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July 6, 2021

Submitted via Regulations.gov

Shalanda Young
Acting Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Methods and Learning Practices for Advancing Equity in Support for Underserved Communities Through Government, Docket ID OMB-2021-0005

Dear Acting Director Young:

On behalf of the NAACP Legal Defense and Educational Fund (LDF), we thank the Office of Management and Budget (OMB) for undertaking this important work to advance equity throughout the federal government. LDF is the nation's oldest civil rights legal organization, founded by Thurgood Marshall in 1940. For more than 80 years, LDF has helped African Americans secure their civil and constitutional rights. We have brought landmark challenges to both governmental and private discrimination across a range of issues impacting the lives of African American individuals and communities,¹ and throughout the decades have advocated with numerous federal agencies for the policy reforms needed to protect and advance racial equality in our country.

Our nation's long history of discrimination continues to shape life outcomes on the basis of race, and to impair health, educational attainment, economic security and participation, and the ability to fully thrive for far too many. The current undertaking to examine how our federal agencies can better advance equity is welcome and long overdue, and must lead to concrete commitments and reforms throughout the government. For too long, civil rights concerns – though central to the government's obligation to serve all Americans and to help our country collectively flourish – have been treated as secondary in policymaking, or in many instances overlooked entirely. This and future Administrations should now course-correct, starting with a hard look at how each federal agency can do better. This endeavor demands that OMB, the

¹ These cases include, for example, *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. 95309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to further fair housing affirmatively); *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (school desegregation); and *Griggs v. Duke Power*, 401 U.S. 424 (1971) (employment discrimination).

Domestic Policy Council, and the agencies examine whether civil rights obligations have been fully and effectively institutionalized throughout each agency and its programs. As recognized by the White House in its Executive Order 13985, racial equity is a pillar of sound policymaking and needed to repair past harms: accordingly, federal agencies must identify how they can prevent further discrimination, remedy past and ongoing discrimination, and *affirmatively advance* equity throughout their policies, programs, and activities, and institutionalize these commitments in ways that will lead to lasting change.

Below, we provide our recommendations for a number of important considerations that should come to bear in assessing and advancing equity across federal agencies. While we commend OMB for posing the specific questions about service access and design detailed within the RFI, we also emphasize the need for equity planning to fully consider the roles of agencies as regulators and as funding providers to recipients subject to civil rights laws (including, among others, Title VI of the Civil Rights Act of 1964²) and other requirements that are or could be imposed by the federal government. Whether an agency is effectively harnessing each of these roles to promote equity and prevent discrimination is a critical inquiry. We recognize that an undertaking of this nature across the whole of government is complex, and in the following sections, we highlight several important criteria that OMB and the agencies should apply, as well as a list of key areas of focus for assessing where there may be opportunities for reform.

Fully implement and institutionalize civil rights laws

Adding force to the Presidential directive in Executive Order 13985 are our nation’s body of civil rights and other laws (such as some agency or programmatic directives) that call for nondiscrimination and other equity-related measures in federal administration. These mandates should be viewed as central aspects of good and effective governance – but they have long lacked sufficient attention and resources. Such laws include, for example: Title VI of the Civil Rights Act of 1964³ (prohibiting discrimination on the basis of race, color, or ethnicity in federally-funded programs and activities); Title VII of the Civil Rights Act of 1964⁴ (prohibiting employment discrimination on the basis of race and other protected characteristics); the Fair Housing Act of 1968⁵ (prohibiting discrimination in the provision of housing and related services, and mandating active measures to promote fair housing), the Equal Credit Opportunity Act (prohibiting discrimination in credit services); and others.

That these important pillars of governance have rarely been prioritized in policymaking constitutes a longstanding failure of political will and priorities – failures that have had severe consequences for Black and other communities. As one example, the Fair Housing Act sets forth the requirement that the U.S. Department of Housing and Urban Development, other agencies engaged in housing and community development-related activities, and funding recipients affirmatively further fair housing (AFFH) – that is, take proactive measures to advance the aims

² 42 U.S.C. § 2000(d).

³ *Id.*

⁴ 42 U.S.C. § 2000(e).

