LDF Legal Defense Fund

Advancing racial justice since 1940

July 27, 2026

Douglas A. Collins
Secretary of Veterans Affairs
U.S. Department of Veteran Affairs
810 Vermont Ave NW
Washington, D.C. 20420

Via regulations.gov

RE: The Department of Veterans Affairs' Notice of Proposed Rulemaking on Eliminating Disparate-Impact Liability Related to Nondiscrimination in Federally-Assisted Programs, RIN 2900-AT04

Dear Secretary Collins:

The Legal Defense Fund (LDF) writes to express strong opposition to the Department of Veteran Affairs' (VA) proposed rule, which, by eliminating protections against unjustified disparate impacts in Title VI of the Civil Rights Act of 1964, would expose veterans to racial discrimination by federally-funded entities.[1] Title VI is grounded in the fundamental premise that federal taxpayer dollars should not fund public or private entities that engage in racial discrimination.[2] For decades, VA and other federal agencies[3] have sought to achieve the purposes of Title VI by prohibiting federally-funded entities from implementing policies and practices that discriminate based on race, color, or national origin, including those that cause unlawful and unwarranted discriminatory effects. VA fails to articulate a reasoned explanation for abandoning these longstanding protections. Instead, it relies on strained and inaccurate interpretations of the law to support their claims. Contrary to what VA and the Trump administration claims, prohibiting policies that cause unlawful discriminatory effects is lawful and necessary to effectuate the purposes of Title VI. Rescinding Title VI disparate-impact regulations will severely limit VA's ability to ensure all veterans, including Black veterans, can equally benefit from federally-funded programs. We urge VA to withdraw the proposed rule in its entirety and restore the prior version of its rules.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest racial justice law organization. Since its inception, LDF has worked to increase fairness and equal opportunity for Black communities in all aspects of the economy. LDF argued the seminal 1971 U.S. Supreme Court case *Griggs v. Duke Power Company*, which recognized that Title VII of the Civil Rights

[1] 42 U.S.C. § 2000d *et seq*.
[2] Nondiscrimination in Federally-Assisted Programs of the Department of Veterans Affairs, 91 Fed. Reg. 38569 (Jun. 26, 2026), https://www.federalregister.gov/documents/2026/06/26/2026-12924/nondiscrimination-in-federally-assisted-programs-of-the-department-of-veterans-affairs (hereinafter "Proposed Rule").
[3] See 7 C.F.R. § 15.3(b)(2)–(3) (USDA); 22 C.F.R. § 209.4(b)(2)–(3) (Agency for Int'l Dev.); 15 C.F.R. § 8.4(b)(2)–(3) (Dep't of Commerce); 45 C.F.R. § 1203.4(b)(2) (Corp. for Nat'l &– Cmty. Serv.); 32 C.F.R. § 195.4(b)(2)(DOD); 34 C.F.R. § 100.3(b)(2)–(3) (Dep't of Educ.); 10 C.F.R. § 1040.13(c)–(d) (Dep't of Energy); 40 C.F.R. §7.35(b)–(c) (EPA); 41 C.F.R. § 101–6.204–2(a)(2)–(3) (GSA); 45 C.F.R. § 80.3(b)(2)–(3) (HHS); 6 C.F.R. §21.5(b)(2)–(3) (DHS); 24 C.F.R. § 1.4(b)(2)(i)–(3) (HUD); 43 C.F.R. § 17.3(b)(2)–(3) (Dep't of the Interior); 28 C.F.R. § 42.104(b)(2)–(3)(DOJ); 29 C.F.R. § 31.3(b)(2)–(3) (DOL); 14 C.F.R. § 1250.103–2(b) (NASA); 45 C.F.R.§ 1110.3(b)(2)–(3) (Nat'l Found. on the Arts &– Humanities); 45 C.F.R. § 611.3(b)(2)–(3) (NSF); 10 C.F.R.§ 4.12(b)–(c) (NRC); 5 C.F.R. § 900.404(b)(2) (OPM); 22 C.F.R. § 141.3(b)(2) (Dep't of State); 18 C.F.R.§ 1302.4(b)(2)–(3) (TVA); 49 C.F.R. § 21.5(b)(2)–(3) (DOT); 31 C.F.R. § 22.4(b)(2) (Dep't of Treasury); 38 C.F.R.§ 18.3(b)(2)–(3) (VA); 18 C.F.R. § 705.4(b)(2) (Water Resources Council).

