State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

June 13, 2025

Submitted via Federal eRulemaking Portal (Regulations.gov)

The Honorable Chris Wright
Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

RE: Significant Adverse Comment and Request for Immediate Withdrawal of Direct Final Rule "Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities" – Docket ID DOE-HQ-2025-0015 (90 Fed. Reg. 20783) (May 16, 2025)

On behalf of the Attorneys General of California, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawai', Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin (States), we submit a significant adverse comment and request for immediate withdrawal of the Direct Final Rule *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities* (DFR), published by the United States Department of Energy (DOE) in the Federal Register on May 16, 2025.[1] The DFR rescinds the decades old regulation promulgated under Section 504 of the Rehabilitation Act of 1973 (Section 504) that requires a recipient to design and construct new facilities (or certain alterations of existing facilities) to make them readily accessible to and usable by people with disabilities.[2] This arbitrary and capricious agency action fails to adhere to the procedures required by law by bypassing opportunity for review and comment prior to issuance and does not consider the interests of the States and the public, including the continued accessibility barriers faced by people with disabilities. We request immediate withdrawal of this unlawful revocation of long-standing standards that require the nation's buildings and facilities to be accessible to and usable by people with disabilities.

[1] *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities* 90 Fed. Reg. 20783 (May 16, 2025) (to be codified at 10 C.F.R. pt. 1040) [hereinafter *Rescinding Regulations*].

[2] 10 C.F.R. § 1040.73.

I. DOE'S IMPERMISSIBLE USE OF THE DIRECT FINAL RULE VIOLATES THE APA

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the Administrative Procedure Act (APA) and rescind critical provisions implementing Section 504 by direct final rule, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025.[3] The agency purports to use the direct final rule to rescind "unnecessary and unduly burdensome" provisions.[4]

The Administrative Conference of the United States (ACUS), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies,"[5] recognizes that agencies may use direct final rulemaking only where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking," and "concludes that the rule is unlikely to elicit any significant adverse comments."[6] In such circumstances, the agency should publish in the Federal Register that it is proceeding by direct final rule and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[7]

Here, DOE violates the APA by using the direct final rulemaking process to limit public input into the agency's rescission of the Section 504 provisions regarding new construction requirements. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescissions. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

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[3] *See generally Rescinding Regulations*, 90 Fed. Reg. at 20783-84.

[4] *Id.*

[5] 5 U.S.C. § 594(1).

[6] Admin. Conf. of the U.S., *Administrative Conference Recommendation 2024-6, Public Engagement in Agency Rulemaking Under the Good Cause Exemption* 4 (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf [hereinafter "ACUS 2024–6"]); *see also* 5 U.S.C. § 553(b)(B); Off. of the Fed. Reg., A Guide to the Rulemaking Process 9 (2011), https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (explaining that direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters").

[7] ACUS 2024–6, *supra* note 6, at 5; *see also* Todd Garvey, Cong. Rsrch. Serv., R41546, *A Brief Overview of Rulemaking and Judicial Review* (Mar. 27, 2017) https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule).

A. DOE's Rescission Must Undergo Notice and Comment Procedures

As an initial matter, to enact this recission, DOE must use the same notice and comment process as it would to enact new regulations.[8] The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule."[9] Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[10]

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when 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."[11] The good cause exception is "narrowly construed and only reluctantly countenanced,"[12] and courts must "carefully scrutinize the agency's justification for invoking the 'good cause' exception."[13] It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."[14] Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare."[15]

Here, DOE provides only a conclusory statement that these provisions are "unnecessary and unduly burdensome."[16] This stated justification for the use of a direct final rule does not satisfy the good cause requirement under the APA. First, DOE has it backward: the APA calls for a determination that the *notice and comment process* is "unnecessary," not the regulation.[17] DOE makes no such claim, much less provides any support for it. In any case, as discussed in detail *infra*, these regulations are necessary: they impact a wide array of DOE's federally assisted programs and recipients, and serve to facilitate meaningful access, prevent discrimination, and effectuate the goals of Section 504.

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[8] *See* 5 U.S.C. § 553.

[9] 5 U.S.C. § 551(5).

[10] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'" (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

[11] 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule.").

[12] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

[13] *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010).

[14] *N. J. Dep't of Env't Prot. v. U.S. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).

[15] *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

[16] *Rescinding Regulations,* 90 Fed. Reg. at 20784.

[17] 5 U.S.C. § 553(b)(B); *see also* ACUS 2024–6, *supra* note 6, at 4 (explaining that direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "concludes that the rule is unlikely to elicit any significant adverse comments").

Moreover, the "unnecessary" prong of the good cause exception is usually "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public."[18] As this letter demonstrates, this rescission is plainly not an insignificant or merely technical change, and it is of great consequence to the public. DOE is substantively altering its regulations to eliminate accessibility requirements in new construction and alterations in a manner that is contrary to law. And as discussed *infra* [Sec. III], there is a significant and practical need for regulations that specify accessibility requirements and design standards so that the public is not harmed.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the substance of the rule."[19] As a threshold matter, it is the province of the judicial branch, not the Executive, "to say what the law is,"[20] But even where an agency claims a rescission is necessary to conform to current legal standards—which is not true here—public comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests"[21] or "important aspect[s] of the problem."[22] DOE thus "cannot simply brand [a prior action] illegal and move on."[23]

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]."[24] However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety."[25] DOE has not articulated and the undersigned are not aware of any emergency situation or imminent safety threat that would

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[18] *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp.,* 236 F.3d. 749, 755 (D.C. Cir. 2001) (emphasis added); *see also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 244 (2021) (explaining that APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment"); U.S. Dep't of Just., Attorney General's Manual on the Administrative Procedure Act (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947iii.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.").

[19] ACUS 2024–6, *supra* note 6, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (Notice and comment were not required for the agency's "nondiscretionary acts required by [statute]").

[20] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. 107, 177 (1803)).

[21] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[22] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[23] *Louisiana v. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

[24] *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

[25] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases).

justify rescinding accessibility requirements in new construction and alterations which have been in effect for decades.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."[26] For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent."[27] Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical protections afforded by Section 504. And DOE provides no information showing that adequate advance notice of changes to regulations regarding accessibility requirements in new construction and alterations would catalyze unlawful action against the public interest. On the contrary, DOE's proposed rescissions, if sustained, would have the effect of catalyzing actions that are otherwise unlawful under Section 504 because those who are subject to the statute's strictures may be lulled into believing that DOE has effectively abolished Section 504's accessibility mandates.

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[28] and agency action must be evaluated "solely by the grounds invoked by the agency."[29]

B. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments"

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule that a substantive response is required."[30] But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[31] Instead, the agency's unjustified heightened requirements

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[26] *Mack Trucks*, 682 F.3d at 95.

[27] *See Util. Solid Waste Activities Grp.*, 236 F.3d at 755.

[28] *See* 5 U.S.C. § 553(a)(1) (exception for "a military or foreign affairs function of the United States"); *id.* § 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); *id.* § 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

[29] *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

[30] *See Rescinding Regulations*, 90 Fed. Reg. at 20783 (emphasis added).

[31] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's

impose an extra barrier to meaningful public participation in DOE's development of this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[32] Unlike the DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[33]

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation direct final rules instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal.[34] For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a direct final rule "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]"[35] And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA.[36] These agencies' rules and practices demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[37]

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decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).

[32] ACUS 2024–6, *supra* note 6, at 5 (emphasis added).

[33] *See, e.g.*, Implementation of OMB Guidance on Drug-Free Workplace Requirements, 75 Fed. Reg. 39443, 39444 (proposed July 9, 2010) (codified at 2 CFR pt. 902 and 10 CFR pt. 607) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); Defense Priorities and Allocations System, 73 Fed. Reg. 10980, 10981 (proposed Feb. 29, 2008)) (codified at 10 CFR pt. 216 48 CFR pt. 911 and pt. 952) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); Collection of Claims Owed the United States, 68 Fed. Reg. 48531, 48532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").

[34] 42 U.S.C. § 6295(p)(4)(C)(i).

[35] 40 C.F.R. § 721.170(d)(4)(i)(B).

[36] 14 C.F.R. § 11.13.

[37] In another deviation from established notice-and-comment processes that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response

C. DOE Does Not Cite Adequate Legal Authority for the DFR

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed."[38] As an initial matter, Executive Order Number 12,250, Leadership and Coordination of Nondiscrimination Laws, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" such as Section 504 of the Rehabilitation Act of 1973.[39] But the DFR does not mention any involvement by the Department of Justice in the rescission of the Section 504 regulations at issue here. Furthermore, to the extent DOE provides any rationale for its rescissions, it relies on the agency's mischaracterization of the regulations, discussed in detail at *infra*-Section IV, which do not stand for the principles the agency, claims nor support the action it wishes to take.

D. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the direct final rule. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments."[40]

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new direct final rule" that responds to the comments.[41] But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new direct

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to this DFR. *Compare* Department of Energy, *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities,* Regulations.gov (June 13, 2025, 10:45 AM ET), https://www.regulations.gov/document/DOE-HQ-2025-0015-0001 (4,881 comments received and 0 comments publicly posted on June 13, 2025, 10:45 AM ET) *with* Department of Justice, *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov (June 13, 2025, 10:45 AM ET), https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and 11,211 publicly posted on June 13, 2025, 10:45 AM ET).

5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes).

[39] Exec. Order No. 12,250, Leadership and Coordination of Nondiscrimination Laws, § 1– 2 (Nov. 2, 1980).

[40] 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (cleaned up)).

[41] *Rescinding Regulations,* 90 Fed. Reg. at 20783.

final rule.[42] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the direct final rule in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[43] However, DOE chose not to do so, and DOE may not undercut the public's right to lawful process required under the APA due to the agency's haste.

II. STATUTORY AND REGULATORY FRAMEWORK

A. The DFR Fails to Consider and Contradicts the Purpose of Section 504 of the Rehabilitation Act of 1973 and its Implementing Regulations

The Rehabilitation Act of 1973 was enacted to "empower individuals with disabilities to maximize... independence, and inclusion and integration into society, through... the guarantee of equal opportunity..." and to "initiate and expand services to groups of individuals [with disabilities] (including those who are homebound or institutionalized) who have been underserved in the past."[44] Section 504 expressly prohibits discrimination against people with disabilities under any program or activity receiving federal financial assistance, or any program or activity conducted by any federal executive agency or the United States Postal Service, including any state or local governments, universities, and private organizations.[45] The Rehabilitation Act also established the Architectural and Transportation Barriers Compliance Board (Access Board) to establish and maintain minimum guidelines and requirements for accessibility standards issued pursuant to several statutes and to "promote accessibility throughout all segments of society."[46]

Despite these critical statutory requirements, no regulations were published in the immediate years following the 1973 enactment of Section 504. As a result, although government agencies and their programs and activities were required to ensure access to people with disabilities, they lacked any guidance on implementing this requirement. Although the Ford administration had drafted Section 504 regulations, they remained unpublished at the time he left office. In April 1977, people with a variety of disabilities launched protests at federal offices

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[42] *See* ACUS 2024–6, *supra* note 6, at 2 (noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[43] *See* ACUS 2024–6, *supra* note 6, at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* OFF. OF THE FED. REG., *supra* note 6, at 9 ("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."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments on the proposed rule, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

[44] 29 U.S.C. § 701; Rehabilitation Act of 1973, 87 Stat. 355, Pub. L. No. 93–112.

[45] 29 U.S.C. § 794.

[46] 29 U.S.C. § 794.

across the country.[47] The longest sit-in took place in San Francisco and lasted nearly one month, ending only when the Section 504 regulations had been signed.[48] Many of the protesters were willing to expose themselves to risk and sacrifice access to the medical equipment and personal aides that assisted them in their daily lives because of how vital these regulations were—and still are—to them and people with disabilities across the country.[49] The importance of and need for Section 504 regulations remains the same today.

Three years later, in 1980, President Carter issued an executive order requiring each agency covered by Section 504 to "issue appropriate implementing directives (whether in the nature of regulations or policy guidance)."[50] And, in the same year, DOE promulgated Section 504 regulations that largely mirror the regulations that would be erased if this Rule goes into effect. Like the statute, the regulations prohibit discrimination based on disability, providing that no person with a disability shall be subjected to discrimination "because a recipient's facilities are inaccessible to or unusable by handicapped persons."[51] And the regulations clarify that this duty not to discriminate requires that a recipient design and construct new facilities (or certain alterations of existing facilities) to make them readily accessible to and usable by people with disabilities.[52] The requirement applies to "each facility or part of a facility constructed by, on behalf of, or for the use of a recipient."[53] The regulations reflect a careful balance of requiring newly constructed facilities to abide by accessibility standards while allowing greater flexibility for existing facilities. The regulations also deem compliance with the Uniform Federal Accessibility Standards (UFAS) to be compliance with the new construction and alterations requirements. *Id.* The UFAS provide clear practical guidelines for developers including wheelchair passage widths, ramps specifications, and parameters for accessible parking spaces.[54] Without this section, which DOE has slated for removal, recipients lose imperative guidance as to which facilities must be accessible to people with disabilities and what standards constitute compliance.

To support repealing this regulation, DOE cites only the general prohibition of discrimination against people with disabilities. But that provision alone is not sufficient to address physical access barriers that continue to exist for people with disabilities.

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[47] Alyssa Eveland, Nat'l Park Serv., *504 Protest: Disability, Community, and Civil Rights* (Mar. 21, 2024), https://www.nps.gov/articles/000/504-protest-disability-community-and-civil-rights.htm.

[48] *Id.*

[49] *Id.*

[50] Exec. Order No. 12,250, 28 C.F.R. Part 41 (1980).

[51] 10 C.F.R. § 1040.71.

[52] 10 C.F.R. § 1040.73.

[53] *Id.*

[54] U.S. Access Bd., *Uniform Federal Accessibility Standards (UFAS)* (1984), https://www.access-board.gov/aba/ufas.html.

III. THERE IS A SIGNIFICANT AND PRACTICAL NEED FOR THE REGULATIONS TO SPECIFY ACCESSIBILITY STANDARDS

More than 1 in 4, over 70 million, adults in the United States have a disability.[55] The U.S. Centers for Disease Control and Prevention notes that barriers, including structural obstacles "can make it extremely difficult or even impossible for people with disabilities to function."[56] For example, an architectural feature as seemingly simple as stairs leading to a building entrance can prevent a person using a wheelchair from entering that building independently. In a 2023 survey, 70.4% of respondents reported that they have arrived at a public building only to realize they could not access the building.[57]

Building accessibility is a longstanding obstacle for people with disabilities in a variety of settings.[58] This is due in no small part to widespread noncompliance with various accessibility standards. For example, the Access Board, the federal agency responsible for enforcing the Architectural Barriers Act of 1968, received 341 complaints during fiscal year 2024.[59] In 2024, the California Commission on Disability Access received 4319 complaints and demand letters alleging violations of state and federal accessibility standards.[60] In fiscal year 2023-2024, approximately 30% of disability discrimination complaints received by the Illinois Office of the

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[55] U.S. Ctrs. for Disease Control and Prevention, *CDC Data Shows Over 70 Million Adults Reported Having a Disability* (Jul. 16, 2024), https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html.

[56] U.S. Ctrs. for Disease Control and Prevention, *Disability Barriers to Inclusion* (Apr. 3, 2025), https://www.cdc.gov/disability-inclusion/barriers/index.html#cdc_generic_section_4-physical-barriers.

[57] Suzanne Perea Burns, et al., *Accessibility of public buildings in the United States: a cross-sectional survey*, 39 DISABILITY & SOC'Y 2988, 2994 (Aug. 20, 2023).

[58] *See, e.g.*, U.S. Government Accountability Off., *K-12 Education: School Districts Need Better Information to Help Improve Access for People with Disabilities* GAO-20-448 (Jun. 30, 2020), https://www.gao.gov/products/gao-20-448 (a national survey finding two-thirds of school districts had facilities with physical barriers that may limit access); Ctrs. for Medicare & Medicaid Services, *Increasing the Physical Accessibility of Health Care Facilities* (May 2017), https://www.cms.gov/sites/default/files/repo-new/23/Issue-Brief-Increasing-the-Physical-Accessibility-of-Health-Care-Facilities.pdf ("Despite federal requirements that health care providers ensure equal access to programs, services, and facilities for people with disabilities, physical accessibility remains a considerable challenge."); Samara Scheckler, et al., Joint Center for Housing Studies Harvard Univ., *How Well Does the Housing Stock Meet Accessibility Needs? An Analysis of the 2019 American Housing Survey*, (Mar. 2022), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_housing_stock_accessibility_scheckler_2022_0.pdf (finding "the US housing stock does not regularly incorporate accessibility, and includes very few housing units that offer multiple accessibility features.").

[59] U.S. Access Bd., *U.S. Access Board Resolves 85 Architectural Barriers Act Complaints Through Corrective Action in Fiscal Year 2024* (Oct. 18, 2024), https://www.access-board.gov/news/2024/10/18/u-s-access-board-resolves-85-architectural-barriers-act-complaints-through-corrective-action-in-fiscal-year-2024/.

[60] Cal. Comm'n on Disability Access, *State and Federal Complaints and Demand Letters Report for 2024*, https://www.dgs.ca.gov/CCDA/Resources/Page-Content/California-Commission-on-Disability-Access-Resources-List-Folder/State-and-Federal-Complaints-and-Demand-Letters-Report-for-2024.

Attorney General's Disability Rights Bureau were related to physical accessibility issues.[61] These complaints underscore why it is critically important for agencies like DOE to provide guiding regulations that clearly outline construction requirements and specify which accessibility standards constitute compliance. The DFR seeks to remove this longstanding guidance, which will lead to greater confusion and noncompliance.

IV. RESCINDING SECTION 504 REGULATIONS IS ARBITRARY AND CAPRICIOUS

The DFR is arbitrary and capricious and must be withdrawn. Pursuant to the Administrative Procedure Act, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[62] A rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, 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."[63] When an agency seeks to rescind an existing rule, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[64] However, a detailed justification is necessary when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[65] Thus, a rule rescinding a prior rule is arbitrary and capricious if "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" and the agency fails to provide one.[66] Moreover, an agency must "examine[] the relevant data and articulate[] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[67]

Here, DOE has entirely failed to consider an important aspect of the problem and has offered a cursory explanation for its decision that runs counter to the evidence before the agency. To rescind a nearly 30-year-old regulation, DOE offers only four short sentences:

> "Given the general prohibition on discriminatory activities and related penalties, see 10 CFR 1040.71, DOE finds these additional provisions unnecessary and unduly burdensome. It is DOE's policy to give private entities flexibility to comply with the law

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[61] Illinois Off. of the Att'y Gen. Disability Rights Bureau, *Investigation and Technical Assistance Activity Report on Fiscal Year 2023-2024* (Jul. 26, 2024), https://illinoisattorneygeneral.gov/Page-Attachments/DRBAnnualInvestigativeandTechnicalAssistanceActivity23-24.pdf.

[62] 5 U.S.C. § 706(2)(a); *see also United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

[63] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

[64] *Fox Television Stations, Inc.*, 556 U.S. at 515.

[65] *Id.*

[66] *Id.* at 515-516.

[67] *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (quoting *State Farm*, internal quotation marks omitted).

> in the manner they deem most efficient. One-size-fits-all rules are rarely the best option. Accordingly, DOE finds good reason to eliminate this regulatory provision."[68]

First, DOE's assertion that these provisions are "unnecessary and unduly burdensome" because the regulation, in a separate provision, prohibits discrimination is unsupported.[69] The prohibition of discrimination alone is not sufficient to address physical access for people with disabilities as required by Section 504. In relying on this rationale, DOE has failed to consider both the historical and present need for these regulations, as detailed in *supra* Sections II and III. DOE's rationale also runs counter to evidence in the legislative record. In support of early versions as well as the final bill that enacted Section 504, members of Congress cited "shameful oversights" in the treatment of people with disabilities that caused them to be "shunted aside, hidden, and ignored" and characterized the legislation as a "national commitment to eliminate the glaring neglect" of people with disabilities.[70] The Supreme Court has recognized, "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act" and explained that Congress viewed discrimination against people with disabilities to be mostly the product of "thoughtlessness and indifference—of benign neglect."[71] Contrary to DOE's stated rationale, clear standards that outline how covered entities must comply with the central aim of the law are wholly necessary and help reduce the burden of compliance by providing clarification and standards by which to measure accessibility. The Department has acted in an arbitrary and capricious manner by rescinding the regulatory provision that supports Congress's central aim in enacting Section 504 and continues to be critical today.

Next, DOE makes a cursory statement about its policy to grant private entities flexibility in compliance and calls the regulation a "one-size-fits-all" rule.[72] Again, DOE entirely fails to consider an important aspect of the problem and offers a rationale that runs counter to the statutory purpose. The DFR would change what DOE calls a "one-size-fits-all" rule to a "free-for-all" that sets no standard for compliance. This would increase the burdens on both DOE when figuring out how to determine compliance and recipients who do not have the benefit of clear construction standards from the outset. Section 504 provides a national baseline for accessibility, and developers have the flexibility to provide greater accessibility. Not only are developers reliant on this baseline, but so too are other industries. For example, the UFAS, the standards the regulations identify for compliance, require a minimum width for doorways.[73] This minimum width correlates to the standard size of wheelchairs, and both wheelchair manufacturers and building developers rely on this baseline to ensure accessibility. Without a clear standard like this, recipients would have difficulty ensuring people using wheelchairs can pass through doorways in their facilities. Furthermore, the regulation on its face offers flexibility and is not "one-size-fits-all" but rather offers standards tailored for different types of facilities.

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[68] *Rescinding Regulations*, 90 Fed. Reg. at 20784.
[69] *Id.*
[70] 117 Cong. Rec. 45974 (1971); 118 Cong. Rec. 526 (1972).
[71] *Alexander v. Choate*, 469 U.S. 287, 297 (1985).
[72] *Rescinding Regulations*, 90 Fed. Reg. at 20784.
[73] UFAS, *supra* note 54, at 4.2.

Both the regulation and UFAS, the standards for compliance, account for new construction separate from alterations to existing facilities. This is a critical point of flexibility built into the regulation and the standards. Congress and DOE had the option to pass a statute and regulations that forced covered entities into a "one-size-fits-all" requirement, but instead chose to make this compromise thus balancing the need for accessible buildings with construction limitations. Moreover, DOE has offered no evidence to support its characterization of the regulation and opted out of a rulemaking process that would have permitted the creation of a robust record through public comment. DOE has acted in an arbitrary and capricious manner by offering a rationale that fails to consider and contradicts the historical record.

V. THE DFR FAILS TO CONSIDER AND CONTRADICTS THE STATES' INTERESTS IN ROBUST FEDERAL REGULATION OF SECTION 504

The DFR is arbitrary and capricious because it entirely fails to consider the States' significant interests, and its rationale runs counter to the evidence States present in this comment. The States have a strong interest in protecting our residents with disabilities from discrimination and in ensuring they have access to buildings and facilities that do not present architectural barriers. Section 504 and its implementing regulations are especially important because DOE's federal funds are awarded not only to private entities, but also to the States themselves. DOE has awarded the State of California, for example, 14 funding awards totaling approximately $1 billion.[74] To the State of Illinois, DOE has awarded 11 funding awards totaling approximately $500 million.[75] It is imperative that private entities and the states themselves have clear guidance for compliance with federal requirements.

The States also have an interest in ensuring developers build accessible facilities that comply with federal law. Rescinding this regulation is likely to create confusion for developers, resulting in reduced architectural accessibility for people with disabilities and increased complaints to state agencies. Deleting regulations that (1) require accessible construction and (2) identify which standards constitute compliance also sends a message that implementation of accessible design standards is not necessary at all. For those that do attempt to implement accessible design, they will be left with no guidance as to which facilities must comply and which standards constitute compliance.

This is particularly concerning in states where state agencies play a role in ensuring compliance with nondiscrimination and accessible design requirements. For example, to ensure enforcement of nondiscrimination and accessible design laws and regulations, the California Attorney General and/or the California Civil Rights Department have been vested with the

[74] USAspending.gov, *Prime Awards and Transactions California* (2025), https://www.usaspending.gov/search?hash=42acc7ec35ca584623e9df0243298936.

[75] USAspending.gov, *Prime Awards and Transactions Illinois* (2025), https://www.usaspending.gov/search?hash=5c8a26c4af7a3b6f9df498df6a639e86.

authority to investigate complaints and bring legal actions to remedy violations.[76] Like California, the Disability Rights Bureau of the Office of the Illinois Attorney General is authorized to investigate and litigate against entities to remedy violations of the Illinois Environmental Barriers Act[77] and its implementing code, the Illinois Accessibility Code.[78] The regulation that DOE proposes to rescind is critical to understanding the federal standards that DOE recipients must comply with for projects located within the each of our States. The States not only have a strong interest in combatting nondiscrimination against people with disabilities but are also authorized to enforce these laws. A gap in federal guidance will lead to less compliance and greater barriers for people with disabilities who will turn to the States to remedy violations. By releasing a DFR rather than the traditional Notice of Proposed Rulemaking in order to rescind a long-standing regulation, DOE has failed to assess the impact on or consult with any stakeholders, including States.

VI. CONCLUSION

In conclusion, Section 504 and its implementing regulations play a critical role in preventing discrimination and ensuring access for people with disabilities. The States have an interest in ensuring that State residents are not subjected to discrimination on the basis of disability and have access to a built environment that minimizes architectural barriers for people with disabilities. Regulations that provide guidance to developers regarding accessible design standards have historically been and continue to be necessary for proper implementation of Section 504's requirements. The DFR rescinding DOE's Section 504 regulations is an arbitrary and capricious action that fails to abide by rulemaking procedures. Proper enforcement of Section 504 is an issue of vital importance to our States, our residents, and our communities. For all of these reasons, we strongly oppose the DFR *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities* and request that it be withdrawn.

