Guidance Regarding Department of Justice Grants and Executive Order 13798

This guidance summarizes the Department's policies on how it administers its Federal grants in compliance with Executive Order 13798, the Attorney General's Memorandum "Federal Law Protections for Religious Liberty," and OMB Memorandum M-20-09.

I. BACKGROUND

On May 4, 2017, President Trump issued Executive Order 13798, Presidential Executive Order Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 9, 2017). Executive Order 13798 states that "Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government" and further provides that the executive branch will honor and enforce those protections. It also directed the Attorney General to "issue guidance interpreting religious liberty protections in Federal law." 82 Fed. Reg. at 21,675. Pursuant to this instruction, the Attorney General, on October 6, 2017, issued the Memorandum for All Executive Departments and Agencies, "Federal Law Protections for Religious Liberty," 82 Fed. Reg. 49,668 (Oct. 26, 2017) (the "Attorney General's Memorandum on Religious Liberty").[1]

The Attorney General's Memorandum on Religious Liberty summarizes twenty key principles of religious liberty protections in Federal law. Among other things, the Memorandum emphasizes that individuals and organizations do not give up religious liberty protections by providing government-funded social services, and that "government may not

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* Guidance documents, like this document, are not binding and lack the force and effect of law, unless expressly authorized by statute or expressly incorporated into a contract, grant, or cooperative agreement. Consistent with Executive Order 13891 and the Office of Management and Budget implementing memoranda, the Department will not cite, use, or rely on any guidance document that is not accessible through the Department's guidance portal, or similar guidance portals for other Executive Branch departments and agencies, except to establish historical facts. To the extent any guidance document sets out voluntary standards (e.g., recommended practices), compliance with those standards is voluntary, and noncompliance will not result in enforcement action. Guidance documents may be rescinded or modified in the Department's complete discretion, consistent with applicable laws.

[1] *Available at* https://www.justice.gov/opa/press-release/file/1001891/download.

exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization."[2] Indeed, rules or grant terms that "disqualif[y] a religious person or organization from a right to compete for a public benefit—including a grant or contract—because of the person's religious character" violate the First Amendment's Free Exercise Clause unless the government proves that the disqualification is the least restrictive means to achieve a compelling governmental interest.[3] The Memorandum further observes that Federal agencies must honor Federal-law religious liberty protections in all their activities, including contracting and distribution of grants.[4] In an implementation memorandum accompanying the Attorney General's Memorandum on Religious Liberty, the Attorney General directed all Department components and United States Attorney's Offices to incorporate the Religious Liberty Memorandum in all aspects of the Department's work, including grant administration.[5]

On January 16, 2020, the Office of Management and Budget (OMB) issued its own guidance to all executive departments and agencies regarding Federal grants and Executive Order 13798 (the "OMB Memorandum").[6] The OMB Memorandum directs all grant-administering agencies to "publish policies detailing how they will administer Federal grants in compliance with E.O. 13798, the Attorney General's memorandum, and this Memorandum." This guidance fulfills that directive.

II. EQUAL PARTICIPATION IN DEPARTMENT PROGRAMS

As detailed below, and as codified in the Department's regulations regarding partnerships with faith-based organizations, 28 C.F.R. Part 38 ("Part 38"),[7] faith-based organizations have a right to equal participation in the Department's programs.

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[2] 82 Fed. Reg. at 49,668, 49,669, 49,670 (principles 4, 6, and 20).

[3] *Id.* at 49,672 (appendix 3a).

[4] *Id.* at 49,671 (Guidance for Implementing Religious Liberty Principles).

[5] Memorandum for All Component Heads and United States Attorneys, "Implementation of Memorandum on Federal Law Protections for Religious Liberty" (Oct. 26, 2017), *available at* https://www.justice.gov/crt/page/file/1006791/download.

[6] OMB M-20-09, Memorandum for the Heads of Executive Departments and Agencies, "Guidance Regarding Federal Grants and Executive Order 13798" (Jan. 16, 2020) (the "OMB Memorandum"), *available at* https://www.whitehouse.gov/wp-content/uploads/2020/01/M-20-09.pdf.

[7] The Department has issued a notice of proposed rulemaking that proposes certain changes to Part 38. *See* Notice of Proposed Rulemaking, "Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831," 85 Fed. Reg. 2,921 (Jan. 17, 2020). The proposed changes will not be effective until the proposed rulemaking is finalized.

