LDF Legal Defense Fund

Advancing racial justice since1940

June 13, 2025

David Taggart
U.S. Department of Energy
Office of General Counsel, GC-1
1000 Independence Avenue SW
Washington, D.C. 20585-0121

Via regulations.gov

RE: Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions), RIN 1903-AA20

Dear Mr. Taggart,

The NAACP Legal Defense and Educational Fund, Inc. (LDF) submits the following significant, adverse comment opposing the U.S. Department of Energy's (DOE) direct final rule (DFR) on "Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities."[1] For decades, DOE and other federal agencies[2] have sought to achieve the purposes of Title VI of the Civil Rights Act of 1964[3] by prohibiting federally-funded entities from implementing programs and policies that discriminate based on race, color, or national origin, including those that cause unlawful and unwarranted discriminatory effects—a form of discrimination known as disparate impact. Now, DOE misuses a procedural mechanism intended for noncontroversial, administrative changes to rescind these critical protections. In doing so, DOE also fails to articulate a reasoned explanation for these changes, instead relying on strained and inaccurate interpretations of recent case law. Contrary to what DOE claims, prohibiting both policies that cause unlawful discriminatory effects and those motivated by a discriminatory intent, is necessary to effectuate the purposes of Title VI. Rescinding these regulations will severely limit DOE's ability to ensure that taxpayer dollars do not subsidize discrimination and all people can equally benefit from federally-funded programs. Because the

[1] 90 Fed. Reg. 20777 (May 16, 2025), https://www.federalregister.gov/documents/2025/05/16/2025-08593/rescinding-regulations-related-to-nondiscrimination-in-federally-assisted-programs-or-activities (hereinafter "DFR").
[2] See 7 C.F.R. § 15.3(b)(2)–(3) (USDA); 22 C.F.R. § 209.4(b)(2)–(3) (Agency for Int'l Dev.); 15 C.F.R. § 8.4(b)(2)–(3) (Dep't of Commerce); 45 C.F.R. § 1203.4(b)(2) (Corp. for Nat'l &– Cmty. Serv.); 32 C.F.R. § 195.4(b)(2)(DOD); 34 C.F.R. § 100.3(b)(2)–(3) (Dep't of Educ.); 10 C.F.R. § 1040.13(c)–(d) (Dep't of Energy); 40 C.F.R. §7.35(b)–(c) (EPA); 41 C.F.R. § 101–6.204–2(a)(2)–(3) (GSA); 45 C.F.R. § 80.3(b)(2)–(3) (HHS); 6 C.F.R. §21.5(b)(2)–(3) (DHS); 24 C.F.R. § 1.4(b)(2)(i)–(3) (HUD); 43 C.F.R. § 17.3(b)(2)–(3) (Dep't of the Interior); 28 C.F.R. § 42.104(b)(2)–(3)(DOJ); 29 C.F.R. § 31.3(b)(2)–(3) (DOL); 14 C.F.R. § 1250.103–2(b) (NASA); 45 C.F.R.§ 1110.3(b)(2)–(3) (Nat'l Found. on the Arts &– Humanities); 45 C.F.R. § 611.3(b)(2)–(3) (NSF); 10 C.F.R.§ 4.12(b)–(c) (NRC); 5 C.F.R. § 900.404(b)(2) (OPM); 22 C.F.R. § 141.3(b)(2) (Dep't of State); 18 C.F.R.§ 1302.4(b)(2)–(3) (TVA); 49 C.F.R. § 21.5(b)(2)–(3) (DOT); 31 C.F.R. § 22.4(b)(2) (Dep't of Treasury); 38 C.F.R.§ 18.3(b)(2)–(3) (VA); 18 C.F.R. § 705.4(b)(2) (Water Resources Council).
[3] 42 U.S.C. § 2000d *et seq*.

DFR would be inappropriate as published, we urge DOE to withdraw the DFR in its entirety and restore the prior version of its rules. [4]

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.[5] LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. LDF has long played an instrumental role in passing legislation, encouraging agency actions, and litigating to protect Black people from policies and practices that have unjustified discriminatory effects.[6] LDF argued the seminal 1971 U.S. Supreme Court case *Griggs v. Duke Power Company*, which recognized that Title VII of the Civil Rights Act of 1964 prohibited disparate impact discrimination.[7] LDF has since argued, and the Supreme Court has recognized, that other federal statutes like the Fair Housing Act,[8] include these important protections. LDF also participated as an *amicus* in *Alexander v. Sandoval,*[9] where the Supreme Court declined to extend a private right of action for disparate impact under Title VI but left agencies' discriminatory effects regulations untouched.[10] While *Griggs* concerned racial discrimination, the principles developed by LDF and adopted by the Supreme Court in that case protect all people covered by the statutes and regulations, prohibiting disparate impact discrimination based on gender, LGBTQ+ status, age, disability, and other characteristics in addition to race, depending on the statutory context.

I. DOE Regulations Prohibiting Unfair Discriminatory Effects Protect People from Discrimination by State and Local Governments, Colleges and Universities, Private Corporations, and Utilities.