⁵ 42 U.S.C. § 3604 and 3608.

of the Act, including nondiscrimination and racial integration.⁶ The AFFH requirement applies across all relevant program areas, and has been part of the legislation since the Act was passed in 1968.⁷ Yet HUD and other agencies, including the U.S. Department of the Treasury and agencies charged with housing finance administration, have thus far failed to fuse the AFFH directive into many of their programs and regulatory activities⁸ – or into the enforcement activities that should animate their recipients to promote fair housing.⁹

The AFFH example also serves to illustrate some of the dynamics that have stalled progress on civil rights within agencies, and the resulting consequences for our country – thus underscoring the need for an invigorated, corrective approach by government going forward. Much of HUD’s past progress to institutionalize the AFFH mandate flowed from lawsuits brought by fair housing advocates: the agency issued a number of regulations intended to provide for AFFH through desegregative housing siting, nondiscriminatory tenant selection, and other areas in the 1980s, in response to legal rulings finding that the agency was in dereliction of its AFFH duty.¹⁰ Notably, since that era, trends in jurisprudence have made it increasingly challenging for external advocates to successfully bring cases that challenge insufficient agency policymaking or enforcement activities around civil rights (or other areas of public concern).¹¹ At the same time, political will to fully implement and attend to civil rights has been conspicuously lacking, and the countervailing problems of industry influence, institutional inertia, and political timidity on racial justice have often prevailed. As a result, civil rights has often been confined to under-resourced agency departments – rather than institutionally empowered in ways that can reach across agency divisions and activities, as well as sufficiently engaging funding recipients.

⁶ 42 U.S.C. § 3608; the FHA was created to “remove the walls of discrimination which enclose minority groups”, *Evans v. Lynn*, 537 F.2d 571, 577 (2d Cir. 1975) (citing 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler); and to foster “truly integrated and balanced living patterns,” *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)).

⁷ *Id.* (requiring that HUD “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies [of the legislation].”)

⁸ See, e.g., Florence Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. Miami L. Rev. 1011 (1998); Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 *Cardozo L. Rev.* 967 (2012).

⁹ *Id.*

¹⁰ See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 *Vand. L. Rev.* 1747, 1793 (2005) (“In response to [the fair housing lawsuits] *Shannon and Gautreaux*, HUD promulgated siting regulations for construction of new public housing, Section 8 new construction, and senior housing”); *Bus Ass’n of Univ. City v. Landrieu*, 660 F.2d 867, 868 (3d Cir. 1981) (“in light of *Shannon* and the subsequent passage by Congress of the Housing and Community Development Act of 1974 ... HUD has since promulgated regulations requiring its officials to consider, prior to the approval of a new low income housing project, the impact of the project on the concentration of racial and low income persons.”).

¹¹ This situation is also notable because it points to the need for OMB, DPC, and the federal agencies to institutionalize reforms in a way that is effective in creating accountability to the public, including civil rights stakeholders, going forward. For example, agencies should consider formal measures such as new regulations or internal rules that require them to undertake particular steps to consider and advance equity, designing these rules so as to create future accountability under the Administrative Procedure Act. See Cristina Isabel Ceballos, *David Freeman Engstrom & Daniel E. Ho, Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 *Yale L.J.* __ (forthcoming 2021).

In the example of federal agencies and the duty to AFFH, funding recipients have continued to engage in harmful activities with near impunity, as evidenced by continuing widespread segregation and disinvestment.¹² Agency programs have continued to contribute to segregation and poverty concentration as well.¹³ For example, the Department of the Treasury, which is directly subject to the AFFH mandate but has thus far failed to regulate accordingly, continues to contribute to racial segregation in the administration of the Low Income Housing Tax Credit Program, reinforcing poverty concentration while failing to channel other investments (that is, beyond subsidized housing) to the areas that need them most.¹⁴

