NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

45 CFR Part 1110

RIN 3135–AA37; 3136–AA48; 3137–AA30

Rescinding Portions of the National Foundation on the Arts and Humanities Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281

AGENCY: National Endowment for the Arts, National Endowment for the Humanities, Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Final rule.

SUMMARY: This rule amends the National Foundation on the Arts and the Humanities' (the Foundation) regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI) to eliminate disparate-impact liability. These amendments align the conduct prohibited by the Foundation's regulations with Title VI text, avoid constitutional concerns, reduce compliance costs, and serve the public interest. In addition, these revisions are consistent with Executive Order 14281.

DATES: These regulations are effective August 26, 2026.

FOR FURTHER INFORMATION CONTACT: Daniel Fishman, Deputy General Counsel, National Endowment for the Arts, 400 7th St. SW, Washington, DC 20506, Telephone: 202–682–5418.

SUPPLEMENTARY INFORMATION:

I. Background

The Foundation operates under the National Foundation on the Arts and the Humanities Act of 1965, as amended (20 U.S.C. 951 *et seq.*), and consists of the National Endowment for the Arts (NEA), the National Endowment for the Humanities (NEH), the Institute of Museum and Library Services (IMLS), and the Federal Council on the Arts and the Humanities (FCAH). The NEA, NEH, IMLS, and FCAH are collectively referred to as the ''Foundation's constituent agencies'' or the ''constituent agencies.''

II. Executive Summary

This rule rescinds portions of the Foundation's regulations promulgated pursuant to Title VI, 42 U.S.C. 2000d–1, to more closely align its regulations with the language that Congress enacted in Title VI prohibiting intentionally discriminatory conduct, *see* 42 U.S.C. 2000d. There are serious statutory and constitutional concerns with the legality of provisions in the Foundation's Title VI regulations that go beyond intentional discrimination by prohibiting conduct that has an unintentional disparate impact. This rule accordingly rescinds those portions of the regulations, which are in considerable tension with both the statute and the Constitution and do not sufficiently serve the public interest. First, this rule rescinds the full text of 45 CFR 1110.3(b)(2), which currently prohibits the utilization of ''criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.'' Second, this rule removes the two uses of the phrase ''or effect'' from 45 CFR 1110.3(b)(3). Third, this rule rescinds the full text of 45 CFR 1110.3(b)(6). Fourth, this rule rescinds the full text of 45 CFR 1110.3(c)(3), which addresses employment practices of Federal funding recipients. Fifth, this rule rescinds the full text of the illustrative applications and examples under 45 CFR 1110.5(e), (f), and (g), in order to conform the illustrative applications to the foregoing revisions.

The rule's revisions also conform to Executive Order 14281, *Restoring Equality of Opportunity and Meritocracy,* 90 FR 17537 (Apr. 23, 2025). That Order states that ''[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.'' *Id.* at 17537.

The practical impact of this rule's modifications will be to clarify for the constituent agencies' recipients of Federal funding that the revised Title VI regulations do not prohibit conduct or activities that have a disparate impact and prohibit only intentional discrimination, and thus that the Foundation's constituent agencies will not pursue Title VI disparate-impact liability against their funding recipients.

III. Discussion

A. Statutory History of Title VI

Title VI of the Civil Rights Act of 1964, as amended, provides: ''No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' 42 U.S.C. 2000d. Title VI also directs Federal departments and agencies that extend Federal financial assistance to ''effectuate the provisions of'' Title VI ''by issuing rules, regulations, or orders of general applicability.'' 42 U.S.C. 2000d–1. The section of Title VI that sets forth the prohibited conduct, 42 U.S.C. 2000d, specifically prohibits intentional discrimination and makes no reference to unintentional disparate effects or impact. *See Alexander* v. *Sandoval,* 532 U.S. 275, 280 (2001) (''[I]t is . . . beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination.''). The statute does not provide any Federal department or agency with authority to prohibit unintentional disparate impact. And despite ample opportunities, Congress has enacted no subsequent amendments to Title VI to impose disparate-impact liability.

B. Regulatory History of Title VI

Pursuant to Executive Order 12250, ''[t]he Attorney General shall coordinate the implementation and enforcement by Executive agencies of . . . Title VI.'' 45 FR 72995, 72995 (Nov. 2, 1980). Accordingly, the Department of Justice (DOJ) acts as the lead Federal agency responsible for defining the nature and scope of Title VI's prohibition of discrimination on the basis of race, color, and national origin in programs or activities receiving Federal financial assistance. The Order directs DOJ to, among other things, ''develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews.'' *Id.* Further, as part of this responsibility, the Order provides that other Federal agencies' regulations implementing Title VI are also subject to the Attorney General's approval. *Id.* at 72996.

The initial set of model regulations for Title VI were issued by the then-Department of Health, Education, and Welfare on December 4, 1964, which included only one reference to the ''effect of'' conduct in the ''discrimination prohibited'' provision of the rule. *See* 29 FR 16298, 16299 (Dec. 4, 1964) (codified at 45 CFR 80.3(b)(2)). In 1973, the Foundation promulgated its regulations under Title VI. 38 FR 17991 (July 5, 1973). In 1997, the Foundation issued a technical amendment to incorporate IMLS into the regulation, after IMLS was established as a subdivision of the Foundation under the Museum and Library Services Act of 1996. 62 FR 66826 (Dec. 22, 1997). In 2003, the Foundation added language regarding ''program or activity'' to reflect the amendment of Title VI by the Civil Rights Restoration Act of 1987. 68 FR 51384 (Aug. 26, 2003). Thus, apart from the technical update of adding IMLS, and the required updating of the phrase ''program or activity'' pursuant to the Civil Rights Restoration Act, the Foundation has not substantively updated its Title VI regulations since 1973—over 50 years ago.

