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Docket No. DOE-HQ-2025-0024

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Re: Significant Adverse Comments on the Department of Energy's Direct Final Rule, DOE-HQ-2025-0024

I. Introduction

We, the undersigned organizations and individuals, submit the following significant adverse comments on the Department of Energy's (DOE) Direct Final Rule ("Direct Final Rule" or "Rule"), DOE-HQ-2025-0024, "Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions)." On May 16, 2025, DOE issued the Direct Final Rule revoking longstanding nondiscrimination regulations, as directed by Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy." The Rule eliminates disparate impact as a cognizable framework for discrimination claims in the administrative complaint process and limits other civil rights protections, such as the requirement that recipients of federal funds provide interpretation and translation services when needed as well as accessibility standards for eliminating architectural barriers. The Direct Final Rule violates the procedural mandates of the Administrative Procedure Act (APA) and subverts nondiscrimination principles that benefit all Americans.

The Direct Final Rule is an inappropriate vehicle by which to revoke the regulations at issue, which effectuate civil rights laws. This comes at a time when this Administration has tried

to circumvent laws and procedures to promote additional fossil fuel production and fewer protections for the health and safety of communities more generally. Indeed, the DOE immediately halted efforts to promote community benefit plans, which help to ensure that the communities most harmed by energy projects have an avenue to engage regarding the effects of plans in their communities. These engagement activities and plans build a sense of transparency and accountability for communities that have suffered the brunt of pollution and energy projects, which all too often are concentrated in places that become so-called "sacrifice zones." Now, this Administration is urging even fewer opportunities for public engagement by rolling back the opportunity for full public engagement regarding civil rights protections addressed in this Direct Final Rule and fast-tracking energy projects through other means. In sum, historically excluded communities will undoubtedly face increased hurdles to highlight solutions and alternatives to address the harms that these collective decisions will have on their health.

DOE must withdraw its Direct Final Rule in response to significant adverse comments.[1] The Office of the Federal Register's (OFR) *A Guide to the Rulemaking Process* states that "[i]f 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."[2] DOE cannot use the vehicle of a direct final rule to evade long-standing procedures for notice and comment rulemaking established by

[1] Direct final rules should be used when the "rule is noncontroversial and adverse comments will not be received." Admin. Conf. of the U.S., *Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking*, https://www.acus.gov/document/procedures-noncontroversial-and-expedited-rulemaking (last visited June 6, 2025).
[2] OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS 9 (2013); *see also* MARK SQUILLACE, BEST PRACTICES FOR AGENCY USE OF THE GOOD CAUSE EXEMPTION FOR RULEMAKING 29 (2024) ("If the agency receives significant adverse comments, it has two options. It can either withdraw the rule or publish a regular proposed rule that is open for public comment. In either case, the agency should promptly publish notice of its decision in the Federal Register so that the public knows whether the rule has gone into effect.").

the Administrative Procedure Act, which promotes the democratic value of public participation in rulemaking. The Direct Final Rule must be withdrawn.

II. The Direct Final Rule Violates the Administrative Procedure Act

The APA requires federal agencies to follow standard notice and comment rulemaking processes unless specific exceptions apply.[3] As we explain below, DOE's Direct Final Rule, "Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions)," does not qualify for any of these exceptions.[4]

A. The Direct Final Rule Does Not Fall Under the Good Cause Exception to Notice and Comment Rulemaking

In rare circumstances, and unless a statute says otherwise, an agency may be entitled to bypass the standard notice and comment rulemaking process if it "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] DOE fails to meet these standards because: (1) it failed to make a finding of good cause in the Rule; and it cannot reasonably find that it is (2) unnecessary, (3) impracticable, or (4) contrary to the public interest to follow notice and comment procedures.

Even if DOE had made such a finding in the Direct Final Rule, it would now need to withdraw the Rule upon receipt of this and other significant adverse comments. If, during the comment period, "even a single adverse comment is received, the direct final rule is withdrawn,

[3] 5 U.S.C. § 553(b).
[4] 90 Fed. Reg. 20777 (May 16, 2025). These significant adverse comments focus on the rescission of DOE regulations implementing Subpart B of Title VI of the Civil Rights Act of 1964, *id.* at 20779–80, but discussion in this comment about the inapplicability of the "for cause" exception to notice-and-comments requirements applies to the Direct Final Rule as a whole.
[5] 5 U.S.C. § 553(b)(B).

and the agency must issue a proposed rule under the APA's informal notice and comment requirements."[6]

1. The Direct Final Rule Lacks a Sufficient Finding of Good Cause

The Direct Final Rule fails to establish good cause for circumventing the notice and comment procedure required under 5 U.S.C. § 553. The good cause exception is meant to be "narrowly construed and only reluctantly countenanced."[7] Because it is to be used only when compliance with the APA's notice and comment requirements would frustrate the agency's ability to fulfill its mandate,[8] the good cause exception is "usually invoked in emergencies."[9]

Courts are meant to "consider an explanation for good cause that the agency has 'advanced at the time of the rule making.'"[10] Explanations issued after the fact are accordingly "viewed with 'skepticism.'"[11] But DOE's Direct Final Rule includes no concrete finding or explanation relevant to the standard as required by the APA.[12] It is the agency's "burden . . . to establish that notice and comment need not be provided,"[13] and here, DOE fails to meet this burden.

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[6] JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 4 n.38 (2016) (citing Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 4–6 (1995)); Office of the Federal Register, *supra* note 2; *see also* SQUILLACE, *supra* note 2, at 29 ("If the agency receives significant adverse comments, it has two options. It can either withdraw the rule or publish a regular proposed rule that is open for public comment. In either case, the agency should promptly publish notice of its decision in the Federal Register so that the public knows whether the rule has gone into effect.").

[7] State of N.J., Dep't of Env't Prot. v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *see also* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012); Jifry v. Fed. Aviation Admin., 370 F.3d 1174, 1180 (D.C. Cir. 2004).

[8] California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018) (quoting Riverside Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992).

[9] *Azar*, 911 F.3d at 575 (citing U.S. v. Valverde, 628 F.3d 1159, 1164–65 (9th Cir. 2010)).

[10] N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 767 (4th Cir. 2012).

[11] *Id.*

[12] 5 U.S.C. § 553(b)(B).

[13] Nat'l Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 114 (2d Cir. 2018) (citing Action on Smoking & Health v. Civ. Aeronautics Bd., 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)).

2. *The Department Lacks Good Cause to Find it "Unnecessary" to Follow Notice and Comment Procedures*

The Administrative Procedure Act's legislative history sheds light on the narrow range of circumstances in which bypassing notice and comment may be justifiable under the good cause exception.[14] According to the statute, under narrow circumstances an agency may avoid the usual notice and comment rulemaking proceedings for good cause if it determines that it is "unnecessary" to follow such procedure.[15] As used in Section 553(b)(B), "unnecessary" refers only "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,'"[16] none of which describe the proposed changes to the Rule here. For example, a regulatory or deregulatory rule that impacts burdens on the regulated community would not be inconsequential.[17] The first Trump administration itself "rarely characterize[d] its deregulatory efforts in these terms" because "the potential impact of repealing the rules that the administration [was] targeting [was] likely to be large."[18]

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[14] Am. Fed. of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) ("As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations.").

