



Housing Justice Center
Advancing housing justice
in Minnesota through
advocacy, organizing, and
legal action.

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Submitted via regulations.gov.

The Honorable Scott Turner
Secretary
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, D.C. 20410-0500

RE: Comment on the Supplemental Notice of Proposed Rulemaking, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard; Amendments to HUD's Title VI Regulations*, Docket No. FR-6540-P-02, RIN 2529-AB09, Document No. 2026-16228, 91 Fed. Reg. 51416 (Aug. 10, 2026)

Dear Secretary Turner,

The Housing Justice Center submits these comments in response to the above-referenced supplemental notice of proposed rulemaking (the "Supplemental Proposal").¹ The Supplemental Proposal would strike from 24 C.F.R. § 1.4 every provision of HUD's Title VI regulations that reaches conduct producing unjustified discriminatory effects: the general prohibition on criteria and methods of administration having a discriminatory effect, § 1.4(b)(2)(i); both references to "or effect" in the site-and-location provision, § 1.4(b)(3); the affirmative action provision in its entirety, § 1.4(b)(6); and the employment provision at § 1.4(c)(2). It also reopens the comment period on HUD's January 2026 proposal to remove 24 C.F.R. part 100, subpart G.² As set out below, the Housing Justice Center strongly opposes the Supplemental Proposal and respectfully urges HUD to withdraw it.

About the Housing Justice Center

¹HUD's Implementation of the Fair Housing Act's Disparate Impact Standard; Amendments to HUD's Title VI Regulations, 91 Fed. Reg. 51416 (Aug. 10, 2026) (Docket No. FR-6540-P-02, RIN 2529-AB09).

²91 Fed. Reg. 1475 (Jan. 14, 2026) (Docket No. FR-6540-P-01).

The Housing Justice Center is a Minnesota public interest advocacy and legal organization whose primary mission is to preserve and expand affordable housing for low-income individuals and families. For more than twenty-five years, the Housing Justice Center has worked to ensure that people have access to safe, stable, affordable dignified places to call home free from discriminatory barriers.

The Supplemental Proposal Fails as a Matter of Law

The Administrative Procedures Act (“APA”) supplies the framework. A reviewing court must “hold unlawful and set aside” agency action that is “in excess of statutory jurisdiction, authority, or limitations . . . or otherwise not in accordance with law,” or that is “arbitrary [or] capricious.”³ The Supplemental Proposal is independently invalid under each command. In brief, and as developed below: (1) its central legal premise misstates the holding of *Alexander v. Sandoval*; (2) it ignores the three decisions in which the Supreme Court actually addressed agencies’ authority under Section 602; (3) it disregards the clause of Section 602 that ties HUD’s Title VI regulations to the objectives of the statutes authorizing its assistance, and with it HUD’s independent statutory duty to affirmatively further fair housing; (4) its constitutional rationale is foreclosed by *Inclusive Communities*; and (5) HUD has failed to provide the reasoned explanation the APA requires for reversing more than fifty years of its own view of Title VI disparate impact.

I. HUD’s Central Legal Premise Misstates *Sandoval*

HUD’s legal case begins and effectively ends with a single sentence: “As the Supreme Court has made clear, Title VI prohibits ‘only intentional discrimination’ and ‘permits’ facially neutral policies that result in disparate outcomes when there is no discriminatory intent.”⁴ That is not what *Sandoval* held, and the difference is dispositive.

The Court in *Sandoval* expressly declined to decide whether the disparate-impact regulations were authorized. In the opening pages of the opinion, it wrote: “We do not inquire here whether the DOJ regulation was authorized by §602.”⁵ It then identified three propositions it was taking as given, the third of which was this:

Third, we must assume for purposes of deciding this case that regulations promulgated under §602 of Title VI may validly proscribe activities that have a

³5 U.S.C. § 706(2)(A) (arbitrary or capricious), (C) (in excess of statutory authority or otherwise not in accordance with law).