As discussed further below, Title VI of the Civil Rights Act of 1964 is grounded in the fundamental premise that federal taxpayer dollars should not fund public or private entities that engage in racial discrimination. Since 1980, DOE regulations have prohibited recipients of its funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex . . . or have the effect or defeating or substantially impairing accomplishment of the program with respect to individuals of a particular race, color, national origin, or sex."[11] These protections apply to the wide variety of programs and activities that DOE funds, from research by early-career scientists to identify new sources of energy that can bring down household costs,[12] to

[4] This comment highlights some of the most significant arguments for why DOE should rescind the DFR. The fact that LDF does not question particular statements in the DFR or address particular proposals does not indicate that LDF agrees with those statements or proposals. LDF believes the DFR is fundamentally flawed and should be withdrawn in its entirety.
[5] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.
[6] *See, e.g., Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[7] 401 U.S. 424 (1971).
[8] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (hereinafter "Inclusive Communities Project").
[9] Brief of NAACP Legal Defense & Educational Fund, Inc., et al., *Alexander v. Sandoval*, No. 99-1908 (Dec. 13, 2000), *available at* 2000 WL 1845997.
[10] 532 U.S. 275, 281 (2001) (hereinafter "Sandoval").
[11] 10 CFR 1040.13.
[12] U.S. Dep't of Energy, Advanced Res. Projects Agency Energy, DE-FOA-0003477: Inspiring Generations of New Innovators to Impact Technologies in Energy (IGNIITE) 2025, https://www.grants.gov/search-results-detail/356730 (last visited Jun. 10, 2025).

facilitating the siting of power transmission lines,[13] to helping low-income households reduce energy costs and improve health and safety by making their homes more energy-efficient.[14] As a result of receiving DOE funds to implement these programs and activities, state and local governmental entities, higher education institutions, private corporations, and utilities and power plants are prohibited from discriminating on the basis of race in all parts of their operations.[15]

DOE's Title VI regulations remain a critical tool to achieving equal opportunity. Past *de jure* segregation, perpetuated by current practices, continue to restrict Black people's access to equal opportunity. While the impact of past and ongoing discrimination on occupational[16] and educational[17] segregation is well-known, similar patterns of discriminatory conduct have also blocked Black people from other basic services, including access to reliable, affordable energy. For decades, federal, state, and local policy explicitly encouraged residential segregation, from redlining maps that denied residents in Black neighborhoods access to federally-backed loans to government enforcement of private racial covenants.[18] Even as they prevented Black people from moving to white neighborhoods, government actors concentrated hazardous infrastructure, such as power plants, in Black neighborhoods and denied those neighborhoods equal access to municipal resources and services, including access to electricity and other utilities.[19] The impacts of these policies are still disproportionately felt by Black communities today.[20] As a result of redlining, people of color today are more likely to live in polluted areas and near environmental hazards.[21] Moreover, longstanding disinvestment has left some communities of color with outdated infrastructure that limits their access to newer technology

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[13] U.S. Dep't of Energy, Nat'l Energy Tech. Lab.. DE-FOA-0003101: Inflation Reduction Act - Transmission Siting and Economic Development Program, https://www.grants.gov/search-results-detail/350022 (last visited Jun. 10, 2025).
[14] U.S. Dep't of Energy, Weatherization Assistance Program, https://www.energy.gov/scep/wap/weatherization-assistance-program (last visited Jun. 10, 2025) (hereinafter "Weatherization Assistance Program").
[15] 10 CFR 1040.3(u).
[16] Ashley Jardina, et al., *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers,* NAT'L BUREAU OF ECON. RESEARCH (Aug. 2023), https://doi.org/10.3386/w31641.
[17] ANDREW HOWARD NICHOLS, ED. TRUST, "SEGREGATION FOREVER"?: THE CONTINUED UNDERREPRESENTATION OF BLACK AND LATINO UNDERGRADUATES AT THE NATION'S 101 MOST SELECTIVE PUBLIC COLLEGES AND UNIVERSITIES (2014), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf; Laura Lumpkin, *Flagship universities say diversity is a priority. But Black enrollment in many states continues to lag,* WASH. POST (Apr. 18, 2021 7:00 AM ET), https://www.washingtonpost.com/education/2021/04/18/flagship-universities-black-enrollment/.
[18] RICHARD ROTHSTEIN, THE RACIAL ACHIEVEMENT GAP, SEGREGATED SCHOOLS, AND SEGREGATED NEIGHBORHOODS – A CONSTITUTIONAL INSULT, ECON. POL'Y INST. (Nov. 12, 2014), https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/
[19] *Id.*
[20] Mario Alejandro Ariza, *Redlining Shaped the Power Grid. Communities of Color Are Still Paying the Price*, MOTHER JONES (May 18, 2025), https://www.motherjones.com/environment/2025/05/redlining-minority-neighborhoods-power-grid-energy-infrastructure-communities-color/
[21] Laura Wamsley, *Even Many Decades Later, Redlined Areas See Higher Levels of Air Pollution*, NPR (Mar. 10, 2022), https://www.npr.org/2022/03/10/1085882933/redlining-pollution-racism; Daniel Cusick, *Past Racist "Redlining" Practices Increased Climate Burden on Minority Neighborhoods*, SCI. AM. (Jan. 21, 2020), https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods/; *SEE* TOM SHAPIRO ET AL., LDF THURGOOD MARSHALL INST. & INST. ON ASSETS & SOC. POL'Y AT BRANDEIS UNIV., THE BLACK-WHITE RACIAL WEALTH GAP 13 (2019), HTTPS://TMINSTITUTELDF.ORG/WP-CONTENT/UPLOADS/2019/11/FINAL-RWG-BRIEF-V1.PDF.

that can lower their energy bills[22] and results in more power outages.[23] Black households pay a disproportionately greater share of their income for energy needs and are more likely to forego other necessities to pay for energy compared to white households.[24] Climate change will continue to exacerbate these challenges by increasing the need for air conditioning and the demands placed on the power grid.[25] DOE has a legal and moral duty to ensure it does not fund public or private entities whose actions exacerbate these inequalities.

II. A Direct Final Rule is Not an Appropriate Procedure for DOE's Controversial Changes to Core Civil Rights Protections.

The DFR departs from decades of practice and precedent by making it easier for entities funded by DOE to engage in racial discrimination. Such changes are inherently controversial and must go through a notice and comment process in order to comply with the Administrative Procedures Act (APA).[26] Because the content of the DFR is deficient for other reasons detailed in Parts III and IV below, DOE should withdraw the DFR and restore the prior regulations.