[15] While DOE's summary of the rule states that the agency "rescinds certain *unnecessary* regulatory provisions related to nondiscrimination in federally assisted programs or activities," the word unnecessary here is used solely to express the current agency's view as to these regulations' value. Importantly, it is not used to assert that notice-and-comment to rescind those regulatory provisions is unnecessary. 90 Fed. Reg. at 20777 (emphasis added).

[16] State of S.C. ex rel. Patrick v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983) (quoting Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 743 (3d Cir.1969)); Nat'l Motor Freight Traffic Ass'n v. United States, 268 F.Supp. 90, 95–96 (D.D.C. 1967)); U.S. DEP'T JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 31 (1947).

[17] *See* Utility Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001) (finding that EPA's rule did not meet the "unnecessary" prong where it "greatly expanded the regulated community and increased the regulatory burden").

[18] Reed Shaw, *Setting the Record Straight on the APA's "Good Cause" Exception*, YALE J. REG. (May 16, 2025), https://www.yalejreg.com/nc/setting-the-record-straight-on-the-apas-good-cause-exception-by-reed-shaw/. For an example of an agency's proper invocation of the good cause exception's "unnecessary" prong, see SQUILLACE, *supra* note 2 (discussing 89 Fed. Reg. 25749 (Apr. 12, 2024), involving non-discretionary requirements mandated by the Social Security Number Fraud Prevention Act of 2017).

The DOE's Direct Final Rule in this case is in stark contrast to the standards required for determining that notice and comment is "unnecessary." DOE took this deregulatory action, targeting disparate impact liability, in response to Executive Order 14281 ("EO"). The EO characterizes disparate impact liability as a "key tool" of a movement it describes as "pernicious," and as "threaten[ing] the commitment to merit and equality of opportunity that forms the foundation of the American Dream."[19] The DOE then attempts to justify rescinding the nondiscrimination provisions on the basis that "they are either outdated, raise serious constitutional difficulties, or are based on anything other than the best reading of the underlying statutory authority or prohibition."[20] Notwithstanding its inaccurate distortion of disparate impact liability as a concept, the Administration itself seems to view disparate impact liability as anything but insignificant or inconsequential. The notice and comment procedure cannot be deemed "unnecessary" for good cause where, as here, the agency action would repeal regulations related to "[a] bedrock principle of the United States."[21] DOE's very argument that the disparate impact regulations raise legal and constitutional questions itself affirms that the Direct Final Rule is anything but "routine, insignificant, and inconsequential."[22]

Lastly, DOE's attempt to assert that notice and comment rulemaking is "unnecessary" is defeated by DOE's utter failure to provide an explanation in the Direct Final Rule as to its rationale as to why it is "unnecessary" to go through the usual notice and comment rulemaking processes.[23] The lack of explanation is contrary to the APA's requirements, and courts are not

[19] Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025).
[20] 90 Fed. Reg. 20777, 20779 (May 16, 2025).
[21] *Id.*
[22] *See* South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983); *see also* Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969).
[23] The Direct Final Rule contains two references to the word unnecessary. However, neither statement explains how or why DOE has found that for good cause, it is "unnecessary" to follow the notice and comment process outlined in the APA. *See* 90 Fed. Reg. 20777, 20781 (May 16, 2025).

permitted to "supply a reasoned basis for the agency's action that the agency itself has not given."[24] Nor can they "lightly accept arguments that an agency, while failing to refer to the good cause exception, nevertheless implicitly relied on the exception."[25] For these reasons, DOE's circumvention of notice and comment procedures for good cause under the "unnecessary" prong of 5 U.S.C. §553(b)(B) is unjustifiable.

3. DOE Lacks Good Cause to Find it "Impracticable" to Follow Notice and Comment Procedures for the Direct Final Rule

In the alternative, "impracticability," may be found in "a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings."[26] Impracticability is usually confined "to situations . . . when immediate implementation of a rule might directly impact public safety."[27] Accordingly, courts have previously upheld agency action relying on the impracticability prong of the good cause exception where "'delay would do real harm' to life, property, or public safety.'"[28]

The DOE did not promulgate—nor does it claim to have promulgated—this Direct Final Rule to stave off any such hazards. And while it may wish to promulgate the rule efficiently, "an agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause."[29] The agency's desire to merely alleviate alleged "constitutional difficulties" and clarify the "best reading of the underlying statutory authority or prohibition" does not render notice and comment procedure impracticable. [30] To the contrary, this reasoning makes the usual notice and comment process even more important.

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[24] *N.C. Growers' Ass'n*, 702 F.3d at 767 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm, 463 U.S. 29 (1983)).
[25] *Id.* at 768.
[26] Nat'l Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978).
[27] *Nat'l Res. Def. Council*, 894 F.3d at 114 (citing Mack Trucks, 682 F.3d at 93.
[28] *Azar*, 911 F.3d at 576.
[29] *Id.*
[30] 90 Fed. Reg. 20778 (May 16, 2025).

4. *DOE Lacks Good Cause to Find Notice and Comment Procedure "Contrary to the Public Interest"*

DOE's Direct Final Rule on nondiscrimination contains no explanation for why it would be "contrary to public interest" for the agency to go through notice and comment procedure.[31] Even if it did, however, the Direct Final Rule does not meet the standard established under the public interest prong of the good cause exception.

In the context of the APA's good cause exception, "public interest" connotes a situation in which the interest of the public would be defeated by any requirement of advance notice."[32] A separate memorandum issued by the Trump administration earlier this year advises agencies to circumvent the notice and comment process when repealing certain categories of purportedly unlawful regulations, asserting that "[r]etaining and enforcing facially unlawful regulations is clearly contrary to the public interest."[33] This mandate contravenes the direct language of the APA and long-established procedures.

We disagree with the Administration's assertion that the regulations in question are "facially unlawful." Regardless, the APA states clearly that for purposes of the good cause exception, the question here is not "whether retaining a purportedly unlawful law is contrary to the public interest, but instead *whether providing notice and comment before rescinding that rule* is contrary to the public interest."[34] While related, the public interest prong may allow circumvention of the notice and comment process, but only when regulations are "'minor or merely technical,' and of little public interest."[35] Our disagreement with the Administration's

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[31] 5 U.S.C §553(b)(B).
[32] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT, *supra* note 16, at 31.
[33] Presidential Memorandum, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/.
[34] Shaw, *supra* note 18 (emphasis in original).
[35] *N.C. Growers' Ass'n*, 702 F.3d at 765 (citing *Nat'l Nutritional Foods Ass'n*, 572 F.2d at 384–85 (quoting S. Rep. No. 72, at 200)); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT, *supra* note

position, and our submission of this significant adverse comment, is proof enough that the "public interest" prong of the APA good cause exemption has not been met.