Sincerely,

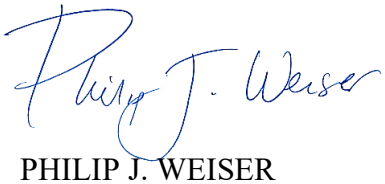
ROB BONTA
California Attorney General

KRISTIN K. MAYES
Arizona Attorney General

[76] Cal. Const., art. V, § 13; Cal. Gov't Code §§ 4458, 11136; Cal. Civ. Code § 55.1; Cal. Health and Saf. Code § 19958.5.

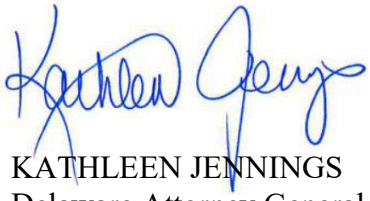
[77] 410 ILCS 25/6.

[78] 71 Ill. Adm. Code 400.



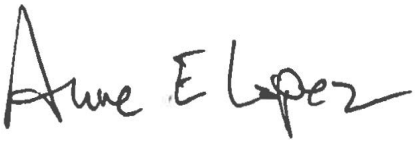
PHILIP J. WEISER
Colorado Attorney General

WILLIAM TONG
Connecticut Attorney General



KATHLEEN JENNINGS
Delaware Attorney General

BRIAN L. SCHWALB
District of Columbia Attorney General

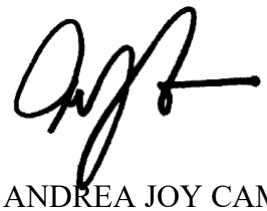


ANNE E. LOPEZ
Hawai'i Attorney General

KWAME RAOUL
Illinois Attorney General

AARON M. FREY
Maine Attorney General

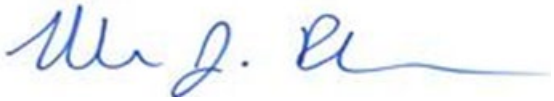
ANTHONY G. BROWN
Maryland Attorney General



ANDREA JOY CAMPBELL
Massachusetts Attorney General

KEITH ELLISON
Minnesota Attorney General

AARON D. FORD
Nevada Attorney General



MATTHEW J. PLATKIN
New Jersey Attorney General

RAÚL TORREZ
New Mexico Attorney General

LETITIA JAMES
New York Attorney General

JEFF JACKSON
North Carolina Attorney General

DAN RAYFIELD
Oregon Attorney General

PETER F. NERONHA
Rhode Island Attorney General

CHARITY R. CLARK
Vermont Attorney General

NICHOLAS W. BROWN
Washington Attorney General

JOSHUA L. KAUL
Wisconsin Attorney General

ANDREA JOY CAMPBELL
MASSACHUSETTS
ATTORNEY GENERAL

LETITIA JAMES
NEW YORK
ATTORNEY GENERAL

ROB BONTA
CALIFORNIA
ATTORNEY GENERAL

Via Federal eRulemaking Portal (Regulations.gov)
David Taggart
Office of the General Counsel, GC-1
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585-0121

RE: Comment on Direct Final Rule Regarding Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions), Docket No. DOE–HQ–2025–0024, RIN 1903-AA20, Document No. 2025-08593, 90 Fed. Reg. 20777 (May 16, 2025)

Dear Mr. Taggart:

The Attorneys General of Arizona, California, Colorado, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin submit this significant adverse comment in response to the above-referenced direct final rule (the "DFR") issued by the Department of Energy ("DOE").[1] The DFR would rescind several longstanding DOE regulations[2] that implement Title VI of the Civil Rights Act of 1964[3] ("Title VI") by addressing disparate impact discrimination, language access, and discriminatory employment practices by recipients of federal funds ("recipients"). These regulations effectuate Title VI's goal of eliminating discrimination in federally funded programs and help to ensure individuals' participation in DOE-funded programs free of discrimination. In sharp contrast, the DFR eliminates core civil rights and anti-discrimination protections that are necessary to advance equal opportunity in DOE-funded programs and in the energy sector as a whole. The undersigned Attorneys General strongly oppose the DFR as both contrary to law and procedurally improper. DOE's unlawful use of a DFR requires DOE to withdraw the DFR in its entirety—including any and all provisions not addressed in detail in this letter.

As Attorneys General, we strongly support ensuring that no residents of our states face unlawful discrimination and that Title VI is robustly enforced in accordance with the intent of

[1] On May 16, 2025, DOE published five direct final rules intended to rescind numerous nondiscrimination regulations implementing multiple statutes, including Title VI of the Civil Rights Act of 1964 ("Title VI"), Title IX of the Education Amendments of 1973 ("Title IX"), and Section 504 of the Rehabilitation Act of 1973 (Section 504).

[2] DOE intends to revoke: (1) 10 C.F.R. §§ 1040.13(c) and (d), prohibiting disparate impact discrimination by recipients; (2) 10 C.F.R. §§ 1040.5(c) and 1040.6(c), establishing language access requirements for recipients; and (3) 10 C.F.R. § 1040.1, 10 C.F.R. § 1040.12, 10 C.F.R. § 1040.14, addressing employment discrimination as applied to funding provided for non-employment purposes and 10 C.F.R. § 1040.8, regarding employment of underrepresented groups.

[3] 42 U.S.C. §§ 2000d *et seq*.

Congress. DOE's disparate impact, language access, and employment discrimination regulations are key tools for reaching these goals. We understand that the institutions, businesses, communities, and individuals in our states and across the nation thrive best with equal access to the resources they need to reach their full potential. DOE provides billions of dollars in grants, contracts, loans, and other financial assistance to advance energy efficiency, accessibility, reliability, affordability in local communities across the United States and to support the research institutions, energy suppliers, and energy regulators shaping energy solutions for the future. It is incumbent on DOE and its funding recipients to ensure that use of these resources advances equal opportunity consistent with the purpose and intent of Title VI. Equally important, DOE and its recipients must make certain that these resources are not used to perpetuate discrimination. The disparate impact framework, as well as DOE's regulations addressing language access and employment discrimination, provide administrable, fair, necessary, and legal frameworks for rooting out unjustified barriers to equality of opportunity in the energy sector–consistent with the purpose and intent of Title VI. The DFR would strip DOE of its ability to work with recipients to identify and address areas where DOE programs and resources fail to benefit all Americans equally. The DFR would further hinder equality of access to energy resources for the millions of people in this country whose first language is not English and constrain the agency's ability to make certain that people working in the energy sector do not face employment discrimination. Not only does DOE's rulemaking discard critical tools for providing these fundamental protections, but the agency also seeks to do so with unprecedented disregard for established administrative procedure and public process. As a result, the DFR violates the Administrative Procedure Act ("APA") in several ways, and DOE must withdraw the DFR in its entirety.

First, DOE subverts the APA's rulemaking requirements by seeking to effectuate the significant changes it proposes through a direct final rule. DOE lacks good cause to invoke any of the APA's exceptions to its notice-and-comment procedures. As a result, DOE has improperly restricted opportunity for meaningful public input on each of these DFRs and eliminated the ability of DOE to meaningfully consider that input before committing to a final agency action.

Second, in rescinding the disparate impact standard, DOE fundamentally mischaracterizes and misapplies the law, rendering its decision unreasonable and, thus, arbitrary and capricious, under the APA. Furthermore, the decision to rescind the disparate impact standard is neither reasonable nor reasonably explained, as required by the APA, as DOE ignores the role of the disparate impact standard in identifying and mitigating the impacts of inequality in the energy sector overall and addressing disparities in energy access—longstanding exercises in cooperative federalism.

Third, DOE's rescission of its language access regulations is contrary to Title VI case law and DOE's and DOJ's interpretation of Title VI. This rescission is also arbitrary and capricious because DOE fails to provide a reasoned explanation for this rescission and fails to consider the need for robust language access protections in DOE programs.

Fourth, the rescission of DOE's employment discrimination regulations is inconsistent with Title VI's legislative history, case law, and DOE's and DOJ's interpretations of Title VI. DOE acts arbitrarily and capriciously by failing to provide a reasoned explanation for this

rescission and failing to consider how this action will subject beneficiaries to an increased risk of discrimination.

Fifth, DOE acts arbitrarily and capriciously by failing to conduct an environmental review of the proposed rescission of its regulations, which is required under the National Environmental Policy Act ("NEPA"). DOE's proposed rescission of these regulations is a major federal action significantly affecting the quality of the environment, thus DOE may not invoke NEPA's review exemption for "strictly procedural" rulemakings.

We have included numerous citations to supporting research in footnotes to this letter, including direct links to the research. We direct DOE to review each of the materials cited, and request that the full text of each of the cited materials, along with the full text of our comment, be considered part of the formal administrative record for purposes of the APA. If DOE will not consider these materials as part of the record in its current form, we ask that you notify us and provide us an opportunity to submit copies of the materials for the record.

I. Background

A. History of Title VI

For nearly a century after the abolition of slavery, government-sanctioned public and private discrimination across the country locked people of color and immigrants out of opportunities and denied them access to essential resources available to white people. Government policies and practices segregated children of color into underfunded schools,[4] imposed and entrenched segregated housing,[5] withheld investments in basic municipal infrastructure and services from communities of color,[6] and concentrated polluting land uses, including industrial facilities, major utilities, and highways within communities of color.[7] These policies and practices

[4] Noliwe Rooks, Integrated, How American Schools Failed Black Children, 5–11 (2025).

[5] *See, e.g.*, Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017); Juliana Maantay, *Zoning, Equity, and Public Health*, 91 Am. J. Pub. Health 1033 (2001), https://doi.org/10.2105%2Fajph.91.7.1033.

[6] *See, e.g.*, US Water Alliance, Closing the Water Access Gap in the United States, DigDeep 8 (2019), Dig-Deep_Closing-the-Water-Access-Gap-in-the-United-States_DIGITAL_compressed.pdf; *see also* Stephen P. Gasteyer et al., Basics Inequality: Race and Access to Complete Plumbing Facilities in the United States, 13 DuBois Rev. 305, 306 (2016) https://doi.org/10.1017/S1742058X16000242 (examining "the relationship between race and access to complete plumbing facilities" and finding "a legacy of structural racism, where investments were not made for those pushed to marginal places in society, be they Indian reservations, counties with migrant farmworkers, or postindustrial 'rust belt' cities"); Coty Montag, Water/Color: A Study of Race and the Water Affordability Crisis in America's Cities, NAACP Legal Def. & Educ. Fund 14 (2019) https://www.naacpldf.org/wpcontent/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf (discussing how "increased residential segregation heightened racial inequities in the provision of municipal services like water and sewer"); Alessandro Rigolon & Jeremy Németh, *What Shapes Uneven Access to Urban Amenities? Thick Injustice and the Legacy of Racial Discrimination in Denver's Parks*, 41 J. Plan. Educ. & Rsch. 11 (2018) (noting that "racist housing policies and divestment in central cities have had long-lasting impacts on the provision of environmental benefits and burdens—from schools to jobs to parks to playgrounds—in cities around the county").

[7] Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 283 (2019) (noting the "role of racially explicit federal, state, and local government policies in creating segregation, which set the stage for the concentration of polluting

denied people of color jobs, the benefits of public and private programs, services, and educational opportunities[8] while at the same time imposing disproportionate health and environmental burdens on them.[9] With the passage of Title VI, Congress aimed to undo these harms by ensuring a future for all Americans free from discrimination in all its forms.

Responding to a "growing demand . . . for the federal government to launch a nationwide offensive against racial discrimination,"[10] Congress enacted Title VI to eliminate federal government support of discriminatory practices by prohibiting discrimination by recipients. Senator Hubert Humphrey, the Senate manager of the Civil Rights Act of 1964, explained that Title VI would: (1) expressly invalidate federal financial assistance statutes that enabled federal grants to racially segregated institutions, despite being deemed unconstitutional by *Brown v. Board of Education*, 347 U.S. 483 (1954)[11]; (2) clarify for federal agencies their authority and obligation to prohibit discrimination in their programs; (3) "insure the uniformity and permanence to the nondiscrimination policy[,]"[12] eliminating the need to debate and pass nondiscrimination language in every new piece of funding legislation and (4) mitigate the need to address discrimination claims through resource- and time-intensive litigation.[13]

To achieve these goals, Section 601 of Title VI mandates that "[n]o person in the United States 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

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sites in communities of color across the country" as discussed in Richard Rothstein's The Color of Law: A Forgotten History of How Our Government Segregated America (2017) and Dorceta Taylor's Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility (2014)).

[8] *See, e.g.*, P. Preston Reynolds, *The Federal Government's Use of Title VI and Medicare to Racially Integrate Hospitals in the United States*, 1963 Through 1967, 87 Am. J. Pub. Health 1850, 1850 (1997) ("Discrimination against African-Americans still existed in the United States in every aspect of medicine in the early and mid-1960s[,]" including admission to medical and nursing schools, appointments to hospital medical staff, and access to medical care).

[9] *See generally* Christopher W. Tessum et al., *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 Sci. Advances 1 (2021); Tracy Hadden Loh, *The Great Real Estate Reset – Separate and Unequal: Persistent Residential Segregation is Sustaining Racial and Economic Injustice in the United States*, Brookings Inst. (Dec. 16, 2020), https://www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/; Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. Times (Aug. 24, 2020), https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html; Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 Health Affairs 879 (2011), https://doi.org/10.1377/hlthaff.2011.0153; Rachel Morello-Frosch & Russ Lopez, *The Riskscape and the Color Line: Examining the Role of Segregation in Environmental Health Disparities*, 102 Env't Rsch. 181 (2006), https://doi.org/10.1016/j.envres.2006.05.007.

[10] U.S. Dep't of Just. C.R. Div., *Title VI Legal Manual* § II, 1 (2024) [hereinafter "*Title VI Legal Manual*"], attached as Exhibit 5; *see also id.* (citing H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)) (Statement of Pres. John F. Kennedy) ("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. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.").

[11] *Title VI Legal Manual*, *supra* note 10, at § II, 2.

[12] *Id.*

[13] *Id.*

Federal financial assistance."[14] Through Section 602, Congress authorized federal agencies to issue regulations that effectuate the national civil rights policy, ensure compliance, and, in the most extreme instances, terminate federal funding for noncompliance.[15] Thus, Congress envisioned that federal agencies would be both Title VI's chief implementers and its primary enforcers.

Consequently, in 1964, the U.S. Department of Justice ("DOJ") and a presidential task force issued model Title VI regulations, which specified that recipients of federal funds may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination" on the basis of race, color, or national origin.[16] Following the promulgation of DOJ's own regulations, "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination."[17] Prohibitions on disparate impact discrimination were therefore considered an integral part of implementing Title VI's protections at the time Title VI was enacted.

B. Disparate Impact Regulations

Although the Supreme Court first recognized disparate impact analysis in *Griggs v. Duke Power Co.*,[18] federal agencies' recognition and use of disparate impact analysis as a means to combat "practices that are fair in form, but discriminatory in operation"[19] stretches back to the New Deal.[20] Building on this history, disparate impact (or discriminatory effect) regulations prohibit policies and practices that have a "disproportionately adverse effect" on protected classes and "are otherwise unjustified by a legitimate rationale."[21] To "effectuate the provisions of Section 601 [42 U.S.C. § 2000d–1]," implementation of such regulations focuses on the consequences of an action rather than the motive—consistent with Congressional intent to eradicate spending of "public funds . . . in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[22]

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[14] 42 U.S.C. § 2000d.

[15] 42 U.S.C. § 2000d–1 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 [42 U.S.C. § 2000d] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . [.]").

[16] 45 C.F.R. § 80.3(b)(2) (2025); *see also* Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16,274–305 (Dec. 4, 1964); *see also Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting 45 C.F.R. § 80.3(b)(2) (1964)).

[17] *Guardians Ass'n*, 463 U.S. at 592 n.13 (1983) (citation omitted); *see also Alexander v. Choate*, 469 U.S. 287, 294 n.11 (1985).

[18] 401 U.S. 424, 431 (1971).

[19] *Id.*

[20] Olatunde C.A. Johnson, The Agency Roots of Disparate Impact, 49 Harv. C.R.-C.L. L. Rev. 125, 136 (2014) (discussing history of agency use of disparate impact analysis); Paul D. Moreno, From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972 at 2 (1997).

[21] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 524 (2015) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)); *see also Lau v. Nichols*, 414 U.S. 563, 568 (1974) (stating that "[d]iscrimination is barred which has that *effect* even though no purposeful design is present" (emphasis added)).

[22] *See Title VI Legal Manual*, *supra* note 10, at § II, 1 (citing H.R. Misc. Doc. No. 124, at 12).

The disparate impact regulations are designed to ensure that, *inter alia*, recipients do not administer federal resources in a manner that "perpetuates the repercussions of past discrimination."[23] Even facially neutral and "benignly-motivated policies . . . may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and many other areas."[24] For example, the federal government has long recognized that the failure to provide information about federally funded programs in languages other than English can have a disparate impact on individuals who have limited English proficiency and may result in national origin discrimination.[25] Thus, federal agencies have relied on DOJ's disparate impact regulations when requiring that recipients adopt reasonable language access policies whenever they serve a large number of limited English proficient ("LEP") individuals.[26]

Disparate impact regulations also help agencies discover if facially neutral practices are "discriminatory in operation."[27] Analysis of discriminatory effect, including through implementation of disparate impact regulations, also functions to unearth covert intentional discrimination and "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[28] The Supreme Court has long recognized that evidence of disparate burden or harm is "a telltale sign of purposeful discrimination."[29]

Title VI disparate impact regulations carry out the purpose of the statute by imposing procedural safeguards that encourage affirmative compliance and proactively reduce the likelihood of the use of federal funds to perpetuate discrimination. Further, these regulations do so while requiring a close look at facially neutral policies and practices that exclude from participation, deny benefits to, or otherwise inflict disproportionate harm on protected groups.[30]

C. Department of Energy Title VI Regulations

In 1977, President Carter issued his National Energy Plan, stating that "[n]o segment of the population should bear an unfair share of the total burden, and none should reap undue benefits from the nation's energy problems."[31] Since DOE's inception that same year,[32] the promise of equal access has been central to the national energy conversation—from energy prices to the

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[23] *Id.* at § VII, 2.
[24] *Id.* at § VII, 2 (first citing *Griggs*, 401 U.S. at 430–31 (1971); then citing *City of Rome v. United States*, 446 U.S. 156, 176–77 (1980); and then citing *Gaston Cnty v. United States*, 395 U.S. 285, 297 (1969)).
[25] *E.g.*, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11595 (July 18, 1970).
[26] *E.g.*, *id*.
[27] *See Griggs*, 401 U.S. at 431 (determining that, in enacting Title VII, Congress required 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.").
[28] *Texas Dep't of Hous.*, 576 U.S. at 540.
[29] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (statistical evidence of disparate impact is often the "only available avenue of proof . . . to uncover clandestine and covert discrimination."); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (evidence of disparate impact provides "an important starting point" in seeking out "invidious discriminatory purpose"); *Washington v. Davis*, 426 U.S. 229, 242–44 (1976) ("disproportionate impact" is highly probative of discriminatory motive).
[30] *See* 28 C.F.R. § 42.101 (2025); *see also Title VI Legal Manual*, *supra* note 10, at § VII, 1–44.
[31] Advisory Comms. to the U.S. Comm'n on C.R., *Energy and Civil Rights* 1 (1980) [hereinafter "U.S. Comm'n on C.R."], https://www2.law.umaryland.edu/marshall/usccr/documents/CR12EN26.PDF.
[32] Department of Energy Organization Act, Pub. L. No. 95–91, 91 Stat. 565 (1977).

impacts of energy infrastructure to access to jobs.[33] Today, DOE manages a suite of programs that provide billions of dollars in grants, contracts, loans, and other financial assistance to advance energy efficiency, accessibility, reliability, and affordability in local communities across the United States and support the research institutions, energy suppliers, and energy regulators shaping energy solutions for the future.

In 1980, to ensure equal access to its programs, DOE promulgated a number of nondiscrimination regulations, including regulations implementing Title VI and prohibiting discrimination based on race, color, or national origin for all recipients of DOE assistance.[34] Consistent with regulations promulgated by DOJ and other federal agencies, DOE's disparate impact regulations prohibit recipients from utilizing "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 of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex . . . ."[35]

These regulations also apply the same disparate impact standard to the siting or location of facilities by recipients, stating, "[i]n determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination because of race, color, national origin, or sex . . . or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of title VI or this subpart."[36]

Moreover, to prevent national origin discrimination, these regulations require recipients to take meaningful steps to ensure individuals with limited English proficiency access to DOE-funded programs. These regulations require that recipients serving significant populations of LEP individuals 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."[37]

DOE's Title VI regulations also implemented Title VI's employment discrimination prohibitions. These regulations prohibit recipients from utilizing employment practices that subject beneficiaries to discrimination on the basis of race, color, national origin, or sex.[38] These regulations prohibit discriminatory employment practices (1) in federally funded programs "where a primary objective of the [f]ederal financial assistance is to provide employment"; or (2) that "cause discrimination . . . with respect to beneficiaries or potential beneficiaries of the assisted

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[33] *See, e.g.*, U.S. Comm'n on C.R., *supra* note 31, at 1; Impact of Energy Prices on Poor: Hearings Before the Subcomm. on Fossil and Synthetic Fuels of the Comm. on Energy and Com., 97th Cong. (1982).
[34] Following the passage of the Department of Energy (DOE) Organization Act, Pub. L. No. 95–91, 91 Stat. 565, 42 U.S.C. 7101 et seq., the functions of the Energy Research and Development Administration, responsible for long-term energy research and development, were transferred to the Department of Energy, which had responsibility for long-term energy research and development.
[35] 10 C.F.R. § 1040.13(c).
[36] *Id.* § 1040.13(d).
[37] *Id.* § 1040.5(c); *see also id.* § 1040.6(c).
[38] *Id.* §§ 1040.1, 1040.12, 1040.14.

program."[39] The language of DOE's disparate impact, language access, and employment discrimination regulations is consistent with analogous regulations promulgated by DOJ and other federal agencies. Further, DOE's regulations have remained unchanged over the past 45 years, through eight presidential administrations.

In issuing these regulations, DOE's contemporaneous statement outlined "what the Department believe[d to be] a simple, workable system of administration" across all its nondiscrimination regulations, including "assurances of compliance; self-evaluation by recipients; establishment of complaint procedures; and notification of employees and beneficiaries of the policy of nondiscrimination of the recipient on the basis of race, color, national origin, sex, handicap, or age."[40] DOE's "responsible civil rights office" is the Office of Civil Rights and Equal Employment, which is housed within the Office of Energy Justice and Equity.[41]

D. DOE's Direct Final Rule

DOE's rule purports to implement Executive Order 14,281, Restoring Equality of Opportunity and Meritocracy, which misconstrues as unconstitutional disparate impact regulations promulgated under Title VI and calls for their repeal or amendment. The DFR would rescind DOE provisions addressing implementation of the disparate impact standard, language access, and employment discrimination under Title VI.

First, the rule amends 10 C.F.R. § 1040.13(c), which prohibits recipients 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[,]" as well as 10 C.F.R. § 1040.13(d), applying the same standard to siting or location of facilities by recipients.[42] As to 10 C.F.R. § 1040.13(c), the rule would rescind the clause prohibiting recipients from utilizing criteria or methods of administration that "have the effect of subjecting individuals to discrimination . . ." and replaces the "effect" language with language that limits the prohibited conduct to utilizing "criteria or methods of administration which *intentionally* subject individuals to discrimination" (emphasis added).[43]

As to 10 C.F.R. § 1040.13(d), the rule would rescind the clauses prohibiting recipients from making "selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination because of race, color, national origin, or sex" and from determining a site or location of facilities with the "purpose or effect of defeating or substantially impairing the accomplishment of the objectives of title VI or this subpart."[44] The rule would, again, replace the "effects" language with language that limits the prohibited conduct to making "selections with the *intent* of excluding individuals from, denying them the benefits of, or

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[39] *Id.* § 1040.12(a)(1)(i)–(ii); *see also id.* § 1040.14.
[40] Nondiscrimination in Federally Assisted Programs; General Provisions, 45 Fed. Reg. 40,514, 40,514 (June 13, 1980).
[41] The office was originally established as The Office of Minority Economic Impact ("OMEI") under the National Energy Conservation Policy Act. *See* Pub. L. No. 95–619, 92 Stat. 3206 (1978).
[42] Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities, 90 Fed. Reg. 20,777, 20,779 (May 16, 2025) (to be codified at 10 C.F.R. pt. 1040) [hereinafter "Rescinding Regulations"].
[43] *Id.* at 20,779-80.
[44] *Id.*

subjecting them to discrimination because of race, color, national origin, or sex" and from determining a site or location of facilities with the "*intent* of defeating or substantially impairing the accomplishment of the objectives of title VI or this subpart."[45]

Second, the rule would rescind DOE's language access provisions, 10 C.F.R. § 1040.5(c) and § 1040.6(c).[46] These regulations require DOE recipients to take reasonable steps to ensure that program and activity information is available in languages other than English whenever a recipient's program or activity serves or is likely to serve a significant population of individuals with limited English proficiency.[47]

Third, the rule would rescind DOE's Title VI employment discrimination regulations (10 C.F.R. §§ 1040.1, 1040.12, 1040.14) as they apply to funding provided for non-employment purposes, even where a recipient's employment practices result in discrimination against program beneficiaries.[48] Relatedly, the rule would rescind DOE's "Effect of Employment Opportunity" regulation, which seeks to ensure recipient compliance with Title VI's employment-related provisions regarding the employment of individuals from underrepresented groups.[49]

II. Comments on Proposed Revisions

A. DOE's Impermissible Use of the Direct Final Rule Violates the APA.

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the APA and rescind nondiscrimination provisions implementing Title VI by direct final rule, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025.[50] The agency purports to use the direct final rule to rescind "unnecessary regulatory provisions" that are either "outdated, raise serious constitutional difficulties, or are based on anything other than the best reading of the underlying statutory authority or prohibition."[51]

The Administrative Conference of the United States ("ACUS"), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies,"[52] recognizes that agencies may use direct final rulemaking only where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking," and "concludes that the rule is unlikely to elicit any significant adverse comments."[53] In such circumstances, the agency should publish in the Federal

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[45] *Id.* (emphasis in original).
[46] *Id.* at 20,778-79.
[47] *Id.*
[48] *Id.* at 20,778.
[49] *Id.* at 20,779.
[50] *See generally* Rescinding Regulations, *supra* note 42.
[51] *Id.* at 20,777–78.
[52] 5 U.S.C. § 594(1).
[53] Admin. Conf. of the U.S., *Administrative Conference Recommendation 2024–6*, Public Engagement in Agency Rulemaking Under the Good Cause Exemption 4 (Dec. 12, 2024), [hereinafter "ACUS 2024–6"] https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf; *see also* 5 U.S.C. §553(b)(B); Off. of the Fed. Reg., A Guide to the Rulemaking Process 9 (2011), https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters").