The APA establishes the norm that agencies engaged in "formulating, amending, or repealing" [27] a substantive rule that binds the public must provide notice of the rulemaking[28] and the opportunity to comment[29] before they finalize the rule. Agencies can avoid these requirements only when a substantive rule falls under limited exceptions[30] or the agency has "good cause" to believe the notice and comment process is "impracticable, unnecessary, or contrary to the public interest."[31] To qualify for the "good cause" exception, the APA requires an agency to state in its Federal Register notice why it has determined there is good cause to bypass the typical notice-and-comment rulemaking process.[32]

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[22] Anna M. Brockway, et al., *Inequitable access to distributed energy resources due to grid infrastructure limits in California*, NATURE ENERGY, vol. 6, pp. 892–903 (2021), https://escholarship.org/content/qt6pc2k2tv/qt6pc2k2tv_noSplash_95f65dcca1ce78c384172a7bef9def2e.pdf; Tom Perkins, *'Utility redlining': Detroit power outages disproportionally hit minority and low-income areas*, THE GUARDIAN (Oct. 6, 2022 6:00 AM ET), https://www.theguardian.com/inequality/2022/oct/06/detroit-power-outages-impact-minority-low-income-neighborhoods.

[23] Vivian Do, *Spatiotemporal distribution of power outages with climate events and social vulnerability in the USA,* NATURE COMMUNICATIONS (Apr. 29, 2023), https://www.nature.com/articles/s41467-023-38084-6; WE THE PEOPLE MICHIGAN, ET AL., UTILITY REDLINING: INEQUITABLE ELECTRIC DISTRIBUTION IN THE DTE SERVICE AREA (2022), https://wethepeoplemi.org/wp-content/uploads/2022/08/DTE-Utility-Redlining-V3_20220822-FINAL.pdf.

[24] Kathiann M. Kowalski, *Racial disparities persist in electric service. Is 'willful blindness' to blame?*, ENERGY NEWS NETWORK (July 1, 2020), https://energynews.us/2020/07/01/racial-disparities-persist-in-electric-service-is-willful-blindness-to-blame/.

[25] U.S. ENVIRONMENTAL PROTECTION AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

[26] 5 U.S.C. § 551 *et seq*.

[27] 5 U.S.C. § 551(5).

[28] 5 U.S.C. § 553(b)(1)-(3).

[29] 5 U.S.C. § 553(c).

[30] *E.g.,* 5 U.S.C. § 553(c) (exempting rules regarding (1) "a military or foreign affairs function of the United States," (2) "a matter relating to agency management or personnel," or (3) a matter relating to "public property, loans, grants, benefits, or contracts" from notice and comment).

[31] 5 U.S.C. § 553(b)(4)(B) (stating that an agency may forgo notice and comment if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[32] *Id.* at § 553(b).

Notably, the DFR process is not codified in the APA,[33] but is an application of the "good cause" exception. The process is intended for situations in which rule changes "are needed immediately or are routine or noncontroversial," making notice-and-comment "unnecessary."[34] Whether notice and comment is "unnecessary" does not depend on the subjective views of the federal agency; as the committee reports on the APA explain, agencies can only avoid this procedural requirement when it is "unnecessary as far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved."[35] As such, when an agency has misjudged the public's interest and receives "significant adverse comments," it must withdraw the DFR and issue a proposed rule under normal notice-and-comment procedures.[36] What constitutes a "significant adverse comment" is a low bar. As the Administrative Conference of the United States, which recommended this form of rulemaking, has explained, a comment that "explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change" suffices.[37] In at least one instance, a single, adverse comment was sufficient to require an agency to republish a direct final rule as a notice of proposed rulemaking.[38]

This DFR inappropriately circumvents the notice-and-comment process to enact controversial changes to DOE's regulations in violation of the APA. The DFR seeks to roll back longstanding civil rights protections against racial and other forms of discrimination. People of color have relied on these regulations and agency enforcement for decades to protect them from discrimination by federal funding recipients. Such changes are exactly the kinds of agency action that are likely to generate substantial public interest and generate significant comments in opposition. DOE has not provided any basis for why it believes otherwise. Nor has it proffered any alternative explanation for why it has "good cause" to forgo notice and comment.

Finally, DOE has never used the DFR process to change its Title VI rules and cannot do so now. Under the APA, agency rules must be amended through the same process used to issue them.[39] DOE first issued its Title VI rules in 1980,[40] and has only amended its Title VI rules once in the last 45 years, in 2003.[41] On both occasions, DOE followed normal APA procedures,

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[33] Ronald Levin, *The D.C. Circuit Undermines Direct Final Rulemaking*, YALE J. ON REGULATION: NOTICE & COMMENT (Aug. 2, 2021), https://www.yalejreg.com/nc/the-d-c-circuit-undermines-direct-final-rulemaking-by-ronald-m-levin/.

[34] Admin. Conf. of the U.S., Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking,60 Fed. Reg. 43110 (Aug. 18, 1995) (adopted Jun. 15, 1995); *cf.* 5 U.S.C. § 553(b)(4)(B).

[35] H.Rep. No. 1980 (1946), *available at* https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/09/houserept-1980-1946.pdf.

[36] OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS (2013), https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf ("If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely.").

[37] Levin, *supra* note 30.

[38] Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 8 (1995).

[39] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (explaining that the definition of "rule making" in the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

[40] Nondiscrimination in federally assisted programs, 45 Fed. Reg. 40515 (Jun. 13, 1980) (codified in 10 CFR Part 1040), https://www.govinfo.gov/content/pkg/FR-1980-06-13/pdf/FR-1980-06-13.pdf (hereinafter "1980 Rule").

