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Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

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RE: Docket No. FR-6540-P-02: HUD's Implementation of the Fair Housing Act's
Disparate Impact Standard; Amendments to HUD's Title VI Regulations

The Legal Defense Fund (LDF) and the undersigned organizations urge the U.S. Department of Housing and Urban Development (HUD) to withdraw its proposal to eliminate regulations prohibiting unjustified disparate impacts in federally-funded programs.¹ Federal taxpayer dollars should help everyone, not leave some communities behind. For more than 50 years, Black communities and other communities of color have relied on HUD's disparate impact rules enforcing Title VI of the Civil Rights Act of 1964 to address funding recipients' policies that appear neutral but cause disproportionate harm where there is no legitimate reason for the policy.² These regulations help achieve the purpose of Title VI by ensuring "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."³ Yet HUD now proposes to eliminate disparate impact from the current rules while failing to provide a reasoned basis for rescinding these longstanding protections. We urge HUD to withdraw the proposed rule.

I. HUD's Title VI Disparate Impact Regulations Help the Agency Prevent and Address Racial Discrimination, Creating Substantial Reliance Interests.

Since 1973, HUD's Title VI regulations have helped ensure all people can access federally-funded programs free from discrimination.⁴ HUD's Title VI regulations not only prevent federal funding recipients from intentionally discriminating on the basis of race, color, and national origin but ban policies and practices that have the "effect of subjecting persons to discrimination because of their race, color, or national origin," regardless of intent.⁵ Applying disparate impact protections in these programs does not make every racial disparity unlawful, but allows HUD to examine whether a policy causes significant racial harm, serves a legitimate need, or could be replaced by a less discriminatory approach. HUD has used its authority under these rules to challenge policies and practices that created unfair barriers in housing and disaster recovery programs and to address environmental justice concerns. Without HUD's disparate impact rules, unjustified policies and practices by federal funding recipients may go unchecked.

¹ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard; Amendments to HUD's Title VI Regulations, 91 Fed. Reg. 51416 (Aug. 10, 2026), <https://www.federalregister.gov/documents/2026/08/10/2026-16228/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard-amendments-to-huds-title-vi> (hereinafter "Proposed Rule"). In an earlier notice of proposed rulemaking in the same regulatory docket, HUD proposed to excise its regulations implementing disparate impact under the Fair Housing Act. CITE. LDF incorporates those comments by reference here.

² 24 C.F.R. part 1.

³ 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

⁴ 38 Fed. Reg. 17949 (Jul. 5, 1973).

⁵ *Id.*

Black people and other people of color continue to face discrimination in housing.⁶ Decades of unjust government practices like redlining and exclusionary zoning practices have led to persistent housing segregation and economic disinvestment that make it harder for Black people to access and maintain safe housing.⁷ These factors, in turn, can prevent Black communities from equally accessing other federal programs,⁸ such as disaster recovery funding, or can expose them to hazards,⁹ including as environmental harms.

HUD's Title VI disparate impact regulations ensure communities equally benefit from programs aimed at increasing affordable housing, strengthening communities, decreasing homelessness, and providing rental assistance to low-income households, including Community Development Block Grant (CDBG) programs,¹⁰ the HOME Investment Partnerships (HOME) program,¹¹ the Emergency Solutions Grants Program,¹² and the Housing Choice Voucher Program.¹³ Taken together, HUD distributed about \$170 billion through more than 9,800 grants and subsidies from 2023 through 2025.¹⁴ All of those programs are covered by Title VI.

HUD has used its Title VI disparate impact rules to address significant problems facing communities of color. Below are just a few examples of HUD's recent actions to enforce Title VI:

- **Disaster Recovery in Texas:** In 2022, HUD determined the State of Texas discriminated based on race and national origin in the allocation of more than \$4 billion in CDBG funds designed to mitigate the effects of disaster recovery following Hurricane Harvey in 2016.¹⁵ HUD found Texas steered CDBG funds toward whiter communities that were far less severely impacted by hurricanes and used those funds for routine infrastructure

⁶ U.S. DEP'T OF HOUS. & URB. DEV., 2023 FISCAL YEAR STATE OF FAIR HOUSING: ANNUAL REPORT TO CONGRESS (2024), https://www.hud.gov/sites/dfiles/SFH/documents/FHEO_Annual_Report_FY_2023.pdf.

⁷ Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/>.

⁸ Rebecca Hersher, *Minorities Likely To Receive Less Disaster Aid Than White Americans*, NPR (Mar. 5, 2019), <https://www.npr.org/2019/03/05/700289776/minorities-likely-to-receive-less-disaster-aid-than-white-americans>.