Under the public interest prong, because procedures like notice and comment rulemaking are "generally presumed to serve the public interest," an agency must demonstrate that providing notice of the rule would harm the public.[36] For example, if an agency provided a reasonable explanation for why issuing notice would enable "the amended rule [to] be[] evaded," a court may find good cause to avoid the notice and comment process.[37] This is clearly not established by DOE's Direct Final Rule.

The public's opportunity to participate in rulemaking in this way is at the heart of the APA, and it significantly harms the public interest for the agency to have bypassed notice and comment rulemaking.

Following the notice and comment process to issue a rule amending nondiscrimination provisions, as here, is entirely in the public interest, and is the minimum required of the agency. Failing to do so cuts against the "public interest" prong of the APA and undermines the purpose of the statute as a whole.[38]

B. The Direct Final Rule is Legislative and Accordingly Must Follow Notice and Comment Procedures

As discussed above, though there are narrow circumstances in which an agency may bypass notice and comment rulemaking, none of these circumstances apply here. Moreover, the

16, at 30–31 (explaining that "the 'unnecessary' prong of the good cause exception refers to 'the issuance of a minor rule or amendment in which the public is not particularly interested'").
[36] *Mack Trucks*, 682 F.3d at 95 (D.C. Cir. 2012).
[37] Utility Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001).
[38] William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 90 NOTRE DAME L. REV. 1893, 1896 (2023) ("[T]he APA offered administrative agencies a legitimate way to make rules with the force of law by combining democratic values with due process values.").

Direct Final Rule alters the substantive rights of third parties, and therefore requires notice and comment rulemaking as a legislative rather than interpretive rule.

The APA provides that, unless "notice or hearing is required by statute," the requirements of notice and comment rulemaking do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[39] This exception does not encompass those rules that "impose[] 'substantive burden[s],' 'encode[] a substantive value judgment,' 'trench[] on substantial private rights [or] interests,' or otherwise 'alter the rights or interests of parties.'"[40] As demonstrated *infra* Part III, the Direct Final Rule has clear, substantive impacts on parties who are regulated under the Civil Rights Act, and on the public whose rights the statute is meant to protect.

A rule is legislative, and thus subject to the APA's notice and comment procedures, when "the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA."[41] Here, the public's substantive interest in the enforcement of nondiscrimination regulations is considerable. Characterizing the rule as anything but legislative in order to circumvent the APA's procedural requirements would threaten the value of democratic participation in rulemaking central to the APA.

The Direct Final Rule does not even attempt to invoke the exception under 5 U.S.C. 553(b)(A) because there is simply no way to characterize these fundamental changes to longstanding nondiscrimination regulations as "interpretive, procedural, or a general statement of policy." As discussed *infra*, the rule is legislative given its considerable substantive impact on

[39] 5 U.S.C. § 553(b)(A).
[40] Am. Fed'n of Lab. & Cong. of Indus. Orgs v. Nat'l Lab. Rels. Bd., 57 F.4th 1023, 1035 (D.C. Cir. 2023) (internal citations omitted).
[41] Lamoille Valley R. Co. v. I.C.C., 711 F.2d 295, 328 (D.C. Cir. 1983).

impacted parties' rights and interests.[42] Given the Direct Final Rule's terms, the agency cannot plausibly argue that it is revoking requirements that simply "reflect agency policy preferences"[43]—or that it is interpretive, intended to "advise the public of the agency's construction" of Title VI of the Civil Rights Act.[44] In any event, it cannot do so after the fact.

While it is true that the presence of some substantive impact on its own "does not undercut the conclusion that, in essence, [a rule is a] general statement[] of policy,"[45] the Direct Final Rule is substantive at its core; it is not merely an interpretive rule or general statement of policy.

Lastly, the Direct Final Rule purports to rescind long-standing regulations that were properly promulgated in accordance with the APA's notice and comment procedures. The Supreme Court held that, under Section 551 of the Act, "the APA "makes no distinction…between initial agency action and subsequent agency action undoing or revising that action."[46] Here, DOE finalized "Nondiscrimination in Federally Assisted Programs; General Provisions," in 1980 through a notice and comment rulemaking process after receiving 511 responses during a 31-day comment period. See 45 Fed. Reg. 40514, 41514 (June 13, 1980) (discussing the 511 responses, which include 431 that concurred with the proposed rule as published and 80 that recommended various changes, as well as DOE's response to comments). In 2003, DOE again issued its final rule, Nondiscrimination on the Basis of Race, Color, National Origin, Handicap, or Age in Programs or Activities Receiving Federal Financial Assistance," a joint final rule with sister agencies, after notice and comment rulemaking, inviting

[42] *See infra* Part III.
[43] 90 Fed. Reg. 20778 (May 16, 2025).
[44] Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995).
[45] Guardian Fed. Savings & Loan Assoc. v. Fed. Savings & Loan Ins. Corp. et al, 589 F.2d 658 (D.C. Cir. 1968).
[46] Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 93 (2015) (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

comments through a Notice of Proposed Rulemaking. 68 Fed. Reg. 51334, 51338 (Aug. 26, 2003) (discussing comments received in response to the Notice for the Joint Final Rule).

The nondiscrimination provisions that the Direct Final Rule seeks to repeal "modifie[d and] add[ed] to a legal norm based on the agency's own authority."[47] Accordingly, their revocation also modifies the law as it has been enforced for nearly half a century.[48]

III. The Direct Final Rule Failed to Address the Need for Strong Civil Rights Laws

A. Robust Implementation and Enforcement of Civil Rights Laws, Including Title VI, Advances Equal Protection for All

Civil rights laws reflect this nation's deep commitment to equality for all and the reality that effectuation of civil rights laws is not a zero-sum game. In agencies such as the Departments of Energy, Agriculture, and Interior, as well as the Environmental Protection Agency, the application of the disparate impact standard enables the federal government and funding recipients to identify areas where individuals are not receiving equitable treatment and advance equality of opportunity and improve service delivery and outcomes for all people, most commonly through a cooperative and voluntary process. For example, whether the result of an affirmative compliance review or a complainant's request for relief, mitigation in cases challenging decisions with an unjustified disparate impact in the environmental or energy sector might include the installation of air monitors, equipment to filter harmful pollutants, or a sound buffer at a power generating facility, each of which improves quality of life for all residents of the surrounding geographic area, not only for the individuals alleging discrimination. Procedural improvements that facilitate meaningful engagement of stakeholders (e.g., plain language explanations of legal and technical concepts, resources translated or interpreted into the

[47] Syncor Intern. Corp. v. Shalala, 127 F.3d 90, 95 (D.C. Cir. 1997).
[48] 45 Fed. Reg. 40514, 41514 (June 13, 1980).

languages that people in a particular community speak, and/or following universal design principles to make the built environment and educational tools) provide equal access and improve transparency and accountability for all potential beneficiaries or participants in a program or activity.