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Act of 1964 prohibited disparate impact discrimination.[4] LDF has since argued, and the Supreme Court has recognized, that other federal statutes like the Fair Housing Act[5] include these important protections. LDF also participated as an *amicus* in *Alexander v. Sandoval,*[6] where the Supreme Court declined to extend a private right of action for disparate impact under Title VI but left agencies' discriminatory effects regulations untouched.[7] In the decades since those victories, LDF has continued to challenge public and private policies and practices **t**hat create discriminatory impacts on Black communities, including Black veterans.[8]

I. Black Veterans Continue to Experience Unfair Barriers in Employment, Health Care, Housing, and Other Sectors.

As the U.S. Army has acknowledged, "America has never fought a war in which Black Americans did not serve proudly,"[9] yet Black people have faced discrimination both within the armed services and in accessing VA programs. After World War II, for example, the GI Bill transformed the American economy and helped change the economic futures of many families by providing veterans with unemployment insurance, educational benefits, low-cost mortgages, and low-interest loans. Unfortunately, although 1.2 million Black veterans served their country during that conflict,[10] Black veterans could not access many of these benefits. Like other New Deal legislation, the GI Bill "was deliberately designed to accommodate Jim Crow," shifting implementation to states and private entities and limiting federal oversight. As a result of these barriers, the cash equivalent of Black veterans' GI Bill benefits was only 40% of what white veterans received, a difference in value of $170,000 per veteran in today's dollars.[11]

Today, Black servicemembers are more likely to serve in the military,[12] yet continue to remain underserved throughout their lives. Black veterans receive less than honorable discharges at higher rates than white veterans[13] and are less likely to be approved for disability status,[14] preventing Black veterans from enjoying the full range of VA benefits. Black veterans make 20% less income on average than their white counterparts[15] due to employment

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[4] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (hereinafter "Griggs").
[5] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (hereinafter *Inclusive Communities Project*).
[6] Brief of NAACP Legal Defense & Educational Fund, Inc., et al., *Alexander v. Sandoval*, No. 99-1908 (Dec. 13, 2000), *available at* 2000 WL 1845997.
[7] *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (hereinafter "Sandoval").
[8] *E.g.* LDF Comment RE: RIN 2900-AR57, Reproductive Health Services (Oct. 11, 2022), *available at* https://www.regulations.gov/comment/VA-2022-VHA-0021-57589.
[9] U.S. Army, Black History is Integral to Army History, https://www.army.mil/blackamericans (last visited Oct. 5, 2022).
[10] Peter C. Baker, *The Tragic, Forgotten History of Black Military Veterans*, NEW YORKER (Nov. 27, 2016), https://www.newyorker.com/news/news-desk/the-tragic-forgotten-history-of-black-military-veterans.
[11] Aaron Morrison & Kat Stafford, *Veterans Day legislation targets GI Bill racial inequities*, AP NEWS (Nov. 11, 2021), https://apnews.com/article/lifestyle-business-veterans-affairs-world-war-ii-discrimination-b2d02e6030ef44e798d4e2d4165ae13e.
[12] Department of Defense, *2022 Demographics: Profile of the Military Community* 7 (2022) https://s3.documentcloud.org/documents/24177791/2022-demographics-report.pdf (DoD Report finding that 17% of total military force was Black, in comparison with Black Americans making up 13.5% of the total U.S. population.)
[13] ALDEN PINKHAM, ET AL., CONNECTICUT VETERANS' LEGAL CENTER, DISCRETIONARY INJUSTICE: HOW RACIAL DISPARITIES IN THE MILITARY'S ADMINISTRATIVE SEPARATION SYSTEM HARM BLACK VETERANS 4 (Nov. 2022) https://ctveteranslegal.org/wp-content/uploads/2022/11/Discretionary-Injustice-Report.pdf.
[14] Gov't Accountability Office, VA Disability Benefits: Actions Needed to Further Examine Racial and Ethnic Disparities in Compensation (2023), https://www.gao.gov/products/gao-23-106097.
[15] Elizabeth Bass, Heidi Golding & Nikhil Bhandarkar, Income of Black Working-Age Veterans 1 (2024) https://www.cbo.gov/system/files/2024-04/60043-Black-Veterans-Income.pdf.