⁴91 Fed. Reg. at 51417 (citing *Alexander v. Sandoval*, 532 U.S. 275, 280, 286 n.6 (2001)).

⁵*Sandoval*, 532 U.S. at 279.

*disparate impact on racial groups, even though such activities are permissible under §601.*⁶

The Court explained why it was assuming rather than deciding: “petitioners have not challenged the regulations here.”⁷ The only holding of the case is that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI. The Fifth Circuit has read the decision the same way, observing that although the Court “decisively held” that no private right of action exists, it “expressly reserved the question of whether ‘§ 602 confers the authority to promulgate disparate-impact regulations.’”⁸

The distinction HUD elides is between Section 601 and Section 602. Every proposition *Sandoval* states about “only intentional discrimination” is a proposition about Section 601. HUD’s notice converts these into statements about “Title VI” as a whole, and in one instance does so by altering the quotation. HUD renders footnote 6 of *Sandoval* as “[Title VI] permits the very behavior that the regulations forbid.” The sentence actually reads: “§601 permits the very behavior that the regulations forbid.”⁹ HUD’s bracketed substitution replaces the precise term that makes the sentence accurate with the precise term that makes it inaccurately support the rule. A final rule resting on that substitution would not survive APA review.

II. The Supreme Court Has Three Times Recognized Section 602 Authority to Reach Discriminatory Effects, and HUD Cites None of Those Decisions

The Supplemental Proposal does not mention *Alexander v. Choate*, *Guardians Ass’n v. Civil Service Commission*, or *Lau v. Nichols*. Those are the only three decisions in which the Court addressed the question HUD says is settled and they all contradict HUD’s position.

In *Choate*, a unanimous Court described *Guardians* as producing “a two-pronged holding on the nature of the discrimination proscribed by Title VI.”¹⁰ The first prong is the one HUD quotes: Title VI itself directly reaches only intentional discrimination. The second is the one HUD omits: “actions having an unjustifiable disparate impact on minorities could be

⁶*Id.* at 281. The Court added: “We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.” *Id.*

⁷*Id.*

⁸*Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty.*, 6 F.4th 633, 643 (5th Cir. 2021) (quoting *Sandoval*, 532 U.S. at 286).

⁹*Sandoval*, 532 U.S. at 286 n.6 (“We cannot help observing, however, how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with’ §601 . . . when §601 permits the very behavior that the regulations forbid.”) (emphasis added); compare 91 Fed. Reg. at 51417 (rendering the same sentence as “[Title VI] permits the very behavior that the regulations forbid”).

¹⁰*Alexander v. Choate*, 469 U.S. 287, 293 (1985).

redressed through agency regulations designed to implement the purposes of Title VI.” The Court then stated the principle on which HUD’s regulations have rested for five decades:

*In essence, then, we held that Title VI had 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 were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.*¹¹

Five Justices in *Guardians* voted to uphold effects-based Title VI regulations.¹² And in *Lau*, the Court sustained a claim resting on a Title VI regulation materially identical to § 1.4(b)(2)(i), barring recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination.”¹³ HUD may not proceed as though these cases do not exist. An agency that rests a rescission on “the Supreme Court has made clear” while omitting every Supreme Court decision addressing the actual question has not engaged in reasoned decision making.

HUD may observe that *Sandoval* characterized the *Choate* passage as dictum.¹⁴ That is a reason to weigh the passage, not to omit it. It is a unanimous Court’s account of what *Guardians* held, and *Sandoval* itself relied on the same tally of votes in *Guardians* for the same proposition. The Fifth Circuit, which acknowledged the dictum argument, answered it with its own rule: a court is “not bound by dicta, even of our own court,” but “[d]icta of the Supreme Court are, of course, another matter.”¹⁵ An agency is free to explain why it finds the reasoning unpersuasive. It is not free to write the decisions out of the record.