⁹ Nambi Ndugga, *Understanding the Inequitable Impacts of Hurricanes and Other Natural Disasters in the Wake of Hurricanes Helene and Milton*, KFF (Oct. 16, 2024), <https://www.kff.org/racial-equity-and-health-policy/understanding-inequitable-impacts-hurricanes-other-natural-disasters-the-wake-hurricanes-helene-and-milton/> (explaining communities of color are more likely to live in formerly redlined neighborhoods, which are more vulnerable to flooding).

¹⁰ 42 U.S.C. § 5301 et seq. (providing annual grants on a formula basis to entitled communities to carry out a wide range of community development activities directed toward neighborhood revitalization, economic development, and improved community facilities)

¹¹ 42 U.S.C. § 12741 et seq. (providing grants to state and local governments to implement local housing strategies designed to increase homeownership and affordable housing opportunities for low- and very low-income Americans, including homeownership downpayment, tenant-based assistance, housing rehabilitation, assistance to homebuyers, and new construction of housing).

¹² 42 U.S.C. §§ 11371–11378 (providing grants to states, large cities, urban counties, and U.S. territories for the rehabilitation and conversion of buildings for use as emergency or transitional shelters for homeless persons).

¹³ 42 U.S.C. § 1437f (providing rental assistance vouchers to help very low-income families, seniors, and people with disabilities afford housing in the private market).

¹⁴ Proposed Rule at 51419.

¹⁵ Tracy Jan, *Black Communities are Last in Line for Disaster Planning in Texas*, WASH. POST (May 12, 2022), <https://www.washingtonpost.com/business/interactive/2022/hud-texas-disaster-discrimination/> (“These projects included \$10.8 million to install a sewage system in the 379-person town of Iola; \$6 million for a new sheriff’s department radio tower and radios for Gonzales County; and \$4.2 million for a 2,000-foot-long road in Bastrop County to connect a Walmart parking lot and a Home Depot, justified as an alternate path for emergency vehicles in case the adjacent freeway is clogged with hurricane evacuees from the Gulf Coast 161 miles away.”); Letter Finding Noncompliance with Title VI and Section 109 from the U.S. Dep’t of Hous. & Urb. Dev. to Tex. Gen. Land Office, et al. (Mar. 4, 2022), <https://texashousers.org/wp-content/uploads/2022/03/HUD-Letter-Finding-Noncompliance-with-Title-VI-and-Section-109-.pdf> (hereinafter “HUD March 2022 Letter of Findings”).

projects in affluent white communities.¹⁶ During the same period, the city of Houston—which has a significant Black population and incurred more than \$2 billion dollars’ worth of damage during Hurricane Harvey—received zero dollars in disaster mitigation funds. Jurisdictions with large Black and Latino populations like Port Arthur, Beaumont, and Corpus Christi also received zero dollars.¹⁷ Even after Hurricane Harvey, Harris County, where Houston is located, passed a \$2.5 billion flood bond and directed a majority of the funding to infrastructure projects in whiter and wealthier neighborhoods. While HUD initially found Texas distributed the funding in a discriminatory manner in violation of its Title VI disparate impact regulations,¹⁸ after further investigation, HUD concluded the Texas General Land Office engaged in intentional discrimination in violation of both Title VI and the Fair Housing Act.¹⁹ Accordingly, HUD referred the case to the DOJ Civil Rights Division for litigation.²⁰

- Affordable Housing in Indiana: In 2017, the City of Noblesville, Indiana and Hamilton County, Indiana entered a voluntary compliance agreement with HUD to resolve a civil rights complaint challenging policies that caused an unjustified disparate impact under Title VI.²¹ Communities of color, particularly Black and Latino households, living in Hamilton County experienced housing problems and severe cost burdens at higher rates.²² Yet Noblesville had a zoning ordinance that specifically prohibited the building of subsidized housing in Noblesville. Noblesville's failure to provide funding for affordable housing development and actions to block such development had a disproportionate discriminatory effect on Black and Latino residents of Hamilton County.²³ The voluntary compliance agreement required Noblesville and Hamilton County to encourage the development of affordable housing within its jurisdiction.²⁴

¹⁶ HUD March 2022 Letter of Findings, *supra* note 15.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Supplemental Letter of Findings of Noncompliance from the U.S. Dep’t of Hous. & Urb. Dev. to Tex. Gen. Land Office, et al. (Jan. 15, 2025), https://texashousers.org/wp-content/uploads/2025/01/2025.01.15_GLO-Supplemental-Letter-of-Findings.pdf.

