ETHICS AND PUBLIC POLICY CENTER

August 24, 2026

Via Federal eRulemaking Portal

Jennifer Bastress
Interim Agency Head
AmeriCorps (Corporation for National and Community Service)
250 E Street SW
Washington, DC 20525

RE: AmeriCorps Proposed Rule "Rescinding Portions of AmeriCorps Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281" (RIN 3045-AA95; Docket No. CNCS-2026-0299)

Dear Ms. Bastress:

We write to offer comment on the Corporation for National and Community Service's (operating as AmeriCorps) proposed rule "Rescinding Portions of AmeriCorps Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281" ("Proposed Rule").[1] Rachel Morrison is a Fellow at the Ethics and Public Policy Center (EPPC), director of EPPC's Administrative State Accountability Project, and a former attorney with the Equal Employment Opportunity Commission (EEOC). Samuel Lucas is a Legal Associate at EPPC's Administrative State Accountability Project.

With this Proposed Rule, AmeriCorps seeks to "more closely align its regulations to Title VI, which prohibits intentionally discriminatory conduct."[2] AmeriCorps has determined that its current regulations implementing Title VI, which go beyond prohibiting intentional discrimination by prohibiting conduct that has an "unintentional disparate impact," raise "serious statutory and constitutional concerns" and "do not sufficiently serve the public interest."[3] As such, the Proposed Rule would amend AmeriCorps' Title VI regulations to eliminate disparate-impact liability, prohibit only intentional discrimination, and "align the conduct prohibited by AmeriCorps' regulations with Title VI's original public meaning, avoid constitutional concerns, reduce compliance costs, and serve the public interest."[4]

These changes are consistent with Executive Order (E.O.) 14281 on "Restoring Equality of Opportunity and Meritocracy" and recent Department of Justice regulatory updates.[5] In E.O. 14281, President Trump recognized "[d]isparate-impact liability imperils the effectiveness of

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[1] 91 Fed. Reg. 46384 (July 23, 2026), https://www.federalregister.gov/d/2026-14906.

[2] *Id.* at 46384.

[3] *Id.*

[4] *Id.*

[5] *Id.*

civil rights laws by mandating, rather than proscribing, discrimination."[6] Similarly, DOJ recognized in its December 2025 rule modifying its Title VI regulations that the tension between disparate-impact liability (which leads to balancing based on protected classes) and laws prohibiting intentional discrimination "create[s] confusion, undermine[s] public confidence in the nation's civil rights laws, and undermine[s] public confidence in the rule of law itself, as the law seems to both forbid and require the same conduct."[7]

AmeriCorps explains that the "practical impact" of its proposal would be to clarify that "AmeriCorps Federal-funding recipients that AmeriCorps' Title VI regulations prohibit only intentional discrimination and do not prohibit conduct or activities that have a disparate impact in the absence of intentional discrimination, and that AmeriCorps thus will not pursue Title VI disparate-impact liability against its Federal-funding recipients."[8]

As discussed below, we support the Proposed Rule, and we agree with AmeriCorps that it has several separate and independent bases, whether viewed separately or cumulatively, for eliminating disparate-impact liability from its Title VI regulations.[9]

First, AmeriCorps has a constitutional duty to enforce Title VI as passed by Congress.[10] Title VI, 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."[11]

As the Supreme Court recently emphasized in *Bostock* (a Title VII case): "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[12] Here, the text is plain—Title VI does not support disparate-impact liability.

Unlike Title VI, Title VII does contain disparate-impact liability language and demonstrates that Congress knows full well how to create a disparate-impact standard when it wants to. But as explained more below, even with Title VII's explicit disparate-impact liability

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[6] Exec. Order 14281, *Restoring Equality of Opportunity and Meritocracy*, 90 Fed. Reg. 17537, 17538 (Apr. 23, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/.

[7] DOJ, *Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281*, 90 Fed. Reg. 57141, 57144 (Dec. 10, 2025), https://www.federalregister.gov/d/2025-22448.

[8] 91 Fed. Reg. at 46384.

[9] *See id*. at 46385–87.

[10] *Cf. Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 654–55 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.").

[11] 42 U.S.C. § 2000d.

[12] *See Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 673–74 (2020).

language, intentional discrimination must still be shown to find a violation of Title VII and avoid the serious constitutional concerns that exist with disparate-impact liability.

