based on subjective perceptions, with or without evidence, that applicants are or might be "[e]ngaging in activities or initiatives that are inconsistent with religious liberty laws." The proposed grant of reviewing authority lacks any indication of what sorts of activities might be deemed suspect and which laws might be considered relevant. Given the problems discussed above that appear inevitably to flow from the Proposed Rule's explicit intention to apply the gender and anti-DEI executive orders as screening criteria, the undefined and potentially capacious "questionable practices" language fails to give proper notice and cannot be valid in any government regulation.

In addition, the NPRM proposes to add new provisions to 2 CFR § 200.300 which would create significant risk of religion-based discrimination against program beneficiaries, including denial of required services. For example, the new subsection (c) forbids discrimination against faith-based organizations that wish to receive federal funding to serve public needs. It not only includes within its nondiscrimination mandate that funding decisions must not be denied due to an organization's religious character or affiliation, ***but also*** not be denied due to an organization's religious ***exercise***. Too often, LGBTQ+ people and people living with HIV have and still do encounter harassment, service refusals, and other discriminatory treatment claimed to be aspects of protected religious exercise. Indeed, when the first Trump administration proposed to lift non-

discrimination restrictions on faith-based organizations receiving federal funding, Lambda Legal opposed the changes in comments submitted to multiple agencies, providing extensive examples of religion-based discrimination against LGBTQ+ people.[119] And when the administration finalized the new rule in largely unchanged form and without meaningfully addressing our stated concerns, Lambda Legal and co-counsel challenged it on behalf of social service organizations that stood to bear the weight of the harms inflicted.[120] In relevant part, our Complaint stated:

> [R]eligiously motivated discrimination against beneficiaries is a substantial problem in the provision of social services. For example, from 2013 through 2020, Lambda Legal received tens of thousands of complaints related to discrimination based on sexual orientation and gender identity, many of which concerned problems accessing services of the type funded by the Agencies … The most frequent complaints concerned discrimination by healthcare providers and in child welfare (foster care) programs, social services often supported by federal funding from HHS. Complainants also commonly reported discrimination by organizations operating shelters and other services for people experiencing homelessness, and by organizations providing nursing and other rehabilitative care, as well as veterans services, all of which may be funded by various Agency programs. Complainants further sought help coping with discrimination in programs to alleviate the effects of poverty, such as food stamps and other nutrition support, often supported with USDA or HHS funding.[121]

American Atheists was among the parties we represented in MAZON. It recently had published the results of a study it had conducted of 34,000 nonreligious people—the largest such study ever conducted—in which substantial numbers of respondents had reported negative experiences when receiving services from faith-based organizations because they identified as not religious.[122] American Atheists submitted a comment opposing the proposal from President Trump's first term to relax the religious discrimination restrictions, laying out its study findings.[123] The MAZON Complaint drew from this evidence, stressing that the Reality Check study reported "substantial" amounts of discrimination in "mental health, substance abuse, reproductive health, and other health services because of [the clients'] nonreligious identity, all of which are services frequently supported with federal funding."[124] At the same time, religion-

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[119] *See* Lambda Legal 2020 HHS Comment & Lambda Legal 2020 VA Comment, *supra* n.1. As stated above, the information set out in those comments is incorporated herein by reference.

[120] Compl., *MAZON: A Jewish Response to Hunger v. U.S. Dep't of Health and Hum. Servs.*, No. 1:21-cv-00475, 2021 WL 225403 (S.D.N.Y. Jan. 19, 2021), Dkt. No. 1. (hereinafter "MAZON Compl.")

[121] MAZON Compl. at 13-14 (citing Lambda Legal 2020 HHS Comment at 22-23). The concerns set out in the complaint were alleviated when the Biden administration replaced the Trump I rule, and the *MAZON* case was voluntarily dismissed.

[122] Somjen Frazer, *et al.*, *Reality Check: Being Nonreligious in America*, AM. ATHEISTS 37 (2020) ("*Reality Check*"), https://static1.squarespace.com/static/5d824da4727dfb5bd9e59d0c/t/6233b4f4e004142a2cbde9b0/1647555829870/Reality+Check+-+Being+Nonreligious+in+America.pdf.

[123] Am. Atheists, Comment Letter on HHS Proposed Rule RIN 0991-AC13 (Feb. 18, 2020), 85 FED. REG. 2974 (proposed Jan. 17, 2020) (to be codified as 45 C.F.R. 87 & 45 C.F.R. 1050) ("AA 2020 HHS Comment"), https://www.regulations.gov/comment/HHS-OS-2020-0001-19946.

[124] MAZON Compl. at 13-14 (citing AA 2020 HHS Comment at 7-9).

based discrimination by faith-based service providers also can impact LGBTQ+ people adversely because many are religious themselves and are likely to feel their own religious freedom is burdened if they must receive services in an environment that imposes different religious tenets.[125]

Thus, refusals of service by religious providers can be constructive due to overt or hostile religious displays if not tempered by explicit nondiscrimination statements.[126] This is particularly true for populations in need of life's essentials, such as food, because "[t]he stigma and shame faced by vulnerable people seeking help to meet their basic human needs is already a significant barrier to receiving assistance."[127] The results of a 2020 survey of LGBTQ+ people experiencing food insecurity illustrate the point. It found that, while many experiences at faith-based providers were positive, a substantial percentage were not. And for many who experienced rejection, whether stated explicitly or not, the emotional impact outweighed the need for food. In the words one transgender man,