²⁰ *HUD Confirms Texas GLO Discriminated Against Black and Hispanic Texas*, RELMAN COLFAX (Jan. 17, 2025), <https://www.reلمانlaw.com/news-HUD-confirmation-discrimination-Texas-2025-01>; Letter from the U.S. Dep’t of Hous. & Urb. Dev. Office of the General Counsel to U.S. Dep’t of Just. Civil Rts. Div. RE: Case Name: Northeast Action Collective, et al. v. Texas General Land Office FHEO Case No.: 06-21-1483-8 (Jan. 15, 2025), https://www.reلمانlaw.com/media/cases/1820_Referral%20to%20Department%20of%20Justice.pdf; Zach Despart, *Feds Refer Texas’ Harvey Funding Discrimination Case to Justice Department*, THE TEX. TRIB. (Jan. 16, 2025), <https://www.texastribune.org/2025/01/16/texas-land-office-hurricane-harvey-aid-hud-discrimination/>. Although the facts had not changed, the agency later under the Trump administration rescinded these letters of findings shortly after it proposed a rule rescinding its regulations implementing the Fair Housing Act’s prohibition on disparate impact discrimination. Letter of Determination and Finding of Compliance from the U.S. Dep’t of Hous. & Urb. Dev. to Tex. Gen. Land Office, et al. (Jan. 28, 2026), <https://www.hud.gov/sites/default/files/hudclips/documents/06-21-1483-6-TX-Housers-Determination-Redacted.pdf>.

²¹ Voluntary Compliance Agreement, U.S. Dep’t of Hous. & Urban Dev. & Hamilton County, Ind. – FHEO case number 05-17-8499-6, (Oct. 15, 2018), <https://www.fhcci.org/wp-content/uploads/2019/03/2018.10.15-Noblesville-and-Hamilton-County-VCAs-EXECUTED.pdf>.

²² Letter from U.S. Dept’ of Hous. & Urban Dev. Office of Fair Hous. & Equal Opportunity to Amy Nelson, Executive Director, Fair Hous. Ctr. of Central Indiana, Inc. RE: Housing Discrimination Compl., Fair Hous. Ctr. or Central Indiana, Inc. v. City of Noblesville, IN (Jun. 21, 2017), <https://www.fhcci.org/wp-content/uploads/2011/12/HUD-Noblesville-OFFICIAL-complaint-6-21-17.pdf>.

²³ Voluntary Compliance Agreement, *supra* note 21.

²⁴ *Id.*

- Environmental Justice in Illinois: HUD used Title VI to help stop a recycling facility's proposed relocation from an affluent white area of Chicago to a predominantly Black and Latino area already burdened by pollution.²⁵ According to HUD's findings, the recycling facility planned to close its location in Lincoln Park, an 80% white neighborhood on the north side of Chicago, and move it to an area at the intersection of three neighborhoods which are more than 80% Black or Latino on Chicago's Southside.²⁶ HUD's Title VI regulations specifically prohibit recipients from discriminating in site selection. HUD found Chicago's actions violated its Title VI disparate impact regulations, and Chicago agreed to change how it decided where to site polluting facilities in order to better account for the burdens communities already face.²⁷

According to the proposed rule, HUD had 500 active and 585 closed Title VI matters from 2023 through 2025.²⁸ It is unclear how many matters involved disparate impact.²⁹ The examples above illustrate how HUD's enforcement of its Title VI disparate impact regulations has helped all people live in thriving communities without discrimination.

In addition to pursuing enforcement actions, HUD has also exercised its authority under its Title VI disparate impact regulations to issue guidance to help recipients ensure equal access to federally-funded programs, consistent with the law. HUD has previously issued guidance related to marketing and advertising housing opportunities in multifamily properties³⁰ and on how to ensure limited English proficiency individuals can access HUD-funded programs.³¹ HUD also issued a Community Development Block Grant-Disaster Recovery Universal Notice requiring recipients to proactively identify how they would address unmet needs following disasters and encourage all communities to participate in disaster recovery programs.³² These

²⁵ Letter of Findings of Noncompliance with Title VI and Section 109 from U.S. Dep't of Hous. & Urban Dev. to Honorable Lori E. Lightfoot Mayor, City of Chicago, et al., RE: Southeast Environmental Task Force, et al. v. City of Chicago Case No. 05-20-0419-6/8/9, ((Jul. 19, 2022), <https://www.fairhousingnc.org/wp-content/uploads/2022/12/Letter-of-Finding-05-20-0419-City-of-Chicago.pdf>).