C. Relevant Supreme Court Decisions

The Supreme Court has made clear that Title VI, 42 U.S.C. 2000d, does not prohibit facially neutral policies that result in disparate outcomes when there is no discriminatory intent. Rather, it prohibits only intentional discrimination.

In 1978, the Supreme Court concluded that Congress intended Title VI to prohibit ''only those racial classifications that would violate the Equal Protection Clause'' if committed by a government actor. *Regents of the Univ. of Cal.* v. *Bakke,* 438 U.S. 265, 287 (1978) (Powell, J., announcing the judgment of the Court); *id.* at 325, 328, 352–53 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); *see also Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.,* 600 U.S. 181, 198 n.2 (2023) (*SFFA*). Shortly before *Bakke'*s Title VI holding, the Supreme Court held that the Equal Protection Clause prohibits only intentional discrimination and that ''a law or other official act'' that has a ''racially disproportionate impact'' alone does not violate that Clause. *Washington* v. *Davis,* 426 U.S. 229, 239 (1976); *see also Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977) (''Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.''). Taken together, these Supreme Court cases establish that Title VI's statutory prohibition, like the Equal Protection Clause, extends only to intentional discrimination.

In 2001, the Supreme Court, in *Alexander* v. *Sandoval,* reaffirmed that settled understanding. 532 U.S. at 280 (''[I]t is . . . beyond dispute . . . that [Title VI] prohibits only intentional discrimination.''). In *Sandoval,* the Supreme Court held that private plaintiffs lacked a private right of action to enforce DOJ's ''disparate-impact regulations.'' *Id.* at 285–87. Though the Supreme Court had previously found a private cause of action to enforce Title VI's bar on intentional discrimination, *id.* at 279–80, that conclusion did not extend to enforcing DOJ's ''disparate-impact regulations,'' *id.* at 285. As the Supreme Court explained, it is ''clear'' that ''the disparate-impact regulations do not simply apply'' the statutory prohibition, as the regulations ''forbid conduct that [Title VI] permits,'' so it is equally ''clear that the private right of action to enforce [Title VI] does not include a private right to enforce these regulations.'' *Id.* Although the Supreme Court in *Sandoval* ''assume[d],'' without deciding, that DOJ's disparate-impact regulations were valid, the Court explained that the regulations are in ''considerable tension'' with the Supreme Court's Title VI precedents. Similarly, the regulations do not ''authoritatively'' construe Title VI because the regulations ''forbid conduct''—namely, policies that unintentionally result in a disparate impact—that Title VI ''permits.'' *Id.* at 281–82, 284–85; *see also id.* at 286 n.6 (''[Title VI] permits the very behavior that the regulations forbid.'').

In 2023, the Court emphasized that ''the equal protection clause requires equality of treatment before the law for all persons without regard to race or color.'' *SFFA,* 600 U.S. at 205 (cleaned up). In reviewing the admissions policies of certain higher education institutions, the Court explained that the Constitution requires ''eliminating all'' racial discrimination. *Id.* at 206. To that end, it held that ''[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny,' '' which requires that racial classifications '' 'further compelling government interests' '' and be '' 'narrowly tailored'—meaning 'necessary'—to achieve [such] interest[s].'' *Id.* at 206–07. Moreover, the Court explained that its ''precedents have identified only two compelling interests that permit resort to race-based government action,'' only one of which is relevant in general government administration: ''remediating specific, identified instances of past discrimination that violated the Constitution or a statute.'' *Id.* at 207. Finally, in 2024, the Supreme Court overruled *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *See Loper Bright Enters.* v. *Raimondo,* 603 U.S. 369, 409–12 (2024). In reaching that result, the Supreme Court made clear that ''statutes . . . have a single, best meaning'' that is '' 'fixed at the time of enactment.' '' *Id.* at 400 (quoting *Wis. Cent. Ltd.* v. *United States,* 585 U.S. 274, 284 (2018)). Thus, Title VI's bar on discrimination can have only one meaning. And under Supreme Court precedent, the single, best meaning of Title VI is that it ''prohibits only intentional discrimination'' and ''permits'' facially neutral policies that result in disparate outcomes when there is no discriminatory intent. *Sandoval,* 532 U.S. at 280, 286 n.6.

D. Executive Order 14281

On April 23, 2025, President Trump issued Executive Order 14281. This Order restated the ''bedrock principle of the United States . . . that all citizens are treated equally under the law.'' 90 FR at 17537. The Order explained that this ''principle guarantees equality of opportunity, not equal outcomes,'' and ''promises that people are treated as individuals, not components of a particular race or group.'' *Id.*

The Order also explained that disparate-impact liability ''endangers this foundational principle.'' *Id.* Disparate-impact liability, the Order reasoned, ''all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability.'' *Id.* As the Order explained, disparate-impact liability ''not only undermines our national values but also runs contrary to equal protection under the law and, therefore, violates our Constitution.'' *Id.*

The Order relayed that because of disparate-impact liability's problems, ''[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.'' *Id.* The Order directed the Attorney General to, among other things, ''initiate appropriate action to repeal or amend the implementing regulations for Title VI of the Civil Rights Act of 1964 for all agencies to the extent they contemplate disparate-impact liability.'' *Id.* On December 10, 2025, DOJ amended its Title VI regulations to eliminate disparate-impact liability. 90 FR 57141 (Dec. 10, 2025). The Foundation agrees with DOJ's rationale provided in its final rule, and accordingly, this rule also revises the Foundation's Title VI regulations to effectuate the Order's policy and purpose.