A. Faith-Based Organizations' Right of Nondiscrimination

Faith-based organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible.[8] No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department or a State or local government in administering financial assistance from the Department shall disqualify faith-based organizations from participating in the Department's programs because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.[9] And neither the Department nor any State or local government receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation, or lack thereof.[10]

These regulations ensuring equal treatment for faith-based organizations reflect constitutional requirements. Under the Free Exercise Clause of the First Amendment, Federal, State, and local governments generally may not condition a public benefit—including an award or sub-award of Federal grant money—in a manner that disadvantages applicants on the basis of their religious status.[11]

Indeed, the Supreme Court has made clear that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'"[12] And the Court also has made clear that State law cannot overcome this principle. In *Espinoza v. Montana Department of Revenue*, the Court held that "the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from [a neutral and generally available] scholarship program."[13]

Consistent with the requirements of the First Amendment's Free Exercise Clause, Part 38's prohibitions on government discrimination against organizations on the basis of their religious character, affiliation, or motivation apply even where such discrimination results from

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[8] 28 C.F.R. § 38.4(a).

[9] *Id.* § 38.5(d).

[10] *Id.* § 38.4(a).

[11] *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'") (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 533, 542 (1993)); *see also* Attorney General's Memorandum on Religious Liberty, 82 Fed. Reg. 49,668, 49,668, 49,670 (Oct. 26, 2017) (principles 4, 6, and 20).

[12] *See Espinoza v. Mont. Dep't of Revenue*, No. 18-1195, 2020 WL 3518364, --- U.S. --- (U.S. June 30, 2020), slip op. at 8 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

[13] *See id.* at 7.

an application of State law.[14] Indeed, Part 38 contains no exception for discrimination that results from an application of State law.

B. Faith-Based Organizations' Right of Independence from Government

A faith-based organization that applies for, or participates in, Department-funded programs or services may retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.[15] For example, among other things, a faith-based organization that receives financial assistance from the Department may use space in its facilities without removing religious art, icons, messages, scriptures, or symbols.[16] In addition, a faith-based organization that receives financial assistance from the Department retains authority over its internal governance. For example, among other things, it may retain religious terms in its organizational name, select its board members on a religious basis, and include religious references in its mission statements and other governing documents.[17]

Like all organizations that receive the Department's financial assistance, faith-based organizations may not use direct Federal financial assistance to engage in any explicitly religious activities, including activities that involve overt religious content such as worship, religious instruction, or proselytization.[18] But this does not require faith-based organizations to forgo their explicitly religious activities, including those that may be similar to the funded program.[19] Rather, if an organization conducts explicitly religious activities, those activities simply must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for

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[14] *See id.* at 11 (examining a state court decision that "applied [state law] to hold that religious schools could not benefit from" a state scholarship program, and holding that this application of state law amounted to unconstitutional religious identity-based discrimination); *cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (holding unconstitutional a state policy of categorically disqualifying religious organizations from receiving certain grants, and rejecting the State's reliance on a state "constitutional tradition of not furnishing taxpayer money directly to churches").

[15] 28 C.F.R. §§ 38.2(a), 38.5(b).

[16] *Id.* § 38.5(b).

[17] *Id.* § 38.5(b).

[18] 28 C.F.R. §§ 38.2(a), 38.5(a). *See also Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, -- Op. O.L.C. --- (2019), slip op. at 20–21 ("HBCUs Opinion"), *available at* https://www.justice.gov/olc/file/1200986/download ("Although the Establishment Clause does not forbid all such aid . . . the federal government has in many instances excluded explicitly religious activities, including religious instruction, from more general funding programs, and thus has long asserted an interest in avoiding the funding of religious instruction akin to that recognized by the Court in *Locke* [*v. Davey*, 540 U.S. 712 (2004)]." *Id.* §§ 38.2(a), 38.5(a).