²⁶ *Id.*

²⁷ Voluntary Compliance Agreement, U.S. Dep't of Hous. & City of Chicago, et al., HUD Case. No. 05-20-04190-6/8/9, https://archives.hud.gov/news/2023/Signed_VCA_Chicago.pdf; Gina Ramirez, *Chicago's Historic Environmental Justice HUD Settlement*, NRDC (Aug. 29, 2023), <https://www.nrdc.org/bio/gina-ramirez/chicagos-historic-environmental-justice-hud-settlement>.

²⁸ Proposed Rule at 51419.

²⁹ *Id.*

³⁰ HUD OFFICE OF MULTIFAMILY HOUSING PROGRAMS, IMPLEMENTATION SHEET FOR HUD'S TITLE VI GUIDANCE REGARDING MARKETING AND APPLICATION PROCESSING AT SUBSIDIZED MULTIFAMILY PROPERTIES (2022), https://www.hud.gov/sites/dfiles/Housing/documents/Multifamily_Title_VI_Guidance%20Implementation_Sheet_4522_FINAL.pdf?utm_medium=email&utm_source=govdelivery.

³¹ Mem. for Office of Fair Housing and Equal Opportunity Headquarters Staff, Office of Enforcement Staff, Regional Directors RE: Enforcement Guidance – National Origin Discrimination based on Limited English Proficiency under the Fair Housing Act and Title VI of the Civil Rights Act, (Sept. 19, 2025), <https://www.hud.gov/sites/default/files/hudclips/documents/LEP-Enforcement-Memo.pdf>.

³² Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees: The Universal Notice, 90 Fed. Reg. 1754 (Jan. 8, 2025), available at: <https://www.govinfo.gov/content/pkg/FR-2025-01-08/pdf/2024-31621.pdf>. HUD later rescinded this guidance after the Trump administration took office. Mem. for All CDBG Grantees Subject to Universal Notice RE: Revisions made to the Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees: The Universal Notice ("Universal Notice") published in the Federal Register (90 FR 1754) and Clarifications to the Allocations for Community Development Block Grant Disaster Recovery and Implementation of the CDBG–DR Consolidated Waivers and Alternative Requirements Notice published in the Federal Register (90 FR 4759) (Mar. 19, 2025), <https://www.hud.gov/sites/dfiles/CPD/documents/Universal-Notice-04032025.pdf>.

guidance documents benefit all parties by helping recipients identify and address discriminatory policies before they cause harm.

As discussed further in Part II(D) below, HUD's Title VI disparate impact regulations and the guidance documents have created substantial reliance interests for communities of color, who depend on these protections to ensure they do not face unjustified barriers. HUD should not remove these critical protections and should withdraw the proposed rule.

II. HUD Does Not Have a Reasoned Basis for Rescinding Its Title VI Disparate Impact Regulations

In order for an agency action to be valid under the Administrative Procedure Act (APA), it must be the product of "reasoned decisionmaking."³³ Agency actions, including regulations, are arbitrary and capricious in violation of the APA when, among other things, the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."³⁴ These same requirements apply when an agency revises its regulations.³⁵ Indeed, when an agency substantially alters an existing regulation, it must provide a "more detailed justification" for a change in policy when the "new policy rests upon factual findings that contradict those which underlay its prior policy" or where the previous policy has "engendered serious reliance interests that must be taken into account."³⁶

A. HUD's Disparate Impact Regulations Are an Appropriate Exercise of the Agency's Statutory Authority.

Title VI mandates that federal agencies ensure people who participate in and benefit from federally-funded programs and activities can do so free from discrimination and grants those agencies 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."³⁷ 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 601.³⁸ In the absence of a single, textual definition of "discrimination," agencies have significant administrative flexibility in deciding the scope of prohibited conduct.³⁹ 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."⁴⁰ Regulations issued

³³ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 53 (1983).

³⁴ *Id.* at 43.

³⁵ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (explaining while "agencies are free to change their existing policies," they must "provide a reasoned explanation for the change").

³⁶ *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009).

³⁷ 42 U.S.C. 2000d.

³⁸ 42 U.S.C. 2000d-1

³⁹ *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).

⁴⁰ 469 U.S. 287, 293-94 (1985). *See also Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) ("[F]ive Justices in *Guardians [Ass'n v. Civil Serv. Comm'n]*, 463 U.S. 582 (1983)] voiced [that regulations promulgated under § 602 of

pursuant to Section 602 may “go beyond . . . § 601” as long as they are “reasonably related” to its antidiscrimination mandate.⁴¹ The Supreme Court has previously 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.⁴² HUD’s reliance on *Sandoval* to justify the proposed rule is thus inapposite.⁴³