> I would try to access the church food banks, it was difficult. Like, you go in there, and they just have this look on their face of like disgust—you really don't wanna deal with them. You don't wanna deal with that. ... You're already emotionally defeated going into that situation, and then to get all of that, I was like I'd rather turn around and go back, figure this out a whole 'nother way.[128]

Increased barriers to receiving services from faith-based providers are especially problematic in rural areas where secular options are harder to find. American Atheists found much higher rates of religion-based discrimination in "very religious" communities, which were disproportionately located in rural areas and small towns.[129] The 2020 survey of food insecurity among LGBTQ+ people found similarly that the rural populations surveyed were served mostly by religiously affiliated organizations.[130] All to say, rather than facilitating fair and effective implementation of Congress's policy goals, as the NPRM claims asserts, these process changes would undermine program effectiveness.

Turning to the legal standards set out in the NPRM, it problematically appears to propose supplanting the case-by-case analysis required by the Religious Freedom Restoration Act ("RFRA")—a statute adopted explicitly to require a proper balancing of religious liberty interests

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[125] Kerith J. Conron, *et al.*, *Religiosity Among LGBT Adults in the US*, UCLA SCH. OF L. WILLIAMS INST. (Oct. 2020), https://williamsinstitute.law.ucla.edu/publicatios/lgbt-religiosity-us/ (finding that nearly half of LGBT adults in the U.S. are religious, that they are found across ages, in every racial and ethnic group, and in rural and urban areas, and with greater religiosity among LGBT adults who are older, Black, and who reside in the South).

[126] Lambda Legal HHS 2020 Comment at 28; Lambda Legal 2020 VA Comment at 27.

[127] MAZON: A Jewish Response to Hunger, Comment Letter on USDA Proposed Rule RIN 0510-AA08 at 2 (Feb. 12, 2020), 85 FED. REG. 2897 (proposed Jan 17, 2020) (to be codified as 7 C.F.R. 16) ("MAZON 2020 USDA Comment"), https://www.regulations.gov/comment/USDA-2020-0009-2852.

[128] *We're Still Hungry* 15. *See also* Brad Sears, *et al.*, *Food Insecurity and Reliance on SNAP Among LGBT Adults*, UCLA SCH. OF L. WILLIAMS INST. (July 2025), https://williamsinstitute.law.ucla.edu/publications/lgbt-food-insecurity-snap/.

[129] *Reality Check* at 34, 37.

[130] *We're Still Hungry* at 2.

with the legitimate needs and interests of third parties and society as a whole[131]—with blanket religious exemptions whenever an applicant for funding requests one. Such a change would be improper for both statutory and constitutional reasons. First, contrary to RFRA, it would enable wrongful harms to third parties, specifically including the members of the public that Congress intends to be assisted by the program it has authorized and funded. That would be counterproductive, especially because those harms are likely to deter intended beneficiaries from seeking and receiving services they need and are entitled to receive.

Second, contrary to the Establishment Clause, this NPRM privileges religious interests over secular ones.[132] As noted above, Section 200.300(c) states that organizations seeking federal funding must not be disfavored in their requests due to their religious exercise. This language is unclear and seems to allow the possibility that organizations could include religious practices within the services they provide at government expense, and could require program beneficiaries to participate or at least attend, and could not be denied funding for that religious activity and manner of service delivery. This plainly would violate the Establishment Clause.[133]

Conclusion

Given the staggering breadth of this NPRM, Lambda Legal makes no attempt to provide an exhaustive analysis of its myriad legal failings, nor to provide a comprehensive survey of the many ways in which the proposed rule would, if implemented, harm LGBTQ+ people and those living with HIV. Among the many errors of this NPRM is that it violates the Administrative Procedures Act, agencies' authorizing legislation, and the United States Constitution. It would upend and undermine congressional intent: it would prohibit agencies from carrying out what Congress has charged them to do in order to address actual disparities among vulnerable populations. It exceeds the Executive Branch's authority: Congress has not authorized the restrictions identified in the Rule, and OMB's purported authority for issuing it is not supported by congressional action. Further, the Proposed Rule is contrary to law: it conflicts with many statutory provisions, such as the Administrative Procedures Act, the Affordable Care Act, and

[131] 42 U.S.C.A. § 2000bb-1(b). *See, e.g.*, *Pennsylvania v. Trump*, 795 F. Supp. 3d 607, 635 (E.D. Pa. 2025) (holding categorical religious exemption arbitrary and capricious where it lacked "RFRA's careful evaluation of sincere beliefs and substantial burdens"). *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 739 (2014) (Kennedy, J., concurring) (religious accommodations should not "unduly restrict other persons . . . in protecting their own interests"); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff'd on other grounds by Bostock v. Clayton Cnty*., 590 U.S. 644 (2020).

[132] *See Cutter v. Wilkinson*, 544 U.S. 709, 722, 726 (2005) (to be permissible, "an accommodation must be measured so that it does not override other significant interests" or "impose unjustified burdens on other[s]."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

[133] *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 228-30 (1997) (religious indoctrination); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007) (religious discrimination); *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001) (religious coercion).

Title IX, and it also suffers from constitutional infirmities because it violates equal protection and First Amendment principles. We urge OMB to rescind the Proposed Rule.

Respectfully submitted,

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