Register that it is proceeding by direct final rule and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[54]

Here, DOE violates the APA by using the direct final rulemaking process to limit public input into the agency's rescission of the Title VI disparate impact, language access, and employment discrimination provisions. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescissions. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

1. DOE's Rescission Must Undergo Notice and Comment Procedures.

As an initial matter, to enact this recission DOE must use the same notice and comment process as it would to enact new regulations.[55] The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule."[56] Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[57]

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when 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."[58] The good cause exception is "narrowly construed and only reluctantly countenanced,"[59] and courts must "carefully scrutinize the agency's justification for invoking the 'good cause' exception."[60] It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."[61] Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare."[62]

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[54] ACUS 2024–6, *supra* note 53, at 5; *see also* Todd Garvey, Cong. Rsch. Serv., R41546, A Brief Overview of Rulemaking and Judicial Review (Mar. 27, 2017), https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule).
[55] *See* 5 U.S.C. § 553.
[56] *Id.* § 551(5).
[57] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'" (quoting *F.C.C. v. Fox Television Stations, Inc. (Fox)*, 556 U.S. 502, 515 (2009))).
[58] 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule.").
[59] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).
[60] *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010).
[61] *N. J. Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).
[62] *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

Here, DOE provides only a conclusory statement that "th[e] direct final rule rescinds certain unnecessary regulatory provisions related to nondiscrimination in federally assisted programs or activities."[63] This stated justification for the use of a direct final rule does not satisfy the good cause requirement under the APA. First, DOE has it backward: the APA calls for a determination that the *notice and comment process* is "unnecessary," not the regulation.[64] DOE makes no such claim, much less provides any support for it. In any case, as discussed in detail *infra*, these regulations are necessary: they impact a wide array of DOE's federally assisted programs and recipients, and serve to facilitate equality of opportunity, prevent discrimination, and effectuate the remedial goals of Title VI.

Moreover, the "unnecessary" prong of the good cause exception is "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public."[65] As this letter demonstrates, this rescission is plainly not an insignificant or merely technical change, and it is of great consequence to the public. DOE is substantively altering its nondiscrimination regulations to eliminate disparate impact discrimination and employment discrimination protections and dramatically curtail language access in a manner that is contrary to law, including Section 2000d which mandates the enactment of regulations that effectuate Title VI. And as discussed *infra*, Sections B-E, the regulations have a significant effect on the system of cooperative federalism that prevents discrimination, promotes robust language access, and implements Title VI's protections in employment.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the *substance* of the rule."[66] As a threshold matter, it is the province of the judicial branch, not the Executive, "to say what the law is."[67] But even where an agency claims a rescission is necessary to conform to current legal standards—which is not true here—public comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests"[68] or "important aspect[s] of the problem."[69] An agency thus "cannot simply brand [a prior action] illegal and move on."[70]

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[63] Rescinding Regulations, *supra* note 42, at 20,777.
[64] 5 U.S.C. § 553(b)(B); *see also* ACUS 2024–6, *supra* note 53, at 4 (direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "concludes that the rule is unlikely to elicit any significant adverse comments").
[65] *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp.*, 236 F.3d. 749, 755 (D.C. Cir. 2001) (emphasis added); *see also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 244 (2021) (APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment"); U.S. Dep't of Just., Attorney General's Manual on the Administrative Procedure Act, FSU Coll. of L. (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArc hive/1947iii.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.").
[66] ACUS 2024–6, *supra* note 53, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (notice and comment were not required for the agency's "nondiscretionary acts required by [statute]")).
[67] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Marbury v. Madison*, 5 U.S. 107, 177 (1803)).
[68] *Fox*, 556 U.S. at 515.
[69] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983).
[70] *Louisiana v. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]."[71] However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety."[72] DOE has not articulated and the undersigned are not aware of any emergency situation or imminent safety threat that would justify rescinding disparate impact discrimination, language access, and employment discrimination protections that have been in effect for decades.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."[73] For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent."[74] Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical protections afforded by Title VI. And DOE provides no information showing that adequate advance notice of changes to disparate impact discrimination, employment practices, and language access regulations would catalyze unlawful action against the public interest. On the contrary, DOE's proposed rescissions, if sustained, would have the effect of catalyzing actions that are otherwise unlawful under Title VI because those who are *subject* to the statute's strictures may be lulled into believing that DOE has effectively abolished Title VI's mandates.

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[75] and agency action must be evaluated "solely by the grounds invoked by the agency."[76]

2. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments."

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule

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[71] *Util. Solid Waste Activities Grp.*, 236 F.3d at 754.
[72] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases).
[73] *Mack Trucks*, 682 F.3d at 95.
[74] *See Util. Solid Waste Activities Grp.*, 236 F.3d at 755.
[75] *See* 5 U.S.C. § 553(a)(1) (exception for "a military or foreign affairs function of the United States"); *id.* § 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); *id.* § 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").
[76] *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

that a substantive response is required."[77] But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[78] Instead, the agency's unjustified heightened requirements impose an extra barrier to meaningful public participation in DOE's development of this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[79] Unlike the DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[80]

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation direct final rules instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal.[81] For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a direct final rule "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]"[82] And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA.[83] These agencies' rules and practices

[77] *See* Rescinding Regulations, *supra* note 42 at 20,777 (emphasis added).
[78] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).
[79] ACUS 2024–6, *supra* note 53, at 5 (emphasis added).
[80] *See, e.g.*, *Implementation of OMB Guidance on Drug-Free Workplace Requirements*, 75 Fed. Reg. 39,443, 39,444 (July 9, 2010) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); *Defense Priorities and Allocations System*, 73 Fed. Reg. 10,980, 10,981 (Feb. 29, 2008) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); *Collection of Claims Owed the United States*, 68 Fed. Reg. 48,531, 48,532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").
[81] 42 U.S.C. § 6295(p)(4)(C)(i).
[82] 40 C.F.R. § 721.170(d)(4)(i)(B).
[83] 14 C.F.R. § 11.13.

demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[84]

3. DOE Does Not Cite Adequate Legal Authority for the DFR.

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed."[85] As an initial matter, Executive Order 12,250, Leadership and Coordination of Nondiscrimination Laws, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" such as Title VI of the Civil Rights Act.[86] And, pursuant to regulation, DOE must submit proposed amendments of its Title VI implementing regulations to the Assistant Attorney General, Civil Rights Division, and Attorney General for approval.[87] But the DFR does not mention any involvement by DOJ in the rescission of the Title VI regulations at issue here. Furthermore, to the extent DOE provides any reference to legal authority for its rescissions, it relies on the agency's erroneous interpretations of Title VI, the United States Constitution, and Supreme Court case law, discussed in detail at *infra* Sections B-E, which do not stand for the principles the agency claims nor support the action it wishes to take.

4. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment.

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the direct final rule. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments."[88]

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new direct final rule" that responds to the comments.[89] But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new direct final

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[84] In another deviation from established notice-and-comment processes that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response to this DFR. *Compare* Dep't of Energy, *Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions)* (June 13, 2025, 3:50 PM ET), https://www.regulations.gov/document/DOE-HQ-2025-0024-0001 (5,091 comments received and 0 comments publicly posted as of 3:50pm. Eastern Time on June 13, 2025) *with* Dep't of Just., *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov (June 13, 2025, 3:50 PM ET), https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and publicly posted as of 3:50pm. Eastern Time on June 13, 2025).

[85] 5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes).

[86] Exec. Order No. 12,250, *Leadership and Coordination of Nondiscrimination Laws*, § 1–2 (Nov. 2, 1980).

[87] 28 C.F.R. § 42.403(a)–(c) (citing Exec. Order No. 12,250).

[88] 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (citation modified)).

[89] Rescinding Regulations, *supra* note 42, at 20,777.

rule.[90] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the direct final rule in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[91] However, DOE chose not to do so, and DOE may not undercut the public's right to the lawful process required under the APA due to the agency's haste.

B. DOE's Recission of Its Disparate Impact Regulations is Arbitrary and Capricious in Violation of the APA.

DOE's decision to rescind its disparate impact regulations lacks a reasoned basis as it is both based on an erroneous interpretation of the law and in blatant disregard for the consequences of upending its longstanding existing policy and practices on the states and our constituents, all in violation of the APA.

Under the APA, an agency action is arbitrary and capricious if it is not "reasonable and reasonably explained[,]"[92] that is, "if the agency has relied on factors which Congress has not intended it to consider, 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."[93] Agency action is unreasonable and therefore arbitrary and capricious when it "relied on an erroneous interpretation of the law."[94] For decisions to be reasonable, agencies must offer "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[95] When an agency changes its existing policy, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy[.]"[96] Agencies must provide "more detailed justification" for a change in policy when their prior policy "engendered serious reliance interests."[97]

DOE's plan to rescind its disparate impact regulations violates the APA in at least four ways. *First*, DOE bases its proposed rescission on its claim that the disparate impact regulations are unconstitutional. But this claim is wrong, and when an agency "relie[s] on an erroneous

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[90] *See* ACUS 2024–6, *supra* note 53, at 2 (noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[91] *See id.* at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* Off. of the Fed. Reg., *supra* note 53, at 9 ("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."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments on the proposed rule, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

[92] *F.C.C. v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

[93] *State Farm*, 463 U.S. at 43.

[94] *Filazapovich v. Dep't of State*, 560 F. Supp. 3d 203, 243 (D.D.C. 2021), *rev'd and remanded on other grounds sub nom.*, *Goodluck v. Biden*, 104 F.4th 920 (D.C. Cir. 2024).

[95] *Dep't of Commerce v. New York*, 588 U.S. 752, 756 (2019).

[96] *Fox*, 556 U.S. at 515.

[97] *Housatonic River Initiative v. EPA*, 75 F.4th 248, 270 (1st Cir. 2023) (quoting *Fox*, 556 U.S. at 515).

interpretation of the law," its action is unreasonable and therefore arbitrary and capricious under the APA.[98]

Second, DOE contends that the regulations are not authorized by the best reading of Title VI. But this too is an error. The Supreme Court has repeatedly affirmed that disparate impact is a valid theory of discrimination under Title VI that effectuates the statute's command. DOE's erroneous interpretation of Title VI makes its action unreasonable a second time, and likewise arbitrary and capricious under the APA.

Third, DOE fails to consider that its proposed rescission would dismantle a long-established nationwide framework, involving both states and the federal government, for rooting out discrimination and equalizing opportunity. When an agency upends its existing policy and practices, as DOE proposes to do here, the APA requires that it "display awareness that it is changing position," "show that there are good reasons for the new policy," and consider "serious reliance interests."[99] DOE has met none of these requirements with respect to these established structures, and thus falls short of its obligations under the APA.

Fourth, DOE fails to acknowledge, explain, or justify the effects of its proposed rescission on efforts to advance energy equality and combat energy poverty—another longstanding project of cooperative federalism. In making such a drastic change to civil rights and energy policy, the APA requires DOE to consider the impacts of its decision on our states and the constituencies that our states represent and are sworn to protect. DOE has not done so, and the DFR violates the APA for this reason as well.

1. By Basing Its Recission of Its Disparate Impact Regulations on an Erroneous Interpretation of the Constitution, DOE Violates the APA.

DOE's suggestion that there are "serious constitutional difficulties"[100] with its disparate impact regulations is unsubstantiated and incorrect. DOE appears to argue that its regulations, which require recipients to confirm that their programs do not disproportionally harm protected classes, run afoul of equal protection principles. To the contrary, they affirm equal protection principles, and rescinding the regulations will perpetuate, rather than prevent, discrimination.

Disparate impact regulations effectuate Congress' directive to remove "artificial, arbitrary, and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[101] Disparate impact regulations require the identification of programs, policies, and practices that result in outcomes that disproportionally affect one group more than another and lack legitimate justifications and could be achieved through a less discriminatory alternative. In so doing, disparate impact regulations do not attempt to favor one group over another. They are a critical tool used to ensure that recipients comply with Title VI by removing such "artificial, arbitrary, and unnecessary barriers."[102]

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[98] *Filazapovich*, 560 F. Supp. 3d. at 243.
[99] *Fox*, 556 U.S. at 515.
[100] Rescinding Regulations, *supra* note 42 at 20,779.
[101] *Griggs*, 401 U.S. at 431.
[102] *Id.*

Moreover, the Supreme Court has continuously affirmed that "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[103] Without the aid of disparate impact regulations, DOE will, among other things, prevent itself from gathering critical evidence that could allow it to discover whether a recipient is intentionally violating anti-discrimination laws. While DOE states in the DFR that recipients will be required to undertake remedial action where DOE "smokes out"[104] policies masking intentional discrimination, DOE undermines that stated purpose by depriving itself of a longstanding tool used to uncover such discrimination.

In the almost sixty years that the disparate impact standard has existed, no appellate court has ever held that it violates the Constitution.[105] Just ten years ago, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court reaffirmed the constitutionality of the disparate impact standard, noting that the standard "has always been properly limited . . . to avoid serious constitutional questions" because it gives defendants "leeway to state and explain the valid interest served by [the challenged] policies" and includes a "robust causality requirement"[106] tying the challenged policy or practice to the discriminatory effect. DOE's DFR ignores *Inclusive Communities* and departs dramatically from decades of settled precedent.

Contrary to the DFR's assertion, eliminating disparate impact regulations does not comport with the Supreme Court's holding and analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, and the DFR's discussion of it is inapt. *Arlington Heights* concerned the proof necessary to show discriminatory intent under the Equal Protection Clause of the Constitution and did not directly address Title VI.[107] However, as applied to a finding of discriminatory intent under Title VI, the evidentiary approach articulated in *Arlington Heights* directs that "statistics demonstrating a clear pattern of discriminatory effect . . . can be probative" of discriminatory intent.[108] Thus, DOE is incorrect in its assertion that eliminating the disparate impact regulations, which assist in demonstrating findings of intent, somehow "aligns with" *Arlington Heights.*[109]

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[103] *Washington*, 426 U.S. at 242; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("The cases of *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Dev. Corp.* recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work.") (citation omitted).

[104] Rescinding Regulations, *supra* note 42, at 20,780 (citing *Ricci*, 557 U.S. at 595 (Scalia, J., concurring)) (clarifying that "[s]uch remedy shall concentrate on the elimination of the offending practice").

[105] *See* Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 Mich. L. Rev. 1668, 1693 (1997) (commenting on the near-universal acceptance of disparate impact theory as a valid part of antidiscrimination law).

[106] *Texas Dep't of Hous*, 576 U.S. at 540–41.

[107] In *Arlington Heights*, the Court there held that under the Equal Protection Clause, if "there is a proof that a discriminatory purpose has been a motivating factor in [a challenged] decision, [the] judicial deference [that normally attaches to government-sponsored action] is no longer justified," and all evidence must be considered to decide whether the action was intentionally discriminatory. DOE's disparate impact regulations, which seek to ensure that agency-funded programs are administered neutrally, do not carry a discriminatory animus against any group. *Vill. of Arlington Heights*, 429 U.S. at 265–66.

[108] *Title VI Legal Manual*, *supra* note 10, at § IV, 12 (citing *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016)).

[109] Rescinding Regulations, *supra* note 42, at 20,779.

DOE's reliance on *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*),[110] is similarly wrong. Citing *SFFA*, DOE asserts that the "'effect' language of 10 C.F.R. §§ 1040.13(c) and (d) raises serious constitutional difficulties and is not based on the best reading of Title VI."[111] But *SFFA* is inapplicable to the DFR. The Supreme Court's analysis in *SFFA* considered only whether university admission policies that explicitly used race as a "determinative tip" in favor of certain applicants violated the Equal Protection Clause.[112] *SFFA* said nothing about race-neutral practices that have a disparate impact. Particularly after the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, DOE lacks the authority to deviate from judicial precedents affirming the constitutionality of disparate impact analysis based on its unsubstantiated view of the law.[113]

The Constitution prohibits discrimination, not agency regulations aimed at ensuring equal opportunity. It is simply common sense for DOE and its recipients to consider the disparate impacts of their programs and policy choices and to pay attention, and respond, to unjustified racial disparities in their outcomes.[114] Accordingly, because the DFR claims that the recission of DOE's disparate impact regulations are required by its erroneous interpretation of the Constitution, that misapprehension of the law cannot supply the reasoned basis that the APA requires to rescind the regulations.

2. Disparate Impact Regulations Are Authorized by Title VI, and DOE's Recission is Arbitrary and Capricious.

Just as DOE's current disparate impact regulations are authorized by the Constitution,[115] they are likewise statutorily authorized by Title VI, and their use by the agency represents the "best reading" of the statute.[116] DOE's suggestion otherwise is an arbitrary and capricious reading of Title VI. As President John F. Kennedy stated in support of the enactment of Title VI, "[d]irect discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation."[117] Section 601 of Title VI provides that "[n]o person in the United States 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."[118] Section

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[110] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181 (2023).
[111] Rescinding Regulations, *supra* note 42, at 20,779.
[112] *SFFA*, 600 U.S. at 3.
[113] *Loper Bright Enters.*, 603 U.S. at 385 (2024) ("'[I]t is emphatically the province and duty of the judicial [branch],'" not the Executive, "'to say what the law is.'") (quoting, 5 U.S. at 177) (citation modified).
[114] *See Texas Dep't of Hous.*, 576 U.S. at 544–45 (approving the *Croson* plurality's endorsement of "race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races" and the *Ricci* Court's refusal to "question[] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions.") (first quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989); and then quoting *Ricci*, 557 U.S. at 585).
[115] *SFFA*, 600 U.S. at 198 n.2 ("[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.")
[116] *See Loper Bright Enters. v. Raimondo*, 603 U.S. at 400.
[117] *See Title VI Legal Manual*, *supra* note 10, at § II, 1 (citing H.R. Misc. Doc. No. 124 at 12).
[118] 42 U.S.C. § 2000d.

602 of Title VI "authorize[s] and direct[s]" agencies distributing federal funds to "effectuate the provisions of section 2000d . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute."[119] This means that agencies are required to develop enforcement tools and methods that proactively root out and prevent discrimination, not simply punish it when presented with direct evidence of intentional discrimination. Disparate impact regulations provide the agency with preventative tools to ensure the use of federal funds promotes fairness and equality, which is exactly what Title VI was designed to achieve.

The Supreme Court has repeatedly affirmed the validity of agency disparate impact regulations, because "Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination."[120] And although the Supreme Court has understood Section 601, on its own terms, to prohibit only intentional discrimination, it has also acknowledged that this reading of Section 601 does not undermine the validity of an agency's disparate impact regulations under Section 602.[121] Accordingly, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the *status quo* of prior discriminatory . . . practices."[122]

DOE should maintain its disparate impact regulations to give it the tools to root out discrimination in all forms, and to help it find evidence of intentional discrimination. To be able to determine whether the statute has been violated, DOE needs the flexibility and mechanisms in place to address evolving and difficult-to-prove forms of discrimination.[123] Disparate impact regulations provide the agency with preventative tools to ensure the use of federal funds to promote fairness and equality of opportunity, which is exactly what Title VI was designed to achieve. Because DOE's interpretation of Title VI is incorrect, its reliance on that interpretation of the statute to rescind its regulations is arbitrary and capricious.

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[119] 42 U.S.C. § 2000d–1.

[120] *See Guardians Ass'n*, 463 U.S. at 593; *see also Alexander*, 469 U.S. at 293 ("actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."); *see also Lau*, 414 U.S. at 568 (relying in part on an agency's Title VI disparate-impact regulation to order prospective relief in the absence of a finding of discriminatory intent); *see also id.* at 569–71 (Stewart, J., concurring); *see also Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980).

[121] *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) ("[R]egulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.").

[122] *Griggs*, 401 U.S. at 430 (discussing Title VII, a statute with nearly identical language to Title VI) (internal quotation marks omitted).

[123] *Cf. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (recognizing that agencies "generally have authority to promulgate and enforce" broad administrative requirements to "effectuate" a statute's nondiscrimination mandate).

3. DOE Violates the APA by Failing to Consider the Consequences of Unraveling Established and Necessary Frameworks to Root Out Discrimination and Equalize Opportunity.

In violation of the APA, DOE entirely fails to consider the consequences of the DFR in unraveling established and necessary frameworks that "root out discrimination and equalize opportunities for all Americans[,]"[124] or account for the serious reliance interests involved. The federal government must enforce civil rights laws in accordance with the persistent mandate of a "[b]ipartisan and bicameral Congressional consensus."[125] Since the promulgation of DOJ regulations in 1966, federal agencies have effectuated the disparate impact standard as "a required federal agency analytical tool . . . critical to ensuring ongoing, prospective nondiscrimination"[126] and functioning as an "equality directive."[127] Rescinding the disparate impact standard would significantly impair the mechanisms through which federal agencies and recipients identify gaps in access and respond with solutions to improve service delivery and systems across the board, notably including in the energy sector.

Agencies like DOE have the authority and, in many cases are required,[128] to enforce Title VI and the disparate impact standard through a wide array of preventative and responsive tools that emphasize voluntary compliance and build capacity to advance civil rights.[129] Through guidance, technical assistance, education and outreach, data collection, and pre- and post-award compliance mechanisms, agencies can work with recipients to anticipate and prevent, as well as identify and mitigate discrimination, fostering best practices that lead to fairer outcomes in federally funded programs and activities. For example, to proactively address the impacts of historical and persistent discrimination and effectuate the goals of Title VI, the Departments of Transportation, Housing and Urban Development, and Agriculture and the Environmental Protection Agency, have specifically developed guidance and analytical tools to help recipients

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[124] U.S. Comm'n on C.R., *supra* note 31, at 510.
[125] *Id.* at 499.
[126] *Id.* at 501.
[127] Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1345 (2012) [hereinafter "*Beyond the Private Attorney General*"], https://scholarship.law.columbia.edu/faculty_scholarship/1095("Equality directives do more than combat discrimination and bias: They also seek to promote economic and other opportunities, full participation in government-funded programs, and social inclusion for excluded groups.").
[128] 10 C.F.R. § 1040.102 (the designated Agency official shall to the fullest extent practicable "seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part."); *see also* U.S. Comm'n on C.R. *supra* note 31, at 55 (many agencies are "specifically required to issue guidance and technical assistance to recipients of federal financial assistance, which clarifies recipients' obligations under federal civil rights laws.").
[129] U.S. Comm'n on C.R. *supra* note 31, at 498 (Regulations require that "agencies first must attempt to secure voluntary compliance as distinct from mandatory resolution."); *see also Beyond the Private Attorney General*, *supra* note 127, at 1363 (under Title VI and the Fair Housing Act, "a set of regulatory requirements has emerged that places proactive and affirmative duties on federally funded actors.").

engage in data collection,[130] evaluate the potential impacts of programs and activities,[131] and facilitate outreach and public participation.[132]

For many years, state, regional, and local government entities have relied on tools such as impact assessments, equity analyses, and Title VI compliance plans to proactively assess for discriminatory effects and mitigate potential harms.[133] Often, these analyses also function as planning exercises that expand access to a range of policy and infrastructural decision-making processes for historically underserved groups.[134] In some cases, recipients use the process of drafting and implementing a Title VI compliance plan "to ensure that discrimination does not occur

[130] Data collection, and specifically collection of disaggregated data, is a critical tool for understanding inequality in the implementation of the Title VI regulations and the disparate impact standard. Many agencies are required to engage in data collection to evaluate and enforce civil rights compliance. *See e.g.* 7 U.S.C. § 2279–1(a)–(d); *see also, e.g.*, 7 C.F.R. § 15d.4(b); *see also, e.g.*, U.S. Dep't of Agric., Regulation No. 4370–001, Collection of Race, Ethnicity, and Gender Data for Civil Rights Compliance and Other Purposes in Regard to Participation in the Programs Administered by the Farm Service Agency, the Natural Resources Conservation Service, the Risk Management Agency, the Rural Business Service, the Rural Housing Service, and the Rural Utilities Service (Oct. 11, 2011), https://www.usda.gov/sites/default/files/documents/DR4370-001[1].pdf. And some agencies require recipients to participate in data collection and provide tools to facilitate that activity. *See, e.g.*, U.S. DOT Fed. Highway Admin., *Title VI Toolkit: Data Collection and Analysis*, https://highways.dot.gov/civil-rights/programs/title-vi/title-vi-toolkit-data-collection-and-analysis (Mar. 4, 2025) ("In order to measure disparate impact, relevant demographic data for our projects and programs needs to be collected and analyzed to see if one protected class is disproportionately impacted compared to other groups.").