[41] Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance; Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance; Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance, 68 Fed. Reg 51346 (Aug. 26, 2003), https://www.federalregister.gov/documents/2003/08/26/03-

issuing a notice of proposed rulemaking followed by a 30-day comment period and a final rule responding to substantive comments.[42] DOE followed this process even when it believed the modifications it proposed were merely technical in nature.[43] DOE has only skipped notice and comment when amending 10 CFR pt. 1040.13 on two occasions, and only with respect to the Title IX portions of the rules, when: (1) the agency adopted a "common rule" from the Department of Justice that had previously gone through extensive notice and comment;[44] and (2) it extended the effective date of that previously finalized rule.[45] As such, DOE cannot rely on the expedited DFR process now.[46]

DOE should withdraw the DFR as procedurally deficient. Because the DFR is inappropriate for other reasons detailed below, it should not issue a notice of proposed rulemaking but should instead restore the prior regulations.

III. DOE Fails to Provide a Reasoned Explanation for Its Proposed Changes.

The DFR seeks to overturn decades-old regulations, disturbing serious reliance interests by the public, who have depended on these rules to protect them from unfair, racially discriminatory effects. When an agency substantially alters an existing regulation, it must provide a reasoned explanation for the change.[47] In particular, when rescinding a rule, an agency must explain its departure from the prior policy and show the new policy is supported by "good reasons" and better, in the agency's belief, than the previous policy, particularly in light of any serious reliance interests at stake.[48] However, DOE offers little explanation for the changes and the limited reasons it does provide rely on clear misstatements of law. Because it fails to sufficiently explain its new policy, it should withdraw the DFR.

A. *Changes to Covered Employment Practices at 10 C.F.R. 1040.1, 1040.12, and 1040.14*

The DFR would permit DOE funding recipients to discriminate in employment practices previously covered by Title VI protections, including where employment discrimination will cause racial discrimination to beneficiaries and impact whether people can participate in or receive the benefits of federally-funded programs. Courts have long held that discriminatory employment practices by federally-funded entities can affect the provision of services, programs,

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21140/nondiscrimination-on-the-basis-of-race-color-or-national-origin-in-programs-or-activities-receiving (hereinafter "2003 Rule").

[42] 1980 Rule; 2003 Rule.

[43] 2003 Rule at 51336 (making amendments intended to make it clear that the broad interpretation of "program or activity" under the Civil Rights Restoration Act applied to Title VI disparate impact following the Third Circuit Court of Appeals' decision in *Cureton* v. *NCAA,* 198 F.3d 107 (3d Cir. 1999)).

[44] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 4630 (Jan. 18, 2001) (amending the agency's Title IX rules), https://www.federalregister.gov/documents/2001/01/18/01-583/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[45] Nondiscrimination on basis of sex in federally assisted education programs or activities; Federal financial assistance covered by Title IX, 66 Fed. Reg. 18721 (Apr. 11, 2001), https://www.govinfo.gov/content/pkg/FR-2001-04-11/pdf/01-8898.pdf (extending the effective date of the agency's Title IX rules).

[46] The Supreme Court has stated unequivocally that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez*, 575 U.S. at 101 (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[47] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)

[48] *FCC*, 556 U.S. at 515.

and activities to the intended beneficiaries of those programs.[49] DOE now claims these regulations are not consistent with the text of Title VI.[50] The DFR would prohibit racial discrimination in employment only where "a primary objective of the Federal financial assistance is to provide employment."[51] However, the agency does not explain how it arrived at this decision, after decades of holding a different view, or how it squares that decision with existing case law, as will be discussed further below.

B. *Changes to Information in Appropriate Languages Under 10 C.F.R. 1040.5(c) and 1040.6(c)*

DOE further proposes to rescind the agency's regulations that implement Title VI's statutory requirement that recipients of federal financial assistance provide language assistance to individuals with limited English proficiency (LEP).[52] In its Direct Final Rule, DOE incorrectly states that this regulation section is "not based on the best reading of the underlying statutory authority or prohibition. Rather, those requirements promote the policy goals of revoked Executive Order (E.O.) 13166."[53] However, the requirement that recipients of federal financial assistance provide language assistance to individuals with LEP flows from Title VI itself. For at least five decades, Title VI, as interpreted by courts, has included language discrimination as a form of national origin discrimination covered by the statute. In 1974, the Supreme Court held in *Lau v. Nichols* that Title VI requires federal funding recipients to provide LEP with meaningful access, and a denial of language assistance services constitutes national origin discrimination.[54] Federal courts have followed this precedent and have consistently reminded schools, hospitals, and government agencies of their requirement to ensure individuals with LEP can access important resources funded by federal dollars.[55] DOE cannot through this DFR or otherwise rewrite what courts have so clearly established.

C. *Effect of Employment Opportunity Under 10 CFR 1040.8*

The DFR would also make it easier for DOE funding recipients to escape remedying discrimination. DOE regulations: 1) require funding recipients to take remedial action following a finding of discrimination, 2) permit them to take active steps "to encourage participation by all persons regardless of race, color, national origin, sex, handicap, or age," and 3) mandate they conduct a self-evaluation to identify and remedy discriminatory practices.[56] Prior to the DFR, 10

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[49] *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 883 (5th Cir. 1966) (explaining "faculty integration is essential to student desegregation"); *Ahern v. Bd. of Educ.*, 133 F.3d 975, 983-84 (7th Cir. 1998) (applying infection theory to public school plan for assignment of principals); *Caulfield v. Bd. of Educ.*, 486 F. Supp. 862, 876 (E.D.N.Y. 1979) (characterization of infection theory where employment practices affect beneficiaries, i.e., students); *Marable v. Ala. Mental Health Bd.*, 297 F. Supp. 291, 297 (M.D. Ala. 1969) (patients of state mental health system have standing to challenge segregated employment practices which affect delivery of services to patients.).