discrimination and other barriers.[16] They also have lower rates of homeownership—perhaps because they are less likely to access VA home loans.[17] Furthermore, veterans experiencing homelessness are more than three times as likely to identify as Black.[18] Like the GI Bill, many VA programs are administered by entities receiving federal financial assistance and must comply with Title VI, including grants to state-run veterans homes, state or tribal veterans cemetery programs, medical and nursing schools, health professional training institutions, legal services organizations, and educational institutions approved for VA education benefits.[19] In some cases, VA-funded programs may also need to comply with the Fair Housing Act of 1968, which prohibits racial discrimination in housing and requires agencies that administer housing programs to affirmatively further fair housing,[20] and Title VII, which prohibits racial discrimination in employment.[21]

II. VA Fails to Provide a Reasoned Explanation for the Proposed Rule in Violation of the Administrative Procedure Act.

The proposed rule would rescind VA regulations prohibiting unjustified disparate impacts, including the full text of 38 C.F.R. 18.3(b)(2) (prohibiting the use of criteria or methods that have unfair discriminatory effects in the administration of services, financial aid, or other benefits), (b)(3) (prohibiting the use of criteria or methods that have unfair discriminatory effects in the selection of locations or facilities), (b)(6) (describing when affirmative action is required or permitted), and (d)(2) (prohibiting the use of criteria or methods that have unfair discriminatory effects in employment related to federal financial assistance programs).[15] In doing so, VA would overturn decades-old regulations, disturbing serious reliance interests by the public, who have depended on these rules to protect them from unfair, racially discriminatory effects. However, VA offers little explanation for the proposed changes. VA claims these sections must be removed to comply with recent executive orders and the agency's unsound legal analysis.[16] Contrary to VA's claims, the proposed rule is not mandated by *Loper Bright Enters. v. Raimondo,*[22] *Students for Fair Admissions v. Presidents and Fellows of Harvard College and University of North Carolina, et al. (SFFA),*[23] or other Supreme Court cases, nor is it justified on other grounds. Because VA fails to sufficiently explain its change in policy, it should withdraw the proposed rule.

A. Compliance with Executive Orders, On Its Own, Cannot Substitute for an Agency's Reasoned Basis for Rescinding a Rule

When an agency substantially alters an existing regulation, the Administrative Procedure Act requires the agency to provide a reasoned explanation for the change.[24] In particular, when rescinding a rule, an agency must explain its departure from the prior policy and show the new policy is supported by "good reasons" and better, in the agency's belief, than the previous policy,