As a result of the enforcement of agency disparate impact regulations effectuating Title VI, recipients of federal funds have implemented policies and procedures to expand public engagement in decision-making. Improvements in public notice, comment periods, meetings and hearings allow the general public opportunities to engage in decision-making processes, regardless of race, color, or national origin. Addressing actions with unjustified disparate impacts can also reach beyond procedural measures and improve the life, health, or environment for all. Recipient agencies have generated health and socioeconomic reports that identify the cumulative impacts of their actions. Still other recipients have taken alternative measures that improve service delivery and protect public health. A recipient may install a vegetative buffer or sound walls around a facility, for example. All of these protective actions, which were induced by Title VI compliance obligations, benefit the entire community at-large, regardless of its racial composition.

B. The Disparate Impact Standard is an Appropriate and Necessary Response to Redress Systemic Discrimination in the Energy Sector

The Direct Final Rule improperly asserts that use of the disparate impact standard by the Department of Energy is outdated or contradicts the best reading of statutory authority. However, civil rights enforcement, including prohibitions on actions with an unjustified disparate impact, is consistent with the statutory history of civil rights law and is needed to effectuate the statutory mandate. In 1963, in calling for the passage of the Civil Rights Act of 1964, President Kennedy asserted that the prohibition against discrimination was not limited to intentional acts alone:

"indirect discrimination, through the use of Federal funds, is just as invidious [as intentional discrimination]; and it should not be necessary to resort to the courts to prevent each individual violation."[49] Indeed, agency regulations implementing Title VI, including DOE's, are a critical tool for the federal government to ensure that the billions of dollars in federal funds received by state, local, and private sector actors across the country do not perpetuate a long history of racial discrimination. This position was reiterated by the DOJ's Office of Civil Rights in 2001, when it issued a memorandum clarifying that federal funding agencies retained their authority and responsibility to enforce their disparate impact regulations, which they categorized as a "vital administrative enforcement mechanism."[50]

Many laws that resulted in segregation have been overturned, but the effects of years of discrimination and segregation in land use persist today in contemporary practices like permitting and siting, which can result in the concentration of industrial infrastructure in historically redlined or segregated communities of color and low income communities.[51] The concentration of polluting facilities disproportionately expose communities of color, indigenous populations, and low income communities to environmental and public health risks.[52] At the same time, these same households are likely to "pay more of their overall income to meet household energy needs while bearing the burden of housing dirty, fossil fuel generation, and

[49] H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).
[50] Civ. Rts. Div., U.S. Dep't of Justice, Title VI Legal Manual 5 [hereinafter DOJ Title VI Manual] (reiterating position following the Supreme Court's decision in *Alexander v. Sandoval*).
[51] Robert D. Bullard, Paul Mohai, Robin Saha & Beverly Wright, *Toxic Wastes and Race at Twenty: 1987–2007*, UNITED CHURCH OF CHRIST x–xiii (Mar. 2007), https://www.ucc.org/wp-content/uploads/2021/03/toxic-wastes-and-race-at-twenty-1987-2007.pdf.
[52] *See, e.g.*, Paula García et al., *Siting for a Cleaner, More Equitable Grid in Massachusetts,* UNION OF CONCERNED SCIS. (2024), https://doi.org/10.47923/2024.15371 (noting that while close to 50% of Massachusetts's neighborhoods classify as an EJ population, more than 80%of existing polluting electricity generating units—with their associated health risks—are located in or within one mile of an EJ population); *see also* Energy, Economic, and Environmental Assessment of U.S. LNG Exports, DEPT. OF ENERGY at S-50-51 (Dec. 2024), https://www.energy.gov/sites/default/files/2024-12/LNGUpdate_SummaryReport_Dec2024_12pm.pdf.

other electricity infrastructure in their backyard."[53] To cite another example, in the wake of Hurricanes Harvey and Maria, the U.S. Commission on Civil Rights examined the civil rights implications of the federal government's response to disaster recovery. Although its annual statutory enforcement report *Civil Rights and Protections During the Federal Response to Hurricanes Harvey and Maria* focused primarily on the Federal Emergency Management Agency's (FEMA) enforcement of federal civil rights laws and policies, the report also examined coordination among federal agencies and made recommendations to address barriers to language access and greater public engagement in the range of activities from emergency planning and response to recovery and mitigation. The report discussed the impacts of the activities of LUMA Energy, the electrical grid operator in Puerto Rico that receives federal financial assistance from DOE, and recounted testimony regarding the impacts of LUMA's actions.[54] Language access was "a significant issue for survivors of both storms" and other marginalized persons faced barriers in accessing services such as shelters.[55] Improved disaster preparedness might include ensuring that people with mobility impairments have ways to evacuate or those who are energy-dependent for life support have access to reliable energy. Although energy sector laws and policies are now facially neutral, there is substantial evidence that "[s]tate, local and private sector actors make decisions every day that create or exacerbate racial [and other] inequalities" in exposure to pollution from energy infrastructure and in access to energy related benefits.[56]

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[53] SHALANDA H. BAKER, REVOLUTIONARY POWER: AN ACTIVIST'S GUIDE TO THE ENERGY TRANSITION (1st ed., 2021); *see also, Energy Burden Research*, ACEEE, https://www.aceee.org/energy-burden (last visited June 14, 2025); JEAN SU & CHRISTOPHER KUVEKE, POWERLESS IN THE PANDEMIC 2.0: AFTER BAILOUTS, ELECTRIC UTILITIES CHOSE PROFITS OVER PEOPLE (Apr. 2022), https://bailout.cdn.prismic.io/bailout/ddebd6e2-b136-4dc8-a1da-f6d4583b4c24_Powerless_Report2022_final.pdf.

[54] U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS AND PROTECTIONS: DURING THE FEDERAL RESPONSE TO HURRICANES HARVEY AND MARÍA 153 (Sept. 21, 2022), https://www.usccr.gov/files/2022-09/2022-statutory-report-fema.pdf.

[55] *Id.* at 2.

[56] Marianne Engelman Lado, *Toward Civil Rights Enforcement in the Environmental Justice Context - Step One: Acknowledging the Problem*, 29 FORDHAM ENV'T LAW REV. 1, 7–8 (2017); Phil Brown, *Race, Class, and*

C. The Disparate Impact Standard Creates Accountability that Includes Procedural Protections for Federal Funding Recipients

Strong implementation and enforcement of civil rights laws, including disparate impact standards, helps ensure "that public funds, to which all taxpayers of all races contribute, [are] not [] spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[57] As the Title VI Legal Manual issued by the Department of Justice explains, "[t]he disparate impact regulations seek to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination."[58] DOE regulations implementing Title VI are a critical tool for the federal government to ensure that the billions of dollars in federal funds received by state, local, and private sector actors across the country do not perpetuate a long history of racial discrimination. These regulations require recipients to take a close look at facially neutral policies that disparately exclude members of a protected class from benefits or services or inflict a disproportionate share of harm on them. As the Supreme Court has explained, even benignly motivated policies and decisions that appear neutral on their face may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and other areas.[59]

Though agencies seek voluntary compliance and rarely withhold federal funds even if the recipient engages in discriminatory policies or practices, compliance activities and the threat of enforcement have been extremely beneficial. As stated above, the mere possibility that funds will not be granted or will be terminated has resulted in changes in policies and practices that benefit all. To our knowledge, the heavy hammer of funding withdrawal has never been exercised by

Environmental Health: A Review and Systemization of the Literature, 69 ENV'T RSCH. 15 (1995), https://doi.org/10.1006/enrs.1995.1021.