[50] DFR at 20778.

[51] 10 CFR 1040.12(a)(1)(i).

[52] 10 C.F.R 1040.5(c) ("Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program or activity requires service or information in a language other than English in order to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and size and concentration of such population, to provide information in appropriate languages (including braille) to such persons. This requirement applies to written material of the type which is ordinarily distributed to the public. The Department may require a recipient to take additional steps to carry out the intent of this subsection.")

[53] DFR at 20779.

[54] 414 U.S. 563 (1974).

[55] *See, e.g., Maricopa Cnty.*, 915 F. Supp. 2d 1073 (D. Ariz. 2012); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112 (9th Cir. 2009); *Mendoza v. Lavine*, 412 F. Supp. 1105, 1110 (S.D.N.Y. 1976); *Pabon v. Levine*, 70 F.R.D. 674, 677 (S.D.N.Y. 1976); *Aghazadeh v. Maine Med. Ctr.*, No. 98-421, 1999 WL 33117182, at *1 (D. Me. June 8, 1999).

[56] 10 CFR 1040.7.

CFR 1040.8 acknowledged that "due to limited opportunities in the past, certain protected groups may be underrepresented in some occupations or professions" and made it clear that recipients could not rely on "statistical information which reflects limited opportunities in these occupations or profession" to avoid these and other antidiscrimination obligations.[57] In other words, the existence of occupational segregation due to past discriminatory practices did not relieve DOE funding recipients of their antidiscrimination obligations or to take action to identify and address their own discriminatory practices. The DFR rescinds 10 CFR 1040.8 in its entirety, arguing it suffers from "fatal constitutional infirmities" by allegedly requiring "racial classifications" based on "societal discrimination" rather than a "specific, identified instance of intentional discrimination."[58] However, 10 CFR 1040.8, by its own terms, does not require DOE or its funding recipients to make decisions based on race or other protected characteristics or use quotas or similar measures to achieve "outright racial balancing."[59] It does not impose any additional duties at all. To the extent that 10 CFR 1040.8 clarifies funding recipients' duty to remedy discrimination and ability to take affirmative action, recipients have many tools to address barriers to opportunity that do not involve racial classifications and therefore do not raise constitutional questions, such as broad advertising and recruiting strategies that ensure all eligible individuals are aware of employment and other opportunities. The Supreme Court has repeatedly expressed approval for such measures.[60] As such, this explanation cannot justify the proposed change.

D. *Prohibited Effects Under 10 CFR 1040.13(c) and (d)*

The DFR also rescinds DOE regulations prohibiting unwarranted discriminatory effects in the implementation of programs[61] or the siting of facilities,[62] arguing these provisions "raise[. . .] serious constitutional questions and [are] not based on the best reading of title VI."[63] However, these explanations are insufficient, as they rely on a misinterpretation of controlling Supreme Court case law.

While the "express statutory language of Title VI only prohibits intentional discrimination,"[64] that does not prevent DOE from prohibiting programs which produce

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[57] 10 CFR 1040.8.
[58] DFR at 20779 (citing *Students for Fair Admissions v. Presidents & Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*)).
[59] *Id.*
[60] *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (declining to "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (explaining that, when government officials utilize "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race, . . . it is unlikely any of [these mechanisms] would demand strict scrutiny to be found permissible."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment) ("A State can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.") (internal quotation marks omitted); *see id.* at 507, 509 (plurality opinion of O'Connor, J.) (criticizing the defendant city for not attempting to address racial barriers through race-neutral means and stating "the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races").
[61] 10 CFR 1040.13(c).
[62] 10 CFR 1040.13(d).
[63] DFR at 20779.
[64] *Alexander v. Choate,* 469 U.S. 287, 293 (1985) ("Title VI itself directly reach[es] only instances of intentional discrimination.")

unjustified discriminatory effects. As discussed further in Part IV below, Title VI also requires federal agencies to issue regulations to effectuate the purposes of the statute,[65] and federal agencies have argued for decades that regulations prohibiting unfair discriminatory effects are necessary to do so.[66] The fact that the Supreme Court has held that Title VI is coextensive with the Equal Protection Clause—which prohibits only intentional discrimination—does not mean agencies cannot issue regulations under expressly delegated authority that prohibit additional kinds of discriminatory conduct that is not banned by the Equal Protection Clause. DOE provides no explanation for why it now chooses to abandon the position it has held for nearly 45 years.

Moreover, while DOE claims regulations prohibiting unfair discriminatory effects raise constitutional questions, the Supreme Court has never held that disparate impact discrimination is unconstitutional or that it requires impermissible race-based decisions. In fact, the Supreme Court has explicitly upheld the disparate impact theory of discrimination as recently as 2015.[67] In support of its claim, DOE cites two cases, *Students for Fair Admissions v. Presidents and Fellows of Harvard College* and *University of North Carolina, et al.* (*SFFA*)[68] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington Heights*).[69] Neither case holds that disparate impact theory is unconstitutional or even addresses disparate impact liability.

Because it cannot cite Supreme Court case law to attack disparate impact, DOE instead argues that *SFFA* "reaffirmed that the equal protection principles of the Constitution, which extend to title VI, do not permit the elimination of society's racial disparities through race-based means."[70] This broad claim misstates both the holding of *SFFA*, which was limited to the use of race-conscious admissions programs, and the operation of the agency's discriminatory effects regulations. In *SFFA,* the Supreme Court held that Harvard and the University of North Carolina's explicit use of race as a tip in their admissions processes in order to further an interest in diversity violated Title VI's prohibition on intentional discrimination.[71] The Court also reaffirmed the general principle that entities can consider race in order to remedy specific instances of past discrimination.[72] The case did not concern disparate impact discrimination or make any statement regarding its legality under the U.S. Constitution or Title VI.