As another example of significant note, Title VI – at times called the “Sleeping Giant” of civil rights legislation – has been under-implemented and under-enforced throughout most of its history and intended scope.¹⁵ Invigorating Title VI and endowing it with its full reach should be a critical priority for this Administration, and among the central concerns within the work being advanced under Executive Order 13985. Title VI protects against discrimination on the basis of race in the programs and activities of federal funding recipients, including both intentional discrimination and, as consistently interpreted by agency regulations, discriminatory effects. Passed at the height of the mid-century civil rights movement, Title VI was intended to be a consistent and robust mechanism to divest federal agencies of discrimination, in acknowledgement of the federal government’s deep history of sponsoring and supporting such discrimination through its funding recipients as well as within its own programs.¹⁶ Title VI was a crucial tool, for example, in the pursuit of school desegregation in the twentieth century, as the country began to emerge from generations of *de jure* segregation.¹⁷

Over the decades since its passage, however, the federal government has done relatively little to meet this responsibility and to give teeth to Title VI’s important nondiscrimination safeguards.¹⁸ This deficit in oversight has had severe, continuing impacts on Black communities and their ability to benefit fully from government-sponsored activities or to avoid the cumulative negative impacts of inequitable program design or spending decisions. Thus, federally-financed transportation programs have continued to yield highway expansions, truck routing decisions,

¹² See Seicshnaydre, *The Fair Housing Choice Myth*, *supra* note 8.

¹³ See, e.g., Stacy Seicshnaydre, *Missed opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 *LAW AND CONTEMPORARY PROBLEMS* 173 (2016).

¹⁴ See Roisman, *supra* note 8; see also Will Fischer, Center on Budget and Policy Priorities, *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families* (2018), available at www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor.

¹⁵ See, e.g., Olatunde C.A. Johnson, *La wyering that Has No Name: Title VI and the Meaning of Private Enforcement*, 66 *Stan. L. Rev.* 1293, 1294 (2014).

¹⁶ See, e.g., Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in 10 *NAT’L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK* 173 (Steven Saltzman & Barbara M. Wolvovitzeds., 1995).

¹⁷ *Id.*

¹⁸ See Johnson, *supra* note 15.

and transit system designs that decimate and disadvantage low-income communities of color.¹⁹ Access to clean water and other basic infrastructure is still shaped by race and often traceable to patterns of de jure and persisting de facto residential segregation.²⁰ Localities engage in discriminatory policing, with consequences that often destroy and/or end lives.²¹ In the realm of environmental protection, the Environmental Protection Agency, Department of Justice, and other agencies have failed to protect Black communities from discriminatory siting of pollutants and other environmental hazards.²² Too frequently, such multiple drivers of discrimination combine and concentrate within the same communities.

Unless federal agencies throughout the government commit to stronger enforcement efforts and other measures to institutionalize Title VI oversight, such discrimination is likely to continue. That the statute’s implementation has thus far largely languished is due in part to (again) jurisprudential trends that have constricted access to the courts for victims of discrimination and those seeking to propel social change in the direction of racial justice.²³ This includes the limitations of administrative law²⁴ and, in the instance of Title VI, the court ruling in *Alexander v. Sandoval* which held that there is no private right of action to enforce the discriminatory effects regulations implementing Title VI.²⁵ Only the federal agencies, and not the individuals or communities subject to discrimination themselves, currently have the power to hold states, localities, or other federal funding recipients accountable for policies or practices that have a discriminatory impact.

In order to remedy inequity in the areas noted above and many others, agencies will need to systematize sharper, more rigorous, and more comprehensive Title VI oversight – in both the design of their programs and in their enforcement activities. The same importance applies to the full range of civil rights and nondiscrimination protections.

¹⁹ See, e.g., Trade, Health & Environment Impact Project, Driving Harm: Health and Community Impacts of Living near Truck Corridors, <https://envhealthcenters.usc.edu/wp-content/uploads/2016/11/Driving-Harm.pdf>; NAACP Legal Defense Fund, Baltimore Residents and Civic Groups File Title VI Complaint with United States Department of Transportation over Maryland’s Discriminatory Decision to Strip Baltimore of Transportation Funding (December 2015), www.naacpldf.org/press-release/baltimore-residents-and-civic-groups-file-title-vi-complaint-with-united-states-department-of-transportation-over-marylands-discriminatory-decision-to-strip-baltimore-of-transportation-funding/.