In any event, the Foundation would have independently initiated steps toward modifying its Title VI regulation in alignment with Executive Order 14281. Even if the Order did not exist, in other words, the Foundation would have taken steps to adopt the policy to eliminate the use of disparate-impact liability under Title VI. The Order states, and the Foundation firmly agrees, that a ''bedrock principle of the United States is that all citizens are treated equally under the law,'' a principle that ''encourages meritocracy and a colorblind society,'' not race-, color-, or national-origin-based favoritism. 90 FR at 17537. And adherence to this principle, including in the issuance of grants, ''is essential to creating opportunity, encouraging achievement, and sustaining the American Dream.'' *Id.*

Imposing disparate-impact liability endangers these policy objectives. Disparate-impact liability also raises serious constitutional concerns, is in considerable tension with the single, best meaning of Title VI, creates confusion, increases the costs of compliance, and does not serve the public interest. After considering the relevant issues and factors and weighing the relevant considerations, the Foundation concludes that these reasons together support eliminating disparate-impact liability from the Foundation's Title VI regulations.

E. Need for Rulemaking

The Foundation's regulations at 45 CFR part 1110, entitled ''Nondiscrimination in Federally Assisted Programs,'' contain several provisions that prohibit conduct or activities causing unintentional disparate impact, without a statutory or constitutional basis for doing so. And in some instances, the regulations encourage or even require unlawful discrimination labeled as ''reasonable action.'' Section 1110.3(b)(2) is the current regulation's general disparate-impact prohibition, which states that a ''recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.'' 45 CFR 1110.3(b)(2). Beyond that general prohibition, section 1110.3(b)(3) addresses a Federal funding recipient's selection of the site or location of facilities and includes two references to ''effect'' that extend the scope of prohibited conduct to include conduct with unintentional disparate impact. *Id.* 1110.3(b)(3). Section 1110.3(b)(6) concerns the use of ''reasonable action,'' and provides that funding recipients may (and sometimes must) use race, color, or national origin to overcome unintentional disparate ''consequences,'' but does not expressly specify that the funding recipient must narrowly tailor such use to serve a compelling governmental interest, as is required to satisfy strict scrutiny. *Id.* 1110.3(b)(6). Finally, section 1110.3(c)(3) addresses prohibited discriminatory employment practices and extends beyond intentional discrimination to prohibiting conduct that ''tends'' to have a discriminatory effect. *Id.* 42.104(c)(2).

There are serious statutory and constitutional concerns with the Foundation's Title VI disparate-impact regulations. There are also serious policy concerns because the current regulations create confusion, undermine public confidence in the Nation's civil rights laws and the rule of law, and produce burdensome litigation and compliance costs.

1. Serious Legal Concerns

There are serious statutory concerns as to whether Title VI authorizes the disparate-impact provisions of the current regulations. 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. *Sandoval,* 532 U.S. at 280, 286 n.6. That is the ''single, best meaning'' of Title VI. *Loper Bright,* 603 U.S. at 400. As summarized above, *Sandoval* calls into serious doubt the legality of the Foundation's ''disparate-impact regulations.'' 532 U.S. at 281–82, 284–85 (noting that DOJ's regulations, which the Foundation's regulations mirror, are in ''considerable tension'' with the Supreme Court's Title VI precedents); *see also id.* at 286 n.6 (''[Title VI] permits the very behavior that the regulations forbid.''). Although *Sandoval* resolved only the question of private enforceability, subsequent cases such as *Loper Bright* have made clear that the Foundation cannot extend Title VI beyond its single, best meaning. *See* 603 U.S. at 412–13 (holding that ''courts must . . . ensur[e] that [an] agency acts within'' its statutory authority). And even in the absence of Supreme Court precedent, the Foundation would have concluded that the best reading of Title VI is that it prohibits only intentional discrimination. *Id.*

Title VI authorizes agencies to promulgate regulations ''to effectuate'' the statute's prohibition of intentional discrimination. 42 U.S.C. 2000d–1. The current regulations' extension of prohibited conduct to include conduct with an unintentional disparate impact reaches a vastly broader range of conduct than the statute itself. This range is too broad to be considered a simple prophylactic measure aimed at preventing intentional discrimination. *See Sandoval,* 532 U.S. at 286 n.6 (''[Title VI] permits the very behavior that the regulations forbid.''). Thus, the disparate-impact regulations do not ''effectuate'' Title VI. 42 U.S.C. 2000d–1.