Importantly, DOE does not explain why it believes its discriminatory effects regulations involve "race-based means" forbidden by *SFFA*. In general, the unlawful discriminatory effects of race-neutral policies are addressed through equally race-neutral means. The *SFFA* majority

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[65] 42 U.S. Code § 2000d-1.
[66] *See., e.g.,* Memorandum from the Assistant Attorney Gen. to Heads of Departments and Agencies that Provide Federal Financial Assistance (Jul. 14, 1994), *available at* http://www.justice.gov/ag/attorney–general–july–14–1994– memorandum–use–disparate–impact–standard–administrative–regulations ("Frequently, discrimination results from policies and practices that are neutral on their face but have the effect of discriminating[.] Those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative."); Memorandum from the Assistant Attorney General to the Heads of Departmental Agencies, General Counsels, and Civil Rights Directors (Oct. 26, 2001), *available at* http://www.justice.gov/crt/about/cor/lep/Oct26Memorandum.php (reaffirming the validity of federal agencies' disparate impact regulations post-*Sandoval;* U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL (2021), https://www.epa.gov/sites/default/files/2021-01/documents/titlevi_legal_manual_rev._ed_1.pdf.
[67] *Inclusive Communities Project,* 576 U.S. 519.
[68] 600 U.S. 181.
[69] 429 U.S. 352 (1977).
[70] DFR at 20779.
[71] *SFFA,* 600 U.S. at 230.
[72] *Id.* at 207.

did not disturb, and Justice Kavanaugh reaffirmed in his concurrence, that both the government and federally-funded entities can achieve equitable goals through such race-neutral means.[73]

Nor does *Arlington Heights* control whether federal agencies can prohibit disparate impact discrimination. DOE claims that *Arlington Heights* prohibits discriminatory effects regulations because it held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[74] While accurate, that holding does not control or even purport to address whether federal agencies can issue regulations prohibiting unjustified discriminatory effects under Title VI. In *Arlington Heights*, the plaintiff argued that the Court should consider whether a decision that was neutral on its face was motivated by racially-discriminatory intent because it disproportionately harmed Black people. The Supreme Court ruled that a disproportionate effect is one factor among many that a plaintiff could use to show a facially-neutral policy was motivated by discriminatory intent but held the plaintiff in that case did not make that showing.[75] The Court did not consider disparate impact claims or rule on any issues related to Title VI. Contrary to what DOE claims, *Arlington Heights* affirms the relevance of evidence of disproportionate effects in identifying and remedying discrimination—albeit in a case alleging discriminatory intent. Moreover, under its discriminatory effects regulations, as in *Arlington Heights,* statistical disparities alone are not enough to prove the policy is discriminatory: the decision-maker must also find the policy is not justified by substantial, legitimate interests and, if there is such an interest, there is a less discriminatory alternative.

As neither *SFFA* nor *Arlington Heights* concerned disparate impact discrimination or otherwise called its constitutionality into question, DOE cannot rely on them to support the rule. Because the reasoning DOE relies on is insufficient and incorrect, the agency should withdraw the DFR in its entirety.

IV. DOE's Regulations Prohibiting Disparate Impact Discrimination Are Necessary to Effectuate the Purposes of Title VI.

In 1963, President John F. Kennedy explained that federal civil rights legislation was needed because, "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[76] The Civil Rights Act of 1964 was passed to live up to that promise of justice. Since the passage of the Act, federal agencies have found that regulations prohibiting unwarranted discriminatory effects are necessary to accomplish this critical goal. They remain necessary today.

A. *Title VI requires agencies to issue regulations to effectuate the purposes of the statute and grants them broad authority to do so.*

Title VI mandates that federal agencies guarantee the right of people who participate in and benefit from federally-funded programs and activities to be free from discrimination and

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[73] *SFFA,* 600 U.S. at 317 (Kavanaugh, concurring) (explaining "governments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race" (citing *Croson*) (internal quotations omitted.

[74] DFR at 20779.

[75] *Arlington Heights,* 429 U.S. at 265-271. These factors include a pattern of prior actions demonstrating invidious intent and the legislative history of a measure. *Id.* at 267-68.

[76] John F. Kennedy, President of the United States, Special Message to the Congress on Civil Rights and Job Opportunities (Jan. 19, 1963), *in* THE AMERICAN PRESIDENCY PROJECT https://www.presidency.ucsb.edu/documents/special-message-the-congress-civil-rights-and-job-opportunities.

grants them significant regulatory powers to give life to this right. The Act provides, in Section 601, that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[77] While the text of Section 601 itself only prohibits intentional discrimination, Section 602 authorizes and directs federal agencies to issue rules, regulations, or orders of general applicability to "effectuate" the purposes of Section 601.[78] In the absence of a single, textual definition of "discrimination," agencies have significant administrative flexibility in deciding the scope of prohibited conduct.[79] As Justice Marshall explained in *Alexander v. Choate*, "Title VI [has] delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that [have] produced those impacts."[80] Regulations issued pursuant to Section 602 may "go beyond . . . § 601" as long as they are "reasonably related" to its antidiscrimination mandate.[81] The Supreme Court has declined to invalidate federal agencies' discriminatory effects regulations: While the Supreme Court held in *Alexander v. Sandoval* that private individuals do not have a right to enforce federal agencies' discriminatory effects regulations, it assumed the regulations themselves were valid.[82]

B. *Discriminatory Effects Regulations Further the Purposes of Title VI*

Discriminatory effects regulations further the Congressional purpose of preventing unjustified disproportionate harm to communities of color. As one of the lead sponsors of the legislation, Senator Hubert Humphrey, explained:

> [T]itle VI is simply designed to ensure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation. Moreover, the purpose of Title VI is not to cut off funds, but to end racial discrimination.[83]

In passing Title VI, Congress wanted to both prevent federal funds from subsidizing intentional discrimination and to prevent those funds from being "spent in any fashion which . . . *entrenches* . . . or *results* in racial discrimination" (emphasis added).[84] Congress' intent was thus not just to address explicitly discriminatory policies and practices, but unwarranted discriminatory effects.