[131] For example, the Federal Transit Administration has long provided recipients a detailed methodology and offered technical assistance for conducting service and fare equity analyses prior to implementing transit service and/or fare changes to determine whether the planned changes will have a disparate impact on the basis of race, color, or national origin. *See generally* Department of Transportation's Federal Transit Administration Notice of Final Title VI Circular, 72 Fed. Reg. 18732 (Apr. 13, 2007), https://www.govinfo.gov/content/pkg/FR-2007-04-13/pdf/E7-7066.pdf; *see also* U.S. Dep't of Agric., Off. of the Assistant Sec'y for C.R., D.R. No. 4300–004: Civil Rights Impact Analysis (Oct. 17, 2016), https://www.usda.gov/directives/dr-4300-004.

[132] U.S. Dep't of Transp., *Promising Practices for Meaningful Public Involvement in Transportation Decision-Making* 2 (2022), https://www.transportation.gov/sites/dot.gov/files/2022-10/Promising%20Practices%20for%20Meaningful%20Public%20Involvement%20in%20Transportation%20Decision-making.pdf (aimed at assisting "USDOT recipients meet the requirements of meaningful public involvement and participation under Title VI of the Civil Rights Act of 1964" and other statutes).

[133] *See, e.g.*, Delaware Valley Regional Planning Commission, *DVRPC's Title VI Implementation Program* 2 (2025), https://www.dvrpc.org/reports/23010.pdf (including tools, methodology, and plans to address public participation of minority and limited English proficient populations, and ensure that Title VI compliance issues are "investigated and evaluated in transportation decision-making"); County of St. Lawrence (New York), Title VI Plan St. Lawrence County 12 (Oct. 20, 2024), https://www.stlawco.gov/sites/default/files/HumanResources/Title%20VI%20Plan.pdf (including a section on data collection, stating that "[i]n order to measure disparate impact, relevant demographic data for St. Lawrence County's projects and programs needs to be collected and analyzed to see if one protected class is disproportionately impacted compared to other groups.").

[134] *Beyond the Private Attorney General*, *supra* note 127, at 1365 ("For instance, this framework has led decisionmakers to change who benefits from public transit and housing programs, to determine where public transit and subsidized housing are located, and to lift zoning and other barriers to housing integration."). *See, e.g.*, Mo. Dep't Transp., Engineering Policy Guide, 127.3 Community Impact Assessment, https://epg.modot.org/index.php?title=127.3_Community_Impact_Assessment (March 5, 2024) (citing Title VI and stating that "[i]n addition to the practical reasons for community impact assessment, multiple major federal regulations, statutes, policies, and Executive Orders legally require and support it").

in" non-federally funded programs.[135] In addition, numerous recipients have instituted public participation plans and protocols aimed at eliminating barriers to meaningful access and involvement in decision making for all.[136] Overall, use of these tools allows "underserved groups to participate in planning and policymaking, engage in front-end redesign of programs and practices, and spur the adoption of practices and policies that promote economic and social opportunity."[137]

The disparate impact standard allows public entities and other recipients to identify where beneficiaries are insufficiently served and improvements are necessary to ensure equal access to decision making and opportunity. Eliminating the disparate impact standard from these systems would create a significant gap, not simply in the consistent and effective enforcement of Title VI, but also in ensuring states and other recipients have all the information and tools they need to make the most effective and fairest decisions when expending taxpayer dollars. Rather than tearing these systems down, causing confusion, and upsetting reliance interests, the federal government should expand the existing disparate impact standard to better effectuate Title VI. For DOE to not consider this important aspect of the problem or account for serious reliance interests in issuing the DFR is arbitrary and capricious and violates the APA.

4. In Violation of the APA, DOE Disregards the DFR's Undermining of Critical Efforts to Advance Equality and Address Energy Poverty.

DOE also arbitrarily and capriciously fails to consider the consequences of rescinding the disparate impact standard on federal, state, and local efforts to prevent discrimination in and advance equality of access to the benefits of our energy system, notably including access to energy and jobs. And in this failing, DOE, again, disregards how eliminating disparate impact regulations would impact states with demonstrated reliance interests in receiving significant tranches of federal funds and must ensure those funds are distributed consistent with the purpose and intent of Title VI.

Equal access to energy resources remains a persistent problem that DOE and recipients have been working to address. Nearly one in three households in the United States are unable to meet their household energy needs[138]—a phenomenon called energy insecurity or energy poverty.[139] Studies confirm the link between socioeconomic status and access to energy

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[135] *See, e.g.*, Tenn. Pub. Util. Comm'n, Title VI Compliance Report and Implementation Plan FY 2023–2024, at 12 (2023), https://www.tn.gov/content/dam/tn/publicutility/documents/reports/titlevi/2324TitleVI.pdf (listing a series of programs for which the Commission states it receives no federal funds and noting "[n]evertheless, the Commission has taken steps to ensure that discrimination does not occur in the operation of these programs").

[136] *See, e.g.*, Mass. Exec. Off. of Energy & Env't Affairs, Department of Public Utilities Public Involvement Plan and Community Engagement and Outreach Guidance (2024), https://www.mass.gov/doc/2024-dpu-public-involvement-plan-english/download; City of Portland, Civil Rights and Meaningful Access Statements, https://www.portland.gov/officeofequity/equity-title-vi-division/civil-rights-and-meaningful-access-statements

[137] *Beyond the Private Attorney General*, *supra* note 127, at 1344.

[138] Carlos Batlle et al., *US Federal Resource Allocations are Inconsistent with Concentrations of Energy Poverty*, ScienceAdvances (Oct. 9, 2024), https://www.science.org/doi/10.1126/sciadv.adp8183.

[139] *See* Tony Gerard Reames, *Targeting Energy Justice: Exploring Spatial, Racial/Ethnic and Socioeconomic Disparities in Urban Residential Heating Energy Efficiency*, 97 Energy Pol'y 549-558 (2016), https://doi.org/10.1016/j.enpol.2016.07.048; *see also* Columbia Mailman School of Public Health, What is Energy

resources,[140] with low-income, Black, Latino/a/x, and Native American households all paying significantly more relative to income than other households,[141] and many experiencing serious long-term impacts as a result, including "increased mortality, decreased physical health, decreased mental well-being, and increased isolation."[142] Energy poverty is linked to the enduring effects of residential racial and income segregation,"[143] including but not limited to the denial of access to opportunities to purchase or rent newer and high-quality housing in environmentally healthy neighborhoods and utility shut-off and access policies and practices that disproportionately impact communities of color.[144] Solutions such as weatherization and energy efficiency retrofit programs have been identified as effective intervention strategies for reducing energy poverty and improving environmental and public health,[145] while also creating job opportunities. However, low-income communities and communities of color "face economic, social, health and safety, and information barriers that impact their ability to access" these programs, requiring targeted interventions.[146]

Congress has allocated to DOE billions of dollars to fill this gap and unlock access to energy for the people who need it most, funding state, tribal, and local programs that support long term energy savings, while creating employment opportunities. For example, DOE's Weatherization Assistance Program supports approximately 8,500 jobs and 32,000 low-income households every year for home energy efficiency improvements.[147] All fifty states, along with almost 750 local agencies, participate in this program, working with subgrantees and subcontractors to reduce utility bills for homeowners and renters while implementing strategies for job training, recruitment and retention.[148] Through the Energy Efficiency and Conservation Block Grant Program, DOE has also allocated nearly $430 million in noncompetitive formula grant funding to state, tribal, and local governments for projects and programs that reduce energy costs, fill infrastructure gaps, and create jobs in communities, as well as enhancing public

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Insecurity, https://www.publichealth.columbia.edu/research/programs/energy-equity-housing-health/what-energy-insecurity (A household's experience of energy insecurity is measured by (1) their household energy expenditures relative to household income or energy burden, (2) the quality of their housing impacting "comfort and costs," and (3) their energy "coping" strategies—i.e. turning energy on and off or forgoing other necessities to "manage physical and economic hardship.").

[140] *See* Miguel Heleno et al., *Optimizing Equity in Energy Policy Interventions: A Quantitative Decision-Support Framework for Energy Justice*, 325 Sci. Direct 1 (Nov. 1, 2022), https://www.sciencedirect.com/science/article/pii/S0306261922010510#b1.

[141] *See* Ariel Drehobl, et al., *How High are Household Energy Burdens?* iii–iv (2020), https://www.aceee.org/sites/default/files/pdfs/u2006.pdf.

[142] *See* Batlle, *supra* note 138; s*ee also* Diana Hernández, *Understanding* '*Energy Insecurity' and Why It Matters to Health*, 167 Soc. Sci. & Med. 1 (Oct. 2016), https://doi.org/10.1016/j.socscimed.2016.08.029.

[143] Reames, *supra* note 139, at 556.

[144] Kathiann M. Kowalski, *Racial Disparities Persist in Electric Services. Is "Willful Blindness" to Blame?*, Energy News Network (Jul. 1, 2020), https://www.canarymedia.com/articles/enn/racial-disparities-persist-in-electric-service-is-willful-blindness-to-blame.

[145] Reames, *supra* note 139, at 550; Connor Harrison & Jeff Popke, *"Because You Got To Have Heat": The Networked Assemblage of Energy Poverty in Eastern North Carolina*, 101 Annals of the Ass'n Am. Geographers 949, 961 (2011), https://doi.org/10.1080/00045608.2011.569659.

[146] Drehobl, *supra* note 141, at 3.

[147] U.S. Dep't of Energy, *Weatherization Assistance Program*, https://www.energy.gov/scep/wap/weatherization-assistance-program.

[148] U.S. Dep't of Energy, Weatherization Assistance Program (2002), https://docs.nrel.gov/docs/fy02osti/31147.pdf; U.S. Dep't of Energy, *Successes & Solutions Center of the Weatherization Assistance Program*, https://www.energy.gov/scep/wap/successes-solutions-center.

transportation.[149] And in recent years, Congress has appropriated to DOE $9 billion in formula funding to state energy offices and tribal governments for "residential energy efficiency and electrification financial assistance programs."[150] These programs have been projected to save consumers up to $1 billion annually in energy costs and support an estimated 50,000 jobs in residential construction, manufacturing and other sectors.[151]

Depending on their implementation, DOE's programs can either help close—or they can entrench and widen—disparities in energy access, as well as pollution exposures, mobility options, and job opportunities, for communities across the country. Critically, the DFR would significantly hinder DOE's ability and mandate to identify and address areas where DOE programs and resources fail to benefit all Americans equally, to address the persistent impacts of discrimination, and to expand equality of access, including for those with the greatest needs. All recipients, including states, will also lose access to important tools, technical assistance, and data that help inform effective decisions and confirm taxpayer dollars are expended in nondiscriminatory ways. Finally, eliminating disparate impact regulations will create additional burdens on states for whom it will now be entirely up to them to ensure that no recipient is disproportionately affecting protected classes in their programming or employment practices.

DOE's failure to consider the states' interest in its continued enforcement of Title VI, ensuring equality of access to the energy and job benefits of the energy sector, is arbitrary and capricious.

C. DOE's Proposed Rescission of its Language Access Regulations is Contrary to Title VI and is Arbitrary and Capricious.

DOE's proposed rescission of its Title VI language access provisions (10 C.F.R. §§ 1040.5(c) and 1040.6(c)) violates the APA because this rescission is contrary to law and arbitrary and capricious. First, DOE's rescission of these regulations is contrary to Title VI case law as well as DOE's and DOJ's previous interpretations of Title VI as it relates to ensuring language access for program beneficiaries with LEP. Second, DOE's rescission of these regulations is arbitrary and capricious because it fails to provide a reasoned basis for this rescission and fails to consider the continuing need for robust language access protections in federally funded programs. Consequently, DOE's proposed rescission of these regulations will increase language barriers for individuals with LEP seeking to participate in federally funded programs and perpetuate national origin discrimination against such individuals.

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[149] Nat'l Renewable Energy Lab'y, *Energy Efficiency and Conservation Block Grant Program*, https://www.nrel.gov/state-local-tribal/energy-efficiency-and-conservation-block-grant (Jun. 12, 2025).
[150] Cong. Rsch. Serv., IF 12258, The Inflation Reduction Act: Financial Incentives for Residential Energy Efficiency and Electrification Projects (2025), https://www.congress.gov/crs-product/IF12258.
[151] U.S. Dep't of Energy, Biden-Harris Administration Awards First State Funding and Announces Progress on Historic $8.8 Billion Home Energy Rebate Programs to Lower Utility Bills (April 18, 2024), https://www.energy.gov/articles/biden-harris-administration-awards-first-state-funding-and-announces-progress-historic-88.

1. DOE's rescission of its language access regulations is contrary to law.

a. The rescission is contrary to Title VI and its case law.

DOE's proposed rescission of its language access regulations contravenes longstanding Title VI case law as well as DOE's and DOJ's language access-related interpretations of Title VI. Most notably, DOE's rescission directly conflicts with the Supreme Court's landmark decision in *Lau v. Nichols*, where it held that Title VI prohibits conduct that has a disproportionate effect on individuals with LEP because such conduct constitutes national-origin discrimination.[152] Moreover, the Supreme Court has long held that laws that require the exclusive provision of government services in English necessarily involve national origin-based classifications.[153] Thus, the failure to provide meaningful language access to LEP individuals may also violate the Equal Protection Clause.[154]

Ignoring *Lau*, however, DOE's proposed rescission would undermine the affirmative steps recipients must take to fulfill their obligations to ensure that beneficiaries with LEP have a meaningful opportunity to access and participate in DOE-funded programs. Further, because recipients rely on DOE regulations for guidance with respect to federal law, including Title VI, DOE's proposed rescission of the language access regulations creates a substantial risk of noncompliance. Thus, DOE flouts Title VI as understood by both Congress and the Supreme Court by failing to require that recipients ensure language access where recipients know or reasonably should know that language access is a barrier to participation in the federally funded programs they operate.

b. The rescissions contradict DOE's and DOJ's past interpretations of Title VI as it relates to language access.

DOE's proposed recission of its language access regulations is also at sharp odds with its previous interpretations of Title VI and the *Lau* decision. As stated previously, agencies are not free to flip-flop in their interpretation of federal law after the law in question has been construed

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[152] *Lau*, 414 U.S. at 568 (holding that Title VI requires that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students").

[153] *Meyer v. Nebraska*, 262 U.S. 390, 398–99 (1923).

[154] In those instances where a government entity knows or has reason to know that a government program serves a significant number of persons with LEP, the government's failure to provide program services in languages other than English may result in national origin discrimination. DOJ argued in *Lau* that the defendant's failure to provide instruction to Chinese-speaking students with LEP violated the Equal Protection Clause. Brief for United States as Amicus Curiae Supporting Petitioners at 21–24, *Lau v. Nichols*, 414 U.S. 563 (1974) (No. 72–6520), 1973 WL 172359, at *21–24 ("*Lau* Amicus Brief"), attached as Exhibit 1. Furthermore, the Supreme Court has held that laws with language restrictions that have the effect of singling out groups based on their national origin may constitute national origin discrimination in violation of the Equal Protection Clause. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524–25 (1926) (invalidating on Equal Protection grounds a facially neutral Philippine law that prohibited "all Chinese merchants from maintaining a set of books in the Chinese language, and in the Chinese characters, and thus prevent[ed] them from keeping advised of the status of their business and directing its conduct"); *see also Lau* Amicus Brief at 20–21.

by the courts.[155] Thus, an agency may not disregard its own previous interpretations of federal law where such interpretations parallel the courts' construction of the law.

Here, DOE has consistently interpreted Title VI to mean that recipients must take affirmative steps to ensure LEP individuals' access to federally funded programs. DOE promulgated its current Title VI language access provisions just four years after *Lau*.[156] These regulations largely mirrored the Department of Health, Education, and Welfare ("HEW") language access regulations at issue in *Lau*, similarly requiring recipients to provide program information in languages other than English to ensure that LEP program beneficiaries have a meaningful opportunity to participate in agency-funded programs.[157]

DOE continued to interpret Title VI in the same fashion when it issued its first LEP guidance in 2004.[158] In this guidance, DOE recognized that, "[i]n certain circumstances, failure to ensure that LEP individuals can effectively participate in or benefit from Federally assisted programs and activities may violate the prohibition in Title VI and Title VI regulations against national origin discrimination."[159] Further, DOE stated that Title VI required DOE and its recipients to "ensure that federally assisted programs aimed at the American public do not leave some persons behind simply because they face challenges communicating in English. This is of particular importance because, in many cases, LEP individuals form a substantial portion of those encountered in federally assisted programs."[160] Recently, DOE reiterated this understanding of Title VI in its December 2024 Language Access Plan.[161] By rescinding its language access regulations, DOE now disregards its own longstanding line of Title VI interpretations. Even more troubling, DOE changes course just six months after last expressing support for its current regulations.

In proposing to rescind its language access regulations, DOE also disregards DOJ's longstanding line of Title VI interpretations regarding language access. To wit, DOJ has consistently interpreted Title VI to mean that recipients must take meaningful steps to ensure that

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[155] *Loper Bright Enters.*, 603 U.S. at 399.

[156] Nondiscrimination in Federally Assisted Programs, 43 Fed. Reg. 53,658, 53,662 (Nov. 16, 1978). Please note, in the proposed rule containing these regulations, § 1040.5(c) was then listed at § 1040.5(d).

[157] *Compare* Identification of Discrimination on the Basis Of National Origin, 35 Fed. Reg. at 11,595 ("Where the inability to speak the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.") *with* 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.").

[158] *See generally* Nondiscrimination in Federally Assisted Programs Enforcement of Title VI of the Civil Rights Act of 1964—Prohibition Against National Origin Discrimination Affecting Persons With Limited English Proficiency (LEP); Policy Guidance, 69 Fed. Reg. 50,366 (Aug. 16, 2004) ("DOE LEP Guidance").

[159] *Id.* at 50,367.

[160] *Id.*

[161] Dep't of Energy, Language Access Plan to Ensure Access to Federally Conducted Programs and Activities by Individuals with Limited English Proficiency 2 n.3 (Dec. 5, 2024) [hereinafter "DOE Language Access Plan"], attached as Exhibit 8.

LEP individuals can participate in federally funded programs. For example, in *Lau*, DOJ argued that Title VI "imposes upon the school authorities . . . an obligation to provide some special instruction to national origin-minority group students within their district who do not have proficiency in the English language sufficient to allow them meaningfully to participate in the educational program which is readily accessible to their English-speaking classmates."[162] Following *Lau*, DOJ promulgated its own Title VI language access regulations in 1976.[163] Patterned after the HEW regulations at issue in *Lau*, DOJ's language access regulations require recipients to take "reasonable steps" to provide program and activity information in languages other than English whenever "a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program . . . needs service or information in a language other than English."[164]

Relatedly, since promulgating its language access regulations, DOJ also has repeatedly emphasized that a "federal aid recipient's failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI."[165] Furthermore, in both Republican and Democratic presidential administrations, DOJ has explained that "Title VI and its regulations require recipients to take reasonable steps to ensure 'meaningful' access to the information and services they provide."[166] DOE's proposed rescission of its language access regulations openly disregards Title VI as interpreted by the Supreme Court, DOE, and DOJ.

In sum, DOE's and DOJ's existing language access regulations reflect *Lau's* construction of Title VI as it applies to recipients serving significant population of individuals with LEP. DOE is not free to turn away from these regulations absent a change in Title VI's statutory language or construction by the courts. Thus, the proposed rescissions are contrary to law and violate the APA.

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[162] *Lau* Amicus Brief at 4.

[163] Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs, 41 Fed. Reg. 52,669, 52,670 (Dec. 1, 1976) (Final Rule); Coordination of Enforcement of Nondiscrimination in Federally Assisted Programs, 41 Fed. Reg. 31,550, 31,551 (July 29, 1976) (Proposed Rule).

[164] 28 C.F.R § 42.405(d)(1).

[165] Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123, 50,123 (Aug, 16, 2000).

[166] *Id.* at 50,124; *see also* Letter from Thomas E. Perez, Assistant Att'y Gen., to Chief Justices & State Court Adm'rs 1 (Aug. 16, 2010), attached as Exhibit 7 ("Policies and practices that deny LEP persons meaningful access to the courts undermine that cornerstone. They may also place state courts in violation of long-standing civil rights requirements. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.* (Title VI)"); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,457–58 (June 18, 2002) [hereinafter "2002 DOJ LEP Guidance"]; Letter from Ralph Boyd, Assistant Att'y Gen., Memorandum for Heads of Departments and Agencies General Counsels and Civil Rights Directors (Oct. 26, 2001) [hereinafter "Boyd Memo"], attached as Exhibit 6; Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 66 Fed. Reg. 3,834, 3,834 (Jan. 16, 2001) ("Title VI was intended to eliminate barriers based on race, color, and national origin in federally assisted programs or activities. In certain circumstances, failing to ensure that LEP persons can effectively participate in or benefit from federally assisted programs and activities or imposing additional burdens on LEP persons is national origin discrimination. Therefore, recipients must take reasonable steps to ensure meaningful access for LEP persons.").

2. DOE's proposed rescission of its language access regulations is arbitrary and capricious.

a. DOE fails to provide a satisfactory explanation for its proposed language access regulation rescissions.

DOE's proposed rescission of its language access regulations is arbitrary and capricious because the Department fails to articulate a reasoned explanation for this policy change, despite the clear harm that will arise from denying the country's millions of LEP individuals access to information about DOE-funded programs in their own language. DOE argues that recission of the regulations is warranted for two reasons: (1) the current regulations "promote the policy goals of revoked Executive Order 13,166"; and (2) Title VI "must be enforced consistent with the Fourteenth Amendment to the U.S. Constitution," and as a result, agencies may only promulgate rules that prohibit intentional discrimination and may not "dictate that a recipient provide services or information in languages other than English."[167] Neither justification is valid or suffices to explain the rescission that DOE proposes.

b. The Language Access Regulations' promotion of the goals of revoked Executive Order 13,166 is not a reasoned basis for rescission of these regulations because the goals of Executive Order 13,166 are in line with Title VI.

DOE's first reason for rescission—that the regulations promote the policy goals of revoked Executive Order 13,166—is without merit and cannot justify the drastic policy change DOE seeks. "Reasoned decision-making requires that when departing from precedents or practices, an agency must offer 'a reason to distinguish them or explain its apparent rejection of their approach.'"[168] While DOE states that the regulations promote the policy goals of a revoked executive order, DOE fails to explain how the promotion of these policy goals contravenes Title VI's language or purpose or otherwise renders the regulations deficient.[169] Nor does DOE explain how the regulations' promotion of the goals of a revoked executive order is a sufficient reason to revoke these regulations under the APA. Indeed, DOE fails to provide any authority for this proposition.

Although DOE's language access regulations advance Executive Order 13,166's goal of ensuring that recipients provide LEP individuals with meaningful access to federally funded programs,[170] DOE's revocation of these regulations is irrational because the policy goals of Executive Order 13,166 are squarely in line with and independently justified by *Lau*. As stated previously, *Lau* held that where the inability to speak and understand English excludes individuals

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[167] Rescinding Regulations, *supra* note 42, at 20,779.

[168] *Physicians for Soc. Resp.*, 956 F.3d at 644 (quoting *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019)).

[169] Although President Trump's Executive Order 14,224, Designating English as the Official Language of the United States, rescinds Executive Order 13,166, President Trump did not state that this revocation was required under Title VI. Exec. Order No. 14,224, 90 Fed. Reg. 11,363, 11,363 (Mar. 3, 2025). Indeed, President Trump did not cite to any specific legal authority for this revocation. *See id*. at 11,363–11,364.

[170] It is questionable whether the regulations intentionally promote the policy goals of Executive Order 13,166 because DOE issued its language access regulations over twenty years before President Clinton issued Executive Order 13,166.

with LEP from participation in federally funded programs, Title VI requires that recipients take affirmative steps to address these language barriers.[171] Similarly, President Clinton issued Executive Order 13,166 with the express goal of "ensur[ing] that recipients of Federal financial assistance . . . provide meaningful access to their LEP applicants and beneficiaries."[172] Therefore, recipients' compliance with the policy goals of Executive Order 13,166 only furthers their compliance with Title VI, relevant case law, and DOE's and DOJ's interpretations of Title VI. Accordingly, DOE cannot argue persuasively that the promotion of the policy goals of Executive Order 13,166 is a reasoned basis for rescinding these regulations.

c. Title VI gives federal agencies the authority to promulgate rules requiring that recipients take specific steps to ensure language access for LEP beneficiaries.