Here, the Proposed Rule rightly recognizes that the Supreme Court has held that Title VI "prohibits only intentional discrimination" and "does not prohibit facially neutral policies that result in disparate outcomes when there is no discriminatory intent."[13] And AmeriCorps' current regulations extend the "prohibited conduct to include conduct with an unintentional disparate impact reaches a vastly broader scope than the statute itself."[14]

Second, disparate-impact liability is based on the abstract assumption that any observed disparity must be the result of unlawful discrimination. But this assumption is not logically necessary and is not backed by evidence.[15] As the Washington Post Editorial Board explained last year, "The concept of disparate impact stretches that idea to the point of incoherence. It says that different average outcomes among groups—even if there was no intent to discriminate—can still be a civil rights violation."[16]

There are many nondiscriminatory reasons why a policy or action might result in disparate outcomes among subgroups of a protected class. For example, law professor and former U.S. Commission on Civil Rights Commissioner Gail Heriot explains how "[a]ll job qualifications have a disparate impact":

> South Asian Indian Americans are disproportionately likely to have experience in motel management than the rest of the population. African Americans are statistically over-represented in many professional athletics as well as in many areas of the entertainment industry. African American college students earn a disproportionate share of college degrees in public administration and social services. Asian Americans are less likely to have majored in Psychology. Unitarians are more likely to have college degrees than Baptists. And it doesn't stop.[17]

The same is true in other contexts. As Heriot explains, disparate-impact liability is an "internally incoherent doctrine," gives a federal agency "enormous discretionary authority," and "makes almost everything presumptively illegal."[18] At bottom, statistical disparities alone without evidence of actual disparate treatment should not be used as a proxy for unlawful discrimination. AmeriCorps is right to reject the disparate-impact theory of discrimination.

Third, as the Proposed Rule recognizes, disparate-impact liability also raises serious constitutional concerns. As President Trump explained in E.O. 14281, "[d]isparate-impact liability is wholly inconsistent with the Constitution and threatens the commitment to merit and

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[13] 91 Fed. Reg. at 46385 (citing, inter alia, *Alexander v. Sandoval*, 532 U.S. 275, 280 (2021) ("[I]t is ... beyond dispute ... that [Title VI] prohibits only intentional discrimination.")).

[14] *Id.* at 46386.

[15] *See generally* Thomas Sowell, *Discrimination and Disparities* (2019) (gathering empirical evidence to challenge the idea that different outcomes can be explained by discrimination or any other single factor).

[16] Editorial Board, *Pam Bondi's Welcome Woke Rollback*, Wash. Post (Dec. 10, 2025), https://www.washingtonpost.com/opinions/2025/12/10/pam-bondi-justice-disparate-impact-regulations/.

[17] Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & Liberty 1, 34–35 (2020), https://ssrn.com/abstract=3482015.

[18] *Id.* at 1, 3.

equality of opportunity that forms the foundation of the American Dream."[19] Indeed, DOJ acknowledged in its December 2025 disparate-impact rule that the theory of disparate impact raises "serious legal concerns."[20] We explain several of these concerns below.

In *Students for Fair Admissions*, the Supreme Court held that race-conscious admissions policies and racial balancing in higher education violated the Fourteenth Amendment's Equal Protection Clause.[21] The Court held that any race-conscious policies, even to avoid disparities that could give rise to disparate-impact claims, are constitutionally suspect.[22] Insofar as AmeriCorps' current Title VI regulations prohibit disparate outcomes, these regulations could compel recipients to intentionally discriminate against protected classes, which would itself seem to violate the Equal Protection Clause. The Proposed Rule acknowledges this reality: "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."[23]

Disparate impact's equal protection issues are only exacerbated by the "arbitrary," "imprecise," and "opaque" nature of racial and ethnic categories often used to determine disparate impact.[24] AmeriCorps agrees: the problems with its disparate impact regulations are "amplified by the arbitrary nature of the racial and ethnic categories typically used to measure disparate effects," which "typically lack a meaningful connection to a compelling interest."[25]

In *Loper Bright*, the Supreme Court rejected the notion that courts must defer to what federal agencies say about federal statutes. The Court explained that "statutes ... have a single, best meaning" that is "fixed at the time of enactment."[26] *Loper Bright* recognizes that courts, not federal bureaucrats, are in the best position to determine what statutes mean.

