Comments of the National Association of Criminal Defense Lawyers

Regarding Docket ID: OMB-2026-0034

These comments are submitted on behalf of the National Association of Criminal Defense Lawyers (NACDL), a not-for-profit organization that has served since 1958 as the nation's preeminent voice for the criminal defense bar in advancing justice and due process for all persons charged with a crime or wrongdoing. NACDL's thousands of direct members and more than 80 affiliate organizations — representing tens of thousands more — include public defenders, private practitioners, and academics who appear in federal, state, local, tribal, and military courts and before regulatory agencies throughout the country. NACDL's members practice in communities of every size, from large urban centers to small rural towns, on matters ranging from minor infractions to capital cases.

For nearly two decades, NACDL has applied for and been selected to serve as a grantee, subgrantee, and contractor on competitive discretionary federal grants issued by the Department of Justice and other federal agencies. NACDL has used this funding to deliver training, develop resources, and provide direct support to state, local, and tribal communities seeking to improve access to justice, regularly partnering with other professional organizations across the legal system to defend the constitutional rights of all.

NACDL submits these comments in opposition to OMB's proposed Regulation for Federal Financial Assistance. OMB and 41 other federal agencies propose to transform the federal grant system from a resource designed to meet community needs into a tool that can be used to silence dissent and compel political alignment. NACDL welcomes the proposal's stated goals of reducing administrative barriers and increasing accessibility — including the requirement that Notices of Funding Opportunity be written in plain language (§200.204) and the use of Statements of Interest to streamline complex, highly competitive proposals. But the overwhelming majority of the proposed changes will do the opposite: they will increase administrative burdens, undermine core American values, and politicize the grant process, divorcing it from its intended role of serving the public good, spurring innovation, and rewarding merit. As detailed below, this wholesale overhaul of the federal grant process raises both legal and practical concerns that warrant its rejection.

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OMB Lacks Legal Authority to Adopt These Sweeping Changes

Although OMB characterizes the proposed amendments as “minor adjustments in the regulatory text” (Federal Register Vol. 91, No. 103, May 29, 2026, Proposed Rules at 32205), the shift is anything but. Converting the provisions of 2 CFR Part 200 from guidelines that agencies use to shape their own policies and practices into permanent, binding regulations strips the 41 named federal agencies[1] of the flexibility they need to meet the distinct demands of their individual fields, and hands OMB unilateral authority to make future amendments that will “apply government-wide” upon their effective date. (*Id*.)

The agencies to be bound by these changes would be agreeing to the strict application of a single set of rules, intended to apply to both the USDA’s $50,000 grants to farm cooperatives to plan ways to market strawberry jam,[2] and the NSF’s $35 million grant for an organization to stand up permanent operations infrastructure for a national AI research resource.[3] This one-size-fits-all approach risks burying every grant applicant, awardee, subgrantee, contractor and service provider in mountains of unnecessary and, in many cases, costly, requirements.

When operating as guidelines, these provisions were dynamic and flexible, enabling each agency to adjust to best fit the needs of their grantees and their responsibilities as the grantor. However, as regulations, they would bind every grant by every agency to a single, inflexible, set of rules. It is difficult to envision a scenario in which these changes would further the objectives of improving oversight and efficiency or reducing recipient burdens.

NACDL is also concerned about the legality of this process. It is unclear what statutory authority permits 41 different federal agencies to unilaterally and permanently cede their individual decision-making authority to OMB. The changes proposed go far beyond the authority OMB cites for this action, that is providing “overall direction and leadership on financial matters” 31 U.S.C. § 503(a)(2).

Finally, as a provider of services to tribal communities, and on behalf of members who work for or belong to recognized Tribes, NACDL challenges the legality of this rulemaking on the additional ground that OMB and the 41 participating agencies did not follow their own Tribal consultation procedures before proposing it.

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[1] Federal Register Vol. 91, No. 103, May 29, 2026, Proposed Rules at 32128

[2] USDA’s Value-Added Producer Grant Fact Sheet.

[3] National Science Foundation’s National AI Research Resource (NAIRR) Operations Center (NSF 25-546).

The Proposed Regulations Unconstitutionally Restrict Grantee Speech and Association

Numerous provisions of the proposed regulations restrict the viewpoints grant recipients may hold or express. Some target specific topics, such as "ideologies that deny the biological reality of sex" (proposed §200.300); others reach any disagreement with federal policy, treating it as grounds to deny payment, terminate funding, or reject an otherwise meritorious application (see, e.g., proposed §200.205(b)(2)(iv), barring funds from being used to "fund, promote, encourage, subsidize, or facilitate" initiatives that "compromise public safety or promote anti-American values"). These provisions strike at the heart of the First Amendment and a bedrock American principle: the right to disagree with the government and to voice differing viewpoints.