DOE's second explanation for its recission of its language access regulations is likewise unreasoned and fails to justify its departure from decades of past policy and practice. DOE argues that Title VI "does not authorize an agency to dictate that a recipient provide services or information in languages other than English."[173] DOE does not cite to any authority in support of its position, and its position is wrong.[174] As described above, Section 602 of Title VI requires agencies to "effectuate" Section 601's prohibition on intentional discrimination, which may include the use of regulations addressing disparate impacts.[175] For this reason, DOJ stated in its 2002 LEP Guidance that the Supreme Court's *Sandoval* decision did not "invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups," including a recipient's failure to ensure that LEP beneficiaries have a meaningful opportunity to participate in federally funded programs.[176] DOE endorsed DOJ's position when it promulgated its LEP Guidance in 2004 explaining the same.[177]

Like the HEW language access regulations at issue in *Lau*, DOE's language access regulations are necessary to effectuate Section 601's prohibition on national origin discrimination. Rescission of these regulations will have the opposite effect—it will discourage recipients from taking the steps necessary to ensure language access for LEP individuals even where Title VI would otherwise require such actions. Further, rescission of these regulations may make it more difficult to identify recipients using their language access policies (or lack thereof) to intentionally discriminate against LEP individuals. Accordingly, DOE has not provided and cannot provide a reasoned explanation for the rescission of its language access regulations, and, as a result, its decision to do so is arbitrary and capricious.

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[171] *Lau*, 414 U.S. at 568.
[172] Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121 (Aug. 11, 2000).
[173] Rescinding Regulations, *supra* note 42 at 20,779.
[174] *Id*.
[175] *See*, *e.g.*, *Sandoval*, 532 U.S. at 281.
[176] *See* 2002 DOJ LEP Guidance, *supra* note 166, at 41,458; *see also* Boyd Memo, Exhibit 6 ("*Sandoval* holds principally that there is no private right of action to enforce the Title VI disparate impact regulations. It did not address the validity of those regulations or Executive Order 13166. Because the legal basis for Executive Order 13166 is the Title VI disparate impact regulations and because *Sandoval* did not invalidate those regulations, it is the position of the Department of Justice that the Executive Order remains in force.").
[177] DOE LEP Guidance, *supra* note 158, at 50,367–68.

3. DOE fails to recognize the problem that its language access regulations seek to address.

DOE's proposed rescission of its language access regulations is also arbitrary and capricious, because it fails to recognize the continued need for robust language access protections in federally funded programs to prevent discrimination against people with LEP. A significant proportion of the United States population is LEP. According to the U.S. Census Bureau, almost 21.7% of individuals in the United States speak a language other than English at home, and of that population, 8.2% meet the definition of having limited English proficiency.[178]

Relatedly, DOE fails to recognize that ensuring language access in federally funded programs is important because recipients, as opposed to the federal agencies, interact most directly with program beneficiaries and that recipients largely do so without direct federal oversight.[179] For example, DOE delegates the administration of the administration of its Weatherization Assistance Program to state, local, and tribal governments, and recipients are responsible for processing program applications for 32,000 households it serves each year.[180] In the absence of direct oversight, DOE's language access regulations provide critical guidance to recipients as to how best to serve LEP beneficiaries and when they must provide program information in languages other than English. In doing so, these regulations help to ensure that recipients comply with their Title VI obligations.

DOE fails to address any of these realities in explaining its decision to rescind its language access regulations. This omission is especially troubling considering the nationwide footprint of DOE programs like its Weatherization Assistance Program and the significant number of LEP individuals in the United States. Most notably, the rescission of these regulations encourages recipient non-compliance with Title VI as it relates to ensuring language access for LEP individuals. As a result of this non-compliance, LEP program beneficiaries will likely face increased language access barriers, reduced access to critical DOE-funded programs, and heightened risk of national origin discrimination. As such, DOE's proposed rescission of these regulations will defeat the broad remedial goal of Title VI to ensure that federal funds are not used to subsidize discrimination.

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[178] DOE Language Access Plan, Exhibit 8, at 2 n. 3 (citing U.S. Census Bureau, Why We Ask Questions About Language Spoken at Home (Nov. 14, 2022), https://www.census.gov/acs/www/about/why-we-ask-each-question/language/.)

[179] Jacob Hofstetter & Margie Mchugh, Expanding Language Access in Federally Supported Programs, Migration Pol'y Institute 1 (2024), https://www.migrationpolicy.org/sites/default/files/publications/mpi-nciip_federal-language-access-2024_final.pdf ("Although the federal government delivers some important information and services to the public directly (for example, Social Security benefits), providing language access in the programs that federal agencies pass funds to is especially critical, since most members of the public receive services and information from programs delivered by state and local entities, rather than directly from federal agencies or offices.").

[180] U.S. Dep't of Energy, Weatherization Assistance Program, https://www.energy.gov/scep/wap/weatherization-assistance-program; U.S. Dept. of Energy, How to Apply for Weatherization Assistance, https://www.energy.gov/scep/wap/how-apply-weatherization-assistance.

D. DOE's Proposed Rescission of its Title VI Employment Discrimination Regulations Violates the APA Because it is Inconsistent with Title VI and is Arbitrary and Capricious.

DOE also violates the APA by proposing to rescind its Title VI employment discrimination regulations insofar as they cover federally funded programs whose primary purpose is to provide services other than employment. First, DOE's rescission of these regulations is contrary to Title VI's purpose and case law as well as DOE's and DOJ's previous interpretations of Title VI, which are consistent with the statute. Second, the rescission of these regulations is arbitrary and capricious, both because DOE fails to provide a reasoned explanation for its recission of these 45-year-old regulations and because DOE fails to understand the primary goal of these regulations—to eradicate employment practices that result in discrimination against federally funded program beneficiaries and deprive them of the benefits of such programs.

1. The DFR's proposed rescission of DOE's Title VI employment discrimination regulations is contrary to law.

DOE's rescission of its employment discrimination regulations is contrary to Title VI's legislative intent and case law. Further, DOE's rescission of these regulations contravenes DOE's and DOJ's longstanding interpretations of Title VI.

a. The rescission contravene Title VI's legislative history.

By limiting the coverage of its Title VI employment discrimination regulations, DOE deliberately disregards Congress' goal to ensure "that funds of the United States are not used to support racial discrimination."[181] Indeed, Title VI's legislative history makes clear Congress sought to eliminate discriminatory employment practices in all federally-funded programs and activities whenever these practices subjected beneficiaries of federal assistance to discrimination.[182] During the Senate Floor Debate on Title VI, Senator Humphrey explained that "[w]hether and to what extent title VI would affect employment in activities receiving Federal assistance will depend on the nature and purposes of the particular Federal assistance program."[183] For example, in the federal education funding context, Senator Humphrey explained that Title VI may prohibit race discrimination in the employment of and assignment of teachers, where such discrimination affected the educational opportunities of students.[184] Similarly, in the federal healthcare funding context, Senator Humphrey explained that Title VI may prohibit race discrimination in the employment of doctors or nurses where such practices resulted in discrimination against hospital patients, the beneficiaries of such funding.[185]

Conversely, Senator Humphrey made clear that Title VI would not cover the employment practices of recipients if the funding they received was unrelated to providing employment services and if both the employment practice in question did not result in discrimination against program

[181] Exhibit 2, 110 Cong. Rec. 6544.
[182] *Id.*
[183] *Id.* at 6545.
[184] *Id.*
[185] *Id.* at 6546.

beneficiaries.[186] To illustrate this point, Senator Humphrey explained that farm employment would not be affected by Title VI because "[t]he various Federal programs of assistance to farmers . . . were not intended to deal with problems of farm employment, and farm employees are generally not participants in or beneficiaries of such programs."[187]

Moreover, when Congress amended Title VI to add Section 604[188] (later codified at 42 U.S.C. § 2000d–3), Senator Humphrey expressly stated that this amendment did not substantively change Title VI's employment coverage as then understood by the Senate.[189] Thus, the Senate understood Title VI's prohibition of employment practices resulting in discrimination against federal funding beneficiaries as an exception to Section 604.

DOE seeks to rescind regulations that directly implement Congress' goal of bringing recipient employment practices that result in discrimination against beneficiaries within Title VI's employment discrimination coverage. Section 1040.1 (10 C.F.R. § 1040.1) makes clear that recipients may not utilize discriminatory employment practices that negatively impact the delivery of program services. Section 1040.12 further implements this legislative intent by extending Title VI's coverage to employment practices that "cause discrimination on the basis of race, color, or national origin with respect to beneficiaries or potential beneficiaries of the assisted program." And Section 1040.14 drives the point home, emphasizing that Title VI's employment discrimination protections apply to "federal financial assistance which does not have provision of employment as a primary objective . . . if discrimination . . . in such employment practices tends to exclude persons from participation in, deny them the benefits of, or subject them to discrimination under the program receiving Federal financial assistance."

By contrast, DOE's proposed rescissions would undermine DOE's and DOJ's enforcement of Title VI against recipients engaged in such discriminatory employment practices. DOE funding supports a significant number of jobs that provide key services to federal energy program beneficiaries.[190] For example, in 2024, DOE's Office of Manufacturing and Energy Supply Chains ("MESC") Project helped companies create or retain nearly 50,000 jobs.[191] DOE's Title VI employment discrimination regulations are necessary to help ensure recipients operate DOE-funded programs free of discrimination. Accordingly, these proposed rescissions directly flout Title VI's overarching goal of ensuring that federal funds are not used to support discrimination, and thus, violate the APA.

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[186] *Id*. at 6545.
[187] *Id.*
[188] Section 604 of Title VI states, "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment".
[189] 110 Cong. Rec. at 12714, attached as Exhibit 3 (stating "[w]e have made no changes of substance in title VI, which is concerned with discrimination in programs that receive financial assistance from the Federal Government. We have made several minor adjustments and, in addition, we have modified the language to make explicit the declared intention of this title").
[190] *See* U.S. Dep't of Energy, DOE's Top Clean Energy Accomplishments in 2024 (Dec. 23, 2024), https://www.energy.gov/articles/does-top-clean-energy-accomplishments-2024.
[191] *Id*.

b. The rescissions are inconsistent with Title VI case law.

DOE's proposed rescission of its Title VI's employment discrimination regulations is also contrary to law because it ignores nearly 60 years of Title VI case law that Congress ratified when Congress amended Title VI without making substantive changes to its employment discrimination regulations. Just two years after Title VI's enactment, in *United States v. Jefferson County Board of Education*, the Fifth Circuit Court of Appeals held that Title VI prohibited discriminatory teacher employment and assignment policies where such policies had a discriminatory effect on the students because students are the primary beneficiaries of federal funding to public schools.[192] Since *Jefferson County Board of Education*, several Courts of Appeals have similarly held that "Title VI authorizes remedial action if employment practices tend to exclude from participation, deny benefits to, or otherwise subject the primary beneficiaries of a federal program to discrimination in violation of 42 U.S.C. § 2000d."[193]

Congress accepted and ratified these judicial interpretations of Title VI when it amended Title VI in the Civil Rights Restoration Act of 1987 without making substantive changes to Title VI's employment discrimination provisions.[194] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[195] Accordingly, DOE cannot now claim that DOE's employment discrimination regulations in this area "find no support" in Title VI. To the contrary—the regulations are squarely in line with Title VI as understood by both Congress and the courts.

c. The proposed rescissions contravene DOE's previous interpretations of Title VI and DOJ's interpretations of Title VI, which are consistent with Title VI.

DOE's proposed rescission is also contrary to law because it contradicts DOE and DOJ Title VI interpretations stretching back more than 50 years that are consistent with section 601. In line with Title VI's purpose and case law, DOE's current regulations make it abundantly clear that "a recipient's employment practices . . . are subject to Title VI where those practices negatively

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[192] 372 F.2d 836, 882–83 (1966) (citing Title VI's legislative history and reasoning that "under Section 601 it is the school children, not the teachers (employees), who are the primary beneficiaries of federal assistance to public schools. Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers"); *see also Caulfield v. Bd. of Educ.*, 632 F.2d 999, 1005 (2d Cir. 1980) (agreeing with *Jefferson Cnty. Bd. of Educ.* and holding that Section 604 did not prohibit the then Department of Health, Education, and Welfare from enforcing Title VI against a school district for its discriminatory teacher employment practices because such practices discriminates against district students, the beneficiaries of the school funding).

[193] *Ahern v. Bd. of Educ.*, 133 F.3d 975, 977 (7th Cir. 1998); *see also*, *e.g.*, *Mayers v. Campbell*, 87 Fed. App'x 467, 471 (6th Cir. 2003); *Ingram v. Morgan State Univ.*, 74 F.3d 1232 (4th Cir. 1996); *Trageser v. Libbie Rehab. Ctr., Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *abrogated on other grounds by Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984) ("[B]ecause of [section] 604, Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid."); *Marable v. Ala. Mental Health Bd.*, 297 F. Supp. 291, 297 (M.D. Ala. 1969) (finding that patients of state mental health system have standing to bring Title VI challenge against defendants regarding their segregated employment practices because these practices the affect delivery of services to patients and patients were beneficiaries of federal funding).

[194] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted).

[195] *Id.*

affect the delivery of services to ultimate beneficiaries."[196] Further, DOE has consistently interpreted Title VI in this fashion since it first promulgated its employment discrimination regulations in November 1978.[197] Indeed, when DOE finalized these regulations in June 1980, DOE explained that "the employment practices of a recipient or subrecipient are only considered when there is a direct relationship between these practices and the delivery of services to the public."[198]

Relatedly, DOE also ignores DOJ's interpretations of Title VI by seeking to rescind these regulations. In line with Congress, the courts, and DOE's employment discrimination regulations, DOJ interprets Title VI to prohibit discriminatory employment practices in federally funded programs whenever these practices subject program beneficiaries to discrimination.[199] DOJ's Title VI employment discrimination regulations are nearly as old as Title VI itself, promulgated just five years after Title VI's enactment in 1971.[200] In announcing these regulations, DOJ stressed that Title VI prohibited employment practices that subject federally funded program beneficiaries to discrimination.[201] In both the proposed and final rule including these regulations, DOJ explained that the "most important of the proposed uniform amendments involve . . . [p]roviding that discriminatory employment practices are prohibited by title VI to the extent that such practices tend to cause discrimination in the services provided beneficiaries."[202] Indeed, DOJ explicitly maintained this position through January 2025.[203]

Further, because DOE's employment discrimination regulations are largely identical to the courts' construction of Title VI's employment discrimination provisions, DOE is not free to rescind these regulations. Therefore, these proposed rescissions are contrary to Title VI and violate the APA.

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[196] *Title VI Legal Manual*, *supra* note 10, at § X, 1.
[197] Nondiscrimination in Federally Assisted Programs, 43 Fed. Reg. 53,658, 53,659–60, 53,663–64 (Nov. 16, 1978) (Proposed Rule).
[198] Nondiscrimination Federally Assisted Programs; General Programs; General Provisions, 45 Fed. Reg. at 40,515.
[199] 28 C.F.R. § 42.104(c) ("In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries."); 28 C.F.R. § 42.402 ("Covered employment means employment practices covered by title VI. Such practices are those which . . . Cause discrimination on the basis of race, color or national origin with respect to beneficiaries or potential beneficiaries of the assisted program.").
[200] Nondiscrimination in Federally Assisted Programs, 36 Fed. Reg. 23,448, 23,473 (Dec. 9, 1971) (Proposed Rule); Nondiscrimination in Federally Assisted Programs, 38 Fed. Reg. 17,920, 17,955 (July 5, 1973) (Final Rule).
[201] Nondiscrimination in Federally Assisted Programs, 36 Fed. Reg. at 23,448 (Proposed Rule); Nondiscrimination in Federally Assisted Programs, 38 Fed. Reg. at 17,920 (Final Rule).
[202] *Id.*
[203] *Title VI Legal Manual*, *supra* note 10, at § X, 2 ("[W]here a recipient's employment discrimination has a secondary effect on the ability of beneficiaries to participate meaningfully in and/or receive the benefits of a federally assisted program in a nondiscriminatory manner, those employment practices are within the purview of Title VI").

2. DOE's proposed rescission of its Title VI employment discrimination regulations is arbitrary and capricious.

The rescissions proposed by DOE also violate the APA because they are arbitrary and capricious. First, DOE fails to provide a reasoned explanation for drastically limiting the coverage of Title VI's employment discrimination prohibitions. Second, DOE's proposed rescissions demonstrate a failure to understand the problem that these regulations seek to solve—eradicating employment practices that discriminate against the beneficiaries of federally funded programs.

a. DOE fails to provide a reasoned explanation for its rescission of its employment discrimination regulations.

DOE violates the APA because it fails to provide a satisfactory explanation for its drastic rescission of its employment discrimination regulations. "It is axiomatic that the APA requires an agency to explain its basis for a decision."[204] An "agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[205] "[W]here the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."[206]

Although DOE argues that the rescissions it proposes are consistent with Title VI's statutory language, specifically citing to section 604 of Title VI, this explanation fails for several reasons. First, DOE fails to offer any reason for disregarding Title VI's legislative history and Congress' understanding that Title VI would prohibit any employment practice that resulted in discrimination against program beneficiaries regardless of whether the primary purpose of federal funding at issue was to provide employment. Second, DOE fails to distinguish the numerous cases holding that section 604 does not bar enforcement of Title VI against recipients whose employment practices subject beneficiaries to discrimination, even where the funding at issue is not employment-related. Third, DOE fails to address DOJ's as well as its own longstanding view that such practices were within the ambit of Title VI's employment discrimination protections. Fourth, DOE fails to cite to any new statutory or judicial authority that would justify the rescissions it proposes. Indeed, the authorities cited by DOE are not recent, nor do they involve Title VI or its employment discrimination regulations. Simply put, despite the significant policy change it seeks to effect through its rescission of its employment discrimination regulation, DOE has failed to adequately analyze Title VI's legislative history and case law or even its own previous interpretations of Title VI. Therefore, it has failed to engage in the "minimal level of analysis" required by the APA, and consequently, these recissions are arbitrary and capricious.

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[204] *Physicians for Soc. Resp.*, 956 F.3d at 644; *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.").
[205] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
[206] *Encino Motorcars*, 579 U.S. at 221.

b. DOE fails to consider Title VI's overarching goal of ending discrimination in federally funded programs.

By limiting the coverage of its Title VI employment discrimination regulation to only programs whose primary purpose is to provide employment, DOE exhibits a categorical failure to understand the broad, remedial goals of Title VI, especially in the employment context, and Congress's intent that federal funds not be used to subsidize unlawful discrimination. As stated previously, "an agency may not 'entirely fai[l] to consider an important aspect of the problem'" when deciding whether regulation is appropriate."[207]

Here, DOE ignores that "Congress intended that title VI . . . be given the broadest interpretation" and enacted the statute "to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination."[208] For this reason, Senator Humphrey emphasized that Title VI's employment coverage would broadly extend to not only federally funded employment programs, but also any federally funded program where a recipient's employment practices resulted in discrimination against the beneficiaries of such funding.[209] Senator Humphrey even went the extra step of providing examples of how Title VI would operate to bar such practices.[210] Even after Congress amended Title VI to add section 604, Senator Humphrey pointed out that this amendment did not substantively change Title VI's protections, including its employment discrimination coverage, as understood at that point.[211]

DOE now seeks to remove such practices from Title VI's employment discrimination protections, even though these practices discriminate against beneficiaries. The rescissions proposed by DOE would open substantial loopholes that would potentially shield recipients engaged in discriminatory employment practices from DOJ and DOE enforcement, which runs afoul of Congress' Title VI objective. This potential outcome is especially alarming given the large number of jobs supported by DOE funding and the public-facing nature of many of DOE programs. Indeed, states rely on Title VI's employment discrimination protections to help ensure that recipients operate federally-funded programs free of discrimination. Accordingly, DOE's failure to consider how its proposed rescission will increase discrimination against beneficiaries is arbitrary and capricious.

E. DOE also Violates the APA by Rescinding its Effect of Employment Opportunity Regulation.

DOE's rescission of its Effect of Employment Opportunity regulation (10 C.F.R § 1040.8) is arbitrary and capricious because DOE's fails to provide a reasoned justification for the rescission. DOE argues that this regulation "suffers from fatal constitutional infirmities," stating that "the effects of past societal discrimination are not a sufficiently compelling justification for racial classifications by or for any level of government."[212] However, this explanation is

[207] *Michigan v. EPA*, 576 U.S. 743, 752 (2015)
[208] S. Rep. No. 100–64, at 7 (1987), attached as Exhibit 4.
[209] Exhibit 2, 110 Cong. Rec. 6545–6546.
[210] *Id*.
[211] Exhibit 3, 110 Cong. Rec. 12714.
[212] Rescinding Regulations, *supra* note 42, at 20,780.

unreasoned because the regulation does not require that DOE recipients adopt racial classifications to address the underrepresentation of "certain protected groups" in some occupations/professions. *SFFA* is irrelevant, as *SFFA* concerned university admission policies that explicitly used race as a "determinative tip" in favor of certain applicants.[213]

To the extent that DOE is concerned that the regulation prompts recipients to take remedial or affirmative action "for which measures of success depend on whether some proportional goal has been reached amounts to outright racial balancing,"[214] this concern is misplaced. DOE fails to provide any facts or data demonstrating that such action is the necessary consequence of these regulations. It also fails to point to any legal authority suggesting the regulation requires that recipients engage in remedial or affirmative action to address the underrepresentation of certain groups in certain professions/occupations.

F. DOE's Failure to Conduct a National Environmental Policy Act Review of Changes it Proposes is Arbitrary and Capricious and an Abuse of Discretion in Violation of the APA.

The DFR must be withdrawn because DOE has not conducted a review under the National Environmental Policy Act. An agency's failure to comply with NEPA before undertaking agency action is arbitrary and capricious and an abuse of discretion in violation of the APA.[215] DOE contends that it is not required to do such a review, citing DOE's categorical exclusion for rulemakings that are strictly procedural.[216] NEPA does not support such a conclusion.

NEPA requires an environmental review for all "major federal actions significantly affecting the quality of the human environment[.]"[217] Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to the environment" and "stimulate [human] health and welfare."[218] "[R]ecognizing the profound impact of [human] activity" on the environment, NEPA requires the federal government to use all practicable means to improve and coordinate federal plans, functions, programs, and resources to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."[219] NEPA's goals are realized through "'action-forcing' procedures that require that agencies take a 'hard look at environmental consequences,' and that provide for broad dissemination of relevant environmental information."[220]

By rescinding the disparate impact standard, the DFR would significantly affect the human environment by opening the door to the expenditure of billions of dollars in DOE funding in manners that contribute to and exacerbate disproportionately poor environmental and health

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[213] *SFFA*, 600 U.S. at 195.
[214] Rescinding Regulations, *supra* note 42, at 20,780.
[215] *See Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020) ("The Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), provides the governing standard for courts reviewing an agency's compliance with NEPA[.]").
[216] Rescinding Regulations, *supra* note 42, at 20,781 (citing 10 C.F.R. pt. 1021, subpt. D, appendix A6).
[217] 42 U.S.C. § 4332(C); *see also id.* § 4336e(10)(A) (defining major federal action as "an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility").
[218] 42 U.S.C. § 4321.
[219] *Id.* § 4331(a)–(b).
[220] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted).

outcomes in certain communities. For example, as described above, DOE's investments in weatherization, energy efficiency, and transportation mobility options have the potential to provide significant environmental benefits. DOE's disparate impact regulations help facilitate equality of access to the environmental and health benefits flowing from these and other DOE investments. Moreover, DOE investments span a broad range of energy infrastructure projects that inevitably will result in environmental impacts, from accelerating siting and permitting of energy transmission lines[221] to facilitating clean energy demonstration projects including "clean hydrogen, carbon management, advanced nuclear reactors, long-duration energy storage, industrial demonstrations, demonstrations in rural areas and on current and former mine land."[222] The DFR specifically eliminates disparate impact regulations designed prevent siting or location decisions that impose discriminatory effects on a protected class in violation of Title VI.[223]

Similarly, DOE's language access regulations ensure that people with LEP have basic awareness of DOE-funded programs so that they can access DOE resources.[224] The regulations also help to make sure that LEP individuals have notice and the opportunity to be heard in proceedings regarding their use of DOE resources,[225] including in siting and permitting decisions. Eliminating these protections will result in the exclusion of many LEP communities from siting and permitting decisions for which they are directly impacted. The elimination of DOE's language access regulations will likely result in increased language access barriers for LEP program beneficiaries. In turn, these language barriers will likely reduce beneficiaries' access to critical DOE-funded programs that would otherwise improve their environmental and public health. Overall, the DFR would potentially undermine vulnerable communities' access to energy resources and impact decision-making critical to their environmental and public health, resulting in environmental impacts that warrant analysis under NEPA.

For DOE to find that a proposal is categorically excluded from NEPA review, the agency "shall determine" that the proposal is within a categorical exemption, there are "no extraordinary circumstances . . . that may affect the significance of the environmental effects," and the "proposal has not been segmented to meet the definition of a categorical exclusion."[226] An agency's determination that a categorical exclusion applies may be challenged under the APA.[227] Here, DOE invokes the categorical exclusion for "Rulemakings that are strictly procedural, including, but not limited to, rulemaking . . . (under 48 CFR chapter 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking. . . establishing application and review procedures for, and

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[221] U.S. Dep't of Energy, Transmission Siting and Economic Development Grants Program, https://www.energy.gov/gdo/TSED.
[222] U.S. Dep't of Energy, Office of Clean Energy Demonstrations, https://www.energy.gov/oced/office-clean-energy-demonstrations.
[223] Rescinding Regulations, *supra* note 42, at 20,779–80, 83 (rescinding disparate impact "effect" language from 10 C.F.R. § 1040.13(d)).
[224] 10 C.F.R. §§ 1040.5(c), 1040.6(c).
[225] 10 C.F.R. §§ 1040.5(c), 1040.6(c).
[226] *Id.* § 1021.410(b)(1)–(3).
[227] Nancy H. Sutley, Chair, Council on Env't Quality, Memorandum: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act 14 n.30 (Nov. 23, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf.

administration, audit, and closeout of, grants and cooperative agreements."[228] The DFR does not address any of these issues, thus the DFR is not "strictly procedural."[229]

Here, DOE failed to properly consider whether NEPA requires the agency to prepare an environmental assessment or environmental impact statement for this action. Instead, the agency summarily stated that review under NEPA is not required because of the categorical exclusion for DOE's "strictly procedural" rulemakings.[230] But the direct final rule is not strictly procedural: it is a substantive rescission of agency regulations *and* a major federal action affecting the environment.[231] DOE cannot dodge its responsibility to assess the impact of its actions on the human environment. To do so is arbitrary and capricious and an abuse of the agency's discretion.