There are also serious concerns about whether the Foundation's Title VI regulations pass constitutional muster under the Equal Protection Clause. As the Supreme Court recently held in *SFFA,* ''the Equal Protection Clause . . . applies without regard to any differences of race, of color, or of nationality—it is universal in its application'' and the ''guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'' 600 U.S. at 206 (internal quotation marks omitted) (first quoting *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886), and then quoting *Bakke,* 438 U.S. at 289–90 (Powell, J.)). Despite the promises of the Equal Protection Clause, a funding recipient's risk of disparate-impact liability under the Foundation's regulations is triggered by unintentional disparate outcomes, which the recipient may not even have known about without investigation. To evaluate and avoid this risk, the funding recipient must incur investigatory costs, such as conducting an impact analysis, and is coerced to proactively consider race, color, and national origin, and potentially use such analysis to change the unintended disparate outcomes. In short, disparate-impact liability encourages and, in some cases, requires covered entities to engage in the intentional use of race and racial balancing to eliminate those disparate outcomes by treating certain racial groups differently from others—the exact conduct the Equal Protection Clause forbids. *See id.* This serious constitutional concern further confirms that the best reading of Title VI is that it prohibits only intentional discrimination and does not authorize Federal agencies to impose disparate-impact liability. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) (''[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'' (citing *NLRB* v. *Catholic Bishop of Chi.,* 440 U.S. 490, 499–501, 504 (1979))).

This use of race, color, or national origin violates the Equal Protection Clause unless it survives review under the ''daunting'' strict-scrutiny standard. *SFFA,* 600 U.S. at 206; *see also Free Speech Coal., Inc.* v. *Paxton,* 145 S. Ct. 2291, 2310 (2025) (''Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is 'the most demanding test known to constitutional law.''' (quoting *City of Boerne* v. *Flores,* 521 U.S. 507, 534 (1997))). The use of race, color, or national origin necessitated by the disparate-impact provisions runs into serious issues with the requirement of narrow tailoring to achieve a compelling interest. *SFFA,* 600 U.S. at 206–07.

Similarly, the Foundation's ''reasonable action'' provision authorizes and sometimes requires the intentional use of race without requiring that this intentional use be narrowly tailored to serve a recognized compelling interest. Instead, it encourages intentional racial balancing ''to remove or overcome the consequences of'' unintended racial disparities. 45 CFR 1110.3(b)(6). Thus, for substantially the same reasons as above, the Foundation's ''reasonable action'' provision raises serious constitutional concerns.

For the reasons summarized above, there are serious statutory and constitutional concerns with the Foundation's disparate-impact regulations. But even if the regulations were legal, eliminating the potential constitutional concerns addressed above would independently justify amending the regulations. *Cf. U.S. Tel. Ass'n* v. *FCC,* 188 F.3d 521, 528 (D.C. Cir. 1999) (concluding it was not ''arbitrary and capricious'' to adopt a certain policy to ''avoid[ ] raising a non-trivial constitutional question''). And even if the regulations did not raise serious constitutional concerns, eliminating the costs and confusion caused by the mismatch between the statute and the disparate-impact regulations would independently justify repealing the disparate impact regulations.

2. Serious Policy Concerns

There are also serious policy concerns with the Title VI regulations' imposition of disparate-impact liability. While policy concerns with disparate-impact liability exist independent of Executive Order 14281, that Order sets forth many valid policy concerns with disparate-impact liability. As noted in section 1 of the Order, ''on a practical level, disparate-impact liability has hindered businesses from making hiring and other employment decisions based on merit and skill, their needs, or the needs of their customers because of the specter that such a process might lead to disparate outcomes, and thus disparate-impact lawsuits. This has made it difficult, and in some cases impossible, for employers to use bona fide job-oriented evaluations when recruiting, which prevents job seekers from being paired with jobs to which their skills are most suited—in other words, it deprives them of opportunities for success.'' 90 FR at 17537. Moreover, the legal concerns identified above have caused uncertainty and confusion for Federal funding recipients as to whether and when they need to comply with the disparate-impact regulations and when they can or must consider race, color, and national origin. As explained above, *Sandoval* casts substantial doubt on the validity of the disparate-impact regulations that many Federal departments and agencies have promulgated pursuant to Title VI. 532 U.S. at 280–82.

Additionally, in practice and as explained above, disparate-impact liability leads covered entities to engage in racial balancing even as Title VI forbids intentional racial discrimination. This tension tends to create confusion, undermine public confidence in the Nation's civil rights laws, and undermine public confidence in the rule of law itself, as the law seems to both forbid and require the same conduct.

These problems are amplified by the arbitrary nature of the racial and ethnic categories typically used to measure disparate effects, which, by virtue of their arbitrariness, typically lack a meaningful connection to a compelling interest. *See, e.g., SFFA,* 600 U.S. at 216–17 (explaining that the ''[racial] categories'' at issue were ''themselves imprecise in many ways'' and ''the use of these opaque racial categories undermine[d], instead of promote[d], [their] goals''). This lack of clarity undermines the law's ability to encourage nondiscrimination. These policy concerns independently justify repealing disparate-impact regulations to eliminate confusion, remove the incentive for covered entities to engage in racial balancing, and maintain clarity and public confidence in the Nation's civil rights laws.

The Foundation's constituent agencies have considered the view that examining disparate effects can sometimes be useful in uncovering or deterring subtle intentional discrimination or intentional indifference to unnecessary and arbitrary barriers. But any alleged benefits are outweighed by the other issues and factors described above that the constituent agencies have considered. And in any event, the concern is mitigated by the fact that eliminating disparate-impact liability does not preclude the use of data on disparate outcomes to help prove intentional discrimination. Each of the Foundation's constituent agencies and private litigants may rely on such data as a potential indicator of intentional discrimination. This use of a statistical disparity to help establish, as an evidentiary matter, liability for intentional discrimination materially differs from using such a disparity to impose liability for an unintentional disparate impact.