[57] H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963) (quoting President John F. Kennedy).

[58] DOJ Title VI Legal Manual, *supra* note 50, Section VII.

[59] *Id.* at Sec. VII; Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971); City of Rome v. U.S., 446 U.S. 156, 176–77 (1980); Gaston Cty. v. U.S., 395 U.S. 285, 297 (1969).

DOE, or most other federal agencies, in part because of the procedural protections that agency Title VI nondiscrimination regulations and guidance provide for recipients.

In those instances where deterrence, technical assistance, and voluntary compliance efforts fail, federal agencies and courts apply a three-part test to determine whether a recipient has violated Title VI disparate impact standards.[60] The federal agency must establish a prima facie case that a recipient's policy or practice caused disproportionate, adverse impact on the ground of race, color, or national origin. To meet this burden, there must be a specific policy or practice at issue that causes disproportionate harm to an identified group. In assessing disproportionality, the agency must consider whether a disproportionate share of the harm is borne based on race, color, or national origin.[61] If those elements are satisfied, then the agency must determine whether there is a "substantial legitimate justification" for the recipient's practice. Lastly, the agency must consider whether a less discriminatory alternative exists – which can include, for example, forms of mitigation, that would achieve the same legitimate goals.

In an administrative investigation, the burden to establish a violation of Title VI remains with the federal agency, as opposed to the recipient or complainant.[62] However, the recipient may be expected to provide information and data to the agency for its investigation. Where the prima facie case for disparate impact is met, the recipient can provide a substantial legitimate justification for its policy or practice and proffer evidence that there was no less discriminatory alternative that would achieve the same goals. While the discriminatory impact of the recipient's actions may disproportionately affect members of one racial or ethnic group, less discriminatory

[60] *See* DOJ Title VI Legal Manual, *supra* note 50, at Section VII ("Proving a Violation of the Disparate Impact Standard").
[61] *Id.* at 16.
[62] *Id.* at 7, 38.

alternatives can include practices that ameliorate the disparate impact and are beneficial to the broader community.

IV. The Direct Final Rule Will Undo Decades of Civil Rights Law and Protections Against Discrimination, Exclusion, and the Denial of Benefits on Prohibited Grounds

A. The Direct Final Rule Would Upend Long-standing Disparate Impact Regulations That Have Been in Place for Decades

Title VI of the Civil Rights Act of 1964 broadly prohibits discrimination, exclusion, and denial of benefits on the ground of race, color, and national origin, and regulations developed contemporaneously with the statute, in 1964, reflected this broad mandate.[63] These regulations uniformly and explicitly prohibited actions by programs or activities receiving federal financial assistance with an unjustified disparate impact.[64] Although DOE was not established until 1977, the Atomic Energy Commission (AEC), a forerunner to DOE, followed suit in 1966. The list of specifically prohibited activities applicable to recipients of AEC financial assistance included actions with an unjustified disparate impact, prohibiting recipients from "directly or through contractual or other arrangements, utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination" on the basis of race, color, or national origin.[65] When the AEC was abolished by the Energy Reorganization Act of 1974, its functions

[63] *See, e.g.*, Nondiscrimination in Federally-Assisted Programs of the Department of Labor–Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16273–16305 (Dec. 4, 1964) (citing sections include regulations for nondiscrimination in federally-assisted programs at the Departments of Interior, Agriculture, Labor, Health, Education and Welfare, General Services Administration, Housing and Home Finance Agency, and the National Science Foundation).

[64] *See, e.g.*, *id.* at 16284 (stating recipients of Department of Labor funding "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination"); *id.* at 16281 (Housing and Home Finance Agency regulations prohibiting actions with "the effect of subjecting persons to discrimination"); *id.* at 16284 (Department of Labor regulations prohibiting actions with "the effect of subjecting individuals to discrimination"); *id.* at 16293 (Department of the Interior regulations prohibiting actions with "the effect of subjecting individuals to discrimination").

[65] Nondiscrimination in Federally Assisted Commission Programs of the Atomic Energy Commission, 29 Fed. Reg. 19277, 19278 (Dec. 31, 1964) (publishing regulations effectuating the provisions of Title VI of the Civil Rights Act of 1964, to be codified at 10 C.F.R. Part 4).

were assigned to agencies that became part of DOE as a result of the Department of Energy Organization Act of 1977.[66]

Soon after the formation of the agency, DOE issued a Notice of Proposed Rulemaking pertaining to nondiscrimination in federally assisted programs, including provisions to effectuate Title VI and other civil rights laws.[67] In alignment with sister federal agencies and the prior AEC regulations, the proposal's list of prohibited activities explicitly included actions with the effect of discriminating.[68] After notice and comment, DOE's final regulations included the effects standard, which has remained unchanged as a core component of the agency's nondiscrimination regulations since.[69]

B. The Direct Final Rule Removes Important Protections Effectuating Prohibitions Against Discrimination, Exclusion, and the Denial of Benefits on the Ground of Race, Color, and National Origin

1. The Rule Will Remove Legal Protections Against Actions with Unjustified Disparate Impacts in Programs and Activities Funded by DOE

DOE awards billions of dollars through thousands of grants and other relevant transactions every year.[70] This year, DOE will give over $64.2 billion in awards, including over $23 billion in grants.[71] DOE's long-standing Title VI rules were designed to ensure these funds benefit everyone in an equitable manner, and are not used to disproportionately help or hurt one group over another. Specifically, Title VI prohibits recipients of these awards from

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[66] *See generally History*, U.S. DEP'T OF ENERGY, https://www.energy.gov/lm/history (last visited June 13, 2025) (providing history of formation of DOE).
[67] *See* Nondiscrimination in Federally Assisted Programs, 43 Fed. Reg. 53658 (Nov. 7, 1978) (proposing rules to be codified at 10 C.F.R. § 1040).
[68] *Id.* at 53663 (proposing list of prohibited discriminatory activities, to be codified at 10 C.F.R. § 1040.13).
[69] Nondiscrimination in Federally Assisted Programs; General Provisions, 45 Fed. Reg. 40515, 40519–20 (June 13, 1980) (prohibiting discrimination, to be codified at 10 C.F.R. § 1043.13); *see also* 68 Fed. Reg. 51334, 51346 (Aug. 26, 2003) (publishing 2003 amendments to 10 C.F.R. Part 1040, which did not alter provisions prohibiting actions with an unjustified disparate impact to effectuate Title VI).
[70] *See, e.g.*, *Agency Profile: Department of Energy*, USASPENDING, https://www.usaspending.gov/agency/department-of-energy?fy=2025 (last visited June 5, 2025).
[71] *Id*.

discriminating, excluding, or denying the benefits of their programs and activities on the ground of race, color, or national origin. DOE's rules effectuate this prohibition through procedures that allow the agency to examine whether the actions of recipients of DOE financial assistance disproportionately harm one racial group over another, and if so, whether there are less discriminatory alternatives, including forms of mitigation. The terms of the statute, as well as DOE's regulations, require that the agency seek to secure compliance through voluntary means before initiating any process to withhold or terminate funds.[72]