As the Supreme Court explained in *303 Creative LLC v. Elenis*:

> By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, "[i]f there is any fixed star in our constitutional constellation," it is the principle that the government may not interfere with "an uninhibited marketplace of ideas." (citations omitted).[4]

Organizations, like individuals, have the right to free speech, and the government cannot create rules that unjustly restrict or regulate that speech. *Citizens United v. FEC*, 558 U.S. 310 (2010). That the government disagrees with a position, or even believes it harmful, does not permit content-based restrictions: "[T]he First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,'" *303 Creative*, 600 U.S. at ___, (slip op., at 8), quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). And the First Amendment prohibits the government from using its power, directly or through a third party, to punish or suppress speech or advocacy with which it disagrees. *NRA v. Vullo,* 602 U.S. 175 (2024).

The proposed regulations are nevertheless strewn with provisions that tie funding to viewpoint. They would transform the grant process from one that reviews applications on their merits into one that rewards — if not outright demands — political allegiance. Would an organization lose funding because the computer used to create a grant-funded checklist on interviewing incarcerated clients was also used to draft an amicus brief opposing the prosecution of a doctor who provided gender-affirming care? Would a contractor building a grant-funded training webpage lose that contract for posting on social media in opposition to immigration enforcement at a county courthouse? As

[4] *303 Creative v. Elenis,* 600 U.S. 600 U. S. ___, ___ (2023) (slip op., at 6–7).

Justice Kennedy observed in his concurrence in *Matal v. Tam*, “[i]t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.” *Matal v. Tam,* 582 U.S. 218, ___ (2017) (Kennedy, J., concurring). Yet that is precisely what these regulations will do, empowering the government to decide, unilaterally, what counts as an “American” value.

The Reputational-Harm Provision Is an Additional, Standalone Speech Restriction

Proposed § 200.332 requires grantees to ensure that subrecipients do not “take actions that could significantly damage” the reputation of the grantee, the awarding agency, or the federal government. This vague, undefined, malleable standard — assessed solely at the discretion of the relevant agency or the Administration — would force grantees to monitor every action taken by every subrecipient, not merely conduct relevant to the grant. The word “could” pushes that monitoring obligation into pure speculation.

Because NACDL has served as a grantee, subgrantee, and contractor, it is well positioned to note that this provision is itself unconstitutional: it withholds compensation or funding based on the Administration's disagreement with a subrecipient's position or action, which is to say it regulates speech the government dislikes — something the Supreme Court has squarely held it cannot do. See *Matal v. Tam,* 582 U.S. 218 (2017) (striking down a law permitting the government to deny trademarks to speech it found “disparaging,” because “[s]peech may not be banned on the ground that it expresses ideas that offend”).

Politicized Pre-Issuance Review and the Removal of Community Engagement Confirm the Politicization Problem

Proposed § 200.205 creates an entirely new “pre-issuance review” requirement under which a senior political appointee must confirm that selected awards “demonstrably advance the President's policy priorities.” §200.205(a). Proposed § 200.202 similarly requires that grant program “goals and objectives” be “aligned with administration policies and priorities.” Although OMB describes merit review as “an objective process of evaluating Federal award applications” (§200.205), inserting a partisan overseer into that process does the opposite: it divorces award decisions from merit and feasibility, undermines the Administration's own stated preference for rewarding substance over status, and risks awarding taxpayer money to organizations chosen for political alignment rather than reliability or effectiveness. Requiring grants to “demonstrably advance the President's policy priorities” also blurs, if not crosses, separation-of-powers lines by substituting executive priorities for the congressional decisions and directives that govern how grant funds are to be used.

The proposal compounds this problem with a catch-all provision barring discretionary awards from being used to “fund, promote, encourage, subsidize, or facilitate . . . initiatives that compromise public safety or promote anti-American values.” §200.205(b)(2)(iv). Undefined terms like “anti-American values” and “public safety” leave applicants to guess what might trigger the provision, and give the Executive Branch unchecked discretion to redefine those terms to suit its political agenda — at best muddying the application process, at worst weaponizing it to deny funding to capable, effective applicants who do not support the administration's unrelated policy interests.