Contrary to the claims in the proposed rule,⁴⁴ HUD’s regulations prohibiting unjustified disparate impacts are a valid exercise of the agency’s expressly-delegated authority under Section 602 to issue regulations to “effectuate” the purposes of Section 601.⁴⁵ Congress intended Title VI 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).⁴⁶ The Supreme Court has explained how prohibiting unjustified disparate impacts furthers the central purpose of the Fair Housing Act (FHA), Title VII of the Civil Rights Act of 1964, and other statutes that, like Title VI, seek to “eradicate discriminatory practices within a sector of our Nation’s economy.”⁴⁷ Disparate impact law prevents unjustified policies from entrenching patterns of discrimination by maintaining unnecessary barriers that limit opportunities for individuals on grounds tied to their race.⁴⁸ Disparate impact 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.”⁴⁹ Disparate impact regulations also help root out surreptitious intentional discrimination that may otherwise go unchecked,⁵⁰ as illustrated by HUD’s investigation of the Texas General Land Office.

In addition to its authorities under Section 602 of Title VI, the FHA imposes additional requirements on how HUD administers its programs. The FHA mandates that HUD “administer [its] programs and activities relating to housing and urban development . . . in a manner affirmatively to further”⁵¹ fair housing.⁵² As the Supreme Court has held, disparate impact law

Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601], at least as alternative grounds for their decisions, see 463 U.S., at 591–592 (opinion of White, J.); *id.*, at 623, n. 15 (Marshall, J., dissenting); *id.*, at 643–645 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting).”)

⁴¹ *Lau*, 414 U.S. at 571 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in result).

⁴² 532 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”).

⁴³ Proposed Rule at 51417.

⁴⁴ *Id.*

⁴⁵ 42 U.S.C. 2000d-1.

⁴⁶ 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy’s message to Congress, June 19, 1963).

⁴⁷ *Inclusive Communities Project*, 576 U.S. at 539.

⁴⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–431 (1971).

⁴⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (citing *Griggs*, 401 U.S. at 430).

⁵⁰ See, e.g., *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015) (“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.”) (hereinafter “*Inclusive Communities*”).

⁵¹ 42 U.S.C. § 3608(d), (e)(5); *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.) (noting that Congress’s goal in passing the Fair Housing Act “reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases”); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (The affirmative furthering fair housing mandate requires HUD to take action “to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”).

⁵² *Inclusive Communities*, 576 U.S. at 521.

advances this core purpose.⁵³ In order to fulfill its obligation to affirmatively further fair housing, HUD may require federal funding recipients to address policies and practices that cause discriminatory effects even if they are neutral on their face and in intent.⁵⁴

HUD's disparate impact regulations reflect longstanding bipartisan consensus on how to interpret and enforce Title VI. The U.S. Department of Justice issued the first Title VI regulations prohibiting racially discriminatory effects immediately after the statute passed.⁵⁵ The same Executive Branch agencies which helped draft the language of Title VI were thus involved in promulgating the first regulations containing disparate impact protections.⁵⁶ HUD issued its Title VI disparate impact regulations during the Nixon administration.⁵⁷ Following the Supreme 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' disparate impact regulations and argued that agencies retained their authority and responsibility to enforce those regulations.⁵⁸ HUD amended 24 C.F.R. part 1 in 2018, during President Trump's first administration, without altering the regulation's disparate impact protections.⁵⁹ As the Supreme Court noted in *Loper Bright v. Raimondo*, "great respect" is thus due to the interpretation of Title VI embodied in HUD's current rules, which was "issued roughly contemporaneously with the enactment of the statute" and have "remained consistent over time."⁶⁰

Congress has also amended Title VI seven times since its inception without ever indicating disapproval of disparate impact,⁶¹ and has expressly modeled major pieces of civil rights legislation on the Title VI framework,⁶² without removing or revising agencies' authority to issue Title VI disparate impact regulations. By contrast, proposals to curb Title VI regulations

⁵³ *Id.*

⁵⁴ See *NAACP*, 817 F.2d at 156 (HUD's duty to affirmatively further fair housing "does not limit HUD's liability to purposive support of discrimination by others, nor does it limit HUD's 'discriminatory action' to activity that itself forecloses housing opportunities on the basis of race. Rather, it includes within the scope of such action a failure to 'consider the effect of a HUD grant on the racial and socio-economic composition of the surrounding area.'" (emphasis in original)). Cf. *County of Westchester vs. Dep't of Hous. & Urban Dev.*, 802 F.3d 413 (2d Cir. 2013) (holding HUD's decision to withhold federal funds to Westchester County because the county failed to adequately analyze the effects of facially-neutral exclusionary zoning policies did not violate the APA).

⁵⁵ 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).

⁵⁶ 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").

⁵⁷ 38 Fed. Reg. 17949 (Jul. 5, 1973).