The historical record HUD also omits is set out in *Choate* itself: model Title VI regulations incorporating a disparate-impact standard were drafted by a Presidential task force and the Justice Department; every Cabinet Department and approximately forty federal agencies adopted them; and in 1966 the House of Representatives rejected a proposed amendment

¹¹*Id.* at 293–94 (footnotes omitted).

¹²*Guardians Ass’n v. Civil Serv. Comm’n of N.Y.C.*, 463 U.S. 582 (1983).

¹³*Lau v. Nichols*, 414 U.S. 563, 568 (1974). The Court added: “Discrimination is barred which has that effect even though no purposeful design is present.” *Id.* Justice Stewart, joined by Burger, C.J., and Blackmun, J., concurring in the result, would have sustained the regulations on the ground that a rule issued under a general authorization such as § 602 is valid so long as it is “reasonably related to the purposes of the enabling legislation.” *Id.* at 571 (quoting *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 369 (1973), and citing *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 280–81 (1969)). Justice Stevens later collected both passages as authority that “[t]his Court has repeatedly upheld the validity of those regulations and their ‘effects’ standard.” *Guardians*, 463 U.S. at 643 (Stevens, J., dissenting).

¹⁴*Sandoval*, 532 U.S. at 281 (referring to “dictum in *Alexander v. Choate*”).

¹⁵*Rollerson*, 6 F.4th at 643 n.6 (quoting *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980)). The same panel described *Sandoval* as having “eliminated the possibility of private disparate-impact claims but left untouched *Choate*’s apparent approval of the promulgation and enforcement of disparate-impact regulations by federal agencies.” *Id.* at 643.

that would have confined Title VI to intentional discrimination.¹⁶ HUD's own regulations were promulgated in 1973 as part of that uniform federal effort, in a rulemaking HUD conducted jointly with the Department of Justice.¹⁷

For these reasons the Supplemental Proposal is contrary to law and its stated explanation is arbitrary and capricious. HUD does not mention or distinguish *Lau*, *Guardians*, or *Choate*. Nor does it acknowledge that the provisions it now calls unauthorized were adopted as part of a government-wide construction of Title VI that Congress declined to disturb and that HUD has administered without material change for more than fifty years. An agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” and a reviewing court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.”¹⁸ A rule that leaves the governing authority unmentioned supplies no basis for a court to discern, let alone sustain.

HUD's invocation of *Loper Bright* compounds the problem rather than curing it. HUD quotes only the half of the opinion directing courts to ensure agencies act within their authority.¹⁹ *Loper Bright* held that courts decide questions of law without deferring to agencies. But, it also held, in the same discussion, that “the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion,” and that where Congress has delegated, a court’s role is to fix the boundaries of the delegation and ensure the agency has acted within them.²⁰ Section 602 provides that each agency “is authorized and directed to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.”²¹ That is an express delegation. Nothing in *Loper Bright* converts a holding about deference into a holding that § 602 confers no authority beyond restating § 601.

Loper Bright says something further about regulations of this type that HUD does not acknowledge. The Court instructed that “interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning.”²² Few federal regulations fit that description more closely than these. The first Title VI effects regulations were drafted within months of

¹⁶*Choate*, 469 U.S. at 294 n.11 (citing *Guardians*, 463 U.S. at 629–31 (Marshall, J., dissenting)).

¹⁷38 Fed. Reg. 17949 (July 5, 1973); see 91 Fed. Reg. at 51416.

¹⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223 (2016) (“[W]e may not supply a reasoned basis for the agency’s action that the agency itself has not given.”) (quoting *State Farm*, 463 U.S. at 43, and citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

¹⁹91 Fed. Reg. at 51417 (quoting *Loper Bright*, 603 U.S. at 412–13).

²⁰*Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024).

²¹42 U.S.C. § 2000d–1.

²²*Loper Bright*, 603 U.S. at 394 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

enactment by a Presidential task force working with the Department of Justice; every Cabinet department and some forty agencies adopted the standard; the House declined to narrow it in 1966; HUD promulgated its own version in a 1973 interagency rulemaking conducted jointly with DOJ; and the operative language of § 1.4(b)(2)(i) has not changed since. If contemporaneous and consistent executive construction is evidence of a statute's meaning, the evidence here runs against HUD's reading rather than for it.