The Foundation's constituent agencies considered adopting a version of this regulation that limits disparate-impact liability to claims involving certain categories of grantees, including grantees with a prior finding of noncompliance in operating an agency-funded program. The Foundation's constituent agencies decline to adopt that approach. Verifying such claims would be administratively untenable because it would require access to records the Foundation's constituent agencies do not retain for a sufficiently long period due to compliance with mandatory record retention regulations (or else require unreasonably long and costly document-retention policies), or would require the Foundation's constituent agencies to obtain records from other agencies to which they do not have regular access. The modification would also add another layer of administrative decision-making, creating additional work and delay between deserving claimants and the disposition of Title VI claims. In any event, that additional layer would not cure the absence of statutory authorization permitting Federal agencies to impose disparate impact liability.

Additionally, the constituent agencies have considered the potential reliance interests of funding recipients and others on the disparate-impact regulations. However, the *Sandoval* decision cast serious doubt on the continuing viability of these regulations more than 25 years ago. Since *Sandoval,* enforcement of Title VI disparate-impact regulations has been minimal and sporadic. Also, Executive Order 14281 directed all Federal agencies to ''deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability.'' 90 FR at 17538. Accordingly, the constituent agencies' position is that any reliance interests should be minimal and do not outweigh legal and other policy concerns. Further, each constituent agency's concerns, whether considered cumulatively or separately, outweigh any reliance interests.

The Foundation's constituent agencies note that *Sandoval* has also led to a divergence between Title VI enforcement by private plaintiffs and enforcement by Federal departments and agencies. After *Sandoval,* private plaintiffs can enforce only Title VI's statutory prohibition on intentional discrimination, while Federal departments and agencies have continued to pursue disparate-impact liability. Repealing the disparate-impact regulations eliminates this incongruent enforcement.

Overall, after considering the relevant issues and factors and weighing the relevant considerations, the Foundation's constituent agencies have determined that, regardless of the legality of the Foundation's disparate-impact regulations, the above summarized policy concerns, whether viewed separately or cumulatively, independently justify the repeal of its disparate-impact regulations.

IV. Regulatory Amendments

This rule's regulatory changes address the concerns regarding the statutory authority that the Supreme Court questioned in *Sandoval* and the other legal and policy concerns discussed above; harmonize the implementing regulations' scope with the conduct that Congress intended Title VI to prohibit; promote consistent enforcement of Title VI among private plaintiffs and Federal departments and agencies; and provide much needed clarity to the courts and Federal funding recipients and beneficiaries.

For the reasons summarized above, the Foundation's constituent agencies amend the following provisions in its Title VI implementing regulations that explain particular types of discrimination prohibited, located in 45 CFR part 1110.

A. Table Summarizing Amendments

The table below indicates the exact wording changes made by this rule. For each section indicated in the left column, the action described in the middle column is taken with respect to the text identified in the right column.

Section	Action	Details
1110.3(b)(2)	Remove	Remove full text of § 1110.3(b)(2).
1110.3(b)(3)	Remove	Remove ''or effect'' from both places.
1110.3(b)(6)	Remove	Remove full text of paragraph (6).
1110.3(c)(3)	Remove	Remove full text of paragraph (3).
1110.5(e)	Remove	Remove full text of paragraph (e).
1110.5(f)	Remove	Remove full text of paragraph (f).
1110.5(g)	Remove	Remove full text of paragraph (g).

B. Section-by-Section Analysis

Section 1110.3(b)(2)

Section 1110.3(b)(2) is the current regulation's general prohibition of conduct with unintentional disparate impact. It imposes liability on Federal funding recipients who ''utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination.'' Because the only purpose of section 1110.3(b)(2) is to extend the scope of Title VI to reach conduct giving rise to unintentional disparate impact, this rule deletes this paragraph in its entirety. Thus, it amends the Foundation's Title VI implementing regulations to conform to the scope of coverage Congress intended when it enacted Title VI and to address the legal and policy concerns described in this document. This rule replaces paragraph (b)(2) with a placeholder to maintain the numbering accuracy of previous citations and other references to parts of this section.

Section 1110.3(b)(3)

Section 1110.3(b)(3) addresses a Federal funding recipient's or applicant's selection of the site or location of facilities. It provides that a funding recipient may not make selections with the ''purpose or effect'' of discriminating, or ''with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of'' Title VI or the Foundation's implementing regulations. The paragraph's two references to ''effect'' extend its scope to conduct causing unintentional disparate impacts. This rule deletes both uses of ''or effect'' to conform paragraph (b)(3) more closely to the scope of coverage Congress intended when it enacted Title VI and to address the legal and policy concerns described in this document.

Section 1110.3(b)(6)

Section 1110.3(b)(6) pertains to ''reasonable action'' to overcome the consequences of certain conduct. The paragraph authorizes such action even in the absence of a finding of prior discrimination in a program ''to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin.'' This provision points not to intentional discrimination, but rather to the unintentional ''consequences of practices or impediments.'' It accordingly encourages intentional racial classifications, racial preferences, and other race-based actions without specifying the compelling governmental interest and narrow tailoring that the Equal Protection Clause demands. This section has long been unlawful under an Equal Protection Clause analysis.

Paragraph (b)(6) also states that a recipient ''has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage'' where ''previous discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination.'' This provision goes beyond the Equal Protection Clause, which, in limited circumstances permits, but does not mandate, a government to take narrowly tailored action to remedy the effects of its identified past discrimination. *See, e.g., Bakke,* 438 U.S. at 307 (Powell, J.). Even placing aside the mandatory language, this provision does not expressly require narrow tailoring to counter particular past discrimination, but rather ''reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage.'' Accordingly, this provision promotes potentially illegal race, color, and national origin discrimination. Moreover, in some instances, it may even coerce recipients to consider and use racial preferences when the recipient does not want to. This is contrary to the goal of promoting and defending a culture of nondiscrimination and is destructive to the public's understanding of and faith in the Nation's civil rights laws. Therefore, this rule removes paragraph (b)(6).