Discriminatory effects regulations recognize that policies that impose disproportionate burdens on particular racial groups are fundamentally unfair and are illegitimate unless they are justified by a substantial, legitimate reason and there is no less discriminatory alternative available. As the Supreme Court explained in *Griggs v. Duke Power Co.*, under Title VII, which was enacted at the same time as Title VI, "practices, procedures, or tests neutral on their face,

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[77] 42 U.S.C. 2000d.
[78] 42 U.S.C. 2000d-1
[79] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 339 (1978) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in part and dissenting).
[80] 469 U.S. at 293-94.
[81] *Lau,* 414 U.S. at 571 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in result).
[82] 532 U.S. at 281 (assuming for purposes of deciding the case "that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups ….").
[83] 110 Cong. Rec. 6545 (Mar. 30, 1964) (statement of Sen. Hubert Humphrey). The Supreme Court has explained that prohibiting disparate furthers the central purpose of the Fair Housing Act and other statutes that, like Title VI, seek to "eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Communities Project,* 576 U.S. at 539.
[84] 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[85] Discriminatory effects regulations prevent unjustified policies from entrenching persistent patterns of discrimination by maintaining unnecessary barriers that limit opportunities for individuals on grounds tied to their race—and thus contravene Title VI's goal that federal funding promote equal opportunity. Discriminatory effects enforcement thus ensures the disadvantages faced by "minority citizens, resulting from forces beyond their control, [will] not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."[86] Discriminatory effects regulations also help root out surreptitious intentional discrimination that may otherwise go unchecked.[87]

Disparate impact is, contrary to what DOE implies in the DFR,[88] is a demanding standard of liability. It guards against specious claims by requiring a plaintiff to make a significant threshold showing that the unfair discriminatory effects are caused by a particular policy. Moreover, a defendant is only liable if it cannot sufficiently justify its policy or if its legitimate objective can be achieved by some other less discriminatory means. For example, funding recipients can show they had a substantial, legitimate reason for the policy by providing evidence they considered multiple alternatives and selected the least damaging or most beneficial path.[89] Federally-funded entities have thus complied with these rules for decades without significant impacts on their ability to operate.

C. *Federal agencies have long prohibited disparate impact, with the implicit approval of Congress*

The idea that disparate impact regulations are necessary to effectuate the purposes of Title VI is longstanding and had previously been noncontroversial. The U.S. Department of Justice issued the first Title VI regulations prohibiting racially discriminatory effects immediately after the statute passed.[90] The same Executive Branch agencies which helped draft the language of Title VI were thus involved in promulgating the first regulations containing "effects" language.[91] Twenty-six federal agencies currently have rules prohibiting unjustified discriminatory effects under Title VI.[92] The effects standard has been a core component of DOE's nondiscrimination rules since those rules were first issued over forty-five years ago.[93] Federal agencies have repeatedly emphasized the need for discriminatory effects regulations across administrations and under presidents of all political parties. Following the Supreme

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[85] *Griggs*, 401 U.S. at 430–31; *see also Inclusive Communities*, 576 U.S. at 521(2015) (noting that "[r]ecognition of disparate impact claims is consistent with the [Fair Housing Act's] central purpose" as it "was enacted to eradicate discriminatory practices within a sector of our Nation's economy") (citations omitted).
[86] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (citing Griggs, 401 U.S. at 430).
[87] *See, e.g., Inclusive Communities Project,* 576 U.S. at 540 ("Recognition of disparate-impact liability . . . also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").
[88] *See* DFR at 20779.
[89] *See, e.g., New York City Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 72 (2d Cir. 2000).
[90] The Department of Justice issued its discriminatory effect regulation in 1966. Implementation of Title VI of Civil Rights Act of 1964 with Respect to Federally Assisted Programs Administered by Department of Justice, 31 Fed Reg. 10,265 (Jul. 29, 1966). Congress, fully aware of this administrative interpretation, has never altered it. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 620–21 (1983) (Marshall, J., dissenting) (noting, among other things, that Congress has enacted ten additional statutes modeled on Title VI "none of which define discrimination to require pro of of intent" and that "Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter").
[91] Comment, 36 GEO. WASH. L. REV. 824, 845-46 (1968); *Zuber v. Allen,* 396 U.S. 168, 192 (1969) (interpretation of a statute by administrators who participated in drafting it carries "most weight").
[92] *Supra* note 1.
[93] 1980 Rule.

Court's decision in *Sandoval*, the Civil Rights Division under the George W. Bush administration issued a memorandum on October 26, 2001, for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that reiterated the legality of federal agencies' discriminatory effects regulations and argued that agencies retained their authority and responsibility to enforce those regulations.[94]

Congress has long been aware of federal agencies' discriminatory effects regulations and has never sought to alter them. Congress has amended Title VI seven times since its inception without ever indicating disapproval of disparate impact.[95] Instead, Congress has frequently moved to expand the coverage of Title VI protections. For example, in 1988, Congress enacted the Civil Rights Restoration Act of 1987 to remedy what it perceived to be a serious narrowing of the longstanding administrative interpretation of which "programs or activities" are covered by Title VI in *Grove City College* v. *Bell*, 465 U.S. 555, 570-74 (1984).[96] Congress sought to restore the prior consistent and long-standing executive branch interpretation and "broad, institution-wide application" of Title VI as previously administered[97] with the express understanding that these programs or activities would be subject to discriminatory effects regulations.[98] Congress has also expressly modeled major pieces of civil rights legislation on the Title VI framework.[99] By contrast, proposals to curb Title VI regulations have never succeeded in Congress.[100]