HUD invokes *Loper Bright* without engaging the portions of the opinion that bear most directly on regulations of this age and consistency. The opinion cuts against the Supplemental Proposal in two ways. It confirms that Congress may vest an agency with interpretive discretion and that § 602 did so expressly, and it confirms that a contemporaneous construction held consistently for six decades is evidence of what the statute means. HUD addresses neither point.

III. HUD Ignores the Clause of Section 602 That Ties Its Title VI Regulations to Fair Housing

Section 602 does not stop where HUD's quotation of it stops. The full sentence directs each agency to effectuate § 601 by issuing rules "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."²³ HUD never mentions that clause and never applies it. Neither did *Sandoval*, which quoted § 602 twice and both times ended the quotation before the clause, unremarkably, since the Court was addressing private enforceability and had expressly reserved the validity question.²⁴ HUD, by contrast, is deciding the validity question, and the omitted clause is directed precisely at it.

The omission matters for HUD²⁵, as Section 3608(e)(5) of the Fair Housing Act directs the Secretary to administer HUD's programs and activities relating to housing and urban development "in a manner affirmatively to further the policies" of the Act, and § 3608(d) extends that obligation to all executive departments and agencies.²⁶ The policy to be furthered is the provision of "fair housing throughout the United States."²⁷ The First Circuit,

²³42 U.S.C. § 2000d-1 (emphasis added).

²⁴See *Sandoval*, 532 U.S. at 278, 288 (quoting § 602 as authorizing agencies "to effectuate the provisions of [§601] . . . by issuing rules, regulations, or orders of general applicability").

²⁵None of the decided cases arose under HUD's regulations or presented § 3608. *Lau* concerned HEW's education regulations, 414 U.S. at 567-68; *Choate* was a Rehabilitation Act case, 469 U.S. at 289; and *Sandoval* involved DOJ and DOT regulations, 532 U.S. at 278-79. *Guardians* comes closest: the recipient there had given written assurances to the Departments of Labor and Justice and to HUD. 463 U.S. at 643-44 (Stevens, J., dissenting). But no decision has addressed the interaction between § 602's objectives clause and the Secretary's duty under § 3608.

²⁶42 U.S.C. § 3608(e)(5); id. § 3608(d).

²⁷42 U.S.C. § 3601.

in an opinion by then-Judge Breyer, held that this duty requires HUD to “do more than simply not discriminate itself,” and reflects a congressional “desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases,” a duty enforceable under 5 U.S.C. § 706(2)(A).²⁸ And the Supreme Court has held that recognition of disparate-impact claims is “consistent with the FHA’s central purpose,” and that suits challenging practices that unfairly exclude minorities from neighborhoods “reside at the heartland of disparate-impact liability.”²⁹

Read together, § 602 and § 3608 mean that HUD’s Title VI regulations must be consistent with the achievement of fair housing, and that HUD must administer its programs so as affirmatively to further that end. Section 1.4(b)(3), the provision from which HUD proposes to strike “or effect”, is the provision most directly tied to that duty, since the siting of federally assisted housing is a principal mechanism by which segregation is entrenched without any stated racial purpose. HUD’s notice does not cite § 3608 anywhere. Instead it states that it “agrees with and adopts the rationale provided in DOJ’s rule.”³⁰ The Department of Justice bears no obligation under § 3608. Adopting another agency’s reasoning wholesale, without addressing the statutory duty that distinguishes HUD from that agency, is the paradigm case of “entirely fail[ing] to consider an important aspect of the problem.”³¹

Similarly, with respect to the applicability of Title VI to an activity receiving federal financial assistance that entails the hiring, training, promotion, or related actions with respect to employees, HUD (and other agencies) must have the authority to enforce Title VI in a manner that consistent with the (employment-related) assistance in connection with which the enforcement is being undertaken, and, since (assuming a suitable size of employer) Title VII’s disparate impact provisions apply to the employment-related assistance, that means that Title VI and Title VII must be read in a harmonious way. Relatedly, especially with respect to HUD’s purported concern with disparate impact compliance resulting in recipient confusion, it is clear that it is HUD’s removal of Title VI disparate impact concerns while recipients must still comply with those concerns with respect to Title VII and the Fair Housing Act that will certainly lead to uncertainty and confusion.