Section 1110.3(c)(3)

Section 1110.3(c)(3) addresses prohibited discriminatory employment practices. Paragraph (c)(1) prohibits intentionally discriminatory employment practices in a program for which a primary objective of the Federal financial assistance that program receives is to provide employment. Paragraph (c)(3) extends the prohibition on discrimination to employment practices of the funding recipient even when ‘‘a primary objective of the Federal financial assistance is not to provide employment’’ if discrimination in the nonfunded ‘‘employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies.’’ This paragraph prohibits not only intentional discrimination but rather extends the prohibition to conduct that ‘‘tends’’ to have a discriminatory effect.

Moreover, paragraph (c)(3)'s extension to employment practices for which the Federal funding's primary objective is not to provide employment conflicts with the statutory limitation found in 42 U.S.C. 2000d–3. That section states that ‘‘[n]othing contained in [Title VI] shall be construed to authorize action under [Title VI] by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.’’ 42 U.S.C. 2000d–3; *see also Johnson* v. *Transp. Agency, Santa Clara Cnty.,* 480 U.S. 616, 627–28 n.6 (1987) (citing the statutory limitation and noting Congress's intent that Title VI not ‘‘impinge’’ on Title VII, which prohibits discriminatory employment practices). This rule deletes paragraph (c)(3) to amend the regulation so that it more closely adheres to the scope of conduct Congress prohibited under Title VI and to address the legal and policy concerns described in this document.

Section 1110.5(e), (f), (g)

The ‘‘Illustrative applications’’ under section 1110.5 consist of examples that illustrate the application of the regulation to some of the activities for which Federal financial assistance is provided by the Foundation's constituent agencies. This rule deletes paragraph (e) because it is an illustrative example of section 1110.3(b)(2), which is being deleted for the reasons described above. Likewise, paragraphs (f) and (g) illustrate the application of section 1110.3(b)(6), which is also being deleted.

V. Severability

The Foundation's constituent agencies' position is that each of this rule's amendments serves a vital, related, but distinct purpose. The constituent agencies also confirm that each of the amendments is intended to operate independently of one other and that the potential invalidity of one amendment does not affect the validity of other amendments. The constituent agencies adopt any of the amendments independent and regardless of the invalidity of a separate amendment.

VI. Regulatory Certifications

Administrative Procedure Act

The Foundation's constituent agencies issue this final rule without prior public notice and comment or a delayed effective date pursuant to the exception in the Administrative Procedure Act (APA) for rules ‘‘relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.’’ 5 U.S.C. 553(a)(2).

Title VI concerns nondiscrimination conditions on the receipt of Federal financial assistance, and more particularly on the receipt of Federal ‘‘[g]rants and loans,’’ ‘‘property,’’ ‘‘personnel’’ and ‘‘[a]ny Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.’’ 45 CFR 1110.13(f); *see also id.* 1110.4 (requiring funding recipient sign contractual assurance of compliance with Title VI); *Cummings* v. *Premier Rehab Keller, P.L.L.C.,* 596 U.S. 212, 217–18 (2022) (observing that Congress enacted Title VI ‘‘[p]ursuant to its authority to ‘fix the terms on which it shall disburse federal money’’’ (internal citation omitted)). *Cf. Education Programs or Activities Receiving or Benefitting from Federal Financial Assistance,* 82 FR 46655 (Oct. 6, 2017) (invoking the section 553(a)(2) exception to amend Title IX regulations to ‘‘promote consistency in the enforcement of Title IX for [the Department of Agriculture] financial assistance recipients’’); *Preserving Community and Neighborhood Choice,* 85 FR 47899 (Aug. 7, 2020) (invoking the exception to repeal a Housing and Urban Development rule regarding Federal grantees); *Participation by Minority Business Enterprise in Department of Transportation Programs,* 53 FR 18285 (May 23, 1988) (invoking the exception to expand coverage of a Department of Transportation regulation regarding the Federal Aviation Administration's airport financial assistance program); *Nondiscrimination on the Basis of Handicap in Federally Assisted Programs—Suspension of Guidelines with Respect to Mass Transportation,* 46 FR 40687 (Aug. 11, 1981) (invoking the exception to suspend DOJ guidelines prohibiting disability discrimination in transportation programs and activities receiving Federal financial assistance).

Invoking 5 U.S.C. 553(a)(2) is consistent with the definition for Federal financial assistance provided by the U.S. Office for Management and Budget (OMB) in 2 CFR 200.1, which defines Federal financial assistance with the same categories as the APA's exception for rules ‘‘relating to agency management or personnel or to public property, loans, grants, benefits, or contracts,’’ 5 U.S.C. 553(a)(2). With potentially limited exceptions not applicable to the Foundation's constituent agencies, all forms of Federal financial assistance set forth under 2 CFR 200.1 that the constituent agencies administer fall under the ‘‘public property, loans, grants, benefits, or contracts’’ exception. Thus, the Foundation's constituent agencies issue this final rule without prior public notice and comment or a delayed effective date under 5 U.S.C. 553(a)(2).