The proposal's removal of existing guidance directing federal agencies to engage with communities affected by their programs (§200.202) is telling in this same respect: read together with the requirement that grant goals align with “administration policies and priorities,” it signals an intention to remake the grant process into an instrument of presidential power rather than a service to the public.

The DEIA Funding Restriction Risks Violating the ADA

Proposed §200.300's prohibition on grant funds being used to “facilitate” or “fund” diversity, equity, inclusion, and accessibility practices may also cause violations of the Americans with Disabilities Act. For example, fearful that expenditures for ASL interpreters or CART (real-time captioning) services will be disallowed — or worse, will trigger suspension or termination of their funding — organizations will simply stop offering these supports. The result is the opposite of the provision's stated purpose: rather than promoting access, it will exclude members of the deaf and hard-of-hearing community from grant-funded training and technical assistance. With more than 1 in 4 Americans having a disability,[5] it is critical that federally funded programs, resources, and services be made fully accessible, and any provisions that would undermine such efforts should be rejected.

The Proposed Regulations Create Unchecked, Unreviewable Instability for Grantees

Unilateral Post-Award Changes to Executed Contracts

Proposed §200.208 empowers the government to unilaterally change the terms of already-executed grant agreements, forcing recipients to accept new terms or instantly lose all funding. The resulting uncertainty — not knowing how, when, or what changes may be imposed, or whether they can even be met — will make long-term planning untenable, undermine grantees' ability to recruit and retain staff for grant-funded work, and discourage other organizations from partnering with grantees whose work could be

[5] CDC Data Shows Over 70 Million U.S. Adults Reported Having a Disability, CDC, July 16, 2024.

discontinued at any moment. Later added conditions can also increase costs as grantees may have to change practices, incorporate new requirements, etc. As these did not exist at the time the grantee accepted the award, they may not be accounted for in the existing budget and will necessitate either the grantee absorbing these costs themselves or their seeking to redirect grant funds earmarked for grant performance to cover these unexpected expenses.

Terminations Based on Shifting Federal Priorities

Revisions proposed to §200.340 formalize and normalize termination of federal grants whenever a federal agency or its leadership changes its views, permitting termination whenever an award "does not effectuate program goals, federal agency priorities, or the national interests as they exist at the time of the termination." §200.340. Allowing termination with no showing of fiscal mismanagement, fraud, or noncompliance — and with no notice or opportunity to be heard — undermines the investment of time, resources, and staff that grantees, subgrantees, contractors, and the communities they serve make to bring a grant's objectives to fruition, and erodes public trust in both the federal government and its grant recipients.

The prospect of funding termination at any time will also make it harder for organizations to recruit and retain staff, since employees facing this kind of uncertainty are more likely to leave for more stable positions — increasing turnover and delaying delivery of grant-funded services. Facing this risk, organizations will favor short, simple projects over longer-term structural work, even where the latter would do more good.

This is not a speculative harm. In April 2025, DOJ summarily terminated more than 350 federal grants without warning[6]; many smaller organizations could not sustain themselves long enough to pursue an appeal while others had to lay off staff and shutter programs.[7] Unpredictable interruptions of this kind also waste the funds already spent on partially completed work.

These harms are compounded by the provisions proposed in §200.342, which relieves agencies of any obligation to "allow for objections, hearings, and appeals" when a termination is based on changed priorities. Eliminating this avenue for review prevents the correction of errors and invites abuse, retaliation, and improper discrimination.

Errors are also not speculative: Following DOJ's mass grant termination in April 2025, a number of grants, including one awarded to NACDL, were restored through the

[6] *DOJ Funding Cuts: More than 550 Organizations Impacted, New Analysis Finds,* Amy Solomon and Betsy Pearl, Council on Criminal Justice, May 2025.
[7] *Federal Cuts Disrupt Local Justice Programs, but Communities Push Forward*, Sophia Nabours and Geoff Hing, The Marshall Project, Sept. 5, 2025, and *US Justice Department slow to respond to appeals after April wave of grant cuts*, Sarah Lynch and Peter Eisler, Reuters, Dec. 19, 2025.

administrative appeals process. Administrative appeals and other informal avenues for resolution allow agencies and grantees to correct mistakes, mitigate harm, and avoid costlier litigation that many nonprofits could not otherwise afford. But that same episode also showed the cost of leaving the appeals timeline undefined. Although a handful of grantees had funding restored within days, and some others within months, NACDL and others waited nearly a year. This extended delay, especially because organizations had no known timelines, left grantees, contractors, and the communities they served in limbo. Instead of gutting a provision that mitigates harm, OMB should strengthen the provision by adopting clear deadlines for filing, reviewing, and resolving appeals to avoid repeating this experience.