For example, the group Californians for Renewable Energy (CARE) filed a Title VI complaint with the DOE in 2003 against the city and county of San Francisco, alleging that the city failed to adequately consider the emission effects of a proposed new, additional natural-gas powered plant at Potrero station, an existing facility, on nearby communities in violation of Title VI and agency regulations.[73] The proposed expansion of Potrero operations raised concerns about impacts on already environmentally overburdened low-income communities and communities of color and, also, risks to aquatic resources posed by the facility's cooling system.[74] Following the complaint, the city voluntarily revoked its proposal.[75] In 2006, in

[72] Title VI, 42 U.S.C. § 2000d-1 (termination or withholding of funds shall not be taken "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"); 10 C.F.R. § 1040.102 (stating DOE officials are responsible for seeking cooperation in obtaining compliance with data collection); *id.* §§ 1040.104 (c)(3)(iii), (4), (5) (stating complaint investigation process including opportunities to come into voluntary compliance).

[73] Letter from Poli A. Marmolejos, Director, Office of Civil Rights and Diversity, U.S. Department of Energy, to Mike Boyd, President, Californians for Renewable Energy (July 15, 2003) (acknowledging the Department's receipt of CARE's Title VI complaint filed on June 21, 2003) (on file with LatinoJustice PRLDEF); Declaration of Michael E. Boyd in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss and Motion for Summary Judgment at 6, Californians for Renewable Energy, et al. v. U.S. E.P.A., No. 4:15-cv-03292-SBA (N.D. Cal. Feb. 2017).

[74] Dennis Herrera, *Protect the Bay - And a Neighborhood*, SFGATE (May 10, 2006), https://www.sfgate.com/opinion/openforum/article/protect-the-bay-and-a-neighborhood-2497411.php (describing opposition by the state Energy Commission and Bay Conservation and Development Commission on this basis).

[75] *See* Declaration of Michael E. Boyd, *supra* note 73. Similarly, a 2011 complaint filed with EPA against the Florida Department of Environmental Protection (FDEP), a recipient of DOE funds at the time, alleged that FDEP's decision to issue an air permit to Northwest Florida Renewable Energy Center for the construction of a biomass fed

response to a proposal to extend the permit for the existing Potrero power plant for five more years, the City Attorney noted that the affected community included "some of the city's most economically disadvantaged residents" who had, "in recent years seen disturbingly high rates of asthma and other health-care problems known to be influenced by environmental factors."[76] He described longstanding noncompliance by the company that had proposed the new facility as well as sought the permit extension as a "shocking affront to the notion of environmental justice – the principle of fair and even-handed enforcement of environmental protections regardless of race, color, national origin, or income."[77]

In a more recent complaint, groups from New York alleged that the state's Department of Environmental Conservation (DEC), Department of Public Service, and National Grid, which received a $12.4 million grant from the DOE, violated Title VI and agency regulations in approving a seven-mile, 30-inch high pressure natural gas pipeline that would run through multiple densely populated neighborhoods in Brooklyn, New York.[78] Complainants argued that the state agencies bypassed federal and state laws to construct and operate the pipeline through the predominantly Black and Latino neighborhoods of Greenpoint, Ocean Hill, Bushwick, East Williamsburg, and Brownsville, and that their actions would have an unjustified disparate impact

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gasification and combined cycle power plant in Port St. Joe would result in human exposure to carcinogens and other adverse outcomes on a disproportionately African American community within 2 kilometers of the facility. *See generally* Letter from David A. Ludder to Helena Wood-Aguilar et al., Title VI Complaint - Northwest Florida Renewable Energy Center, LLC, Port St. Joe, Florida at 1 (Nov. 30, 2011), https://www.epa.gov/system/files/documents/2025-03/11r-11-r4-complaint_redacted.pdf. Ultimately Northwest Florida Renewable Energy Center withdrew from the project based on an inability to secure financing for the facility. Letter from Rafael DeLeón to Secretary Herschel Vinyard, Dismissal of Title VI Administrative Complaint Without Prejudice (Jan. 14, 2013), https://www.epa.gov/system/files/documents/2025-03/11r-11-r4-rec-dismissal.pdf (dismissing complaint E.P.A. No. 11R-11-R4 filed before EPA against Florida Department of Environmental Protection).

[76] Herrera, *supra* note 74.

[77] *Id.*

[78] Letter to Christine Stoneman et al., Complaint Under Civil Rights Act of 1964, 42 U.S.C. § 2000d (Aug. 30, 2021), https://www.epa.gov/system/files/documents/2025-04/02rno-21-r2-complaint-mfr_redacted.pdf (submitting complaint to DOT and DOE against New York State Department of Environmental Conservation, the New York State Department of Public Service, and National Grid).

on the basis of race and national origin.[79] At issue in the complaint was the last portion of the project including two new liquified natural gas vaporizers in Greenpoint. Community members raised concerns about the risks of fire or explosion and alleged they had not received sufficient or timely notice and information about the project.[80] Community residents alleged that the final phase of the project would have increased the pressure through the entire pipeline, elevating risks to communities along the pipeline's path, which already experienced "disproportionate poverty, pollution, and poor health outcomes."[81] Among other things, the complainants asked the Environmental Protection Agency (EPA), the Department of Transportation (DOT), and the DOE to ensure that National Grid be required to comply with federal and state law, and that the DEC consider the "whole action" related to the pipeline and not segment the final phases of the larger pipeline project to evade a more searching review.[82] Ultimately the Public Service Commission (PSC) denied National Grid's request to raise rates to finance the $70 million project. Following the PSC's action, the complaint, an analysis by a consulting group concluding that the final phase of the project was not needed, and other adverse responses, National Grid withdrew its permit application to build the planned liquified gas vaporizers in Greenpoint.[83] The

[79] *Id.* at 3.
[80] *Id.* at 15–17.
[81] *Id.* at 2.
[82] *Id.* at 48–49. The EPA accepted jurisdiction over the complaint filed against DEC, *see* Letter from Lilian S. Dorka to Basil Seggos et al., Jurisdictional Determination of Administrative Title VI Complaint at 2 (Oct. 21, 2021), https://www.epa.gov/system/files/documents/2023-09/21.10.21-02rno-21-r2-03rno-21-r2-04rno-21-r2-recipients-decision-letter-final__1.pdf, and the DOT accepted jurisdiction over the complaint filed against the Department of Public Service, *see* Letter from Lilian to Mark Sanza & Robert Rosenthal, Informal Resolution/Tolling of Investigative Timeframe at 1 (Jan. 13, 2022), https://www.epa.gov/system/files/documents/2023-09/01.13.2022-tolling-letter-to-recipients-epa-complaint-no-02rno-21-r2-dot-complaint-2021-0328-final.pdf.
[83] Letter from Cathy Waxman to Caitlyn P. Nichols, Greenpoint Energy Center – Article 19 State Facility Permit Application (Mar. 24, 2023), https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/natgridgreenpntwthdrwl.pdf.