Executive Orders 12866 and 13563 (Regulatory Review)

The Foundation's constituent agencies have determined that this rulemaking is a ‘‘significant regulatory action’’ under section 3(f) of Executive Order 12866, 58 FR 51735, 51738 (Sep. 30, 1993), but not an ‘‘economically significant’’ action under section 3(f)(1). Accordingly, this rule has been submitted to OMB for review.

This regulation has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866, *id.* at 51735, and section 1(b) of Executive Order 13563, 76 FR 3821, 3821 (Jan. 18, 2011), which supplements and reaffirms the principles of Executive Order 12866. These Executive Orders direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. 58 FR at 51735; 76 FR at 3821. Executive Order 13563 also recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify. *Id.*

As explained in the preamble, the regulatory modifications in this rule conform the Foundation's regulations to Executive Order 14281; address serious concerns regarding Title VI disparate-impact regulations that the Supreme Court raised in *Sandoval;* harmonize the implementing regulations' scope with the scope of conduct that Congress intended Title VI to prohibit; promote consistency in enforcement among private plaintiffs and Federal departments and agencies; and provide much needed clarity to courts and

Federal funding recipients and beneficiaries regarding the scope of the Foundation's Title VI regulations. Indeed, with respect to section 1110.3(c) of the Foundation's Title VI regulations, the changes made to this rule are necessary to bring the regulations into compliance with 42 U.S.C. 2000d–3. In short, this rule is necessary to conform the Foundation's current regulations to existing statutory law, as interpreted by the Supreme Court.

The costs and benefits of this rule are difficult to quantify due to data limitations. Although the figures below do not represent the monetary impact of the rule, the NEA issued approximately 14,950 separate awards totaling approximately $942 million from fiscal year 2020 through fiscal year 2024, and the NEH issued approximately 4,517 separate awards totaling approximately $920 million during this same period. IMLS issued approximately 2,346 separate awards totaling approximately $1.03 billion from fiscal year 2022 through fiscal year 2025. During the period from fiscal year 2020 through fiscal year 2024, the Foundation's constituent agencies did not conduct any Title VI-related active investigations or compliance reviews regarding these funds and their recipients that centered on disparate impact alone. For enforcement actions that relate to both intentional discrimination and conduct having an unintentional disparate impact, the constituent agencies do not track and cannot reliably quantify the costs attributable to the varying disparate-impact portions of enforcement actions. Also, the existence of a disparate impact is sometimes a factor that may be considered in determining whether discrimination was intentional; this further impedes monetizing costs and benefits specific to disparate-impact enforcement. Therefore, the overall cost effect on the constituent agencies is difficult to quantify, although this rule should decrease the constituent agencies' enforcement costs. This rule also should have the benefit of bringing the constituent agencies' conduct in line with the law, which is also difficult to quantify. Similarly, the constituent agencies are unable to quantify how funding recipients will respond to the regulatory changes. But this deregulatory action should result in greater flexibility and lower compliance costs for recipients.

The Foundation's constituent agencies recognize that a funding recipient may receive Federal funds from sources other than, and in addition to, the constituent agencies. Regardless, the constituent agencies do not envision that this rule will appreciably increase administrative costs or compliance costs for funding recipients that also must adhere to the regulations of another department or agency. This deregulatory action does not create any new obligations for constituent agencies' funding recipients. On the contrary, eliminating disparate-impact liability from the regulations eliminates a source of regulatory confusion, narrows and makes more specific the conduct prohibited, and thus lessens the costs of compliance and potential liability. Moreover, recipients that receive funds for the same program or activity from more than one Federal entity already enter into separate contractual assurances with each funding entity. *See, e.g.,* 45 CFR 1110.4 (the Foundation), 10 CFR 1040.4 (Department of Energy); 45 CFR 605.5 (National Science Foundation); 45 CFR 80.4 (Department of Health and Human Services).

Such assurances already impose varying requirements that each Federal funding source deems necessary. Thus, funding recipients will continue to be held to the most stringent contractual assurance and regulation. And in any event, the Foundation notes that other agencies are currently amending their regulations to align with the changes made in this rule, so the Foundation anticipates that there will be little, if any, disparity in Federal requirements regarding disparate-impact liability going forward.

Based on the analysis of the practical qualitative costs and benefits noted above, the Foundation's position is that this rule is consistent with the principles of Executive Orders 12866 and 13563, including the requirements that, to the extent permitted by law, an agency adopt a regulation only upon a reasoned determination that its benefits justify its costs and choose a regulatory approach that maximizes net benefits. *See* 58 FR at 51735; 76 FR at 3821.

Executive Order 14192 (Unleashing Prosperity Through Deregulation)

Executive Order 14192 requires an agency, unless prohibited by law, to identify at least ten existing regulations to be repealed when the agency publicly promulgates a new regulation. 90 FR 9065, 9065 (Jan. 31, 2025). In furtherance of this requirement, section 3(c) of the Order requires that ''any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least 10 prior regulations.'' *Id.* By revising the Foundation's current Title VI regulations, which extend prohibited conduct to include unintentional disparate impacts and thus expand the scope of those regulations to a vastly broader range of conduct than the statute prohibits, this rule eliminates unnecessary regulation. Accordingly, the Foundation's constituent agencies consider this rule to be a deregulatory action under Executive Order 14192.

Executive Order 14294 (Fighting Overcriminalization in Federal Regulations)

Executive Order 14294 requires agencies promulgating regulations with criminal regulatory offenses potentially subject to criminal enforcement to ''explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the mens rea standard applicable to'' each element of those offenses. 90 FR 20363, 20363 (May 9, 2025). This rule does not impose a criminal regulatory penalty and is thus exempt from Executive Order 14294's requirements.