[19] Frequently Asked Questions: Partnerships with Faith-Based and Other Neighborhood Organizations: 28 C.F.R. part 38, *available at* https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/faqs_part38.pdf (FAQ 16).

beneficiaries of the programs or services funded with such assistance.[20] The organization is not prohibited from inviting program beneficiaries to participate in a separate, explicitly religious activity, so long as the invitation occurs separate in time or location from the Department-supported program (for example, before the program has begun or after the program has ended) and appropriate steps are taken to ensure the distinction between the activity and the Department-supported program and to ensure the voluntariness of any participation in the activity.[21] In addition, no grant document, agreement, covenant, memorandum of understanding, policy, or regulation that the Department or a State or local government uses in administering financial assistance from the Department shall single out faith-based organizations by requiring only them to provide assurances that they will not use monies or property for explicitly religious activities.[22]

Notwithstanding the foregoing restriction on the use of direct Federal financial assistance, nothing in Part 38 restricts the Department's authority under applicable Federal law to directly fund activities, such as the provision of chaplaincy services, that can be directly funded by the Government consistent with the Establishment Clause and other applicable federal law.[23] For example, the restriction against the use of direct financial assistance to support explicitly religious activities might not apply to some programs where funds are provided to chaplains to work with people in detention facilities, or where funds are provided

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[20] 28 C.F.R. § 38.5(a).

[21] Frequently Asked Questions: Partnerships with Faith-Based and Other Neighborhood Organizations: 28 C.F.R. part 38, *available at* https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/faqs_part38.pdf (FAQ 21).

[22] 28 C.F.R. § 38.5(d).

[23] *Id.* § 38.2(c); *see Theriault v. Silber*, 547 F.2d 1279, 1280 (5th Cir. 1977) (per curiam) (rejecting claim "that employment of chaplains in federal prisons by the United States violates the Establishment Clause"); *see also Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005) (rejecting an argument that would call into question a state's "provid[ing] inmates with chaplains but not with publicists or political consultants" (internal quotation marks omitted)); *Marsh v. Chambers*, 463 U.S. 783 (1983) (rejecting Establishment Clause challenge to state legislature's practice of opening each session with a prayer offered by a chaplain paid with public funds); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 297 (1963) (Brennan, J., concurring) (observing that "provision by state and federal governments for chaplains in penal institutions" may be "sustained on constitutional grounds as necessary to secure to . . . prisoners those rights of worship guaranteed under the Free Exercise Clause"); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988) (rejecting Establishment Clause challenge to county hospital's chaplaincy); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (rejecting Establishment Clause challenge to military chaplaincy); *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, -- Op. O.L.C. --- (2019), slip op. at 21 ("HBCUs Opinion"), *available at* https://www.justice.gov/olc/file/1200986/download ("As we have observed, . . . the federal government since the time of the Founding has employed chaplains . . . .").

to religious or other organizations for programs in detention facilities that assist chaplains in carrying out their duties.[24]

In any event, receipt of direct Federal financial assistance does not preclude all mention of religion in a Department-supported program. First, program beneficiaries may freely express their own religious beliefs, and attending a Department-supported program does not affect an individual's right to the free exercise of religion, including the right to pray on one's own.[25] Second, guest speakers also may express their religious beliefs, provided that the program itself remains neutral toward religion.[26] And third, while faith-based organizations may not use direct Federal financial assistance to engage in any explicitly religious activities, they may refer to religion in a variety of ways when doing so is consistent with the purposes of the program. For example, in a healthy-marriage program or in a responsible-fatherhood program, staff may note that some spouses share religious convictions and practice their faith as a family or that couples who do not share the same faith may need to discuss constructive ways in which to handle their religious differences. Instructors in a juvenile justice program may note that for some youths, values may spring from religious beliefs and traditions. In conflict mitigation programs, staff may note that principles of nonviolence are anchored in the teachings of many religious traditions. Just as public schools may teach about religion, such as the history of religion, comparative religion, literary analysis of the Bible and other scripture, and the role of religion in the history of the United States and other countries, staff in Department-supported programs receiving direct Federal financial assistance may discuss religion in such ways. In other words, staff may not use direct Federal financial assistance to inculcate or discourage a religious practice or belief, but it is permissible for staff to acknowledge the role of religion in the lives of some individuals and in certain communities.[27]

Finally, the prohibition against using *direct* Federal financial assistance to engage in explicitly religious activities—and the corresponding requirement to separate, in time or location, such activities from the supported programs or services—does not apply to the use of *indirect* Federal financial assistance, such as certain vouchers, certificates, or other similar means of government-funded payment where the choice of service provider is placed in the hands of the beneficiary.[28] Accordingly, an organization that participates in a program funded

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[24] Frequently Asked Questions: Partnerships with Faith-Based and Other Neighborhood Organizations: 28 C.F.R. part 38, *available at* https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/faqs_part38.pdf (FAQ 17).

[25] *Id.* (FAQs 11 and 14).