²⁰ NAACP Legal Defense Fund Thurgood Marshall Institute, Water/Color: A Study of Race and the Water Affordability Crisis in America’s Cities (May 2019), available at <https://tminstituteldf.org/publications/2383/>.

²¹ See, e.g., NAACP Legal Defense Fund, Letter to Attorney General Garland re: Instituting a Moratorium on Disbursement of Federal Funds to Law Enforcement Agencies Until DOJ Audits Each Agency for Compliance with Title VI Non-Discrimination Provisions (April 23, 2021), available at www.naacpldf.org/wp-content/uploads/2021.04.23-LDF-letter-to-DOJ-re-Title-VI-final.pdf.

²² See US Commission on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898 (September 2016), www.southernenvironment.org/uploads/words_docs/Civil_Rights_Commission_Statutory_Enforcement_Report2016.pdf.

²³ See Johnson, supra note 15.

²⁴ Id.; see also Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, Disparate Limbo: How Administrative Law Erased Antidiscrimination, 131 Yale L.J. ___ (forthcoming 2021).

²⁵ 532 U.S. 275 (2001).

Assess and reform both program designs and enforcement/oversight structures

Federal agencies are charged with numerous duties that significantly impact racial equity: federal program design and administration (including direct and indirect service delivery and the structuring of grants or other funding provided to states, localities, and other entities); regulation of private and public activities (such as the financial sector, for example); and the implementation and enforcement of statutes and enforcement regimes within their administrative authority, as provided by Congress (including the body of civil rights laws noted above, as well as other laws where differential enforcement impacts racial justice. While OMB's RFI is largely focused on service delivery and access to programs, and these are important concerns, we urge the Administration to ensure that it encompasses all areas of agency activity and authority in its equity planning.

Agencies must not only ensure equitable access to their own programs and services; they must commit to systematic civil rights oversight of their funding recipients (and other regulated entities). The obligation to refrain from discrimination extends throughout a recipient's federally funded programs and activities (that is, it reaches beyond the specific funding endowed by the federal government), and agencies may assert their power to withhold funds if necessary to ensure compliance. In order to consistently and effectively institutionalize civil rights oversight, agencies will need to commit to invigorating enforcement policies at multiple leverage points.²⁶ This includes embedding clear civil rights directives in regulations, guidance, and agency rules, as well as systematizing multi-stage engagement with recipients and other stakeholders (including impacted communities). Enforcement entities must, for example: provide meaningful ex ante reviews; process complaints effectively; proactively and affirmatively engage in monitoring and compliance reviews and initiate enforcement activities; ensure results in the context of settlement agreements and remedies; and provide education and technical assistance to beneficiaries, community stakeholders, and recipients. Full and rigorous implementation of civil rights laws must entail, also, the creation and execution of meaningful remedies.

Agencies should consider each of these aspects of process, and should also assess how to strategically and assertively use their funding power to advance civil rights – holding recipients accountable for discriminatory activities that have previously been overlooked.²⁷ The agency-recipient relationship – and the potential leverage it can offer to protect against and remedy discrimination – is of critical import to the Administration's commitment to advancing racial equity.

Promote access to programs and services that build both security and opportunity; and harness agency authority to redress both individualized and structural discrimination

Throughout our nation's history, racial discrimination (often implemented and advanced by the federal government) has excluded Black Americans from full and equal economic and

²⁶ See, e.g., Marianne Engelman Lado, No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice, 22 U. Penn. J. of L. and Social Change 281, 298 (2019).

²⁷ See NAACP LDF Letter to Attorney General Garland, *supra* note 21.

civic participation. The federal government will need to undertake a range of deliberate measures to respond to and remedy the resulting disparities. Equity requires that agencies ensure that their programs and services meet the public’s needs where they are greatest (in large measure due to the impacts of racism), and where the ongoing legacy of racialized disinvestment and exclusion has persisting effects.