⁵⁸ Mem. from the Assistant Att'y Gen. to the Heads of Departmental Agencies, General Counsels, & 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*).

⁵⁹ Removal of Cross References to Previously Removed Appendices and Subpart, 83 Fed. Reg. 26359 (Jun. 7, 2018), <https://www.federalregister.gov/documents/2018/06/07/2018-12274/removal-of-cross-references-to-previously-removed-appendices-and-subpart#page-26360>.

⁶⁰ 603 U.S. 369 (2024) at 8.

⁶¹ *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 proof of intent" and that "Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter").

⁶² See 20 U.S.C. § 1681 *et seq.* (Title IX); 29 U.S.C. § 794 (Rehabilitation Act).

have never succeeded in Congress.⁶³ These actions signal that Congress ratified HUD's Title VI disparate impact regulations as a valid exercise of the agency's authority.⁶⁴

B. HUD's Purported Justification for the Proposed Rule is Inconsistent with Other Proposed Rules and the Law.

Despite the prior consensus that Title VI disparate impact regulations effectuate the purposes of the statute, HUD now claims these regulations require unconstitutional race-based decisions and are inconsistent with public policy. HUD argues:

[T]he funding recipient must incur investigatory costs, such as conducting an impact analysis, and is coerced to proactively consider race, color, and national origin, and potentially use it to change the unintended disparate outcomes. . . . In short, disparate-impact liability encourages and, in some cases, requires covered entities to engage in the intentional use of race and racial balancing to eliminate those disparate outcomes by treating certain racial groups differently from others.⁶⁵

HUD does not provide any support for these claims, which misrepresent both how disparate impact law operates in practice and Equal Protection Clause jurisprudence.

Contrary to what HUD implies, the Equal Protection Clause does not prohibit the awareness that race exists and impacts individuals' lives,⁶⁶ but rather actions by the government because of race.⁶⁷ The Supreme Court has repeatedly held strict scrutiny only applies "when the government distributes burdens or benefits on the basis of individual racial classifications."⁶⁸

Disparate impact law does not require federal funding recipients to allocate benefits or burdens or otherwise make unlawful decisions based on race.⁶⁹ Removing or mitigating policies or practices that disproportionately bar people of color without a legitimate reason, as required

⁶³ See, e.g., 112 Cong. Rec. 18715 (1966) (rejecting proposal to amend Title VI so as to require proof of "intent to exclude")

⁶⁴ Cf. *Inclusive Communities*, 576 U.S. at 521 ("The 1988 amendments [to the Fair Housing Act] signal that Congress ratified [disparate impact] liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.").

⁶⁵ Proposed Rule at 51417.

⁶⁶ *Students for Fair Admissions v. Presidents and Fellows of Harvard College*, 600 U.S. 181, 230 (2023) ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.") (hereinafter "SFFA").

⁶⁷ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The equal protection clause does not forbid classification. It simply keeps decision makers from treating differently persons who are in all relevant respects alike."). See also *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 747 (2007) (holding defendants violated the Equal Protection Clause by "determin[ing] admission to a public school on a racial basis").

⁶⁸ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (citing *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011) ("A racial classification occurs only when an action distributes burdens or benefits on the basis of race." (internal citations and quotations omitted); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 77 (1st Cir. 2004) ("The term racial classification 'normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits.'"); see also *Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin*, 142 F.4th 819 (5th Cir. 2025) ("[A]ll parties agree that it is lawful for the institution to collect that data for the lawful purposes of reporting to government agencies and recruiting students to enroll . . .").

⁶⁹ *Griggs*, 401 U.S. at 436 ("Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.").

by HUD's current regulations, does not require recipients to apply different standards to different groups.⁷⁰ Rather, it gives everyone who was unfairly harmed, regardless of race, a fair chance. For example, in the aftermath of Hurricane Katrina in 2005, HUD and the state of Louisiana used a discriminatory formula for allocating home repair funds that unfairly disadvantaged Black homeowners. Under the program, homeowners could only receive the lower of either the pre-storm value of the house or the cost of the damage to the home. As a result, one Black homeowner whose rebuilding grant was based on pre-storm value received only \$1,400; had the award been based on damage cost, that homeowner would have received a grant of \$150,000.⁷¹ When the Legal Defense Fund challenged the policy, the relief granted benefited thousands of homeowners regardless of race.⁷² For example, more than 13,000 eligible homeowners received supplemental grant awards totaling \$473 million based upon the estimated cost of damage to their homes, rather than the original grants based on the much lower pre-storm market value of their homes.⁷³ Homeowners also received additional time to rebuild their homes without the fear of penalty or foreclosure by the State of Louisiana.⁷⁴ While the prior policy particularly harmed Black homeowners, these benefits accrued to eligible homeowners of all races.