Moreover, there are frequently good reasons to doubt that regulations actually reflect an honest effort to discern congressional intent. As former Secretary of Labor Eugene Scalia has noted, regulations often reflect "policy choices, often outfitted after the fact with legal explanations."[27] Even worse, "[s]ome agency heads not only don't interpret; at times they're

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[19] 90 Fed. Reg. at 17538.

[20] 90 Fed. Reg. at 57143–44.

[21] *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) ("Outright racial balancing is patently unconstitutional." (quoting *Fisher v. Univ. of Tex.*, 570 U.S. 297, 311 (2013))).

[22] *See id.* at 210.

[23] 91 Fed. Reg. at 46386.

[24] *See* DOJ, Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 90 Fed. Reg. 57141, 57144 (Dec. 10, 2025); *Students for Fair Admissions*, 600 U.S. at 216–17.

[25] 91 Fed. Reg. at 46387.

[26] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024) (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)).

[27] *See* Eugene Scalia, *Chevron Deference Was Fun While It Lasted*, WSJ, Jan. 9, 2024, https://www.wsj.com/opinion/chevron-deference-was-fun-while-it-lasted-legal-scotus-partisan-regulation-changes-bddbfe27.

indifferent to—even contemptuous of—the right legal answer."[28] Under the text of Title VI, the single, best meaning is that it prohibits only intentional discrimination.

Even under Title VII where Congress explicitly authorized disparate-impact liability, DOJ's Office of Legal Counsel recently explained that "[p]roperly understood," Title VII "proscribes only those practices that reflect a significant likelihood of intentional discrimination."[29] DOJ further explained that the EEOC's Title VII guidelines violate the Constitution because "they contemplate liability based on disparate effects alone, without regard to an employer's likely intent, and pressure employers to engage in race-based decisionmaking."[30] The argument against disparate-impact liability under Title VI is even stronger where there is no statutory language authorizing disparate-impact liability.

In *West Virginia v. EPA*, the Supreme Court limited the ability of federal agencies to regulate on matters of "vast economic and political significance" without "clear congressional authorization."[31] This doctrine, known as the major question doctrine, means that Congress must clearly speak on important matters before an agency can issue regulations that have the force and effect of law. Disparate-impact liability is arguably a major question that Congress must speak to directly.

Related, legal scholar Alison Somin explains for the Harvard Journal of Law and Public Policy how disparate-impact theories violate the non-delegation doctrine:

> Because disparate-impact violations can result from so many innocuous decisions, agencies that enforce disparate impact have virtually unfettered discretion to decide what disparate-impact violations to pursue. Even under the deferential 'intelligible principle' standard, such a grant of virtually unlimited power violates the Constitution's prohibition on delegation of congressional power.[32]

Somin concludes: "The nondelegation and major questions doctrines protect individual liberty. By making huge swaths of private conduct presumptively illegal, disparate impact as currently understood have significantly infringed individual liberty."[33]

In short, AmeriCorps is right to eliminate disparate-impact liability from its Title VI regulations to avoid its problematic implications and serious constitutional concerns.

Fourth, eliminating disparate-impact liability under AmeriCorps regulations aligns with the following executive orders issued by President Trump:

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[28] *Id.*

[29] *Constitutionality of Disparate-Impact Liability Under Title VII*, 50 Op. O.L.C. __ (June 9, 2026), https://www.justice.gov/olc/media/1444871/dl.

[30] *Id.*

[31] *West Virginia v. EPA*, 597 U.S. 697, 716, 723 (2022).

[32] Alison Somin, *Disparate Impact As a Non-Delegation Violation and Major Question*, Harv. J.L. & Pub. Pol'y Per Curiam (June 20, 2024), https://journals.law.harvard.edu/jlpp/disparate-impact-as-a-non-delegation-violation-and-major-question-alison-somin/.

[33] *Id.*

- E.O. 14281, “Restoring Equality of Opportunity and Meritocracy,” which seeks 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.”[34]
- E.O. 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” which seeks to end illegal preferences and discrimination, including under “the guise of so-called ‘diversity, equity, and inclusion’ (DEI).”[35] In the words of legal scholar GianCarlo Canaparo, “To truly save America from the yoke of D.E.I., the theory of disparate impact has to be eliminated.”[36]
- E.O. 14219, “Ensuring Lawful Governance and Implementing the President’s ‘DOGE’ Deregulatory Initiative,” which directs agencies to rescind regulations including those that are “not authorized by clear statutory authority,” “impose significant costs upon private parties that are not outweighed by public benefits,” and “impose undue burdens on small business and impede private enterprise and entrepreneurship.”[37] Here, disparate impact is not clearly authorized by Title VI and can create confusion and increase compliance costs as the Proposed Rule recognizes.[38]