There is a confluence of race and economic disadvantage due to generations of discrimination impeding the ability to access high-paying jobs and credit and to build wealth, as well as discriminatory land use practices around infrastructure and service delivery.²⁸ This means that the federal government should take active measures both to prevent continuing discrimination and to respond to the particular needs raised by the intersection of race and poverty (and the extensive harms that such economic exclusion and insecurity inflicts on many Americans and on the country as a whole). A sound and principled system of governance must respond to the needs of all communities, and especially the most vulnerable; but due to an exceptional degree of political disempowerment (and a related cycle of fiscal disempowerment²⁹), the needs of Black communities and especially low-income Black Americans have been too long passed by in policymaking. Agencies should prioritize programs and program designs that respond to the needs of low- and moderate-income Americans of color. The administration should, furthermore, provide for racial inclusion across the economic spectrum – as by taking measures to ensure access to the middle class, through targeted homeownership programs, support for equitable public education, and other similar efforts.

Accounting for the particular needs and harms of geographically concentrated poverty (and disinvestment) should be a critical consideration. The administration’s equity plans should channel commercial and infrastructure resources as needed to invest in neighborhoods of color and protect them from further harm; they should also redress the drivers of racial segregation, especially in housing policy and education policy. Residential racial segregation allows for discrimination to geographically concentrate itself and for the discriminators to distance themselves from the resulting harms. It is closely linked to adverse outcomes in health, education, and other aspects of life.³⁰

It is important, moreover, that government policies take an affirmative approach to equity, as well as vigorously enforcing nondiscrimination laws. Case-by-case findings of discrimination and their particularized remedies will be important. Yet such measures alone cannot go far enough to truly remediate the breadth and depth of racial discrimination and its effects, rooted as they are in well over three centuries of history and the actions of various government actors and multiple sectors. As a matter of good policymaking that serves all Americans (including those underserved in the past), and a necessary complement to forward-

²⁸ See, e.g., Richard Rothstein, *The Color of Law; The Black White Racial Wealth Gap*, LDF Thurgood Marshall Institute, <https://tminstituteldf.org/wp-content/uploads/2019/11/FINAL-RWG-Brief-v1.pdf>.

²⁹ See, e.g., generally, K. Sabeel Rahman, *Democracy Against Domination* (Oxford University Press 2017).

³⁰ See, e.g., Gregory Acs, Rolf Pendall, Mark Treskon & Amy Khare, *The Cost of Segregation: National Trends and the Case of Chicago 1990-2010* (The Urban Institute, 2017); Patrick Sharkey, *Stuck in Place* (2013); David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 *Pub. Health Repts.* 404, 409 (2001).

looking anti-discrimination protections, each agency will need to set out the affirmative measures it can undertake to advance equity throughout its activities and exercise of authority. This includes, for example, targeted programs, regulatory measures, and funding requirements that appropriately prompt recipient action. In many instances, well-crafted race-conscious measures will be needed to remedy particularized discrimination; in other situations, agencies may consider strategies including affirmative outreach, performance benchmarking that includes racial outcomes, and/or thoughtfully designed policies that can promote equity through consideration of poverty rates, resource distribution, or other criteria.

Recommended Considerations in Agency Equity Planning and Assessments

In keeping with the principles discussed above, we recommend that OMB and the agencies evaluate the following specific aspects of agency programs and activities. This list is not intended to be comprehensive. However, it serves to highlight a number of issues that significantly impact civil rights and can either impede or advance equity, and that should be included in equity planning throughout the federal government.

Agency-recipient oversight measures

- Is the agency providing sufficient oversight to ensure that in federally -funded programs and activities, benefits are equitably distributed and there are safeguards against disproportionate adverse impacts?
 - Does the agency have clear standards in regulations and guidance?³¹
 - Does the agency actively enforce these requirements?³² (See enforcement, below.)

- Beyond the enforcement measures noted below, how specifically does the agency identify and protect against inequitable adverse impacts, flowing from either the agency or its recipients?³³
 - Does the agency have robust ex ante measures in place to evaluate impacts?
 - Where a program or activity has an adverse effect on the basis of race, does the agency take adequate measures to require the consideration of less discriminatory alternatives?