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[16] ROBERT BARTOLOTTA, ET AL., BLACK VETERANS AND EMPLOYMENT: A LITERATURE REVIEW 9 (2023), https://www.dol.gov/sites/dolgov/files/VETS/files/CEO-BlackVeteransLitReview-20230807-508.pdf.
[17] *Id.*
[18] U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS IN AMERICA: FOCUS ON VETERANS 3 (June 2018), https://www.usich.gov/sites/default/files/document/Homelessness_in_America._Focus_on_Veterans.pdf.
[19] *See, e.g.,* U.S. Dep't of Veterans Affairs, VA Grants, https://department.va.gov/grants/.
[20] 42 U.S.C. § 3601 *et seq.*
[21] 42 U.S.C. § 2000-e *et seq.*
[22] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 409-12 (2024) (hereinafter "Loper Bright").
[23] *Students for Fair Admissions, Inc. v. President and fellows of Harvard College*, 600 U.S. 181 (2023) (hereinafter "SFFA").
[24] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

particularly in light of any serious reliance interests at stake.[25] An agency must consider the policy effects of its decision, vital aspects of the problem in the issue before it, and important factors relevant to its action,[26] as well as "less restrictive, yet easily administered" regulatory alternatives.[27] While VA claims the proposed rule is necessary to comply with President Trump's Executive Order 14281,[28] such compliance does not remove its obligation to have logical and consistent policy reasons, supported by facts, for the change.

VA claims Executive Order 14281 lays out "valid policy concerns" that disparate-impact liability limits merit-based hiring and impedes "bona fide job-oriented evaluations."[29] However, the Executive Order misrepresents the demanding standard for disparate-impact liability. Disparate-impact liability guards against specious claims by requiring a plaintiff to make a significant threshold showing that the unfair discriminatory effects are caused by a particular policy. Moreover, a defendant is only liable if it cannot sufficiently justify its policy or if its legitimate objective can be achieved by some other less discriminatory means. For example, funding recipients can show they have a substantial, legitimate reason for the policy by providing evidence they considered multiple alternatives and selected the least damaging or most beneficial path.[30] Federally-funded entities have thus complied with these rules for decades without a significant impact on their ability to operate. Perhaps as a result, neither the Executive Order nor the proposed rule cite to any facts in support of the "policy concerns" articulated. Nor does VA explain why these "policy concerns" are relevant to grant programs that are unrelated to employment.

B. *Loper Bright* Does Not Change VA's Authority to Issue Disparate Impact Regulations

VA claims the "single, best meaning" of Title VI is that the statute only prohibits intentional discrimination.[31] As a result, VA claims the proposed rule is required by *Loper Bright,*[32] which held that federal agency interpretations of statutes and agency actions that rely on them do not receive any judicial deference."[33] While VA is correct that the "express statutory language of Title VI only prohibits intentional discrimination,"[34] the agency ignores Congress' explicit grant of regulatory authority to agencies to effectuate the purposes of Title VI.[35] For decades, federal agencies have issued regulations prohibiting unfair discriminatory effects in order to do so.[36]

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[25] *FCC. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[26] *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012).
[27] *Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).
[28] Proposed Rule at 38569.
[29] *Id.* at 38572.
[30] *See, e.g., New York City Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 72 (2d Cir. 2000).
[31] Proposed Rule at 38570.
[32] *Id.* at 38571.
[33] *Id.* (citing *Loper Bright Enterprises* v. *Raimondo,* 603 U.S. 369 (2024)).
[34] *Alexander v. Choate,* 469 U.S. 287, 293 (1985) ("Title VI itself directly reach[es] only instances of intentional discrimination.")
[35] 42 U.S. Code § 2000d-1.
[36] *See., e.g.,* Memorandum from the Assistant Attorney Gen. to Heads of Departments and Agencies that Provide Federal Financial Assistance (Jul. 14, 1994), *available at* http://www.justice.gov/ag/attorney–general–july–14–1994–memorandum–use–disparate–impact–standard–administrative–regulations ("Frequently, discrimination results from policies and practices that are neutral on their face but have the effect of discriminating[.] Those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative."); Memorandum from the Assistant Attorney General to the Heads of Departmental Agencies, General Counsels, and Civil Rights Directors (Oct. 26, 2001), *available at* http://www.justice.gov/crt/about/cor/lep/Oct26Memorandum.php (reaffirming the validity of federal agencies'

1. *Title VI Directs Agencies to Issue Regulations to Address Discrimination*

In 1963, President John F. Kennedy explained that federal civil rights legislation was needed because, "[s]imple 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."[37] The Civil Rights Act of 1964 was passed to live up to that promise of justice. Since the passage of the Act, federal agencies have found that regulations prohibiting unwarranted discriminatory effects are necessary to accomplish this critical goal. They remain necessary today.