IV. The Constitutional Rationale Is Foreclosed by *Inclusive Communities*

²⁸*N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 154–55 (1st Cir. 1987) (Breyer, J.); see *id.* at 160.

²⁹*Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 539–40 (2015).

³⁰91 Fed. Reg. at 51417.

³¹*Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

HUD asserts that disparate-impact liability “encourages and, in some cases, requires covered entities to engage in the intentional use of race and racial balancing,” and that the resulting use of race must satisfy strict scrutiny.³² The argument rests on *Students for Fair Admissions*, which concerned express racial classifications in university admissions.³³ It does not survive contact with the decision that actually addresses this question.

Before reaching that decision, it is worth being precise about what *SFFA* did and did not decide. The majority opinion did not address Title VI. It observed that the parties had proceeded on the understanding that Title VI is coextensive with the Equal Protection Clause and noted that although Justice Gorsuch questioned that proposition, “no party asks us to reconsider it.”³⁴ The Title VI analysis that HUD’s argument tracks appears in Justice Gorsuch’s separate concurrence, which Justice Thomas alone joined.³⁵ HUD is entitled to find a two-Justice concurrence persuasive and to say so. It is not entitled to present that concurrence as what “the Supreme Court recently held.”

In *Inclusive Communities*, the Court considered and rejected the same concern, holding that disparate-impact liability “has always been properly limited in key respects that avoid the serious constitutional questions that might arise . . . if such liability were imposed based solely on a showing of a statistical disparity.”³⁶ The limits are structural: a robust causality requirement ensures that racial imbalance alone does not establish a *prima facie* case; liability attaches only to “artificial, arbitrary, and unnecessary barriers”; and remedial orders must be consistent with the Constitution and should concentrate on eliminating the offending practice rather than imposing racial targets or quotas.³⁷ A rule that requires a recipient to justify a barrier, or to replace it with a less discriminatory alternative serving the same interest, demands the abandonment of an unjustified practice. It does not demand that anyone be classified by race.

HUD’s argument also proves far more than HUD can intend. If effects-based liability inherently coerces unconstitutional racial balancing, then Title VII’s disparate-impact framework, which Congress codified in 1991 and which the Court applied in *Griggs*, is

³²91 Fed. Reg. at 51417–18.

³³*Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). HUD’s notice cites the case as “600 U.S. 206 (2023)” and pin cites “600 U.S. at 206” and “600 U.S. at 216–17.” See 91 Fed. Reg. at 51417–18. The opinion begins at 600 U.S. 181.

³⁴*SFFA*, 600 U.S. at 198 n.2.

³⁵*Id.* at 287 (Gorsuch, J., concurring, joined by Thomas, J.).

³⁶*Inclusive Cmty.*, 576 U.S. at 540.

³⁷*Id.* at 542 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)); *id.* at 543, 544–45.

unconstitutional as well.³⁸ The Supreme Court has twice been invited to say so and has twice declined: in *Ricci* it expressly reserved the question, and in *Inclusive Communities* it resolved it the other way.³⁹

Ricci is instructive in a second respect. Confronted with the very tension HUD invokes between a statutory bar on disparate-treatment and a statutory bar on disparate-effects, the Court did not resolve it by reading the effects provision out of the statute. It held that “[w]e must interpret the statute to give effect to both provisions where possible,” and then fashioned a standard that did so.⁴⁰ HUD proposes the opposite. It would cure a claimed conflict by eliminating one side of it, a resolution the Court in *Ricci* declined to adopt.