[228] 10 C.F.R. pt. 1021, subpt. D, appendix A6.
[229] *Cf. Citizens for Better Forestry v. USDA*, 481 F.Supp.2d 1059, 1086–87 (N.D. Cal. 2007) (rejecting the agency's invocation of a CE for "routine administrative, maintenance, and other actions" to its "wholesale adoption of nationwide rules" regarding species viability and diversity requirements for national forests).
[230] Rescinding Regulations, *supra* note 42, at 20,781 (citing 10 C.F.R. pt. 1021, subpt. D, appendix A6).
[231] *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008).

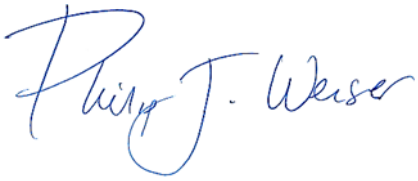
III. CONCLUSION

As detailed above, the DFR contravenes Title VI's goal of eliminating discrimination in federal funding programs. DOE's rescission of its disparate impact, language access, and employment-related regulations will undermine its ability to root out discrimination and enforce Title VI against recipients. For these reasons, the States strongly oppose the DFR, and hence it must be withdrawn.

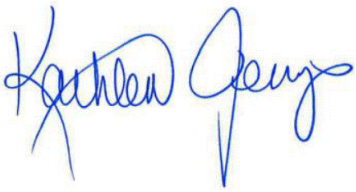
Sincerely,

KRIS MAYES
Attorney General
State of Arizona

ROB BONTA
Attorney General
State of California

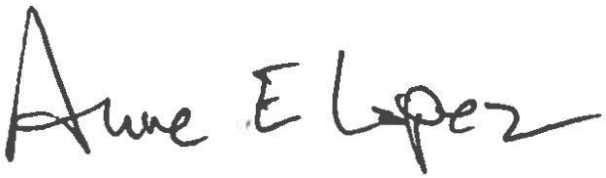


PHILIP J. WEISER
Attorney General
State of Colorado



KATHLEEN JENNINGS
Attorney General
State of Delaware

BRIAN L. SCHWALB
Attorney General
District of Columbia



ANNE E. LOPEZ
Attorney General
State of Hawai'i

KWAME RAOUL
Attorney General
State of Illinois

AARON M. FREY
Attorney General
State of Maine

ANTHONY G. BROWN
Attorney General
State of Maryland

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts

KEITH ELLISON
Attorney General
State of Minnesota

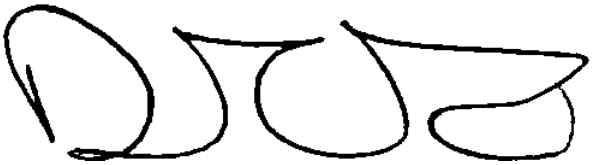
AARON D. FORD
Attorney General
State of Nevada

MATTHEW J. PLATKIN
Attorney General
State of New Jersey

RAÚL TORREZ
Attorney General
State of New Mexico

LETITIA JAMES
Attorney General
State of New York

JEFFREY N. JACKSON
Attorney General
State of North Carolina

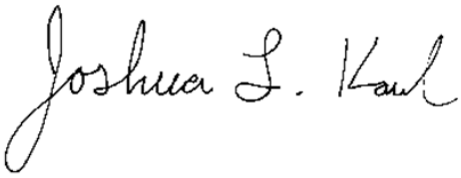


DAN RAYFIELD
Attorney General
State of Oregon

PETER NERONHA
Attorney General
State of Rhode Island

CHARITY R. CLARK
Attorney General
State of Vermont

NICHOLAS W. BROWN
Attorney General
State of Washington



JOSHUA L. KAUL
Attorney General
State of Wisconsin

LETITIA JAMES
NEW YORK
ATTORNEY GENERAL

ROB BONTA
CALIFORNIA
ATTORNEY GENERAL

Via Federal eRulemaking Portal (Regulations.gov)
David Taggart
Office of the General Counsel, GC-1
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585-0121

RE: Significant Adverse Comment to Direct Final Rule Rescinding Regulation Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (DOE-HQ-2025-0025)

Dear Mr. Taggart:

Signatory States Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin submit this comment letter to oppose both the Department of Energy's rescission of subsection (b), Remedial and Affirmative Action and Self-Evaluation, of 10 C.F.R. § 1042.110, and its use of a direct final rule (DFR) for this rescission. Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance ("DFR"), 90 Fed. Reg. 20,788 (May 16, 2025) (to be codified at 10 C.F.R. 1042).[1]

Under 10 C.F.R. § 1042.110(b), recipients of federal education funding "may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation . . . by persons of a particular sex" in an "education program or activity." DOE states without any rationale or support that it has decided to eliminate this long-standing express grant of permission because it is "unnecessary" and "contains no substantive right or obligation." DFR, 90 Fed. Reg. at 20,789. As discussed below, contrary to DOE's statement, this a significant regulatory change, which is wholly inappropriate to promulgate through a DFR, and the decision to eliminate this provision is also arbitrary and capricious under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 551–59.

[1] Signatory States do not oppose the rescission of subsections (c) and (d); Signatory States agree with DOE's assessment that these provisions are long expired. *See* DFR, 90 Fed. Reg. at 20,789.

Signatory States receive billions of dollars of education funding from DOE and operate numerous education programs and activities that receive federal funds, such as state-operated universities and community colleges, and pass federal funding through to local educational agencies. Where, as here, Signatory States have submitted a significant adverse comment, DOE is required to withdraw this DFR. 5 U.S.C. § 553(c); *see also* Section (II)(D), *infra.*

I. Background

A. The DFR's Rescission of the "Affirmative Action" Safe Harbor.

The DFR amends longstanding regulations governing the remedial and affirmative actions that may be taken by recipients of funding contained in 10 C.F.R. § 1042.110. The regulation currently consists of four subsections. Subsection (a) provides: "[i]f the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination." This provision remains in effect.

Subsection (b), entitled "Affirmative action," specifies in its first sentence that "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex" ("Affirmative Action Provision"). The DFR would eliminate this subsection. In other words, the rule, as amended by the DFR, would no longer create a safe harbor affirmatively permitting funding recipients to remain compliant with Title IX while taking "affirmative action" to overcome the effects of conditions that resulted in limited participation in an education program or activity by persons of a particular sex before there is a specific finding of discrimination on the basis of sex in the education program or activity.

As justification for this immediate and substantive change, the DFR offers a conclusory statement that subsection (b) "contains no substantive right or obligation" and that the provision is "unnecessary" without any further reasoning or support. DFR, 90 Fed. Reg. at 20,789.

B. Regulatory History.

The current iteration of the Affirmative Action Provision originates from a public process that was based on a strong history of public participation and a desire for consistency across public agencies. DOE promulgated § 1042.110 on January 18, 2001 as part of a regulatory package intended to replace existing DOE regulations with provisions from a common rule published by the United States Department of Justice ("U.S. DOJ") in order to promote consistent and adequate enforcement of Title IX" across federal agencies. *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 4,627 (Jan. 18, 2001) ("Title IX Common Rule"). The Title IX Common Rule adopted provisions that "for the most part, are identical to those established by the Department of Education ('ED')." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,859

(Aug. 30, 2000). The underlying rationale for promulgating the Title IX Common Rule included "the history of public participation in the development and congressional approval of ED's regulations" and that the regulations were the "result of an extensive public comment process and congressional review," wherein "more than 9700 comments" were received and reviewed before the final regulation was drafted. *Id.*

As U.S. DOJ explained, the substance of the ED regulations (which had originally been issued by the predecessor agency to ED, the Department of Health, Education, and Welfare ("HEW")), were part of a package of Title IX regulations that was promulgated by the agency and, under a process set out in the statute, set before Congress. "[A]fter the final [HEW] regulations were issued, but before they became effective, Congress held six days of hearings to determine whether the regulations were consistent with the statute. Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975)." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,858. This in-depth process of statutory delegation of rulemaking authority, followed by congressional review and approval, has led courts to afford the HEW/ED regulations substantial deference. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (describing statutory process and affording deference to HEW/ED Title IX regulation on employment); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference [to the ED athletics regulation] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.").

II. The Department of Energy Cannot Use a Direct Final Rule to Rescind 10 C.F.R. § 1042.110, Subsection (b).

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the APA to rescind subsection (b) of 10 C.F.R. section 1042.110 by DFR, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025. *See generally* DFR, 90 Fed. Reg. 20,788.

The Administrative Conference of the United States ("ACUS"), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs,"[2] recognizes that agencies may use direct final rulemaking only where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking," and "concludes that the rule is unlikely to elicit any significant adverse comments."[3] In such circumstances, the agency should publish in the Federal

[2] Admin. Conf. of the U.S., *About ACUS,* https://www.acus.gov/about-acus (last visited June 9, 2025) (Attached as Exhibit 1).

[3] Admin. Conf. of the United States, *Public Engagement in Agency Rulemaking Under the Good Cause Exemption* (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf [hereinafter "ACUS 2024-6"] (Attached as Exhibit 2); *see also 5* U.S.C. § 553(b)(B); Off. of the Fed. Reg., *A Guide to the Rulemaking Process* 9, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (last visited

Register that it is proceeding by DFR and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[4]

Here, it is procedurally improper for DOE to use the DFR process to rescind the Affirmative Action Provision within the Remedial and Affirmative Action and Self-Evaluation Regulation, 10 C.F.R. § 1042.110. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescissions. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

A. DOE's Rescission Must Undergo Notice and Comment Procedures.

As an initial matter, to enact this recission, DOE must use the same notice and comment process as it would to enact new regulations. *See* 5 U.S.C. § 553. The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when 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." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule."). The good cause exception is "narrowly construed and only reluctantly countenanced," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) and courts must "carefully scrutinize the agency's justification for invoking the 'good cause' exception." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010). It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *N.J. Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)). Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself

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June 9, 2025) (direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters") (Attached as Exhibit 3).

[4] ACUS 2024–6, *supra* note 3, at 5; *see also* Todd Garvey, Cong. Research Serv., R41546, *A Brief Overview of Rulemaking and Judicial Review* 4 (Mar. 27, 2017), https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule) (Attached as Exhibit 4).

could be expected to precipitate activity by affected parties that would harm the public welfare." *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

Here, DOE did not articulate a good cause finding, per 5 U.S.C. § 553(b)(B), and instead provided only a conclusory statement that the Affirmative Action Provision "contains no substantive right or obligation but rather grants permission for a recipient to 'take action . . . consistent with law.' Accordingly, DOE finds this provision to be unnecessary." DFR, 90 Fed. Reg. at 20,789. DOE has it backward: the APA calls for a determination that the *notice and comment process* is "unnecessary," not the regulation.[5] DOE makes no such claim, much less provides any support for it. In any case, as discussed in detail *infra*, these regulations are necessary: they provide a safe haven permitting recipients, consistent with Title IX, to "take affirmative action" to overcome the effects of conditions that resulted in limited participation in an education program or activity by persons of a particular sex, before there is a specific finding of discrimination on the basis of sex in the education program or activity.

Moreover, the "unnecessary" prong of the good cause exception is "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp. v. EPA,* 236 F.3d. 749, 755 (D.C. Cir. 2001)) (emphasis added).[6] As this letter demonstrates, this rescission is plainly not an insignificant or merely technical change, and it is of great consequence to the public. DOE is substantively altering its regulations to eliminate the safe haven that currently exists, clearly permitting recipients, consistent with Title IX, to "take affirmative action" to overcome the effects of conditions that resulted in limited participation in an education program or activity by persons of a particular sex, before there is a specific finding of discrimination on the basis of sex in the education program or activity. Allowing this affirmative action to occur prior to the finding allows the effects of conditions that resulted in limited participation to be mitigated more quickly.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the *substance* of the rule."[7] As a threshold matter, it is the province of the judicial branch, not the executive, "to say what the law is," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. 107, 177 (1803)). But even where an agency claims a rescission is necessary to conform to current legal standards—which is not true here—public

[5] 5 U.S.C. § 553(b)(B); *see also* ACUS 2024–6, *supra* note 3, at 4 (Direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "concludes that the rule is unlikely to elicit any significant adverse comments").

[6] *See also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 Stan. L. Rev. 237, 244 (2021) (APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment") (Attached as Exhibit 5); Tom C. Clark, Att'y Gen., U.S. Dep't of Just., *Attorney General's Manual on the Administrative Procedure Act*, FSU Coll. of L. (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947cover.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.") (Attached as Exhibit 6).

[7] ACUS 2024–6, *supra* note 3, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (Notice and comment were not required for the agency's "nondiscretionary acts required by [statute]")).

comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), or "important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency thus "cannot simply brand [a prior action] illegal and move on." *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754. However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases). DOE has not articulated, and the undersigned are not aware of, any emergency situation or imminent safety threat that would justify rescission of the regulation permitting recipients to engage in affirmative or remedial actions to mitigate the effects of discrimination on the basis of sex by means of a DFR.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Mack Trucks*, 682 F.3d at 95. For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *See Util. Solid Waste Activities Grp.*, 236 F.3d at 755. Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical opportunities clearly articulated in the Affirmative Action Provision. And DOE provides no reason to suspect that adequate advance notice of changes to a regulation regarding permission to engage in affirmative action to mitigate the effects of discrimination on the basis of sex would catalyze unlawful action against the public interest.

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[8] and agency action must be evaluated "solely by the grounds invoked by the agency." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

B. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments."

[8] *See* 5 U.S.C. §§ 553(a)(1) (exception for "a military or foreign affairs function of the United States"); 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule that a substantive response is required." *See* DFR, 90 Fed. Reg. at 20,789 (emphasis added). But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[9] Instead, the agency's unjustified heightened requirements impose an extra barrier to meaningful public participation in DOE's development of this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[10] Unlike the DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[11]

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation DFRs instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal. 42 U.S.C. § 6295(p)(4)(C)(i). For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a DFR "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]" 40 C.F.R. § 721.170(d)(4)(i)(B). And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we

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[9] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).

[10] ACUS 2024–6, *supra* note 3, at 5 (emphasis added).

[11] *See, e.g.*, *Implementation of OMB Guidance on Drug-Free Workplace Requirements*, 75 Fed. Reg. 39,443, 39,444 (July 9, 2010) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); *Defense Priorities and Allocations System*, 73 Fed. Reg. 10,980, 10,981 (Feb. 29, 2008) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); *Collection of Claims Owed the United States*, 68 Fed. Reg. 48,531, 48,532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").

will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA. 14 C.F.R. § 11.134. These agencies' rules and practices demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[12]

C. DOE Does Not Cite Adequate Legal Authority for the DFR.

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes). As an initial matter, Executive Order Number 12,250, Leadership and Coordination of Nondiscrimination Laws, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" such as Title IX of the Education Amendments of 1972. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250 § 1–2 (Nov. 2, 1980). But the DFR does not mention any involvement by the Department of Justice or the Attorney General in the rescission of the Title IX regulations at issue here.

D. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment.

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the DFR. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments." 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (cleaned up)).[13]

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[12] In another deviation from established notice-and-comment practices that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response to the DFR. *Compare* Dep't of Energy, *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0025-0001
(7,551 comments received and 0 comments publicly posted as of 11:00 AM on June 13, 2025), *with* Dep't of Justice, *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov, https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and 11,826 comments publicly posted as of 11:00 AM on June 13, 2025).

[13] The DOE has already received 7,551 comments on the DFR. Dep't of Energy, *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0025-0001 (last visited June 13, 2025, 8:05 PM).

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new final rule" that responds to the comments. DFR, 90 Fed. Reg. at 20,789. But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new DFR.[14] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the DFR in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[15] However, DOE chose not to do so, and DOE may not undercut the public's right to lawful process required under the APA due to the agency's haste.

III. States Have Relied on the Affirmative Action Provision in Crafting Education Programs to Promote Gender Equality Consistent with Title IX and the Constitution.

While the Affirmative Action Provision does not create a substantive right or obligation, *see* DFR, 90 Fed. Reg. at 20,790, this subsection does provide that "a recipient may take affirmative action consistent with law" even before there has been a "finding of discrimination on the basis of sex" by a "designated agency official." 10 C.F.R. § 1042.110(a)–(b). A designated agency official means "the Director, Office of Civil Rights and Diversity or any official to whom the Director's functions under this part are relegated." § 1042.105. The regulation thus clarifies that a recipient will not violate Title IX where the recipient takes affirmative steps, even absent an investigation or finding by the Agency, to "overcome the effects of conditions that resulted in limited participation" in recipient's programs or activities "by persons of a particular sex." § 1042.110(b).

In reliance on this regulation, the Signatory States have historically crafted a variety of approaches to remedy past discrimination. For example, New York provided grants to local educational agencies to provide career and technical education programs with support and resources to, *inter alia*, promote gender diversity in non-traditional career paths.[16] Additionally, California provided train-the-trainer grants to local educational agencies to establish a program of professional development in the identification and elimination of gender bias and inequality in

[14] *See* ACUS 2024–6, *supra* note 3, at 2 (Noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[15] *See* ACUS 2024–6, *supra* note 3, at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* Off. of the Fed. Reg., *supra* note 3, at 9 ("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."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

[16] N.Y. State Dep't of Educ., *Removing Barriers to CTE Programs for English Language Learners and Students with Disabilities Grant Application*, https://www.p12.nysed.gov/funding/2017-2018-cte-ell-swd/home.html (last updated Mar. 17, 2017).

California's local educational agencies.[17] Furthermore, the Department of Energy itself has provided grants to Signatory States for programs that may be characterized as promoting "affirmative action consistent with law." For example, one of Washington's community colleges received the Community Capacity Building Grant from the Department of Energy to, *inter alia*, create more inclusive teaching and training to serve all students while limiting barriers for historically underrepresented students.[18]

IV. The Rescission of the Rule Jeopardizes the States' Efforts to Remedy Discrimination, Subjects States to Enforcement Actions, and Opens Them to Liability from Private Litigants.

In addition to jeopardizing the remedial approaches described above, rescinding the Affirmative Action Provision may place States in the untenable position of providing programs that further the goals of Title IX, while risking implementation challenges by DOE or private litigants. Furthermore, by removing this provision, DOE may create doubt as to recipients' (including States') authority under Title IX to proactively remedy instances of sex discrimination or "limited participation" in their programs. DOE has previously recognized the importance of Title IX protections for women and girls in STEM, stating that Title IX helps to secure "a clean energy future by closing the gender gap in math and science."[19] As DOE notes, Title IX is critical to "ensure that the recruitment, retention, training and education practices at the school are inclusive for both men and women."[20] Chilling efforts to promote gender equality will undermine rather than effectuate the purpose of Title IX to eliminate discrimination on the basis of sex. *See* 20 U.S.C. § 1681(a).

The rescission of this provision raises particular concerns for the Signatory States in light of the current administration's overt hostility to affirmative efforts to remedy discrimination. The administration has taken steps to stamp out efforts—in both government and the private sector—focused on remedying past and present discrimination, and continuing disparities, based on race, sex, and other characteristics protected by civil rights laws. For example, Executive Order Number 14,173 condemns "sex-based preferences," "diversity," "affirmative action," and "workforce balancing" as "dangerous, demeaning, and immoral" and as "illegal, pernicious discrimination," Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14,173, 90 Fed. Reg. 8,633, 8,633–34 (Jan. 31, 2025), even though many such programs have lawfully sought to *remedy* discrimination and effectuate civil rights laws.

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[17] Cal. Dep't of Educ., *Gender Equity Train-the-Trainer Grants*, https://www.cde.ca.gov/fg/fo/profile.asp?id=226 (last updated Aug. 3, 2007).
[18] Columbia Basin College, *Clean Energy Learning Center Full Application Submitted to Department of Energy Community Capacity Building Grant Program (DE-FOA-0003131)* (Apr. 30, 2024); Off. of Env't Mgmt, U.S. Dep't of Energy, *DOE Announces $18.9 Million Financial Assistance Grant Award Selections to 12 Disadvantaged Communities Across Country* (Sept. 12, 2024), https://www.energy.gov/em/articles/doe-announces-189-million-financial-assistance-grant-award-selections-12-disadvantaged.
[19] U.S. Dep't of Energy, *Title IX: More Than Just Sports* (June 23, 2011), https://www.energy.gov/articles/title-ix-more-just-sports (Attached as Exhibit 7).
[20] *Id.*

Similarly, Executive Order Number 14,151 characterizes "diversity, equity, and inclusion" programs as "illegal," "immoral," and "shameful discrimination," and directs the Office of Management and Budget to "review and revise . . . all existing Federal employment practices, union contracts, and training policies or programs" to "terminate" any "factors, goals, policies, mandates, or requirements" to promote diversity. Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8,339, 8,339 (Jan. 29, 2025). The administration has also begun to require recipients of federal grants and funding, including State recipients of Title IX and Title VI funds, to provide assurances that they will not promote diversity, equity, or inclusion in their programs.[21]

Given these actions, it is evident that the current administration regards as impermissible any program to remedy discrimination or its ongoing effects—far beyond the forms of affirmative action that courts have found unlawful. The administration's actions also run directly counter to Signatory States' ongoing efforts to eliminate discrimination, remedy its ongoing effects, and foster equal opportunity for all. Without express permission to redress sex discrimination—which the Affirmative Action Provision currently provides—recipients, including Signatory States, may not know which remedial efforts will be regarded as lawful, and which will be subject to arbitrary enforcement action by DOE.

Furthermore, because Title IX creates a private right of action, including money damages, *e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639–40 (1999), removing the Affirmative Action Provision might expose recipients, including Signatory States, to potential liability to private litigants. Even if such private lawsuits were ultimately deemed meritless, rescinding recipients' express permission under the Affirmative Action Provision may invite private litigants to challenge States' efforts to remedy discrimination, which will require States to divert scarce resources and personnel to defend against such challenges. Consequently, the rescission will also create a risk that States will be needlessly and improperly chilled from taking lawful remedial action to effectuate Title IX, potentially halting or reversing decades of progress.

V. The Signatory States Oppose the Rescission of 10 C.F.R. § 1042.110(b) and Raise Sufficiently Serious Objections to Require DOE to Withdraw the DFR.

DOE has not offered a sufficient justification or explanation for the withdrawal of the Affirmative Action Provision. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"). The sole basis for DOE's determination that the Affirmative Action Provision is "unnecessary" is that the provision "contains no substantive right or obligation but rather grants permission for a recipient to 'take action . . . consistent with law.'" DFR, 90 Fed. Reg. at 20,789 (ellipsis in original). But this is no explanation at all—DOE does not articulate why a regulatory grant of permission is "unnecessary," or why that grant of permission, which clarifies recipients' ability to address sex

[21] *See, e.g.,* U.S. Dep't of Educ., *ED Requires K–12 School Districts to Certify Compliance with Title VI and* Students v. Harvard *as a Condition of Receiving Federal Financial Assistance* (Apr. 3, 2025), https://www.ed.gov/about/news/press-release/ed-requires-k-12-school-districts-certify-compliance-title-vi-and-students-v-harvard-condition-of-receiving-federal-financial-assistance (Attached as Exhibit 8).

discrimination under Title IX, should be rescinded. Put differently, there are at least two fatal gaps in DOE's reasoning: Why is a grant of permission an unnecessary regulation? And even if the provision merely clarifies recipients' permission, without creating substantive rights or obligations, why is its rescission justified on that basis? DOE's anemic explanation—comprising all of two sentences—cannot justify the withdrawal of this longstanding provision of the Title IX Common Rule, which, as discussed above, was adopted after extensive public commentary and congressional review.

This failure of reasoned explanation renders the DFR arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A). *See State Farm*, 463 U.S. at 43. The rescission is also arbitrary and capricious because DOE has "entirely failed to consider" at least three "important aspect[s] of the problem." *See id.* First, in withdrawing the Affirmative Action Provision, DOE has failed to account for the fact that recipients, including Signatory States and their educational agencies, rely on clear guidance as to what efforts to remedy discrimination are permissible, and in what circumstances. DOE has not addressed the potential confusion and lack of clarity that will be created when the express grant of permission in the Affirmative Action Provision is rescinded. Second, DOE has not considered the difficult question of what standards will be applied, in the absence of the Affirmative Action Provision, to determine whether a remedial plan is permissible, or the potential chilling effect of withdrawing the grant of permission to recipients—who may feel compelled to wait for a finding of noncompliance before undertaking remedial efforts. Third, the resulting lack of clear standards, and potential chilling effect, are likely to undermine recipients' efforts to redress the very discrimination Title IX seeks to prohibit, *see* 20 U.S.C. § 1681(a), while DOE offers no explanation whatsoever as to how the withdrawal of the Affirmative Action Provision serves to effectuate the goals of Title IX.