Title VI requires agencies to issue regulations to effectuate the purposes of the statute and grants them broad authority to do so. Title VI mandates that federal agencies guarantee the right of people who participate in and benefit from federally-funded programs and activities to be free from discrimination and grants them significant regulatory powers to give life to this right. The Act provides, in Section 601, that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [38] While the text of Section 601 itself only prohibits intentional discrimination, Section 602 authorizes and directs federal agencies to issue rules, regulations, or orders of general applicability to "effectuate" the purposes of Section 601.[39]

In the absence of a single, textual definition of "discrimination," agencies have significant administrative flexibility in deciding the scope of prohibited conduct. [40] As Justice Marshall explained in *Alexander v. Choate*, "Title VI [has] delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that [have] produced those impacts."[41] Regulations issued pursuant to Section 602 may "go beyond . . . § 601" as long as they are "reasonably related" to its antidiscrimination mandate. [42] As a result, the Supreme Court has declined to invalidate federal agencies' discriminatory effects regulations: While the Supreme Court held in *Alexander v. Sandoval* that private individuals do not have a right to enforce federal agencies' discriminatory effects regulations, it did not deem the regulations to be invalid.[43]

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disparate impact regulations post-*Sandoval;* U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL (2021), https://www.epa.gov/sites/default/files/2021-01/documents/titlevi_legal_manual_rev._ed_1.pdf.

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

[38] 42 U.S.C. 2000d.

[39] 42 U.S.C. 2000d-1

[40] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 339 (1978) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in part and dissenting).

[41] 469 U.S. at 293-94.

[42] *Lau v. Nichols,* 414 U.S. 563, 571 (1974) (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in result).

[43] 532 U.S. at 281 (assuming for purposes of deciding the case "that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups . . . .").

2. *VA Regulations Prohibiting Unjustified Disparate Impacts Effectuate the Purpose of Title VI*

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

> [T]itle VI is simply designed to ensure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation. Moreover, the purpose of Title VI is not to cut off funds, but to end racial discrimination.[44]

In passing Title VI, Congress wanted to both prevent federal funds from subsidizing intentional discrimination and to prevent those funds from being "spent in any fashion which . . . *entrenches* . . . or *results* in racial discrimination" (emphasis added).[45] Congress' intent was thus not simply to address explicitly discriminatory policies and practices, but unwarranted discriminatory effects. Congress' broad understanding of discrimination is consistent with the state of the law at the time: the Supreme Court had not yet held that the Equal Protection Clause only prohibits intentional discrimination,[46] and courts addressed policies with unjustified discriminatory effects and well as discriminatory intent.[47]

Disparate-impact regulations recognize that policies imposing disproportionate burdens on particular racial groups are fundamentally unfair unless they are justified by a substantial, legitimate reason and there is no less discriminatory alternative available. As the Supreme Court explained in *Griggs v. Duke Power Co.*, under Title VII, which was enacted at the same time as Title VI, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[48] Discriminatory effects regulations prevent unjustified policies from entrenching persistent patterns of discrimination by maintaining unnecessary barriers that limit opportunities for individuals on grounds tied to their race—and thus contravene Title VI's goal that federal funding promote equal opportunity. Disparate-impact enforcement thus ensures the disadvantages faced by "minority citizens, resulting from forces beyond their control, [will] not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."[49] Disparate-impact regulations also help root out surreptitious intentional discrimination that may otherwise go unchecked.[50]

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[44] 110 Cong. Rec. 6545 (Mar. 30, 1964) (statement of Sen. Hubert Humphrey). The Supreme Court has explained that prohibiting disparate furthers the central purpose of the Fair Housing Act and other statutes that, like Title VI, seek to "eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Communities Project,* 576 U.S. at 539.