Fifth, AmeriCorps’ Proposed Rule is consistent with actions other agencies have taken to eliminate disparate-impact liability. For example, on December 10, 2025, DOJ issued a final rule amending its regulations implementing Title VI to eliminate disparate-impact liability.[39] These amendments comply with E.O. 14281 and “align the conduct prohibited by the Department’s regulations with Title VI’s original public meaning, avoid constitutional concerns, reduce compliance costs, and serve the public interest.”[40]

Similarly in response to E.O. 14281, the Equal Employment Opportunity Commission reportedly issued an internal memo on September 15, 2025, directing agency staff to stop investigating charges of employment discrimination based on disparate impact and to issue notices of “Right to Sue,” allowing complainants to take their claims to federal court without further agency involvement.[41] According to the memo, the agency will not be “commencing, developing, or continuing to pursue litigation advancing disparate impact causes of action.”[42] After DOJ’s Office of Legal Counsel opinion, EEOC formally rescinded its regulations regarding Affirmative Action Appropriate Under Title VII.[43]

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[34] 90 Fed. Reg. 17537 (Apr. 23, 2025), https://www.federalregister.gov/d/2025-07378.

[35] 90 Fed. Reg. 8633 (Jan. 21, 2025), https://www.federalregister.gov/d/2025-02097.

[36] GianCarlo Canaparo, *Ending D.E.I. Is Only Half the Battle*, Civitas Outlook (Mar. 24, 2025), https://www.civitasoutlook.com/research/ending-dei-is-only-half-the-battle-e5a937.

[37] 90 Fed. Reg. 10583 (Feb. 19, 2025), https://www.federalregister.gov/d/2025-03138.

[38] 91 Fed. Reg. at 46386.

[39] 90 Fed. Reg. at 57141.

[40] *Id.* at 57141.

[41] *Final Impact? EEOC Closing of Disparate Impact Investigations Is Challenged*, JD Supra (Oct. 30, 2025), https://www.jdsupra.com/legalnews/final-impact-eeoc-closing-of-disparate-4101871.

[42] *Id.*

[43] Rescission of Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended, 91 Fed. Reg. 40,879 (July 6, 2026) (removing 29 C.F.R. pt. 1608), https://www.federalregister.gov/d/2026-13637.

In January 2026, the Department of Housing and Urban Development issued a proposed rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," which would remove disparate-impact regulations under the Fair Housing Act.[44]

In April 2026, the Consumer Financial Protection Bureau issued a final rule "Equal Credit Opportunity Act (Regulation B)"[45] that amended provisions related to disparate impact under Regulation B, the regulation implementing the Equal Credit Opportunity Act (ECOA),[46] which "prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age."[47]

In the last several months, many agencies have issued final rules modifying their Title VI regulations to conform more closely with the statutory text and to implement E.O. 14281, including: Department of Agriculture,[48] Department of Commerce,[49] Department of Defense,[50] Department of Education,[51] Department of Health and Human Services,[52] Department of Labor,[53] Department of State,[54] Department of the Interior,[55] Department of Transportation,[56]

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[44] 91 Fed. Reg. 1475 (Jan. 14, 2026), https://www.federalregister.gov/d/2026-00590. We and others supported HUD's proposal. *See EPPC Scholars Submit Comment Supporting Elimination of Disparate-Impact Liability in Housing Regulations*, EPPC (Feb. 13, 2026), https://eppc.org/publication/eppc-scholars-submit-comment-supporting-elimination-of-disparate-impact-liability-in-housing-regulations/.

[45] 91 Fed. Reg. 21620 (Apr. 22, 2026), https://www.federalregister.gov/d/2026-07804. We and others supported this rule. *See EPPC Scholar Submits Comment Supporting Elimination of Disparate Impact Liability for Creditors*, EPPC (Dec. 15, 2025), https://eppc.org/publication/eppc-scholar-submits-comment-supporting-elimination-of-disparate-impact-liability-for-creditors/ (collecting comments).

[46] 15 U.S.C. § 1691, *et seq.*

[47] *The Equal Credit Opportunity Act*, Dep't of Justice (last updated Jan. 2, 2025), https://www.justice.gov/crt/equal-credit-opportunity-act-3.