³¹ For example: although EPA released a “toolkit” in January 2017 detailing Title VI compliance principles (U.S. EPA’s External Civil Rights Compliance Toolkit, Chapter 1, <https://www.epa.gov/ogc/chapter-1-us-epas-external-civil-rights-compliance-office-compliance-toolkit-chapter-1>), clear and binding authority on these requirements remains needed. *See* Lado, Marianne Engelman, No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice, 22 U. Penn. J. of L. and Social Change 281, 298 (2019).

³² For example: EPA has been widely critiqued for its failures to enforce Title VI. *See, e.g.,* US Commission on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898 (September 2016), www.southernenvironment.org/uploads/words_docs/Civil_Rights_Commission_Statutory_Enforcement_Report2016.pdf.

³³ Positive examples of such measures include the Federal Transit Authority’s Title VI Circular (available at www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf) and Environmental Justice Circular (www.transit.dot.gov/regulations-and-guidance/fta-circulars/environmental-justice-policy-guidance-federal-transit), released in 2012.

- Does the agency provide opportunities for stakeholder input at multiple stages?
- Does agency policy require the consideration of cumulative impacts?³⁴
- Does grant implementation effectively ensure recipients' overall compliance with nondiscrimination law and other laws that impact equity, such as labor protections?
 - Beyond requiring certifications, what active measures does the agency take, such as audits, funding cut-offs where needed, etc?³⁵
- Do the agency's programs and activities advance equitable access to and use of public resources more broadly, beyond those at stake in the particular government program)?
 - How should the agency consider use its funding leverage more robustly in the interest of promoting equity outcomes and civil rights compliance among recipients?³⁶
 - Does the agency require cross-cutting equity analyses and action steps as part of compliance activities?³⁷
- Does the agency have robust oversight and reporting criteria and processes that assess demographic outcomes for households and on the community level?

Authority to interpret and enforce laws (including but not limited to civil rights laws)

- Does the agency have effective enforcement policies in place across the full range of enforcement activities?
 - Does the agency have dedicated staff capacity and well-developed policies and protocols for: ex ante reviews, agency initiated investigations and complaints, audits, complaint processing, technical assistance, and education for recipients and beneficiaries about rights?
 - Is the agency engaging in the full scope of enforcement that it is authorized to, or are there enforcement gaps?³⁸

³⁴ For example: EPA does not account for cumulative impacts in its enforcement of environment laws, such that the simultaneous existence of polluting facilities in a particular neighborhood (which may also suffer from other health burdens) is not accounted for in issuing permits or in enforcement activities. See Lado, supra note 29.

³⁵ For example: although HUD requires its grantees to certify that they affirmatively further fair housing, these certifications are rarely challenged. See Nikole Hannah Jones, Living Apart: How the Government Betrayed a Landmark Civil Rights Law, Pro Publica (2015), www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law#gao.

³⁶ For example: see NAACP LDF Letter to Attorney General Garland, supra note 21.

³⁷ A positive example of this was HUD's 2015 AFFH regulation, which required recipients to undertake a holistic analysis, using standardized data and a standardized template to assess local policies impeding fair housing, including in relation to education, neighborhood health, and other factors. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42275 (2015).

³⁸ For example: HUD could bring a broader range of FHA cases, including those addressing the link between segregation, housing discrimination, and municipal services such as water access. See Water/Color, supra note 18.

- How does the agency prioritize its enforcement activities, and how can it better prioritize civil rights?³⁹
- Is the agency effectively using its authority to interpret legal requirements, as designated by Congress?
 - In what areas is there a lack of clarity around civil rights requirements, such that the agency should issue new guidance?⁴⁰
 - Are any current agency interpretations of law at odds with adequate civil rights oversight or other federal policy concerns around equity, and does the agency have grounds to revise or qualify those interpretations?⁴¹
- If the agency is granted coordinating authority, is it using that authority effectively?⁴²

Other issues in grant and program design and implementation

- Across its grant programs and federal assistance overall, is the agency prioritizing disadvantaged communities to the full extent it is authorized to?
- For those grants that are specifically designated for low income/disadvantaged communities, are there adequate resources for outreach and implementation; and are the grants sufficiently well designed to actually reach those populations?
- Do the agency's block grants have sufficiently specific criteria to promote equity, and are there adequate reporting and oversight measures?⁴³
- Do the agency's competitive funding grants include criteria that advance equity?⁴⁴