DOE also misrepresents the impact that the rescission of the Affirmative Action Provision will have on the States. The DFR asserts that "DOE has examined this rescission and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government." DFR, 90 Fed. Reg. at 20,790. This conclusion is simply incorrect. By revoking recipients' grant of permission to remedy discrimination absent a finding by the Agency, DOE is necessarily arrogating a greater degree of decision-making authority for itself. States and their educational agencies, absent express permission, will have less clarity about their ability to remedy discrimination and the circumstances in which they can take action. As a result, the local and state actors who are best positioned to understand any discrimination that may be present in their institutions, and the steps needed to remedy such discrimination, will be discouraged from implementing such remedies without a finding of discrimination by DOE. Contrary to DOE's conclusion, then, the DFR thus inherently shifts "power and responsibilities" in the educational context away from the local and state levels and towards the federal level.

These serious deficiencies of the DFR require its withdrawal. As discussed in Section (II) above, if DOE wishes to proceed with this misguided deregulatory action, it must undertake notice-and-comment rulemaking in accordance with the APA and cure the DFR's shortcomings under the arbitrary-and-capricious standard.

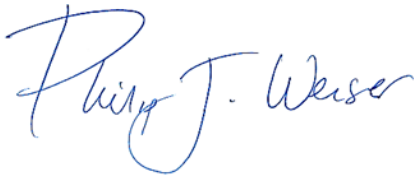
VI. Conclusion

For the reasons stated above, the Signatory States oppose the rescission of the Affirmative Action Provision, subsection (b) of 10 C.F.R. § 1042.110. Signatory States also oppose DOE's use of a direct final rule on the procedural grounds stated herein.

Sincerely,

KRIS MAYES
Attorney General
State of Arizona

ROB BONTA
Attorney General
State of California



PHILIP J. WEISER
Attorney General
State of Colorado

WILLIAM TONG
Attorney General
State of Connecticut

KATHLEEN JENNINGS
Attorney General
State of Delaware

BRIAN L. SCHWALB
Attorney General
District of Columbia

KWAME RAOUL
Attorney General
State of Illinois

AARON M. FREY
Attorney General
State of Maine

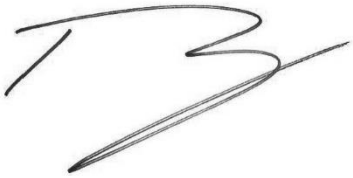
ANTHONY G. BROWN
Attorney General
State of Maryland

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts

KEITH ELLISON
Attorney General
State of Minnesota

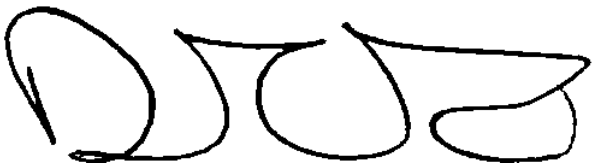
AARON D. FORD
Attorney General
State of Nevada

MATTHEW J. PLATKIN
Attorney General
State of New Jersey



RAÚL TORREZ
Attorney General
State of New Mexico

LETITIA JAMES
Attorney General
State of New York



DAN RAYFIELD
Attorney General
State of Oregon

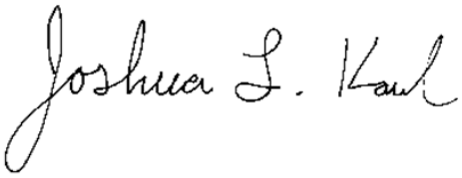
PETER NERONHA
Attorney General

CHARITY R. CLARK
Attorney General

State of Rhode Island

NICHOLAS W. BROWN
Attorney General
State of Washington

State of Vermont



JOSHUA L. KAUL
Attorney General
State of Wisconsin

LETITIA JAMES
NEW YORK
ATTORNEY GENERAL

ROB BONTA
CALIFORNIA
ATTORNEY GENERAL

Via Federal eRulemaking Portal (Regulations.gov)
David Taggart
Office of the General Counsel, GC-1
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585-0121

RE: Significant Adverse Comment to Direct Final Rule Rescinding Regulation Related to Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance (DOE-HQ-2025-0016)

Dear Mr. Taggart:

Signatory States California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin provide comment on the Department of Energy ("DOE") Direct Final Rule, published at 90 Fed. Reg. 20,786 (May 16, 2025) (to be codified at 10 C.F.R. pt. 1042), Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance ("DFR"). The DFR rescinds, effective immediately, a key provision of longstanding Title IX rules governing recipients' obligations to effectively accommodate students in athletic programs and activities regardless of sex. Specifically, the DFR eliminates the provision of 10 C.F.R. § 1042.450 that requires recipients to allow students to try out for single-sex sports teams (except contact sports) that are designated for the other sex where there is no parallel team for members of their sex, and athletic opportunities for members of the excluded sex have been limited ("the Tryout Rule.").

Signatory States oppose the rescission of the Tryout Rule on both procedural and substantive grounds. First, such a significant regulatory change is inappropriate to promulgate though a DFR, a process reserved for noncontroversial and non-substantive changes. Second, rescission of the Tryout Rule is arbitrary and capricious because it would result in fewer, not more, opportunities for female athletes whose interests it purports to protect; is premised upon no evidence and no reasoned decision-making; and fails to consider important aspects of the problem, including States' reliance interests in this longstanding regulation and its consistent application across federal agencies, the chaos and uncertainty the abrupt rescission of this longstanding rule creates, and the health and wellbeing of women and girls who enjoy increased access to athletic opportunities under the current Tryout Rule and who would lose such

opportunities without it. And third, this rescission is contrary to law and unconstitutional because it relies on impermissible stereotypes about men and women to justify maintaining and expanding sex-separate teams, and further relies on an executive order that itself is premised on unlawful stereotypes and impermissible animus.

Signatory States receive billions of dollars of education funding from DOE, operate numerous education programs and activities that receive federal funds, such as state-operated universities and community colleges, and pass federal funding through to local educational agencies. Where, as here, Signatory States have submitted a significant adverse comment, DOE is required to withdraw this DFR. 5 U.S.C. § 553(c); *see also* Section (II)(D), *infra.*

I. Background

A. The DFR's Amendment to the Title IX Athletic Participation Rule.

The DFR amends longstanding regulations governing athletic participation contained in 10 C.F.R. § 1042.450.

Subsection (b), entitled "Separate teams," specifies in its first sentence that "a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." The remainder of subsection (b), which the DFR eliminates, goes on to state:

> [W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

§ 1042.450(b). In other words, the rule, as amended by the DFR, continues to permit separate teams under the circumstances specified in the first sentence of subsection (b), but no longer contains the Tryout Rule or a definition of "contact sports."

As justification for this immediate and substantive change, the DFR states, without any support for its assertions, that rules allowing for mixed participation "ignore differences between the sexes which are grounded in fundamental and incontrovertible reality while also imposing a burden on local governments and small businesses who are in the best position to determine the needs of their community and constituents." DFR, 90 Fed. Reg. at 20,786. The DFR further states that "[t]he modification also aligns the rule with Presidential direction under E.O. 14201 'Keeping Men Out of Women's Sports' which makes clear it is the policy of the United States to 'oppose male competitive participation in women's sports more broadly, as a matter of safety, fairness, dignity and truth.'" *Id.* (citing Keeping Men Out of Women's Sports, Exec. Order No. 14,201 (Feb. 5, 2025) [hereinafter "Sports Ban EO"]).

B. Regulatory History.

The current iteration of the athletics regulations, including the Tryout Rule, originates from DOE's adoption of a common Title IX rule (the "Title IX Common Rule") published by the U.S. Department of Justice ("U.S. DOJ") and based on regulations originally issued by the U.S. Department of Health, Education, and Welfare ("HEW"), the predecessor to the U.S. Department of Education ("ED"). *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 4,627 (Jan. 18, 2001). The underlying rationale for promulgating the Title IX Common Rule and HEW regulations was a desire "to promote consistent and adequate enforcement of Title IX" across federal agencies. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. at 4,627. The Title IX Common Rule and HEW regulations are supported by a strong history of "an extensive public comment process and congressional review," wherein "more than 9700 comments" were received and reviewed before the final regulation was drafted, and six days of congressional hearings took place to approve the regulation. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859. This regulatory history of extensive public input, followed by congressional review and approval, has led courts to afford substantial deference to the HEW/ED regulations, on which the Title IX Common Rule is based. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (describing statutory process and affording deference to HEW/ED Title IX regulation on employment); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference [to the ED athletics regulations] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX."). DOE replaced its existing regulations with the Title IX Common Rule, including the Tryout Rule, in 2001. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. at 4,627.

Moreover, the athletics regulations have been the subject of substantial sub-regulatory guidance over the years, which has remained in place across numerous administrations.[1] Recipients, including state universities, state educational agencies, and local educational agencies, have relied on these longstanding regulations and the accompanying guidance in structuring their academic and athletic programs to ensure compliance with Title IX.

II. DOE's Impermissible Use of the Direct Final Rule Violates the APA.

[1] *See* Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter "1979 Policy Interpretation"]; U.S. Dep't. of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), https://www.ed.gov/laws-and-policy/higher-education-laws-and-policy/higher-education-policy/clarification-of-intercollegiate-athletics-policy-guidance-the-three-part-test [hereinafter "1996 Clarification"] (Attached as Exhibit 1); U.S. Dep't of Educ., Off. for C.R., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/title9guidanceFinal.pdf [hereinafter "2003 Clarification"] (Attached as Exhibit 2).

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the APA and rescind a longstanding regulation implementing Title IX by direct final rule, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025. *See generally* DFR, 90 Fed. Reg. at 20,786.

The Administrative Conference of the United States ("ACUS"), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies," 5 U.S.C. § 594(1), recognizes that agencies may use direct final rulemaking only where the agency for good cause finds that it is "impracticable, unnecessary, or contrary to the public interest" to undertake notice-and-comment rulemaking, and "concludes that the rule is unlikely to elicit any significant adverse comments."[2] In such circumstances, the agency should publish in the Federal Register that it is proceeding by direct final rule and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[3]

Here, DOE violates the Administrative Procedure Act ("APA") by using the direct final rulemaking process to limit public input into the agency's rescission of the Tryout Rule. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescission. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

A. DOE's Rescission of the Tryout Rule Must Undergo Notice and Comment Procedures.

As an initial matter, to enact this recission, DOE must use the same notice and comment process as it would to enact new regulations. *See* 5 U.S.C. § 553. The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action

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[2] Admin. Conf. of the U.S., *Public Engagement in Agency Rulemaking Under the Good Cause Exemption* (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf [hereinafter "ACUS 2024–6"] (Attached as Exhibit 3); *see also* 5 U.S.C. § 553(b)(B); Off. of the Fed. Reg., *A Guide to the Rulemaking Process* 9, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (last visited June 9, 2025) (direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters") (Attached as Exhibit 4).

[3] ACUS 2024–6, *supra* note 2, at 5; *see* also Todd Garvey, Cong. Research Serv., R41546, *A Brief Overview of Rulemaking and Judicial Review* 4 (Mar. 27, 2017), https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule) (Attached as Exhibit 5).

undoing or revising that action.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when 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." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule."). The good cause exception is "narrowly construed and only reluctantly countenanced," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012), and "courts must carefully scrutinize the agency's justification for invoking the 'good cause' exception." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010). It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *N.J. Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)). Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare." *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

Here, DOE does not articulate a good cause finding under the APA. As a threshold matter, the APA calls for a determination that the notice and comment process is "unnecessary." 5 U.S.C. § 553(b)(B).[4] DOE makes no such claim, much less provide any support for it. Moreover, the "unnecessary" prong of the good cause exception is "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp. v. EPA,* 236 F.3d. 749, 755 (D.C. Cir. 2001)) (emphasis added).[5] As this letter demonstrates, this rescission is plainly not an insignificant or merely routine change, and it is of great consequence to the public. DOE is substantively altering its nondiscrimination regulations to eliminate a regulation that for several decades has paved the way for women's athletic participation in sports from which they would otherwise have been utterly excluded. And by eliminating the definition of contact sports, it invites a vast expansion of single-sex athletic

[4] *See also* ACUS 2024–6, *supra* note 2, at 4 (Direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "[c]oncludes that the rule is unlikely to elicit any significant adverse comments.").

[5] *See also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 Stan. L. Rev. 237, 244 (2021) (APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment") (Attached as Exhibit 6); U.S. Dep't of Just., *Attorney General's Manual on the Administrative Procedure Act*, FSU Coll. of L. (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947iii.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.") (Attached as Exhibit 7).

teams and casts into question decades of guidance upon which recipients have relied in structuring their athletic programs.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the substance of the rule."[6] As a threshold matter, it is the province of the judicial branch, not the executive, "to say what the law is." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (*quoting Marbury v. Madison*, 5 U.S. 107, 177 (1803)). But even where an agency claims a rescission is necessary to conform to current legal standards—as DOE attempts to do here by asserting this rescission "aligns the rule with Presidential direction" as set forth in executive orders, DFR, 90 Fed. Reg. at 20,786—public comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests," *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009), or "important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency thus "cannot simply brand [a prior action] illegal and move on." *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]." *Util. Solid Waste Activities Grp.*, 236 F.3d at 754. However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases). DOE has not articulated and the undersigned are not aware of any emergency situation or imminent safety threat that would justify rescinding an athletics regulation that has been in effect for decades.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Mack Trucks*, 682 F.3d at 95. For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *See Util. Solid Waste Activities Grp*., 236 F.3d at 755. Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical protections afforded by Title IX. And DOE provides no information showing that adequate advance notice of changes to athletics regulations would catalyze unlawful action against the public interest.

[6] ACUS 2024–6, *supra* note 2, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (Notice and comment were not required for the agency's "nondiscretionary acts required by [statute].")).

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[7] and agency action must be evaluated "solely by the grounds invoked by the agency." *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947).

B. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments."

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule that a substantive response is required." *See* DFR, 90 Fed. Reg. at 20,786 (emphasis added). But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[8] Instead, the agency's unjustified heightened requirements serve to impose an extra barrier to meaningful public participation in this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[9] Unlike this DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[10]

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[7] *See* 5 U.S.C. §§ 553(a)(1) (exception for "a military or foreign affairs function of the United States"); 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

[8] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).

[9] ACUS 2024–6, *supra* note 2, at 5 (emphasis added).

[10] *See, e.g.,* Implementation of OMB Guidance on Drug-Free Workplace Requirements, 75 Fed. Reg. 39,443, 39,444 (July 9, 2010) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); Defense Priorities and Allocations System, 73 Fed. Reg. 10,980, 10,981 (Feb. 29, 2008) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); Collection of Claims Owed the United States, 68 Fed. Reg. 48,531, 48,532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation direct final rules instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal. 42 U.S.C. § 6295(p)(4)(C)(i). For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a direct final rule "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]" 40 C.F.R. § 721.170(d)(4)(i)(B). And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA. 14 C.F.R. § 11.13. These agencies' rules and practices demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[11]

C. DOE Does Not Cite Adequate Legal Authority for the DFR.

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes). As an initial matter, Executive Order Number 12,250, *Leadership and Coordination of Nondiscrimination Laws*, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" including Title IX of the Education Amendments of 1972. Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250 § 1–2 (Nov. 2, 1980). But the DFR does not mention any involvement by the Department of Justice or Attorney General in the rescission of the Title IX regulation at issue here. Furthermore, to the extent DOE provides any reference to legal authority for its rescissions, it cites only the Sports Ban EO, which as discussed *infra* at Section (III)(B), is itself contrary to law and unconstitutional.

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publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").

[11] In another deviation from established notice-and-comment practices that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response to the DFR. *Compare* Dep't of Energy, *Nondiscrimination on the Basis of Sex in Sports Programs Arising out of Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0016-0001 (1,833 comments received and 0 comments publicly posted as of 8:00 PM on June 13, 2025), *with* Dep't of Justice, *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov, https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and 11,826 comments publicly posted as of 8:00 PM on June 13, 2025).

D. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment.

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the direct final rule. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments." 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (Finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (cleaned up)).[12]

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new direct final rule" that responds to the comments. DFR, 90 Fed. Reg. at 20,786. But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new direct final rule.[13] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the direct final rule in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[14] However, DOE chose not to do so, and DOE may not undercut the public's right to lawful process required under the APA due to the agency's haste.

III. The DFR Suffers from Serious Issues on the Merits.

A. The DFR Is Arbitrary and Capricious.

The DFR does not withstand review under the APA's arbitrary-and-capricious standard. The "touchstone" of arbitrary-and-capricious review is whether the agency undertook "reasoned decisionmaking." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061,

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[12] The DOE has already received 1,833 comments on the DFR. Dep't of Energy, *Nondiscrimination on the Basis of Sex in Sports Programs Arising out of Federal Financial Assistance,* Regulations.gov, https://www.regulations.gov/document/DOE-HQ-2025-0016-0001 (last visited June 13, 2025, 8:05 PM ET).

[13] *See* ACUS 2024–6, *supra* note 2, at 2 (noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[14] *See* ACUS 2024–6, *supra* note 2, at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* Off. of the Fed. Reg., *supra* note 2, at 9 ("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."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

1080 (9th Cir. 2019) (quoting *State Farm*, 463 U.S. at 52 (1983)). Under this standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Generalized statements or factual assertions do not suffice to explain agency actions. *Siddiqui v. Holder*, 670 F.3d 736, 744 (7th Cir. 2012) ("Where, as here, the agency uses only generalized language to reject the evidence, we cannot conclude that the decisions rest on proper grounds."); *see also Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1140 (5th Cir. 2021). An agency must explain its actions when it departs from longstanding policies, and in such cases, is obligated to consider reliance interests. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). Moreover, should an agency action be challenged in court, a court must not "attempt itself to make up for such deficiencies," *id.*, and must consider only "the grounds that the agency invoked when it took the action," *id.* at 20; *accord SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943); *Beno v. Shalala*, 30 F.3d 1057, 1074 (9th Cir. 1994) ("[W]e cannot infer an agency's reasoning from mere silence or where the agency has failed to address significant objections and alternative proposals.").

As described below, the DFR is arbitrary and capricious in at least three ways. First, it fails to assess any relevant facts, articulate a rational connection between a factual basis and its decision, or provide any legitimate justification for rescinding the Tryout Rule. Second, it does not adequately explain its change in longstanding agency policy. And third, it ignores recipients' significant reliance interests and the harms caused by its abrupt change in policy.

1. DOE Fails to Offer a Reasoned Justification for the Rescission.

The DFR utterly fails to explain this significant policy change. Its cursory attempt to do so gestures vaguely at two justifications: (a) "oppos[ing] male competitive participation in women's sports" in order to promote "safety, fairness, dignity, and truth" for women athletes; and (b) protecting the interests of small businesses and local governments. DFR, 90 Fed. Reg. at 20,786. Neither holds water.

a. Rescinding the Tryout Rule Will Not Promote Safety or Fairness for Women Athletes.

The DFR is arbitrary and capricious because it fails to advance the principal interests it purports to address: promoting safety, dignity, and fairness for women athletes by preventing men's participation in women's sports. *See* DFR, 90 Fed. Reg. at 20,786. The DFR contains no facts or evidence related to the Tryout Rule or to how it might promote safety and fairness—or the more nebulous concepts of "dignity" and "truth"—in women's sports. Nor does DOE offer any evidence that the Tryout Rule has led to significant men's participation in women's sports or diminished women's opportunities to participate in athletics. That is because no such evidence exists. On the contrary, the Tryout Rule has in fact *expanded* opportunities for women and girls in sports, and rescinding it would lead to the opposite result.

The primary function of the Tryout Rule is to ensure that *women* have an opportunity to participate in sports from which they would otherwise be wholly excluded. Though women's athletic participation has dramatically improved in recent years, men's sports teams still vastly outnumber women's teams.[15] According to a recent report by the Women's Sports Foundation, "[a]nnually, boys receive more than 1.13 million more high school sports opportunities than girls, and the gap between high school boys' and girls' participation has not significantly narrowed in the past 20 years. At the college level, in 2017–18 women had 62,236 fewer participation opportunities than men in NCAA sports."[16] Moreover, a report by the National Coalition for Women and Girls in Education found "[w]hen girls and women do have a chance to play sports, they are frequently provided worse facilities, uniforms, and equipment; are supported by inexperienced coaches; receive less support and publicity from their schools; and experience a whole host of other inequities that send a corrosive message to girls and women that they are 'less than' their male peers."[17] It is these forms of persistent inequality—and not the imagined threat of men joining women's teams—that are the principal remaining barriers to women's equal participation in athletics.

Moreover, the Tryout Rule has provided an important backstop to Title IX's longstanding interpretation by agencies and courts, under which recipients are not required to create a parallel team for each sex in each sport, or to achieve exact proportionality. *See* 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. Rather, the statute requires "effective accommodation" of the interests of athletes regardless of sex—a test that can be satisfied in a variety of ways.[18] Recipients are therefore not ultimately required to form a team for members of the excluded sex except where, among other factors, "[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team." *See* 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. But, crucially, the portion of the regulation slated for rescission has required members of the excluded sex to have an opportunity to at least *try out* to play a specific non-contact sport, regardless of whether there is sufficient interest to form a parallel single-sex team.[19] Girls who try out and earn a spot

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[15] sportanddev.org, *How Title IX Changed the Landscape of Sports* (July 29, 2022), https://www.sportanddev.org/latest/news/how-title-ix-changed-landscape-sports (Attached as Exhibit 8).

[16] Women's Sports Found., *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women (Attached as Exhibit 9).

[17] Elizabeth Tang et al., Nat'l Coal. for Women and Girls in Educ., *Title IX at 50*, at 33 (June 2022), https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf (Attached as Exhibit 10).

[18] *See, e.g.*, 2003 Clarification (Describing three-part test for effective accommodation, and clarifying that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored"); 1996 Clarification (Discussing three-part test and clarifying that "institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes").

[19] The Tryout Rule also does not *preclude* allowing girls to try out for or participate on contact sports teams; rather, it creates an exception from the requirement that they be permitted to try out in such

on the existing team enjoy the opportunity to participate in a sport that would otherwise have been wholly unavailable to them.

Conversely, the Tryout Rule has had virtually no bearing on men's participation in women's teams, because it only applies where no comparable men's team exists and where men's opportunities to participate have previously been limited. 10 C.F.R. § 1042.450(b). Such situations are rare because there are very few sports for which only a women's team is offered and from which men have been excluded. The Tryout Rule is mostly invoked by women seeking to try out for men's teams, rather than the reverse.[20] But regardless of which sex invokes the Tryout Rule, it serves the salutary purposes of eroding segregation of sports teams based on stereotypical notions of men's and women's different interests and abilities, and ensuring students are not constrained in their choices of available sports by the fact that their interests do not conform to majority preferences. This is entirely consistent with the purpose of Title IX, which was to "root out" gender stereotypes "as thoroughly as possible[.]" 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh on the day Title IX was enacted).

As to the Sports Ban EO, the reference to it is simply inapt. The targets of the Sports Ban EO are not male athletes, but rather, transgender women and girls—and neither the Tryout Rule nor the athletics regulations more broadly says anything at all about the participation of transgender athletes. Yet, through its reference to the Sports Ban EO and its vague appeal to "dignity and truth," the DFR implies that transgender women and girls, who would be (wrongly) treated as men and boys under the Sports Ban EO, might exploit the Tryout Rule to gain spots on women's teams from which they would otherwise be excluded. However, DOE fails to state this reasoning directly, or otherwise offer any independent factual basis in support of its flawed premise. And even assuming under the DFR's indirect reasoning that some small minority of transgender women, if wrongly treated as male athletes under the Sports Ban EO and thereby

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contexts. *E.H. by & through Herrera v. Valley Christian Acad.*, 616 F. Supp. 3d 1040, 1055 (C.D. Cal. 2022). The elimination of the Tryout Rule means the requirement would no longer exist even for *non-contact* sports.

[20] While there are relatively few reported decisions applying the Tryout Rule, it has largely been invoked to permit girls to try out for boys' teams, rather than the reverse—and many of those cases were ultimately decided on equal protection grounds. *See, e.g.*, *Brenden v. Indep. Sch. Dist. No. 742*, 477 F.2d 1292, 1303 (8th Cir. 1973) (School could not exclude high school girl from its cross-country competition because of her sex; Tryout Rule invoked but case decided on other grounds); *Brenden v. Indep. Sch. Dist. No. 742*, 477 F.2d 1292, 1303 (8th Cir. 1973) (Striking down a high school athletics association rule that prohibited girls from playing non-contact sports where there were no alternative girls' teams on Equal Protection grounds, but citing Title IX); *cf. Hoover v. Meiklejohn*, 430 F. Supp. 164, 172 (D. Colo. 1977) (School that refused to allow a female student to play school soccer violated her right to equal protection because the school did not have a separate women's team). The lone reported case in which male athletes invoked the Tryout Rule and secured the right to try out, which involved two high school boys who wished to try out for their school's all-female dance team, was also ultimately decided on equal protection grounds. *D.M. & Z.G. v. Minn. State High Sch. League*, 917 F.3d 994 (8th Cir. 2019); *see also Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F. Supp. 951 (D.R.I. 1991) (Male plaintiff was unlikely to succeed on his Title IX claim that he be allowed to play on the girls' field hockey team because the evidence showed that "only the female sex has had limited athletic opportunities at the high school.").

excluded from women's teams, might then seek to join women's teams under the Tryout Rule, the DFR fails to explain how closing this avenue for their participation would justify eliminating the longstanding benefits for the far greater number of cisgender women and girls who availed themselves of the Rule to try out for boys' teams. Nor does it address or attempt to justify the underlying categorical exclusion of transgender women and girls from women's sports as a whole.