Another proposed revision to §200.340 compounds this instability by newly authorizing agencies to "temporarily suspend" any award's activities and funding for up to 90 days whenever the agency believes doing so is in its "interest" (§200.340(e)) — an undefined, unchecked power that leaves grantees in constant limbo. As with the termination provisions discussed above, this creates another avenue for the government to leverage the loss of earned funding against any grantee that opposes the administration in power, again implicating the First Amendment. *NRA v. Vullo,* 602 U.S. 175 (2024).

The Proposed Regulations Increase Administrative Burdens and Divert Funds from Direct Services

Added Payment Justification Requirements

Proposed §200.305 would require recipients and subrecipients to submit a detailed written justification for every reimbursement request, ostensibly to ensure reimbursements are "tied to measurable award activities and outcomes." This ignores the extensive monitoring already in place and adds a substantial burden for no offsetting benefit: time spent justifying every individual expenditure is time not spent doing the grant's substantive work, and the added cost of administering that justification process undermines the very goal of ensuring grant dollars fund actual services. It will also require federal staff to review and act on each new justification, adding delay to the payment process, a prospect that would fall hardest on smaller organizations that cannot afford extended waits to be reimbursed.

Grantees are already subject to extensive oversight. For example: under one recent NACDL grant from DOJ's Bureau of Justice Assistance — under which NACDL oversaw three subgrantees and more than two dozen contractors across more than 60 deliverables — monitoring included:

- Biweekly calls with programmatic and financial managers;
- Quarterly financial reports;

- Semi-annual progress reports;
- Detailed pre- and post-event Conference Cost Reports for every live training event, detailing both projected and actual individual staff hours expended; travel and event costs; and documentation of competitive bidding for facilities and hotels;
- A BJA desk review with an in-person office visit which included randomized production of financial records and expense documentation; and
- NACDL's own annual independent financial audit, reported to the Federal Audit Clearinghouse.

NACDL conservatively estimates it would take an additional 100 hours of staff time per grant per year if, in addition to all these safeguards, we were required to submit written justification for every reimbursement submitted for itself, its subgrantees, and its contractors. This would be time diverted from grant work to paperwork.

New Barriers to Conference Attendance

Proposed §200.432 would make conference-attendance costs allowable "only if participation in the conference is expressly approved by the Federal agency and included in the terms and conditions of the Federal award." While framed as a clarification that funds may not be used for conferences unrelated to program outcomes, the change goes far beyond that goal. Rather than allow grant managers to approve conference participation as opportunities arise — consistent with the current practice for cooperative grants — it would force applicants to predict, at the time they apply, which conferences will arise and budget for them accordingly, or later amend their award terms to add them. Both paths create unnecessary work for grantees and agencies alike; the alternative — being barred from unbudgeted conferences altogether — costs grantees the collaboration, innovation, and dissemination that conferences uniquely provide.

Prohibition on Studying and Redressing Disparate Impact

Proposed §200.218 bars the use of federal grant funds to "promote or support" "disparate-impact studies." §200.218(b). Although the provision carves out "statistical or demographic analysis for internal program evaluation, research, or other purposes," it still bars federal funds from paying for that analysis and separately prohibits recipients from using its results to "adjust[]" their activities or performance. §200.218(d). Barring the use of federal funds to determine whether a program is having an improper disparate impact runs contrary to the basic goal of treating similarly situated individuals alike, regardless of whether a disparity stems from intentional choices or unintended consequences. Requiring a grantee that discovers such a disparity to take no corrective action compounds rather than resolves the underlying inequity.

Conclusion

The proposed sweeping revisions to the federal grant process will hurt the average American far more than they will help. They will raise costs, reduce the quality of services, inhibit innovation, and promote politics over merit. The risks and restrictions placed on grantees will discourage many from seeking federal funding at all, forfeiting the benefits of a competitive marketplace — itself a hallmark of American values — in favor of a system that rewards political loyalty over competence. Federally funded grants exist to serve the public good and promote innovation; these proposed changes instead place presidential preferences ahead of community needs, override the separation of powers by substituting executive fiat for congressional decisions, and reward political affiliation over merit. For the reasons above, NACDL urges OMB to reject the proposed Regulation for Federal Financial Assistance.

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