DOE itself has recognized the outsized pollution impacts on marginalized communities in a recent assessment of LNG exports.[84]

Residents of other communities across the country have raised similar concerns about decisions by recipients to approve the siting of new or expanding facilities in already overburdened communities with poor health outcomes that may be able to trace their designation as "industrial" back to the time of segregation or redlining. Complaints may be filed with DOE or with other agencies that also have jurisdiction. In some cases, allegations are against one or more recipients of federal funds from multiple agencies and other agencies take the lead, but obligations set forth in DOE's regulations, which are now the subject of the direct final rule, are implicated. For example, a federally recognized Tribe in the State of Washington filed a complaint against the Puget Sound Clean Air Agency, a recipient of DOE funds, arguing that its permit for a new liquified natural gas (LNG) facility pipeline impacted the airshed shared with the Tribe and its Reservation.[85] The complaint alleged that the impacted area already bore a disproportionately high level of pollution, which would be further exacerbated by the new facility. Complainants further alleged that the facility had the potential to emit significant amounts of particulate matter 2.5, NOx, SO2, and other toxic air pollutants and hazardous air pollutants.[86] The complaint alleged that there could be no serious dispute that the facility would increase pollution:

> Yet these contaminants will not be spread out throughout the state; they will be confined to the area near the Tacoma LNG facility, including the … Tribe's Reservation. And significantly, many of the chemicals the Tacoma LNG facility emits into the Tribe's airshed are persistent and bioaccumulative, and therefore, will remain in the environment

[84] U.S. DEP'T OF ENERGY, OFF. OF FOSSIL ENERGY AND CARBON MGMT., ADDENDUM ON ENVIRONMENTAL AND COMMUNITY EFFECTS OF U.S. LNG EXPORTS APPENDIX at 40-D41 (Dec. 2024).
[85] Letter to EPA Off. of Civ. Rts. (Sept. 5, 2024), https://www.epa.gov/system/files/documents/2025-03/05no-24-r10-complaint_redacted.pdf (submitting complaint No. 05NO-24-R10 against New York State Puget Sound Clean Air Agency).
[86] *Id.* at 5.

> for generations and accumulate through the food chain. This poses a danger to tribal food sources and cultural practices.[87]

Complainants requested that the planned site be moved away from a community that already bears a disproportionately high level of pollution or halted entirely. Even before the planned LNG facility, residents of this community were already exposed to nine major sources of air pollutants and seven minor sources, including two oil refineries, a paper mill, and other industrial facilities.[88] In seeking voluntary compliance in this type of case, federal agencies such as EPA, where this complaint is pending, and DOE, can pursue less discriminatory alternatives that would mitigate harm for all residents, such as controls on pollution, buffer zones, air monitoring, and health monitoring.

In another example, a community in Maryland filed a Title VI complaint alleging discrimination by the Maryland Public Service Commission, a recipient of DOE financial assistance, and other Maryland state agencies for permitting the construction of a 990 megawatt natural gas-fired power plant in Brandywine, an already environmentally overburdened predominantly Black community in Maryland.[89] Complainants described Brandywine as an unincorporated community in Prince George's County that is bordered by several fossil fuel-fired power plants, including a natural gas-fired power plant, and another coal, oil, and natural gas-fired power plant, the Chalk Point Generating Station. In addition to the new plant that was the subject of the complaint, two more fossil fuel-fired power plants were under construction nearby, and community members raised concerns about the proximity of the facilities near public schools, and exposure of students to risks associated with air pollution, noise and traffic. In

[87] *Id.* at 6.
[88] *Id.* at 3.
[89] Letter from EarthJustice to Leslie Proll et al. re Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d at 1 (May 11, 2016), https://www.epa.gov/system/files/documents/2025-04/28r-16-r3-complaint-mfr_redacted.pdf (submitting complaint against Maryland Public Service Commission, Maryland Department of Environment, and Maryland Department of Natural Resources to DOT, EPA, the U.S. Department of Justice).

addition, Brandywine hosts a number of open pit sand or gravel mines, a coal ash disposal facility and a superfund site that stored hazardous military and governmental waste, with risks to groundwater.[90] As part of the complaint, the community highlighted actions the state agencies could take to minimize the facility's negative public health impacts, which would benefit all residents in nearby communities, including requiring regular air monitoring and taking steps to minimize vehicle air emissions from traffic congestion.[91] DOE and other federal agencies that asserted jurisdiction over the complaint reached an agreement with the state agencies to modify their procedures to increase community engagement in the permitting process, including providing meaningful access to persons with limited English proficiency and people with disabilities.[92] The Informal Resolution Agreement with the Maryland Public Service Commission included, for example, submitting to its rulemaking process a proposed rule that would, among other things, designate a Community Liaison Officer to serve as a point of contact for community inquiries about an application, identify community members and organizations within affected communities and provide them with notice of relevant projects, and hold a minimum of one public meeting within the county or municipal corporation of which a qualifying generating station is proposed to be located.[93]

2. The Direct Final Rule Removes Protections for Individuals with Limited English Proficiency

The Direct Final Rule also targets regulations intended to assist individuals with limited English proficiency (LEP) and restricts harmed parties' ability to remedy the injuries they face. The Rule revokes 10 C.F.R. 1040.5(c) at subpart A, which states, "Where a significant number

[90] *Id.* at 7–8.
[91] *Id.* at 2.
[92] Letter from Rosanne Goodwill & Lilian Dorka to Jason Stanek at Informal Resolution Agreement §§ A, B https://www.epa.gov/system/files/documents/2025-03/28r-16-r3-rec-ira-resolution-ltr-and-agreement.pdf (resolving complaint number 28R-16-R3 before DOT and EPA via attached informal resolution agreement).
[93] *Id.* at Subpart A.

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." The Rule also revokes 10 C.F.R. 1040.6(c), which incorporates 10 C.F.R. 1040.5(c) by reference.

While language access is not explicitly mentioned under Title VI, it has been interpreted by both courts and federal agencies to include protections for individuals with limited English proficiency (LEP), as language often serves as a proxy for national origin.[94] The Department of Justice has "consistently adhered to the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations."[95]

In 2019, the Census Bureau reported that approximately 67.8 million people speak a language other than English at home. Over 38% of these people spoke English less than "very well."[96] This includes 14% of naturalized citizens who spoke English less than "very well."[97] As noted above, recipients of DOE funds provide crucial services to diverse communities. These services may involve technical knowledge that only a certified translator or interpreter may be able to meaningfully discuss and explain. Ensuring that all community members can access

[94] *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (holding that failure to provide English-language instruction to students of Chinese ancestry was national origin discrimination under Title VI).
[95] Nat'l Multi Hous. Council v. Jackson, 539 F.Supp.2d 425, 430 (D.D.C. 2008).
[96] Sandy Dietrich and Erik Hernandez, *Language Use in the United States: 2019*, U.S. CENSUS BUREAU (Aug. 2022), https://www.census.gov/content/dam/Census/library/publications/2022/acs/acs-50.pdf.
[97] *Id*.

information regarding projects like pipelines and power plants helps ensure their safety and wellbeing.