Contrary to DOE's baseless and flimsy assertion, rescinding the Tryout Rule will in fact *limit* opportunities and undermine fairness for women in sports. It is arbitrary and capricious for an agency to adopt a position contradicted by the available evidence. *See State Farm*, 463 U.S. at 43. Moreover, because the DFR examines no data and finds no facts, it definitionally fails to draw a "rational connection" between those (nonexistent) facts and its rescission of the Tryout Rule. Consequently, the DFR falls short of the standard of reasonableness the APA requires. *See Penick Corp., Inc. v. Drug Enf't Admin.*, 491 F.3d 483, 488 (D.C. Cir. 2007) (noting that agency action is arbitrary and capricious if it does not, "[a]t a minimum," consider relevant data and rationally connect facts to agency decision).

b. There Is No Basis for the Agency's Claim That the Tryout Rule Imposes a Burden on Local Government or Small Businesses.

The DFR further claims that the Tryout Rule "impos[es] a burden on local governments and small businesses who are in the best position to determine the needs of their community and constituents." DFR, 90 Fed. Reg. at 20,786. However, DOE again offers no facts, evidence, or explanation whatsoever as to how small businesses are impacted by the regulation, and there is no basis for this claim. Small businesses are not typically considered "education program[s]" for purposes of Title IX, nor are small businesses recipients of federal funds. They are accordingly not bound by the Tryout Rule, and it is therefore unclear how, if at all, they could be burdened by its application—or unburdened by its rescission. This does not meet the APA's requirements for reasoned decision-making. *State Farm*, 463 U.S. at 43; *see also Transp. Trades Dep't, AFL-CIO v. Nat'l Mediation Bd.*, 530 F. Supp. 3d 64, 72–73 (D.D.C. 2021) (Agency action is arbitrary and capricious where it lacks any factual basis and "rational connection between the facts found and the choice made").

Having omitted any such evidence or explanation, DOE proceeds to solicit them from public commenters, inviting comments which elucidate "the prior rule's effect on small business, entrepreneurship and private enterprise." DFR, 90 Fed. Reg. at 20,786. But "[i]t is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later." *Texas v. Biden*, 10 F.4th 538, 558–59 (5th Cir. 2021). The reasoning supporting an action must be "articulated by the agency itself." *State Farm*, 463 U.S. at 50. DOE may not rescind the Tryout Rule and then begin searching for evidence from others to justify its rescission. Because the DFR articulated no "contemporaneous explanations" of how the Tryout Rule impacts small businesses, any evidence subsequently generated by this fact-fishing expedition would be an "impermissible post hoc rationalization" upon which DOE cannot rely to maintain the DFR. *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 857–58 (5th Cir.

2022) (citing *Regents*, 591 U.S. at 22); *see also Regents*, 591 U.S. at 24 ("The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted.").[21]

The DFR likewise provides no factual basis, much less the "satisfactory explanation" the APA requires, to support the assertion that the Tryout Rule burdens local governments. *See State Farm,* 463 U.S. at 43. DOE's claim that this rescission is motivated by respect for local government is also belied by recent efforts by ED and U.S. DOJ to investigate state and local governments with policies inclusive of transgender student athletes, apparently taking the position that such policies violate Title IX or the Equal Protection Clause per se in light of the President's Executive Orders.[22] In light of the flurry of announced investigations, DOE's justification about respect for local government control rings hollow.

2. DOE Fails to Explain Its Abrupt Change in Position.

The DFR provides no explanation for the abandonment of the longstanding Tryout Rule and is therefore arbitrary and capricious. "When an agency changes its existing position, it . . . must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citation modified); *see also id.* at 222 (Explaining that an "unexplained inconsistency in agency policy is a reason for holding an [action] to be an arbitrary-and-capricious change from agency practice" (citation modified)). Agencies "may not . . . depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord State Farm*, 463 U.S. at 56 ("While the agency is entitled to change its view on [a policy], it is obligated to explain its reasons for doing so.").

But by abruptly breaking with decades of DOE policy, the DFR does just that. The Tryout Rule has been in effect since adoption of the Title IX Common Rule in 2001. The DFR reverses decades of DOE policy with a mere two sentences' justification, and offers no explanation or reasoning as to how DOE arrived at this decision or why it is rescinding a policy that *advances* the very purpose set forth in the DFR, namely, fairness and opportunity for women in sports. The APA forbids this. *See, e.g.*, *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (Holding agency's unexplained "abrupt departure" from past policy arbitrary and capricious).

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[21] Of course, in the usual notice-and-comment process—which DOE has unlawfully forgone by using a DFR—agencies must solicit and respond to input from the public. But an agency may not issue a DFR without evidence or justification, and then rely on the public to adduce supporting evidence for the agency's action *post-hoc*.

[22] *See* Off. Of Pub. Affairs, U.S. Dep't of Justice*, U.S. Department of Education and U.S. Department of Justice Announce Title IX Special Investigations Team* (Apr. 4, 2025), https://www.justice.gov/opa/pr/us-department-education-and-us-department-justice-announce-title-ix-special-investigations (Attached as Exhibit 11); Dep't of Educ. Office for Civil Rts, "Dear Colleague" Letter from Acting Assistant Sec'y Craig Trainor (Feb. 4, 2025), https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf (Attached as Exhibit 12).

As to the DFR's reference to the Sports Ban EO, the policies embodied in that order further represent a sharp departure from prior agency positions, with no acknowledgement or explanation of the change. Following the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), which recognized that Title VII's prohibition on sex discrimination encompasses discrimination based on gender identity, U.S. DOJ issued a memorandum directing all federal agencies to enforce Title IX consistent with that holding.[23] U.S. DOJ has rescinded that guidance in the wake of the President's Executive Orders.[24] The DFR does the same, but *sub silentio*—without acknowledgement of or explanation for the change. Its mere throwaway reference to the Sports Ban EO—without any independent reasoning or analysis, and without accounting for the potential impact on students, recipients, or States—is a woefully inadequate basis for such a dramatic reversal. *See State Farm*, 463 U.S. at 43. Further, the Sports Ban EO itself contains no evidence or reasoning that DOE could incorporate by reference to explain or justify this departure. *See* Sports Ban EO, Exec. Order No. 14,201.

3. The DFR Fails to Address Reliance Interests.

The DFR further fails to take into account important aspects of the problem—reliance interests by recipients. "When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Regents*, 591 U.S. at 30 (citation modified). In particular, an agency must assess States' reliance interests on federal programs or policies and weigh those interests against competing policy concerns. *Id.*; *see also State Farm*, 463 U.S. at 43 (ignoring reliance interests represents a "fail[ure] to consider an important aspect of the problem" and renders an agency action arbitrary and capricious); *Texas v. Biden*, 20 F.4th at 988–90 (5th Cir. 2021) (agency's failure to assess States' reliance on the rescinded policy was "fatal"), *rev'd and remanded on other grounds*, 597 U.S. 785 (2022). DOE utterly failed to assess or even acknowledge recipients' reliance on the longstanding Tryout Rule, let alone weigh those reliance interests against others. This renders its DFR arbitrary and capricious. *Regents*, 591 U.S. at 30.

The impacts of the rescission of the Tryout Rule on affected recipient institutions would be significant. The Tryout Rule has been the law of the land since 2001. Recipients of federal funding, including state institutions, have organized their athletic programs and expanded considerable resources in reliance on the longstanding rule, and the agencies' interpretation of the rule. DOE likewise fails to acknowledge the existence of or explain the rescission's potential

[23] *See* Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) ("[T]he Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity."); Memorandum from Pamela S. Karlan, Principal Deputy Solic. Gen., Civ. Rts. Div., U.S. Dep't of Just. on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://web.archive.org/web/20240421221643/https://www.justice.gov/crt/page/file/1383026/dl?inline.

[24] *See* Memorandum from The Acting Assoc. Att'y General to The Civ. Rts. Div. (Feb. 12, 2025), https://www.justice.gov/crt/media/1389946/dl?inline (Attached as Exhibit 13).

impact on the many related sub-regulatory guidance documents and interpretive rules issued by the Education Department over decades,[25] many of which have been given deference by courts. *See Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1993).

The rescission of the Tryout Rule creates considerable uncertainty as to which of these longstanding guidance documents remains in effect. For example, the DFR rescinds the sentence which defines "contact sports." But other requirements of Title IX turn on this definition. For example, this regulation and its interpretation by the Education Department establish different standards between contact and non-contact sports for when a recipient *must* institute a single-sex team for members of the excluded sex. *See* 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. For contact sports, a recipient must establish a separate team if (1) the opportunities for members of the excluded sex have historically been limited; and (2) there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team. However, for non-contact sports, separate teams are required if the first two factors are met *and* "members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such team if selected." *Id.* This longstanding policy interpretation is dependent in part on the provision of the regulation that is struck in the DFR, defining "contact sports" and mandating tryout opportunities. DOE's elimination of this provision will lead to uncertainty as to when establishment of separate teams is required or permissible. DOE **"**failed to consider [this] important aspect of the problem" or address the problems its abrupt revocation of this longstanding rule will create, rendering the DFR arbitrary and capricious. *See State Farm*, 463 U.S. at 43; *Regents*, 591 U.S. at 30.

4. The DFR Fails to Consider the Impact on Female Athletes of Rescinding the Tryout Rule.

The DFR further fails to consider the impact that recission of the Tryout Rule will have on female athletes—whether cisgender or transgender. It is well documented that sports participation confers a broad range of significant health, social, academic, and other benefits. These benefits extend far beyond school and encompass both immediate and long-term advantages, including improved academic outcomes like test scores and graduation rates, increased confidence, self-esteem, and body image, and lower levels of depression and risk-taking behavior.[26] Further, "[t]he lessons of teamwork, leadership, and confidence that girls and women gain from participating in athletics can help them after graduation as well as during school."[27] An impressive 96% of female business executives played sports, with the majority

[25] Relevant ED Guidance includes: 2003 Clarification; 1979 Policy Interpretation; 1996 Clarification.

[26] Tang et al., *supra* note 17, at 34.

[27] Nat'l Coal. for Women & Girls in Educ., *Title IX and Athletics* 11 (2012), https://www.ncwge.org/TitleIX40/Athletics.pdf (Attached as Exhibit 14).

saying that lessons learned on the playing field contributed to their success.[28] Former female athletes also earn an average of 7% more in annual wages than their non-athlete peers.[29] Further, "[b]ecause girls of color often have limited out-of-school sports opportunities in their communities and face other challenges to participation (e.g., financial and transportation needs), they are more likely to participate in sports through school than through private organizations. This makes it even more critical that they have equal access to school-sponsored sports to enable them to be physically active."[30]

The DFR fails utterly to address the potential impact of rescinding the Tryout Rule on girls' and women's overall athletic opportunities, which as previously discussed, will decrease, rather than increase, those opportunities and the multiple benefits that flow from them.

Moreover, the DFR fails to account for the impacts of achieving its stated purpose to end "male competitive participation in women's sports," DFR, 90 Fed. Reg. at 20,786—by which it means depriving transgender women and girls the chance to play on female athletic teams. In addition to being discriminatory, as discussed further below, the DFR fails to address the significant harms such exclusion causes to transgender students.[31] Discrimination against transgender youth—including denying them the opportunity to participate in extracurricular activities consistent with their gender identity—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.[32] Students who report such negative experiences in grades K–12 are more likely than other students to be under serious psychological distress, to experience homelessness, and to have attempted suicide.[33] The impacts on academic achievement are just as stark. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies

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[28] Barbara Kotschwar, Peterson Inst. for Int'l Econ., *Women, Sports, and Development: Does it Pay to Let Girls Play?* 9 (2014), https://www.piie.com/sites/default/files/publications/pb/pb14-8.pdf (Attached as Exhibit 15).

[29] *Id.* at 2.

[30] Nat'l Coal. for Women & Girls in Educ., *Title IX at 45: Title IX and Athletics* 4–5 (2017), https://www.ncwge.org/TitleIX45/Title%20IX%20and%20Athletics.pdf (Attached as Exhibit 16).

[31] *See, e.g.,* Toomey et al., Soc'y for Rsch in Child Dev., *Gender-Affirming Policies Support Transgender and Gender Diverse Youth's Health* (Jan. 2022), https://www.srcd.org/sites/default/files/resources/SRCD%20SOTE-Gender%20Affirming%20Policies%202022.pdf (Attached as Exhibit 17).

[32] Joseph G. Kosciw et al., Gay, Lesbian, & Straight Educ. Network, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xviii (2016), https://www.glsen.org/sites/default/files/2020-01/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf (Attached as Exhibit 18).

[33] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131–35, Nat'l Ctr. for Transgender Equal. (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (Attached as Exhibit 19).

and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.[34] Discriminatory school climates have also been found to exacerbate absenteeism. In the month before a 2019 survey, LGBTQ students who had experienced discrimination in their schools based on their sexual orientation or gender identity were almost three times as likely (44.1% versus 16.4%) to have missed school because they felt unsafe or uncomfortable.[35]

Conversely, policies that allow transgender students to access facilities and activities consistent with their gender identity create school climates that enhance students' well-being and facilitate their ability to learn.[36] Studies have shown that an affirming school environment is critical to supporting transgender young people.[37] For example, transgender students permitted to live consistently with their gender identity have mental health outcomes comparable to their cisgender peers.[38] And for LGBTQ students in particular, sports participation has been linked to higher levels of self-esteem and lower levels of depression.[39]

Forcing transgender girls to compete only on boys' teams functionally deprives them of the ability to participate in an affirming environment. For many, it will mean they will forgo the chance to compete at all. *See B.P.J. v. W.V. State Bd. of Educ.*, 98 F.4th 542, 564 (4th Cir. 2024) (Observing that forcing transgender girls to choose "between not participating in sports and participating only on boys' teams is no real choice at all"), *petition for cert. filed*, No. 24-43. The DFR does not mention, much less grapple with, the immediate or longer-term consequences of depriving a minority category of students of the multiple benefits of participating in athletics or of subjecting them to exclusionary policies. The DFR's cavalier **"**fail[ure] to consider [this] important aspect of the problem" is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

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[34] *Id.* at 45, 48; *see also* Emily A. Greytak et al., Gay, Lesbian, & Straight Educ. Network, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi, 25, 27 fig. 17 (2009), https://www.glsen.org/sites/default/files/2020-01/Harsh_Realities_The_Experiences_of_Transgender_Youth_2009.pdf (Showing that more frequently harassed transgender students had significantly lower grade point averages than other transgender students) (Attached as Exhibit 20).

[35] Kosciw et al., *supra* note 32.

[36] *See, e.g.*, Br. of Amici Curiae Sch. Administration from Thirty-One States and D.C. in Supp. of Resp't at 3–4, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055 [hereinafter "Br. of Amici Curiae Sch. Administration"].

[37] *See, e.g.,* Toomey, *supra* note 31.

[38] *See* Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 Pediatrics 3, 5–7 (2016), https://pubmed.ncbi.nlm.nih.gov/26921285/ (Attached as Exhibit 21); Br. of Amici Curiae Sch. Administration at 4, Gloucester Cnty. Sch. Bd., 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

[39] Caitlin M. Clark et al., Gay, Lesbian, & Straight Educ. Network, *LGBTQ Students and School Sports Participation: Research Brief* 8 (2021), https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf (Attached as Exhibit 22).

B. The DFR is Contrary to Law and to the Constitutional Guarantee of Equal Protection.

In addition to being arbitrary and capricious, the DFR is contrary to law and the Constitution, in violation of the APA. 5 U.S.C. § 706(2)(A)–(B) (agency action must not be "contrary to law" or "contrary to constitutional right"). The DFR violates both of these standards.

First, to the extent that the DFR is intended to further the Sports Ban EO's exclusionary goal, it flatly violates Title IX. The Sports Ban EO conditions federal funding on the blanket exclusion of transgender women and girls from school-sponsored athletic programs consistent with their gender identity—a facially sex-based exclusion. As the Supreme Court has repeatedly affirmed, Title IX must be given "a sweep as broad as its language." *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 521 (1982); *accord Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 175 (2005). As the U.S. DOJ and ED previously recognized, the reasoning of *Bostock*, 590 U.S. 644 (2020), which held discrimination on the basis of transgender status constitutes discrimination on the basis of sex under Title VII, applies equally in the context of Title IX.[40] And Title VII and Title IX have long been broadly construed as coterminous with respect to their substantive prohibitions on discrimination. *See* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. at 32,637; *Franklin v. Gwinnett Cnty. Pub. Sch*., 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C*., 482 F.3d 686, 695 (4th Cir. 2007). Accordingly, numerous courts have held that exclusionary policies like the Sports Ban EO violate Title IX. *See Hecox v. Little*, 104 F. 4th 1061 (9th Cir. 2024); *A.C. v. Metropolitan Sch. District of Martinsville*, 75 F.4th 760, 768–69 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *but see Adams ex rel. Kasper v. School Bd. of St. Johns Cnty*, 57 F.4th 791 (11th Cir. 2022) (en banc).

Furthermore, the DFR is contrary to the Constitutional guarantee of Equal Protection in at least two independent ways: (1) it seeks to bolster sex-separated teams based on impermissible stereotypes about men and women; and (2) it relies on an executive order that draws facial sex-

[40] Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. at 32,637; Memorandum from Pamela S. Karlan, *supra* note 23; *see also* Joint Letter from U.S. Dep't of Educ. and DOJ (May 13, 2016), https://www.justice.gov/opa/file/850986/dl (Title IX "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status") (Attached as Exhibit 23); U.S. Dep't of Educ, Off. For Civ. Rts., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf ("All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.") (Attached as Exhibit 24).

based classifications without demonstrating an adequate justification, and is motivated by a "bare desire to harm" transgender individuals. *See Romer v. Evans*, 517 U.S. at 634.

The DOE offers no factual support for its assertion that the elimination of the Tryout Rule serves the interest in addressing "differences between the sexes which are grounded in fundamental and incontrovertible reality." As discussed above, this "incontrovertible reality" is in fact controverted by the evidence of numerous girls who have successfully tried out for and competed on men's sports teams in the many decades since the rule was first promulgated, and who would have otherwise been denied that opportunity. But even in areas where there might be aggregate differences between men's and women's skills or abilities, "generalizations about 'the way women are,' or estimates of what is appropriate for *most women,* no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *See United States v. Virginia*, 518 US. 515, 550 (1996). It is precisely such circumstances—where an individual has the talent and capacity to compete on a cross-sex team—that the Tryout Rule is intended to address.[41] In removing the safety valve that allows for such participation to take place, in reliance on categorical generalizations about sex-differences, the DFR runs afoul of the constitutional guarantee of equal protection.

Moreover, the exclusion of transgender students pursuant to the Sports Ban EO draws facial classifications based on (1) sex, because the determination of how to enforce it, and against whom, cannot be made but for considering the sex—defined as sex assigned at birth—of the individuals involved on the teams in question; (2) transgender status, because it facially targets transgender individuals; and (3) both sex and transgender status, because it singles out transgender women in particular for different and worse treatment without adequate justification. Any of these criteria, alone, would subject the Sports Ban EO to heightened scrutiny, which it cannot survive.[42]

The DFR's purported appeal to "safety, fairness, dignity, and truth" as a basis for its exclusionary goal is equally flawed. While promoting safety and fairness—along with the more general values of "dignity" and "truth"—are undoubtedly important interests, the DFR does not

[41] Moreover, the DFR does not explain how its assertion about "fundamental" and "incontrovertible" differences between the sexes can be squared with the remainder of the regulation, embodied in subsection (a), which still treats mixed participation as the default rule outside of the context of contact and competitive team sports. Eliminating the Tryout Rule does not further the purported purpose in recognizing such presumed sex differences because the DFR does not alter the underlying presumption of mixed-competition sports teams.

[42] *See Doe v. Horne*, 115 F.4th 1083, 1109 (9th Cir. 2024); *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2024) (Idaho law categorically prohibiting transgender women and girls from participation on female teams violated equal protection); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (School board policy of denying access to restroom and refusing to amend school records consistent with gender identity violated equal protection); *Kadel v. Folwell*, 100 F.4th 122, 143 (4th Cir. 2024) (exclusion of gender-affirming care from state employee and Medicaid program was prohibited sex discrimination under the Equal Protection clause); *Fowler v. Stitt*, 104 F.4th 770, 793–94 (10th Cir. 2024) (state ban on sex-designation amendments on birth certificates violated equal protection); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (discharge of state employee based on gender identity violated equal protection).

explain or provide any evidence of how the rescission of the Tryout Rule would advance any of those goals. For example, as to "fairness," the DFR provides zero evidence that the Tryout Rule has in any way restricted women's athletic opportunities, or that rescinding it will improve opportunities. On the contrary, as previously discussed, the Tryout Rule has been a crucial tool to further women's equal athletic opportunities; its rescission will have the opposite result. What is more, even assuming some transgender women athletes had some competitive advantage in some cases, which the DFR does not even attempt to demonstrate, that would be insufficient to justify their categorical exclusion across all sports, all ages, and all levels of competition. *See Hecox v. Little*, 104 F.4th 1061, 1083–84 (9th Cir. 2024), *as amended* (June 14, 2024) ("[T]he Act's sweeping prohibition on transgender female athletes in Idaho—encompassing all students, regardless of whether they have gone through puberty or hormone therapy, without any evidence of transgender athletes displacing female athletes in Idaho, and enforced through a mechanism that subjects all participants in female athletics to the threat of an invasive physical examination—is likely too unrelated to the State's legitimate objectives to satisfy heightened scrutiny.").

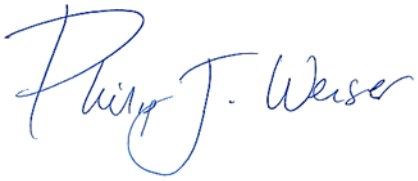
The DFR's reference to the Sports Ban EO reveals the ultimate goal in rescinding the Tryout Rule: to "oppose" female transgender athletes' participation in women's sports. DOE does not seek to promote equal opportunities for female athletes, but to exclude and erase transgender women. Such a justification amounts to exclusion for exclusion's sake, and is impermissible per se. *See Virginia*, 518 U.S. at 545 (Rejecting the "notably circular argument" that exclusion of women for purposes of maintaining single-sex education at military training academy). This ultimate exclusionary goal is even more clear when viewed in the context of the spate of Presidential executive orders targeting the transgender population. Those executive orders refer to transgender women as men; attempt to deny the existence of a population of individuals who do, in fact, exist; direct their exclusion from military service; aim to cut off their access to necessary and often life-saving medical care; and generally direct federal agencies to use all of the tools of the federal government to erase their legal existence. *See* Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order No. 14,168 (Jan. 20, 2025); Protecting Children from Chemical and Surgical Mutilation, Exec. Order No. 14,187 (Jan. 28, 2025); Ending Radical Indoctrination in K–12 Schooling, Exec. Order No. 14,190 (Jan. 29, 2025); Prioritizing Military Excellence and Readiness, Exec. Order No. 14,183 (Jan. 27, 2025). The Constitution's guarantee of equality "must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (citing *Dep't of Agric. v. Moreno,* 413 U.S. 528, 534–35 (1973)). The animus behind these executive orders is plain. The Sports Ban EO is unconstitutional, and insofar as the DFR is based upon the Sports Ban EO, it too violates the constitutional guarantee of Equal Protection.

IV. Conclusion

For the reasons stated above, the Signatory States oppose the rescission of the Tryout Rule, a provision of subsection (b) of 10 C.F.R. § 1042.450. Signatory States also oppose DOE's use of a direct final rule on the procedural grounds stated herein. Accordingly, in light of this "significant adverse comment" opposing the basis for the DFR, it must be withdrawn.

Sincerely,

ROB BONTA
Attorney General
State of California



PHILIP J. WEISER
Attorney General
State of Colorado

WILLIAM TONG
Attorney General
State of Connecticut

KATHLEEN JENNINGS
Attorney General
State of Delaware

BRIAN L. SCHWALB
Attorney General
District of Columbia

KWAME RAOUL
Attorney General
State of Illinois

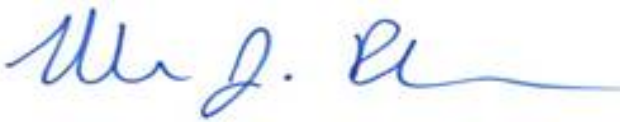
AARON M. FREY
Attorney General
State of Maine

ANTHONY G. BROWN
Attorney General
State of Maryland

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts

KEITH ELLISON
Attorney General
State of Minnesota

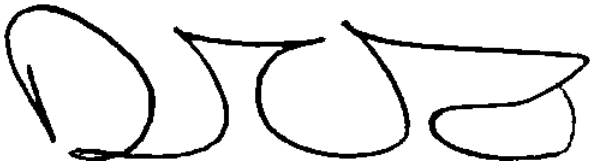
AARON D. FORD
Attorney General
State of Nevada



MATTHEW J. PLATKIN
Attorney General
State of New Jersey

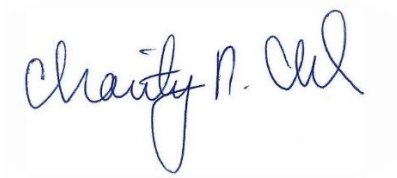
RAÚL TORREZ
Attorney General
State of New Mexico

LETITIA JAMES
Attorney General
State of New York



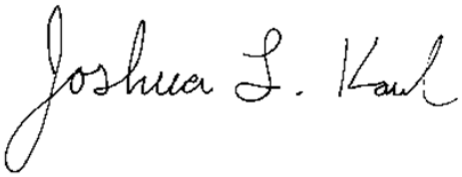
DAN RAYFIELD
Attorney General
State of Oregon

PETER NERONHA
Attorney General
State of Rhode Island



CHARITY R. CLARK
Attorney General
State of Vermont

NICHOLAS W. BROWN
Attorney General
State of Washington



JOSHUA L. KAUL
Attorney General
State of Wisconsin