While HUD cites extensively to *Students for Fair Admissions v. Presidents and Fellows of Harvard College (SFFA)* in its proposed rule,⁷⁵ that case does not call into question HUD's Title VI disparate impact regulations. In *SFFA*, the Supreme Court held that Harvard and the University of North Carolina's explicit use of race as a factor in their admissions processes in order to increase diversity violated Title VI's prohibition on intentional discrimination.⁷⁶ The case did not concern disparate impact discrimination or make any statement regarding its legality under the U.S. Constitution or Title VI. Nor did it disturb the longstanding principle that the government can advance equal opportunity through race-neutral means,⁷⁷ as disparate impact law does. The Court also reaffirmed the general principle that entities can consider race in order to remedy specific instances of past discrimination.⁷⁸

⁷⁰ *Id.* at 430-1 (Title VII "does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

⁷¹ Press Release, Civil Rights Organizations Settle Hurricane Katrina Housing Discrimination Case Against HUD and Louisiana (Jul. 6, 2011), <https://www.prnewswire.com/news-releases/civil-rights-organizations-settle-hurricane-katrina-housing-discrimination-case-against-hud-and-louisiana-125096789.html> (hereinafter "Katrina Press Release").

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 600 U.S. 181.

⁷⁶ *Id.* at 230.

⁷⁷ 600 U.S. at 284 (Thomas, J. concurring) (explaining that "universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means"); *Id.* at 285 (Thomas, J., concurring) ("Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies."); *id.* at 317 (Kavanaugh, J., concurring) ("And 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.'"); *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. . . . Such programs may well have racially disproportionate impact, but they are not based on race.") (internal quotation marks omitted); *see id.*, at 509 (plurality opinion of O'Connor, J.) ("[T]he 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.").

⁷⁸ *SFFA*, 600 U.S. at 207.

Notably, HUD did not claim disparate impact law is unconstitutional in its original proposal to rescind its disparate impact regulations under the FHA. In that rulemaking, HUD conceded, as it must, that it is bound by the Supreme Court’s holding that the FHA prohibits policies with unjustified disparate impacts.⁷⁹ Instead, the agency claimed its FHA disparate impact rules are unnecessary because it is “appropriate for courts, not a Federal agency, to make determinations related to the interpretation of disparate impact liability under the Fair Housing Act.”⁸⁰ HUD’s inconsistent reasoning for why it must rescind the disparate impact regulations it enforces shows that its reasoning is pretextual and therefore arbitrary and capricious.

C. HUD Does Not Cite Facts Supporting Its Change in Position.

Throughout the proposed rule, HUD makes sweeping new claims regarding the operation and impact of its Title VI disparate impact regulations. Yet HUD does not cite any facts supporting its current view or justifying its change in position. While HUD claims disparate impact law encourages unlawful race-based decisions, the agency does not cite any examples where recipients took such actions either in response to a HUD investigation or to proactively avoid liability. Similarly, while HUD falsely claims disparate impact law can prevent merit-based hiring,⁸¹ the agency gives no examples of how disparate impact law prevents HUD from advancing its statutory duty to affirmatively further fair housing⁸² nor its current mission to “foster strong communities by supporting access to quality, affordable housing, expanding the housing supply, and unlocking homeownership opportunities.”⁸³ HUD also does not provide any examples to support its claim that federal funding recipients are confused by its Title VI disparate impact requirements,⁸⁴ which have been in place for more than 50 years.⁸⁵ Such bare assertions, unsupported by any underlying facts, are insufficient to justify the proposed rule.

D. HUD Underestimates the Costs and Overestimates the Benefits of Rescinding the Rule.

HUD underestimates the costs to the nation of rescinding its Title VI disparate impact regulations, which communities of color have relied on for decades to prevent and address unjustified policies and practices. Black communities and other communities of color have substantial reliance interests in these regulations. Because there is no private right of action for disparate impact discrimination under Title VI,⁸⁶ harmed individuals must rely exclusively on HUD enforcement of disparate impact protections to deter and address harms—including the harms of intentional discrimination, as “unconscious prejudices and disguised animus [can]

⁷⁹ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 91 Fed. Reg. 1475 (2026) (*citing Inclusive Communities*, 576 U.S. 519), <https://www.federalregister.gov/documents/2026/01/14/2026-00590/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

⁸⁰ *Id.* at 1476. Many commenters, including LDF, flagged the flaws in this argument. Because HUD has an obligation to monitor grantee compliance and to make determinations in fair housing complaints, it needs a clear standard for identifying unjustified disparate impacts and cannot rely on the courts alone.