³⁹ Agencies have been given broad discretion around enforcement activities and priorities, in ways that curtail the ability of the public to hold them accountable when they fail to enforce civil rights laws, consumer protections, and other measures. See *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that the agency's exercise of discretion not to undertake enforcement activities was not subject to review under the Administrative Procedure Act); see also Congressional Research Service, *Judicial Review of Actions Legally Committed to an Agency's Discretion* (2020), available at <https://fas.org/sgp/crs/misc/LSB10536.pdf>. Thought should be given to ways in which agencies can be required to be more transparent about both enforcement and non-enforcement, and in which enforcement expectations can be systematized.

⁴⁰ See, for example, critiques of EPA, *supra* note 29.

⁴¹ For example: EPA has been criticized for its adherence to its reasoning in 1998 in its *Select Steel* determination, which established a presumption of nondiscrimination where general environmental standards are met, despite the impact on a particular community. See *Select Steel Complaint: EPA Title VI of the Civil Rights Act Decision Memorandum and Report*, 1998, pp. 4-5, available at http://www.epa.gov/ocr/docs/ssdec_ir.pdf.

⁴² For example: the U.S. Department of Justice has a coordinating role across agencies with regard to Title VI.

⁴³ For example, HUD's Community Development Block Grant Program has been critiqued for falling short in serving low-income communities, due to a lack of standards, despite its intended purpose. See Urban Institute, *Taking Stock of the Community Development Block Grant* (2017), available at https://www.urban.org/sites/default/files/publication/89551/cdbg_brief_finalized_1.pdf.

⁴⁴ As a positive example, HUD included AFFH as a scoring criterion in many of its Notices of Funding Availability under the Obama Administration. See PRRAC, *Affirmatively Furthering Fair Housing at HUD: A First Term Report Card* (2013), <https://prrac.org/pdf/HUDFirstTermReportCard.pdf>.

- Are there aspects of program/grant design that impair equity or have a negative effect on civil rights, including with regard to income and wealth inequality, racial segregation, educational attainment, disparities in personal health and security, or in other respects?⁴⁵
- Does program administration that allows for state or local discretion include adequate standards to promote equity and protect civil rights?⁴⁶
- Do program and grant designs adequately respond to cumulative impacts and to the historical/ongoing impacts of discrimination?⁴⁷
- Across its programs, does the agency sufficiently employ policies that promote equity, such as: targeted outreach; benchmarking; compliance reporting; etc?⁴⁸

Recommendations on Community Input and Outreach

Government has the ability to adopt policies and programs that can alter the trajectory of a person’s life, transform communities, and begin to address the long history of racial discrimination in this country. If this power is wielded responsibly, government agencies may begin the important work of dismantling racial bias and structural inequity in their policies and programs. Yet underserved communities, particularly Black Americans, have long been kept out of the governing process. We commend the Biden administration for the steps taken thus far, but much more is needed, including the important work of directly engaging Black communities and other communities of color in a meaningful way to help shape policy and programs throughout government. Our nation’s government must not function in a manner that is detached from the experiences and needs of its people.

The process of governing should be inclusive of a range of groups, representatives, and stakeholders within the civil rights community. For example, alongside the expertise that national civil rights groups can offer, state and local grassroots organizations can provide valuable insight on the needs of the people they serve. Racial justice advocacy groups that are engaged at the state and municipal level may offer perspective about how actions of the federal government have shaped local policy and programs and impacted communities of color. Direct-service racial justice organizations can often advise based on first-hand knowledge of how such policy and programs are implemented in their communities and what further action is needed to

⁴⁵ For example: see critiques of the Low Income Tax Credit Program, supra note 14.

⁴⁶ *Id.* Note also that the sharing of administrative authority across agencies or levels of government has presented challenges to litigation that seeks to hold any one of those actors accountable – a dynamic that underscores the need for this Administration to ensure strong standards across the board. See, e.g., *ICP v. Treasury and Office of the Comptroller*, case materials and petitions for rulemaking available at www.danielbesharalawfirm.com/icp-petitions-to-treasury-irs-occ.