D. *Discriminatory effects regulations remain important today.*

Discriminatory effects regulations remain an essential tool to effectuate the purposes of Title VI today, including in DOE-funded programs. As explained in Part I above, Black people and other communities of color continue to face unfair barriers in access to energy, employment, and higher education. DOE's longstanding prohibition on unfair discriminatory effects ensures that federal taxpayer dollars do not further entrench these barriers. These goals can be accomplished through race-neutral means that benefit program beneficiaries of all backgrounds, as the following hypotheticals illustrate:

- DOE provides funds to state and local governments to help people stay safe and healthy and reduce energy costs by weatherizing their homes.[101] However, if a state government only advertises the program in English-language newspapers whose readership is primarily white, eligible residents of color, as well as residents who are not fluent in English, may not learn about the program. Advertising weatherization assistance

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[94] Memorandum from the Assistant Attorney General to the Heads of Departmental Agencies, General Counsels, and Civil Rights Directors, *supra* note 62.

[95] *Guardians Ass'n*, 463 U.S. at 620–21 (Marshall, J., dissenting) (noting, among other things, that Congress has enacted ten additional statutes modeled on Title VI "none of which define discrimination to require pro of of intent" and that "Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter").

[96] Pub. L. No. 100-259, 102 Stat. 28 (1988).

[97] *See* S. Rep. No. 100-64, at 4.

[98] *See* H.R. Rep. No. 829, 98th Cong., 2d Sess. Pt. 1, at 24 (1984); 134 Cong. Rec. 229 (1988) (Sen. Kennedy) (stating "title VI regulations use an effect standard to determine violations" and that "the Federal courts have upheld the use of an effect standard"); *see also* 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy)l 134 Cong. Rec. 4257 (1988) (Sen. Hatch) (explaining that the legislation provided "expansive coverage" of "agency disparate impact regulations implementing Title VI"); *accord id.* at 4231, 4239, 4252, 4259 (Sen. Hatch); *id.* at 4784 (Rep. Boulter) (observing that the legislation would bring about an "extension of the effects test"); *see also id.* at 4767 (Rep. McEwen); *id.* at 4246 (Sen. Symms).

[99] *See* 20 U.S.C. § 1681 *et seq.* (Title IX); 29 U.S.C. § 794 (Rehabilitation Act).

[100] *See*, *e.g.*, 112 Cong. Rec. 18715 (1966) (rejecting proposal to amend Title VI so as to require proof of "intent to exclude")

[101] Weatherization Assistance Program, *supra* note 13.

programs through multiple outlets, including radio stations and ethnic media, and working with community-based organizations can help ensure all eligible residents, including Black residents and LEP residents, are aware they can apply for this assistance.

- DOE provides funding to site new transmission lines to increase grid resilience and improve energy distribution.[102] A public-private partnership proposes a project that will increase the availability of low-cost energy transmission in several predominantly white counties but not several majority Black and Indigenous counties. The partnership claims connecting Black and Indigenous communities will be prohibitively expensive due to the path of the new transmission lines. The partnership's decision about where to site the lines was made in a closed-door meeting with minimal minutes, so there is little evidence regarding the intent of the siting decision. The public-private partnership identifies an alternative path for the transmission lines that allows it to connect several predominantly Black and Indigenous counties with minimal additional costs, benefiting all residents in those counties.

- DOE funds a workforce development program to support energy construction projects and clean energy investments.[103] The workforce development program requires applicants to have a college degree, although this degree is not necessary to perform the job effectively. The degree requirement disproportionately excludes Black, Latino, and Southeast Asian applicants. Ending this unnecessary degree requirement would remove this unnecessary barrier while equally benefiting all applicants without college degrees, including white applicants. The program would continue to evaluate each applicant for the program individually, regardless of race.

As these examples illustrate, discriminatory effects enforcement can help identify and address unfair policies that can cause significant harm. Importantly, DOE's discriminatory effects regulations not only permit DOE to address harmful actions by its funding recipients but encourage those recipients to proactively identify and address unfair barriers, creating more equitable opportunities for all program beneficiaries.

Discriminatory effects regulations thus remain a critical tool for effectuating the purposes of Title VI. If DOE rescinds these regulations, it will fail its Congressional mandate and allow unfair barriers and discriminatory results to become entrenched. DOE should withdraw the DFR and restore its prior rules.

V. **Conclusion**

DOE cannot take the controversial step of rescinding decades-old civil rights protections without good cause or affording the public a robust opportunity for notice and comment before the rule is finalized. The agency also fails to provide a sufficient, reasoned explanation for its change in policy. Discriminatory effects regulations help give life to Title VI's promise of simple justice by addressing unfair racial barriers in federal-funded programs and activities. We strongly urge DOE to withdraw the DFR and restore the prior rules.

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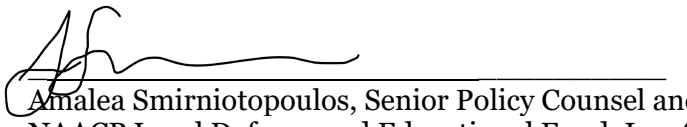
[102] *E.g.* U.S. Dep't of Energy, Transmission Facilitation Program, https://www.energy.gov/gdo/transmission-facilitation-program (last visited Jun. 12, 2025).
[103] *E.g.* U.S. Dep't of Energy, Transmission Siting & Economic Development Program, https://www.energy.gov/gdo/TSED (last visited Jun. 12, 2025).

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel and Equal Protection Initiative Co-Manager (asmirniotopoulos@naacpldf.org).

Sincerely,



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