Executive Order 13132 (Federalism)

This rule will not have a substantial, direct effect on the relationship between the national government and the States, on distribution of power and responsibilities among various levels of government, or on States' policymaking discretion. States that choose to receive Federal financial assistance from the Foundation's constituent agencies do so voluntarily and agree to comply with relevant statutory requirements as a condition of receiving such funding. This rule does not subject States or any other funding recipients or beneficiaries to any new obligations. Rather, this rule amends and clarifies existing regulations that are required by statute. Therefore, in accordance with section 6 of Executive Order 13132, 64 FR 43255, 43257–58 (Aug. 4, 1999), the constituent agencies have determined that these amendments do not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and (b)(2) of Executive Order 12988 to specify provisions in clear language. *See* 61 FR 4729, 4731–32 (Feb. 5, 1996). Pursuant to section 3(b)(1)(I) of the Executive Order, *id.* at 4731, nothing in this or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the program that is the subject of this rule is intended to create any legal or procedural rights enforceable against the United States.

Executive Order 12250

Pursuant to Executive Order 12250, DOJ has the responsibility to ''review . . . proposed rules . . . of the Executive agencies'' implementing nondiscrimination statutes such as Title VI ''in order to identify those which are inadequate, unclear or unnecessarily inconsistent.'' 45 FR at 72995. DOJ has reviewed and approved this rule.

Regulatory Flexibility Act

This rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, 604, because, for the reasons described above, no notice of proposed rulemaking is required under 5 U.S.C. 553. *See Or. Trollers Ass'n* v. *Gutierrez,* 452 F.3d 1104, 1123–24 (9th Cir. 2006) (noting that the RFA does not apply when an agency validly invokes an exception to the public comment requirements of 5 U.S.C. 553). Further, the Foundation's constituent agencies, in accordance with 5 U.S.C. 605(b), have reviewed these regulations and certify that the rule's changes will not have a significant economic impact on a substantial number of small entities because these regulatory changes do not impose any new substantive obligations on Federal funding recipients. Rather, the rule amends and clarifies existing regulations that are required by Title VI. Also, the rule brings constituent agencies into compliance with the Equal Protection Clause and harmonizes the scope of the current regulations to conform to the scope of Title VI, which does not prohibit conduct giving rise to unintentional disparate impact. All Federal funding recipients have been and will continue to be bound by existing standards that will remain in place after this rule is effective.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.,* requires agencies to prepare several analytic statements before proposing any rule that may result in annual expenditures of $100 million by State, local, or Tribal governments, or the private sector. 2 U.S.C. 1532(a). However, UMRA also excludes from its coverage any proposed or final Federal regulation that ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' 2 U.S.C. 1503(2). Accordingly, this rule is not subject to the provisions of UMRA.

Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this rule is not a ''major rule'' as defined by the Congressional Review Act, 5 U.S.C. 804(2).

Paperwork Reduction Act of 1995

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* agencies must consider whether a rule will create additional burdens related to recordkeeping, paperwork, or information collection. This rule will not impose additional reporting or recordkeeping requirements under the Act.

List of Subjects for 45 CFR Part 1110

Administrative practice and procedure, Civil rights, Equal employment opportunity, Grant programs.

Accordingly, for the reasons set forth above, the NEA (for itself and on behalf of FCAH, for which NEA provides legal counsel), NEH, and IMLS amend part 1110 of title 45 of the Code of Federal Regulations as follows:

PART 1110—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

■ 1. The authority citation for part 1110 is revised to read as follows:

Authority: 42 U.S.C. 2000d, 2000d–1, 2000d–7; E.O. 12250, 45 FR 72995; E.O. 14281, 90 FR 17537.

■ 2. Amend § 1110.3 by:

■ a. Removing and reserving paragraph (b)(2);

■ b. Revising paragraph (b)(3); and

■ c. Removing paragraphs (b)(6) and (c)(3).

The revision reads as follows:

§ 1110.3 Discrimination prohibited.

* * * * *

(b) * * *

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

* * * * *

§ 1110.5 [Amended]

■ 3. Amend § 1110.5 by removing paragraphs (e), (f), and (g).

Mary Anne Carter,

Chairman, National Endowment for the Arts.

Michael McDonald,

Senior Deputy Chairman, National Endowment for the Humanities.

Lisa K. Solomson,

Senior Official Performing the Duties of the Director, Institute of Museum and Library Services.

[FR Doc. 2026–17366 Filed 8–25–26; 8:45 am]

BILLING CODE 7537–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 260820–0009]

RIN 0648–BN42

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Duckabush Estuary Restoration Project in Washington

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; notification of issuance of Letter of Authorization.

SUMMARY: NMFS, upon request from the U.S. Army Corps of Engineers (USACE) issues this final rule pursuant to the Marine Mammal Protection Act (MMPA), to govern the taking of marine mammals incidental to the Duckabush Estuary Restoration Project (DERP) in Hood Canal, Washington over 5 years (2027–2032). This final rule, which allows for the issuance of a 5-year letter of authorization (LOA) allowing for the incidental take of marine mammals during the described activities and timeframes, prescribes the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and establishes requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from July 9, 2027, through July 8, 2032.

ADDRESSES: Electronic copies of the application and supporting documents, the proposed rule and associated public comments, as well as a list of the references cited in this document, may be obtained online at: *https:// www.fisheries.noaa.gov/action/*