For example, in 2023-2024 DOE funded various projects to expand accessibility to solar and battery storage systems throughout Puerto Rico.[98] As the island is suffering from a years-long energy crisis,[99] services like these are crucial. These projects, funded generally through and encompassed within the Puerto Rico Energy Resilience Fund (PR-ERF),[100] reached marginalized communities across the archipelago to increase energy reliability and help reduce the energy burden on vulnerable residents.[101] Congress appropriated $1 billion to fund this program, and the Fund allocated grants to private entities that help connect households with residential solar and battery storage systems.[102]

One project in Puerto Rico, the Solar Access Program, required extensive public participation, as individual residents had to utilize the DOE website to determine their eligibility for particular parts of the program, then communicate with a Solar Ambassador (private companies receiving DOE funding) to begin the application process.[103] Translation services were crucial. In 2012, 2.8 million LEP individuals resided in Puerto Rico.[104] Language translation and interpretation services provided meaningful access for LEP individuals to participate fully in the program. Continuing this accessibility was imperative for LEP individuals because the program

[98] *Puerto Rico Energy Recovery and Resilience Newsletter - January 2025,* U.S. DEP'T OF ENERGY (Jan. 16, 2025), https://www.energy.gov/gdo/articles/puerto-rico-energy-recovery-and-resilience-newsletter-january-2025.
[99] *Power Restored to More than Half of Puerto Rico After Island-Wide Blackout*, THE GUARDIAN (Apr. 17, 2025), https://www.theguardian.com/us-news/2025/apr/17/puerto-rico-island-blackout-electricity-restored.
[100] *Id.*
[101] *Puerto Rico Energy Resilience Fund*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gdo/puerto-rico-energy-resilience-fund (last visited June 13, 2025).
[102] *Solar Access Program*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gdo/solar-access-program (last visited June 13, 2025).
[103] *Id.*
[104] Chhandasi Pandya et al., *Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity*, MIGRATION POL'Y INST. at 1 (Dec. 2011), https://www.migrationpolicy.org/sites/default/files/publications/LEPdatabrief.pdf.

aimed to serve low-income households and households that experience frequent and prolonged power outages.[105] With millions of people in need of DOE-funded programs that impact their everyday life—especially with the increased frequency of blackouts in Puerto Rico—the need to provide proper translation and interpretation to LEP individuals is critical.

Similar circumstances have arisen and will continue to arise on the mainland United States as well. As explained above, in 2021, a group of complainants brought a Title VI complaint against a number of New York State entities and National Grid, which receives funding from the Department of Energy.[106] The complaint alleged that a pipeline caused adverse disproportionate impacts on Black and Latino communities. Under current DOE regulations, National Grid was required to provide information to the community on safety hazards associated with the project in English and other dominant languages. It failed to do so. Under DOE's Title VI rules in 2021, the community could use the complaint process to raise this issue with DOE, and DOE had a clear mechanism to discuss potential solutions with the funding recipient. However, if the Direct Final Rule goes into effect, individuals with LEP and other marginalized communities will not have a clear mechanism through which to hold DOE funding recipients accountable for excluding them from important processes that affect their daily lives.

Translation and interpretation services benefit everyone,[107] regardless of race and national origin, as increased public participation in processes that affect the public strengthen our

[105] *Programa Acceso Solar*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gdo/programa-acceso-solar (last visited June 13, 2025).
[106] *Id.*
[107] Moreover, language accessibility is interconnected with disability discrimination. The provision that DOE seeks to rescind includes Braille, subjecting DOE to further vulnerabilities under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. While the Direct Final Rule states that the rescission of these provisions does not affect the prohibitions on disability discrimination, individuals may be subject to discrimination, especially those members in the Deaf or hard of hearing community who need access to sign language interpretation. Translation and interpretation services for individuals with language access needs within the disability community are necessary to provide meaningful access in programs and activities provided and funded by DOE.

democratic systems. By removing regulatory tools to ensure DOE-funded entities serve the public good, the Direct Final Rule will have large-scale negative impacts.

Not only does the revocation of these regulatory provisions do away with requirements for recipients of federal funds to provide translations and interpretations, the revocation of 10 C.F.R. 1040.13(c) and (d) severely limits cognizable claims for discrimination that LEP individuals and other marginalized communities would otherwise be able to bring to the agency. As a result, there will be limited routes for those harmed by DOE-funded projects and activities to try to rectify those harms.

3. The Direct Final Rule Removes Protections for People with Disabilities

The Direct Final Rule will rescind two subsections of 10 C.F.R. 1040.72 that govern how recipients of federal financial assistance "shall operate any program or activity to which this subpart applies so that when each part is viewed in its entirety it is readily accessible and usable by handicapped persons."[108] The Rule would revoke the requirements that recipients make construction alterations that comply with access standards within a certain timeframe and under specific procedures, like meeting with interested parties.[109] Complying with access standards is necessary to further the goals of Section 504 of the Rehabilitation Act. The Supreme Court has affirmed that "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act."[110] Thus the Direct Final Rule revokes fundamental protections that ensure federally-funded infrastructure is accessible to everyone.

V. Conclusion

[108] 10 C.F.R. § 1040.72(a).
[109] *Id.* §§ 1040.72(c) & (d).
[110] Alexander v. Choate, 469 U.S. 287, 297 (1985). The Direct Final Rule also creates enforcement standards that conflict with the 1990 regulations DOE and 14 other agencies adopted in 1990. 55 Fed.Reg. 52136 (Dec. 19, 1990) ("[G]overnmentwide reference to UFAS will diminish the possibility that recipients of Federal financial assistance would face conflicting enforcement standards.").

The issuance of the Direct Final Rule not only violates the Administrative Procedure Act but threatens decades-long nondiscrimination regulations that benefit us all. Specifically, DOE failed to explain how this Rule satisfies the narrow "good cause" exception under the APA. Further, revoking these regulations will have a substantive impact on people's lives, and bypassing the APA's procedures undermines the statute's purpose of ensuring democratic participation in rulemaking. DOE must immediately revoke this Rule in response to this and other significant adverse comments received.

Sincerely,

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On behalf of:

Advocacy for Racial & Civil Justice Clinic

Alaska Community Action on Toxics

Center for Biological Diversity

Center for Engagement, Environmental Justice and Health

Center for Environmental Health

Citizens for Alternatives to Radioactive Dumping (CARD)

Communities for a Better Environment

Concerned Citizens for Nuclear Safety

Conservation Law Foundation

Dallas Peace and Justice Center

Great Rivers Environmental Law Center

Heart of America Northwest

IDARE LLC

Law Office of Dennis M. Grzezinski

Los Jardines Institute

National Center for Law and Economic Justice

New Mexico Environmental Law Center

Peace Action Wisconsin

Portsmouth/Piketon Residents for Environmental Safety and Security

Poverty & Race Research Action Council

Restore the Delta

Transportation for Massachusetts

Texas Environmental Justice Advocacy Services

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