An additional defect deserves note. HUD elsewhere in the Supplemental Proposal concedes that “the existence of a disparate impact is sometimes a factor that may be considered in evaluating intentional discrimination.”⁴¹ That concession is compelled by precedent: the Supreme Court has held that a clear pattern of disproportionate effect unexplainable on other grounds, together with the historical background of a decision, are among the evidentiary sources from which discriminatory purpose may be proved.⁴² Provisions that require recipients to identify and justify disparate effects generate precisely the evidence that proving intentional discrimination demands. The Supreme Court has said the same of the Fair Housing Act, stating that disparate-impact liability “plays a role in uncovering discriminatory intent” because it “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”⁴³ Even judges critical of disparate-impact theory have acknowledged that function, describing it as “an evidentiary tool . . . to identify genuine, intentional discrimination—to ‘smoke out’ . . . disparate treatment.”⁴⁴ An agency that concedes as much cannot coherently maintain that those provisions do nothing to “effectuate” § 601.

³⁸Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e–2(k)); see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³⁹*Ricci v. DeStefano*, 557 U.S. 557, 584 (2009) (“[W]e need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.”); see *id.* at 594.

⁴⁰ *Ricci*, 557 U.S. at 580; see *id.* at 583 (the adopted standard “gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances”).

⁴¹91 Fed. Reg. at 51420.

⁴²*Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977).

⁴³ *Inclusive Cmty.*, 576 U.S. at 540; *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

⁴⁴*Rollerson*, 6 F.4th at 649 (Ho, J., concurring in part and concurring in the judgment) (quoting *Ricci*, 557 U.S. at 595 (Scalia, J., concurring)).

V. HUD Has Not Supplied the Reasoned Explanation the APA Requires for Reversing Fifty Years of Its Own Construction of Title VI

The defects described above are not merely errors of statutory reading. They are also a failure of explanation, and that failure independently violates the APA. An agency that rescinds a rule must supply “a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance,” because a settled course of behavior “embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.”⁴⁵ At a minimum, the agency must “display awareness that it is changing position” and “show that there are good reasons for the new policy.”⁴⁶ The requirement is not satisfied by reasons for the new rule alone: “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁴⁷

A. HUD Does Not Acknowledge That It Is Reversing the Construction of Title VI It Has Administered for More Than Fifty Years

The prior policy here is well documented and has been in place for more than fifty years. The original Title VI regulations, incorporating an effects standard, were published in 1964, within months of the statute’s enactment and as part of a government-wide model developed by a presidential task force with the Department of Justice.⁴⁸ HUD adopted its current provisions in 1973 in a joint rulemaking with DOJ, and by HUD’s own account they have not been substantively amended since.⁴⁹ For more than fifty years HUD has told applicants, grantees, public housing agencies, and complainants that § 1.4 of Title VI includes disparate impact. HUD has investigated and resolved matters on that understanding, including the hundreds of Title VI investigations and compliance reviews the Supplemental Proposal itself reports.

Two features of that history deserve emphasis, because the Supplemental Proposal mentions neither. First, HUD’s predecessor, the Housing and Home Finance Agency adopted a Title VI rule on December 4, 1964, five months after the Title VI was signed, barring

⁴⁵ *State Farm*, 463 U.S. at 41–42 (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–08 (1973)).

⁴⁶ *Encino Motorcars*, 579 U.S. at 221 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

⁴⁷ *Id.* at 221–22 (quoting *Fox Television*, 556 U.S. at 515–16).

⁴⁸ 29 Fed. Reg. 16274 (1964); see *Guardians*, 463 U.S. at 618 (Marshall, J., dissenting) (describing the model regulations produced by a presidential task force “[s]hortly after the enactment of Title VI”); *id.* at 643 n.13 (Stevens, J., dissenting) (noting that every Cabinet department and about forty agencies followed).