[48] Rescinding Portions of U.S. Department of Agriculture Title VI Regulations To Conform More Closely With the Department of Justice's Regulations To Implement Executive Order 14281, 91 Fed. Reg. 36511 (June 17, 2026), https://www.federalregister.gov/d/2026-12139.

[49] Rescinding Portions of Department of Commerce Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 91 Fed. Reg. 20326 (Apr. 16, 2026), https://www.federalregister.gov/d/2026-07477.

[50] Nondiscrimination in Federally Assisted Programs of the Department of Defense-Effectuation of Title VI of the Civil Rights Act of 1964; Amendment, 91 Fed. Reg. 46724 (July 24, 2026), https://www.federalregister.gov/d/2026-14983.

[51] Rescinding Portions of the Department of Education Title VI Regulations To Align With the Statutory Text and Conform to Executive Order 14281, 91 Fed. Reg. 46733 (July 24, 2026), https://www.federalregister.gov/d/2026-15019.

[52] Rescinding Portions of the U.S. Department of Health and Human Services Title VI Regulations To Align With the Statutory Text and Conform to Executive Order 14281, 91 Fed. Reg. 46746 (July 24, 2026), https://www.federalregister.gov/d/2026-15000.

[53] Rescinding Portions of Department of Labor Title VI Regulations, 91 Fed. Reg. 40372 (July 2, 2026), https://www.federalregister.gov/d/2026-13371.

[54] Rescinding Portions of Department of State Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 91 Fed. Reg. 42339 (July 9, 2026), https://www.federalregister.gov/d/2026-13860.

[55] Rescinding Portions of Department of the Interior Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 91 Fed. Reg. 30239 (May 22, 2026), https://www.federalregister.gov/d/2026-10258.

[56] Rescinding Portions of Department of Transportation's Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 91 Fed. Reg. 35424 (June 11, 2026), https://www.federalregister.gov/d/2026-11790.

and the National Aeronautics and Space Administration (NASA).[57] AmeriCorps should finalize its rule and join these agencies.

Sixth, eliminating disparate-impact liability provides many benefits. As the Proposed Rule acknowledges, AmeriCorps' current disparate-impact regulations "create confusion, undermine public confidence in the nation's civil rights laws and the rule of law, and have the potential to produce burdensome litigation and compliance costs."[58] We agree that eliminating AmeriCorps' disparate-impact regulations will promote compliance with nondiscrimination obligations, eliminate confusion and provide clarity. Because reading disparate-impact liability into nondiscrimination laws seems to (in the words of DOJ) "both forbid and require the same conduct,"[59] eliminating disparate impact will provide clarity regarding nondiscrimination obligations. Eliminating AmeriCorps' disparate-impact liability regulations also aligns with regulatory reform efforts and will help reduce unnecessary and onerous regulatory burdens and costs associated with compliance, enforcement, and litigation under that theory of discrimination.

Finally, eliminating disparate-impact claims would not undermine and indeed would promote the Administration's efforts to robustly enforce Title VI and other federal civil rights laws. Significantly, Title VI's nondiscrimination requirements still apply. And, as the DOJ disparate-impact rule acknowledges, "eliminating disparate-impact liability does not preclude the use of data on disparate outcomes to help prove intentional discrimination."[60]

Conclusion

In sum, we support AmeriCorps' Proposed Rule eliminating disparate-impact liability in its Title VI regulations. In the words of President Trump, federal "civil-rights protections serve as a bedrock supporting equality of opportunity for all Americans."[61] Treating people equally under the law, including Title VI, "is essential to creating opportunity, encouraging achievement, and sustaining the American Dream."[62] AmeriCorps should finalize the Proposed Rule.

Sincerely,

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[57] Nondiscrimination in Federally Assisted Programs of NASA-Effectuation of Title VI of the Civil Rights Act of 1964, 91 Fed. Reg. 40872 (July 6, 2026), https://www.federalregister.gov/d/2026-13624.

[58] 91 Fed. Reg. at 46386.

[59] 90 Fed. Reg. at 57144.

[60] *Id.*

[61] 90 Fed. Reg. 8633 (Jan. 21, 2025), https://www.federalregister.gov/d/2025-02097.

[62] 90 Fed. Reg. 17537 (Apr. 23, 2025), https://www.federalregister.gov/d/2025-07378.