[26] *Id.* (FAQ 13).

[27] *Id.* (FAQ 10).

[28] *See* 28 C.F.R. §§ 38.2(b), .3(b), .6(b); *see also id.* § 38.5(a) ("Organizations that receive *direct* financial assistance from the Department may not engage in explicitly religious activities . . . .") (emphasis added).

by *indirect* Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.[29]

C. Application to Commingled State and Local Funds

If a State or local government voluntarily contributes its own funds to supplement activities carried out under the applicable programs, the State or local government has the option to separate out the Federal funds or commingle them. If the funds are commingled, the same rules that apply to Federal funds shall apply to all of the commingled funds.[30]

III. HIRING OF CO-RELIGIONISTS AND RELIGIOUS FREEDOM RESTORATION ACT EXEMPTIONS

A faith-based organization's right to employ individuals of a particular religion set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1(a), is not forfeited when the organization receives direct or indirect Federal financial assistance from the Department.[31] This right protects decisions to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.[32] Some Department programs, however, are predicated on independent statutory provisions requiring that all grantees[33] agree not to make religion-based employment decisions. But as described more fully below, under certain circumstances, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA") guarantees to faith-based grantees an exemption from these requirements.

Under RFRA, the Federal government "shall not substantially burden [an organization's] exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the [organization] is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[34] RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA's effective date.[35] Indeed, Federal statutory law enacted after RFRA's effective date "is subject to this chapter unless such law explicitly excludes such

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[29] *Id.* § 38.5(c).

[30] *Id.* § 38.6(a).

[31] *Id.* § 38.5(e).

[32] Attorney General's Memorandum on Religious Liberty, 82 Fed. Reg. 49,668, 49,670, 49,677 (Oct. 26, 2017) (principle 19 and appendix).

[33] As used in this guidance, the terms "grantee" and "grantees" include sub-grantees.

[34] 42 U.S.C. § 2000bb-1.

[35] *Id.* § 2000bb-3(a).

application by reference to" RFRA.[36] Therefore, RFRA applies to all statutes and regulations governing Department programs, and to the Department's implementation of those statutes and regulations, unless those statutes and regulations explicitly exclude its application by reference to RFRA.

On a case-by-case basis, RFRA allows faith-based organizations to receive a grant or cooperative agreement while maintaining a hiring preference for co-religionists, even when the authorizing statute for the grant program expressly forbids such employment practices.[37] Where a law governing a Department program prohibits religion-based employment practices, to obtain an exemption, a faith-based organization must complete a certification regarding its religion-based hiring practices.[38] Among other things, it must certify to the applicable Department component administering the program (or, in the case of a sub-award, to the award recipient) that it sincerely believes that providing the programs or services funded under the award by the Department is an expression of its religious beliefs, that employing individuals of a particular religious belief is important to its religious mission or identity, and that having to abandon its religious hiring practice to receive Department funding would substantially burden its religious exercise.[39] Where a substantial burden on the exercise of religion exists, RFRA requires the Department to recognize an exemption unless the Department finds good reason to question the statements in the certification or the Department demonstrates that denying an exemption for that particular organization is the least restrictive means of furthering a compelling governmental interest.[40]

A hiring preference for co-religionists need not be compelled by, or central to, an organization's system of religious belief for RFRA to require the Department to recognize an exemption.[41] In addition, RFRA does not permit the Department to assess the reasonableness of a religious belief or the reasonableness of an organization's application of its religious belief, including an organization's assessment that a hiring preference for co-religionists is important to the exercise of its faith.[42] However, RFRA does not require the Department to recognize

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[36] *Id.* § 2000bb-3(b).

[37] *See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to a Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007) ("World Vision Opinion"), *available at* https://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf.

[38] *See* "Certification Regarding Hiring Practices on the Basis of Religion," *available at* https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/certificationregardinghiring.pdf.

[39] *Id.*

[40] *See* Attorney General's Memorandum on Religious Liberty, 82 Fed. Reg. 49,668, 49,669–70 (Oct. 26, 2017) (principles 10, 11, 13, 14, and 15); *see also, e.g.*, "Civil Rights Requirements Associated with OJP Awards," *available at* https://www.ojp.gov/funding/explore/legaloverview2020/civilrightsrequirements#5.

[41] 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7).