⁴⁹ 38 Fed. Reg. 17949 (July 5, 1973); 91 Fed. Reg. at 51416 (stating that HUD’s Title VI regulations “were last substantively amended in 1973” and that later amendments were “minor or technical”).

recipients from using “criteria or methods of administration which have the effect of subjecting persons to discrimination.”⁵⁰ That is the same operative language HUD now proposes to strike from § 1.4(b)(2)(i). Second, when the agencies revised their rules in the 1973 interagency rulemaking, the published notice identified as among “the most important provisions” of the amendments the prohibition on discrimination “in the selection of sites for facilities of Federally assisted programs” and the requirement of “affirmative action to overcome the effects of past discrimination.”⁵¹ Those are § 1.4(b)(3) and § 1.4(b)(6), two of the four provisions the Supplemental Proposal would remove. HUD is not simply changing a position, it is deleting what its own rulemaking identified as that rulemaking’s most important provisions, without acknowledging that it is doing so.

Further, HUD’s new interpretation of Title VI runs counter to the legislative record. Explaining Title VI on the Senate floor, Senator Humphrey quoted President Kennedy’s message to Congress: public funds, “to which all taxpayers of all races contribute,” must not “be spent in any fashion which encourages, entrenches, subsidizes, or *results in* racial discrimination.”⁵² A regulation that reaches only purposeful discrimination leaves untouched the federal spending that “results in” it.

B. HUD’s Policy Rationale is Inadequate

HUD advances five policy grounds: compliance burden, recipient confusion, a risk of racial balancing, the asserted arbitrariness of the racial and ethnic categories used to measure effects, and the incongruity between private and agency enforcement after *Sandoval*. The Supplemental Proposal does not provide adequate evidence for any of them. The racial-balancing ground is answered in Part IV; the remaining four are taken up here.

First, with respect to compliance burden, HUD states that it “does not track which of its investigations and compliance reviews involve solely allegations of disparate-impact discrimination,” that it “does not track and cannot reliably quantify the costs attributable to the disparate-impact portions of enforcement actions,” and that it “is unable to quantify how funding recipients will respond to the regulatory changes.”⁵³ It nonetheless concludes that the action “should result in greater flexibility and lower compliance costs for recipients”

⁵⁰ 29 Fed. Reg. 16274–16305 (Dec. 4, 1964); see *Guardians*, 463 U.S. at 643 n.13 (Stevens, J., dissenting) (citing the same publication). The Housing and Home Finance Agency’s provision appears at 29 Fed. Reg. 16281.

⁵¹ 38 Fed. Reg. 17920 (July 5, 1973) (Nondiscrimination in Federally Assisted Programs); HUD’s revised rules appear at 17949. The rulemaking was coordinated by the Department of Justice under Executive Order 11247 and was preceded by notice and comment.

⁵² *Lau*, 414 U.S. at 569 & n.4 (quoting 110 Cong. Rec. 6543 (Sen. Humphrey, quoting President Kennedy’s message to Congress of June 19, 1963)) (emphasis added).

⁵³ 91 Fed. Reg. at 51419–20.

and that it “eliminates a source of regulatory confusion.”⁵⁴ An agency may act on qualitative judgment. It may not assert benefits of a kind it has just explained it has no data to assess, and then certify under the Regulatory Flexibility Act that there is “no change in burden for those involved in a challenged practice.”⁵⁵ Those propositions cannot all be true. An explanation that “runs counter to the evidence before the agency” is arbitrary and capricious.⁵⁶

Second, the Supplemental Proposal is likely to cause more confusion rather than less. HUD states that the confusion it describes “is evident in, among other things, many of the grant proposals that HUD awarded funds to in past years.”⁵⁷ Repeal does not simplify a recipient’s obligations, it fragments them. As Part III explains, a recipient whose federally assisted employment practices fall within Title VI is at the same time governed by Title VII’s codified disparate-impact framework. Further, a public housing agency that screens applicants, or an assisted-housing owner that sets occupancy standards, remains subject to disparate-impact liability under the Fair Housing Act, which rests on the statute rather than on any regulation. What the Supplemental Proposal removes is not the effects standard but HUD’s own authority to apply it, leaving recipients answerable to the same principle under two bodies of law while HUD’s regulations say the opposite. That is a source of confusion, not a cure for one.