⁸¹ Proposed Rule at 51418.

⁸² 42 U.S.C. § 3608(d).

⁸³ Press Release, HUD Delivers Mission-Minded Results in Trump Administration’s First 100 Days (Apr. 29, 2025), <https://www.hud.gov/news/hud-no-25-059>.

⁸⁴ Proposed Rule at 51418.

⁸⁵ HUD also claims its disparate impact regulations are questionable because “arbitrary nature of the racial and ethnic categories typically used to measure disparate effects, which, by virtue of their arbitrariness, typically lack a meaningful connection to a compelling interest.” *Id.* However, both disparate impact and disparate treatment law typically address discrimination based on similar racial, ethnic, and other categories. Moreover, HUD does not need to establish a compelling interest in using those categories because disparate impact law does not require recipients to use race in a manner that triggers strict scrutiny, as explained above.

⁸⁶ *Sandoval*, 532 U.S. at 281.

escape easy classification as disparate treatment.”⁸⁷ To be clear, harmed individuals may still seek relief in court for intentional discrimination under Title VI, as well as both disparate treatment and disparate impact under the FHA and other statutes. However, litigation is significantly more costly than HUD’s administrative complaint process and may be out of reach for some individuals. The proposed rule would deprive these individuals and the communities they come from of an important civil rights tool, increasing the likelihood they will face unfair barriers in federally-funded programs. Such racial discrimination imposes significant costs not only on directly-harmed individuals, but on the U.S. economy.⁸⁸ By removing safeguards to ensure “public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice,”⁸⁹ the proposed rule is also likely to undermine faith in the federal government as a whole.

HUD also overestimates the benefits and underestimates the costs of the proposed rule for recipients. As noted above, in many cases, HUD-funded programs and activities are covered not only by Title VI but by other laws prohibiting unjustified disparate impacts. Harmed individuals may also use evidence that a policy or practice causes disproportionate harm to particular groups on the basis of race to prove intentional discrimination. As a result, recipients that rightly wish to avoid the risk of costly litigation may still incur similar compliance costs. Indeed, in the absence of an effective administrative process to investigate and resolve discrimination claims, harmed individuals who have access to counsel may be more likely to file a complaint in court rather than with HUD, increasing the total number of cases litigated even as some claims go unaddressed. An accurate assessment of the costs and benefits of the proposed rule ultimately weighs in favor of maintaining HUD’s current Title VI disparate impact regulations.

E. HUD Fails to Consider Revising Its Regulations to Address Concerns Rather than Rescinding Them Entirely

Finally, HUD fails to consider more limited revisions to its Title VI disparate impact regulations that could address its concerns. For example, if HUD is genuinely concerned that recipients are confused about how to follow the regulations, it could provide additional guidance to them. If HUD is concerned recipients will make unlawful race-based decisions, it could revise its regulations to explicitly state recipients may only take race-neutral actions to remedy unjustified disparate impacts and must follow the standards of strict scrutiny when making race-based decisions to remedy intentional discrimination. Yet HUD fails to consider revising its regulations to address its concerns, despite the substantial reliance interests at stake.

III. Conclusion

For more than 50 years, HUD’s Title VI disparate impact regulations have been a critical tool in ensuring every person equally benefits from federally-funded programs, regardless of race, color, or national origin. Given the substantial reliance interests both recipients and communities, particularly communities of color, have in the current regulations, the proposed

⁸⁷ *Inclusive Communities*, 576 U.S. at 521.

⁸⁸ *E.g.* DANA M. PETERSON & CATHERINE L. MANN, CITI GPS, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 7 (2020), <https://www.citigroup.com/global/insights/citigps/closing-the-racial-inequality-gaps-20200922>; Chang-Tai Hsieh, et al., *The Allocation of Talent and U.S. Growth*, 87 *ECONOMETRICA* 1439 (2019).

⁸⁹ *Croson*, 488 U.S. at 492.

rule fails to offer a sufficient basis for rescinding these protections, as required by the APA. As such, HUD must withdraw the proposed rule.

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel (asmirniotopoulos@naacpldf.org), and David Wheaton, Assistant Policy Counsel (dwheaton@naacpldf.org).

Sincerely,

The Legal Defense Fund
Access Ready Inc
Alliance For Housing Justice
American Civil Liberties Union
Center for Environmental Health
Center for Law and Social Policy (CLASP)
Center for Responsible Lending
Human Rights Campaign
Justice in Aging
Los Jardines Institute
Metropolitan Group
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
National Housing Law Project
National Urban League
PolicyLink
Poverty & Race Research Action Council
Public Justice Center
SAGE
WERA