[42] Attorney General's Memorandum on Religious Liberty, 82 Fed. Reg. 49,668, 49,669 (Oct. 26, 2017) (principle 12).

an exemption where the organization itself regards its hiring preference as unimportant or inconsequential.[43]

Grantees should consult with the appropriate Department program office to determine the scope of any applicable prohibition on religion-based employment practices.

IV. ENFORCEMENT OF RELIGIOUS LIBERTY PROTECTIONS

As the OMB Memorandum observes:

> 2 C.F.R. § 200.300 requires grant awarding agencies "to ensure that Federal funding is expended . . . in full accordance with U.S. statutory and public policy requirements: including . . . those . . . prohibiting discrimination. The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements . . . and incorporate them either directly or by reference in the terms and conditions of the Federal award." The Financial Assistance General Certifications and Representations completed by all recipients of Federal awards that register and apply for grants through the System for Award Management requires awardees to certify that they will comply with all relevant provisions of Federal laws, executive orders, regulations, and public policies governing financial assistance awards.[44]

In addition, under Department regulations, "[e]very application submitted to the Department for direct Federal financial assistance subject to [Part 38] must contain, as a condition of its approval and the extension of any such assistance, or be accompanied by, an assurance or statement that the program is or will be conducted in compliance with [Part 38]," and "[e]very intermediary must provide for such methods of administration as are required by the Office for Civil Rights to give reasonable assurance that the intermediary will comply with [Part 38] and effectively monitor the actions of its recipients."[45] Accordingly, the terms of the Federal grants that the Department awards make clear that grantees must comply with Part 38. This includes, but is not limited to, the obligation of States and other public grantees to comply with the prohibitions on discriminating against sub-grantees on the basis of their religious character, affiliation, or motivation.[46]

As the OMB Memorandum further observes:

> Agencies have meaningful tools to address public recipients' unlawful discrimination on the basis of religious character in the issuance of sub-awards

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[43] *Id.* at 49,669–70 (principle 13).

[44] OMB Memorandum at 1.

[45] 28 C.F.R. § 38.7.

[46] *See id.* §§ 38.4(a), .5(d); *see also, e.g.*, "General Conditions for OJP Awards in FY 2020," https://www.ojp.gov/funding/explore/legaloverview2020/mandatorytermsconditions#23.

> of Federal grant funds —up to and including terminating the grant and initiating proceedings to debar the recipient from being eligible in the future to receive Federal grants, contracts, or subsidies. Agencies administering a Federal grant program shall take all appropriate action, in a manner consistent with applicable law, to ensure that public grantees do not discriminate against applicants for sub-grants on the basis of their religious character. Such action may include, but is not limited to, utilizing the risk mitigation provisions set forth in 2 C.F.R. § 200.207 and the enforcement provisions set forth in 2 C.F.R. § 200.338, as appropriate.[47]

In addition to these authorities, the Department's regulations provide particularized mechanisms for enforcement of all of the obligations that grantees assume under Part 38. The Department's regulations provide that the Office of Justice Programs' Office for Civil Rights (the "OCR") "is responsible for reviewing the practices of recipients of Federal financial assistance to determine whether they are in compliance with" their obligations under Part 38.[48] The OCR is charged with investigating any allegations of noncompliance with those obligations.[49] If recipients are "determined to be in violation" of any of those obligations, they "are subject to the enforcement procedures and sanctions, up to and including suspension and termination of funds, authorized by applicable laws."[50]

It is the Department's policy that it will investigate allegations of noncompliance with Part 38 and take appropriate action upon a finding of a violation. This policy of investigation and enforcement includes, but is not limited to, allegations and findings that States or other public grantees are conditioning sub-awards of Federal grant money in a manner that disadvantages applicants on the basis of their religious status, even if they act or purport to act pursuant to State law when doing so.[51]

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[47] OMB Memorandum at 2.

[48] 28 C.F.R. § 38.8(a).

[49] *Id.* § 38.8(b).

[50] *Id.* § 38.8(c).

[51] *See Espinoza v. Mont. Dep't of Revenue*, No. 18-1195, 2020 WL 3518364, --- U.S. --- (U.S. June 30, 2020), slip op. at 11 (examining a state court decision that "applied [state law] to hold that religious schools could not benefit from" a state scholarship program, and holding that this application of state law amounted to unconstitutional religious identity-based discrimination); *cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (holding unconstitutional a state policy of categorically disqualifying religious organizations from receiving certain grants, and rejecting the State's reliance on a state "constitutional tradition of not furnishing taxpayer money directly to churches").