[45] 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

[46] *Washington v. Davis*, 426 U.S. 229 (1976).

[47] *Norwalk CORE v. Norwalk Redevelopment,* 395 F.2d 920 (2d Cir. 1968); *Hobson v. Hansen*, 269 F.Supp. 401, 497 (D.D.C.1967).

[48] *Griggs*, 401 U.S. at 430–31; *see also Inclusive Communities*, 576 U.S. at 521 (noting that "[r]ecognition of disparate impact claims is consistent with the [Fair Housing Act's] central purpose" as it "was enacted to eradicate discriminatory practices within a sector of our Nation's economy") (citations omitted).

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

[50] *See, e.g., Inclusive Communities,* 576 U.S. at 540 ("Recognition of disparate-impact liability . . . also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").

3. *Congress Has Implicitly Approved of the VA's Title VI Regulations*

The idea that disparate impact regulations are necessary to effectuate the purposes of Title VI is longstanding and has previously been noncontroversial. The U.S. Department of Justice issued the first Title VI regulations prohibiting racially discriminatory effects immediately after the statute passed.[51] The same Executive Branch agencies that helped draft the Civil Rights Act of 1964 were thus involved in promulgating the first regulations containing "effects" language under Title VI.[52] Twenty-six federal agencies later issued rules prohibiting unjustified discriminatory effects under Title VI.[53] The effects standard has been a core component of VA's nondiscrimination rules since those rules were first issued more than 60 years ago.[54] Federal agencies have repeatedly emphasized the need for discriminatory effects regulations across administrations and under presidents of all political parties. Following the Supreme Court's decision in *Sandoval*, for example, the Civil Rights Division under the George W. Bush administration issued a memorandum on October 26, 2001, for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that reiterated the legality of federal agencies' discriminatory effects regulations and argued that agencies retained their authority and responsibility to enforce those regulations.[55]

Congress has long been aware of federal agencies' discriminatory effects regulations and has never sought to alter them. Congress has amended Title VI seven times since its inception without ever indicating disapproval of disparate impact.[56] Instead, Congress has frequently moved to expand the coverage of Title VI protections. For example, in 1988, Congress enacted the Civil Rights Restoration Act of 1987 to remedy what it perceived to be a serious narrowing of the longstanding administrative interpretation of which "programs or activities" are covered by Title VI in *Grove City College* v. *Bell*, 465 U.S. 555, 570-74 (1984).[57] Congress sought to restore the prior consistent and long-standing executive branch interpretation and "broad, institution-wide application" of Title VI as previously administered[58] with the express understanding that these programs or activities would be subject to disparate-impact regulations.[59] Congress has

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[51] The Department of Justice issued its discriminatory effect regulation in 1966. Implementation of Title VI of Civil Rights Act of 1964 with Respect to Federally Assisted Programs Administered by Department of Justice, 31 Fed Reg. 10,265 (Jul. 29, 1966). Congress, fully aware of this administrative interpretation, has never altered it. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 620–21 (1983) (Marshall, J., dissenting) (noting, among other things, that Congress has enacted ten additional statutes modeled on Title VI "none of which define discrimination to require pro of of intent" and that "Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter").

[52] Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact,* 36 GEO. WASH. L. REV. 824, 845-46 (1968); *Zuber v. Allen,* 396 U.S. 168, 192 (1969) (interpretation of a statute by administrators who participated in drafting it carries "most weight").

[53] *Supra* note 2.

[54] 29 Fed. Reg 19301 (Dec. 31, 1964).

[55] Memorandum from the Assistant Attorney General to the Heads of Departmental Agencies, General Counsels, and Civil Rights Directors, *supra* note 36.