Third, HUD argues that the racial and ethnic categories used to measure disparate effects are arbitrary and so “lack a meaningful connection to a compelling interest.”⁵⁸ That misdescribes what disparate-impact analysis does. *SFFA* addressed categories used to sort individual applicants and award preferences on that basis, the objection was to classifying people. Disparate-impact analysis classifies no one. It asks whether an identified practice causes a disparity and, if so, whether the recipient can justify it, which is why *Inclusive Communities* requires a robust causal link between a specific policy and the disparity rather than reliance on categories as such.⁵⁹

Fourth, the enforcement-incongruity rationale is self-defeating. As detailed in Part I, the *Sandoval* Court declined to imply a private right of action in part because Congress had already specified how § 602 regulations would be enforced, through notice to the recipient, an attempt to secure voluntary compliance, and, as a last resort, fund termination subject

⁵⁴*Id.* at 51420.

⁵⁵*Id.*

⁵⁶*State Farm*, 463 U.S. at 43.

⁵⁷ 91 Fed. Reg. at 51418.

⁵⁸ 91 Fed. Reg. at 51418 (citing *SFFA*, 600 U.S. at 216–17).

⁵⁹ *Inclusive Cmty.*, 576 U.S. at 542–43.

to reporting requirements and judicial review.⁶⁰ The division HUD now calls “incongruent” is the allocation the Court read as Congress’s design. Eliminating the agency half of that scheme does not cure an incongruity, it closes the forum *Sandoval* assumed would remain open. HUD nowhere acknowledges that consequence.

Taken together, the reasons HUD gives for the removal of disparate impact rest on a misreading and mischaracterization of case law, in addition to entirely missing Supreme Court precedents that contradict HUD’s position. Reasoning that rests on such unsteady ground cannot be “good reasons for the new policy.”⁶¹

Conclusion

The Supplemental Proposal would remove, from regulations that have governed federally assisted housing since 1973, every provision of § 1.4 that applies to practices excluding people from housing without an announced racial purpose, and it fails on each ground the APA supplies. Part I shows that its central legal premise misstates *Sandoval*, which reserved rather than decided whether § 602 authorizes effects-based regulations. Part II shows that HUD rests the rescission on what “the Supreme Court has made clear” while citing none of the three decisions that address the question and none of the legislative history confirming them. Part III shows that HUD never applies the clause of § 602 that conditions the authority it is exercising, never mentions the Secretary’s duty to affirmatively further fair housing, and instead adopts another agency’s rationale wholesale. A rule resting on those errors would be “in excess of statutory jurisdiction, authority, or limitations,” and in each respect HUD has “entirely failed to consider an important aspect of the problem.”⁶²

Part IV shows that the constitutional rationale is foreclosed by *Inclusive Communities* and traces to a concurrence that drew two votes. Part V shows that HUD nowhere acknowledges that it is reversing a construction it has administered for more than fifty years, or that it is deleting the provisions its own 1973 rulemaking identified as that rulemaking’s most important, which is arbitrary and capricious.⁶³

The Housing Justice Center appreciates the opportunity to comment and respectfully requests that HUD withdraw the Supplemental Proposal.

⁶⁰*Sandoval*, 532 U.S. at 289–90 (describing the “elaborate restrictions on agency enforcement” in 42 U.S.C. §§ 2000d–1, 2000d–2).

⁶¹ *Encino Motorcars*, 579 U.S. at 221 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

⁶² 5 U.S.C. § 706(2)(C); *State Farm*, 463 U.S. at 43; see *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d at 160 (the § 3608 duty is enforceable under 5 U.S.C. § 706(2)(A)).

⁶³ *Encino Motorcars*, 579 U.S. at 221–22; *Fox Television*, 556 U.S. at 515–16.

Sincerely,

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