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

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

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

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

also expressly modeled major pieces of civil rights legislation on the Title VI framework.[60] By contrast, proposals to curb Title VI regulations have never succeeded in Congress.[61]

VA's disparate-impact regulations are a lawful exercise of its authority to issue regulations to effectuate the purpose of Title VI. Because VA cannot justify the proposed rule based on *Loper Bright*, the agency should withdraw it.

C. VA Fails to Explain Why Its Current Disparate-Impact Regulations Mandate Race-Based Decisions

VA claims the proposed rule is necessary because disparate-impact liability requires recipients to make race-based decisions.[62] VA does not point to any instances in which the threat of disparate-impact liability encouraged its grantees to take unlawful actions, instead relying on broad presumptions. In doing so, VA ignores Supreme Court precedent upholding disparate impact protections and misrepresents recent Supreme Court cases.

1. *The Supreme Court Has Consistently Upheld Disparate-Impact Protections*

The Supreme Court has repeatedly recognized disparate impact is a lawful theory of liability. In *Griggs v. Duke Power Co.*, the Court unanimously held that disparate impact liability was a valid legal theory to establish racial discrimination.[63] Later, the Court in *Smith v. City of Jackson* held that disparate impact is a valid theory of liability under the Discrimination in Employment Act of 1967.[64] More recently, in 2015, the Court held in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* that disparate impact liability is a valid theory under the Fair Housing Act.[65] VA does not try to square its view that disparate-impact liability requires unlawful race-based decisions with these cases.

2. *Recent Supreme Court Cases Do Not Change the Legality of Disparate Impact*

In support of its position, VA cites *SFFA* for the proposition that the Equal Protection Clause applies equally to all racial groups.[66] While *SFFA* supports that limited proposition, it does not call into question the legality of disparate impact protections. In *SFFA,* the Supreme Court held that Harvard and the University of North Carolina's explicit use of race as a factor in their admissions processes in order to further an interest in diversity violated Title VI's prohibition on intentional discrimination.[67] The Court also reaffirmed the general principle that entities can consider race in order to remedy specific instances of past discrimination.[68] The case did not concern disparate impact discrimination or make any statement regarding its legality under the U.S. Constitution or Title VI.

Importantly, VA does not explain why it believes its disparate-impact regulations involve "race-based means" forbidden by *SFFA*. In general, the unlawful discriminatory effects of race-

[60] *See* 20 U.S.C. § 1681 *et seq*. (Title IX); 29 U.S.C. § 794 (Rehabilitation Act).
[61] *See, e.g.*, 112 Cong. Rec. 18715 (1966) (rejecting proposal to amend Title VI so as to require proof of "intent to exclude")
[62] Proposed Rule at 38571.
[63] *Griggs*, 401 U.S. at 431, (holding that Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.")
[64] *Smith v. City of Jackson*, 544 U.S. 228 (2005).
[65] *Inclusive Communities Project, Inc.,* 576 U.S. 519.
[66] Proposed Rule at 38571.
[67] *SFFA,* 600 U.S. at 230.
[68] *Id*. at 207.

neutral policies are addressed through equally race-neutral means. The *SFFA* majority did not disturb, and Justice Kavanaugh reaffirmed in his concurrence, that both the government and federally-funded entities can achieve equitable goals through such race-neutral means.[69]

D. VA Fails to Explain Why the Affirmative Action Provision in Its Title VI Regulation Mandates Unlawful Race-Based Decisions or Consider Alternatives

VA claims it must remove the regulation on affirmative action because it "authorizes and sometimes requires the intentional use of race without requiring that this intentional use be narrowly tailored to serve a recognized compelling interest."[70] VA misrepresents both the regulation and the law. While the regulation refers to "affirmative action," it does not require recipients to use race-based decisions. Recipients are permitted to take actions that apply equally to remedy both intentional discrimination and unfair discriminatory effects. Moreover, as noted about, the Supreme Court in *SFFA* reaffirmed the general principle that entities can consider race to remedy specific instances of past discrimination.[71] Finally, VA fails to consider more limited revisions that could address its concerns, such as explicitly stating entities may only take race-neutral actions and/or must follow the standards of strict scrutiny when making race-based decisions to remedy intentional discrimination.

E. The Proposed Rule Creates Confusion Regarding Recipients Other Legal Obligations

While the proposed rule would remove VA's disparate impact regulations, it does not and cannot change recipients' legal obligations under the Fair Housing Act, Title VII, or other civil rights laws. In some cases, recipients have concurrent obligations under both Title VI and other statutes that prohibit disparate impact. For example, recipients of grants for the hiring and retention of nurses at state veterans' homes must comply with both Title VI[72] and Title VII if the state employs more than 15 employees.[73] As discussed, the Supreme Court has held that both the Fair Housing Act and Title VII prohibit unjustified disparate impacts,[74] and Congress amended Title VII to codify that prohibition.[75] Because the prohibition of unjustified disparate impacts under those statutes is well-established law, the proposed rule cannot change those obligations. However, the proposal's sweeping claims regarding the illegality of disparate-impact liability risk creating confusion for recipients, who may not understand they must continue to take steps to prevent unfair barriers in housing and employment.

F. Black Communities and Other Communities of Color Have Substantial Reliance Interests in VA's Disparate-Impact Regulations

VA must demonstrate a substantial basis for rescinding its Title VI regulations given the serious reliance interests at stake. VA first implemented Title VI regulations in 1964, shortly after the Civil Rights Act was passed.[32] In the six decades since, no amendments have been made to eliminate or narrow disparate-impact liability. In fact, as the proposed rule acknowledges, the amendments to the regulations since 1964 have been to apply disparate impact theory to

[69] *SFFA,* 600 U.S. at 317 (Kavanaugh, concurring) (explaining "governments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race" (citing *Croson*) (internal quotations administered).
[70] Proposed Rule at 38571.
[71] *SFFA* at 207.
[72] 38 C.F.R. 18.3(d) (discussing when discrimination in employment violates VA's Title VI regulations).
[73] 42 U.S.C. § 2000e(b) (defining covered employers).
[74] *Inclusive Communities Project,* 576 U.S. 519; *Griggs*, 401 U.S. 424.
[75] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 3(3) (1991).

additional programs and clarify its scope.[3376] For federally-funded activities not covered by the Fair Housing Act and Title VII, in the absence of a private right of action under Title VI, individuals must rely on continued agency enforcement and deterrence to prevent and address discrimination by federal funding recipients. Rescinding the rule would increase the likelihood that Black veterans will face unfair barriers in accessing VA programs, undermining the effectiveness of those programs and impose economic costs on the country as a whole.[77] Because VA has failed to articulate a sufficient reasoned basis to rescind its Title VI disparate-impact regulations in light of these reliance interests, the proposed rule must be withdrawn.

III. Conclusion

VA's proposed rule would harm Black veterans and other veterans of color by eliminating decades-old protections against racial discrimination. Despite what VA claims, disparate-impact liability is well-recognized by the Supreme Court and Congress and remains necessary to effectuate the purposes of Title VI. Because VA has failed to provide a reasoned basis for the proposed rule, it should immediately withdraw it.

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

Sincerely,

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[76] Proposed Rule at 38570.

[77] DANA M. PETERSON & CATHERINE L. MANN, CITI GPS, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 4 (2020), https://www.citigroup.com/global/insights/citigps/closing-the-racial-inequality-gaps-20200922 (explaining the United States' aggregate economic output would have been $16 trillion higher since 2000 if the country had closed racial gaps in wages, access to higher education, lending, and mortgage access); Nick Noel, et al., *The economic impact of closing the racial wealth gap*, MCKINSEY & CO. (Aug. 13, 2019), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap (explaining the racial wealth gap alone will cost the U.S. economy between $1 trillion and $1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028).