⁴⁷ See EPA critique, supra note 32.

⁴⁸ As a positive example, see U.S. Department of Health & Human Services, Action Plan to Reduce Racial and Ethnic Health Disparities: Implementation Progress Report 2011-2014, <https://aspe.hhs.gov/basic-report/hhs-action-plan-reduce-racial-and-ethnic-health-disparities-implementation-progress-report-2011-2014>.

support people of color. These perspectives must be considered in developing proposals to advance equity for underserved communities.

We urge the Biden administration to be bold in its approach and leverage its many tools to further equity, as informed by the communities directly impacted by discrimination. Below, we discuss key elements of meaningful community engagement. These principles draw in part from LDF's own work and partnerships with Black communities contending with discrimination on a range of issues.

Principle 1: Sustain strategic communication with underserved communities before, during and after changing federal policy or programs.

To meaningfully advance equity, the federal government must engage with communities at multiple stages: before, during and after the policymaking process. Front-end community engagement allows agencies to diagnose a problem more accurately. Ensuring that community stakeholders are able to engage during the process allows for real-time feedback and the targeted input necessary for good policymaking. Engaging the community after policymaking supports stronger implementation and results-driven accountability.

For instance, during the COVID-19 pandemic, states and districts have struggled to feed children. While the Department of Agriculture provided the necessary waiver extensions to ensure there was flexibility and funding for school meal programs, the needs of children remained unmet in several communities. The Brookings Institute found that only 15 percent of low-income households with children who qualify for free or reduced-price school meals were receiving them due to distribution issues, and about 14 million children were facing food insecurity.⁴⁹ LDF took urgent action when informed by community members that school meal distribution had been suspended.⁵⁰

Following the issuing of the waivers, the federal government had a role in urging states to collect and provide key information about whether children were receiving school nutrition and, if not, what resources or supports were needed to improve access. However, in places including Tennessee⁵¹ and Massachusetts⁵², the government did not proactively engage families and

⁴⁹ Lauren Bauer, *About 14 million children in the U.S. are not getting enough to eat*, BROOKINGS INST. (July 9, 2020); 'Children Are Going Hungry': Why Schools Are Struggling To Feed Students (Sept. 2020), www.npr.org/2020/09/08/908442609/children-are-going-hungry-why-schools-are-struggling-to-feed-students.

⁵⁰ Press Release, LDF Urges Alabama State Leaders to Ensure the Distribution of Crucial School Meals (May 6, 2020), available at <https://www.naacpldf.org/press-release/ldf-urges-alabama-state-leaders-to-ensure-the-distribution-of-crucial-school-meals/>; See also, Press Release, Louisiana's Governor Requires Schools to Provide Meals and Instruction for the State's Children in Line with LDF's Recommendations (Apr. 16, 2020), <https://www.naacpldf.org/press-release/louisiana-governor-requires-schools-to-provide-meals-and-instruction-for-the-states-children-in-line-with-ldfs-recommendations/>.

⁵¹ Cathryn Stout, *Tennessee families who missed P-EBT funds for free school lunches are urged to appeal*, CHALKBEAT TN (June 29, 2021).

⁵² James T. Mulder, *Half of Massachusetts families reported food insecurity during COVID despite increased SNAP supports, survey suggests*, MASS LIVE (June 24, 2021).

communities to identify barriers to accessing school meals. This remains an important racial equity issue as national surveys have shown that students of color are more likely to remain in remote instruction during the pandemic, especially in light of a potential COVID surge during the upcoming school year.⁵³ This example demonstrates that the work of furthering racial equity must continue through diagnosis of the problem, policy change and implementation.

Principle 2: Engage communities in proximity to the problems the government seeks to solve

Agencies should deploy their resources to spend time in historically underserved communities and gain a deeper understanding of the challenges communities face. An agency should not rely only on formal studies to understand the devastating impact of the ongoing housing crisis; it must engage with the unhoused and understand their preceding circumstances and current needs. An agency should not solely base its understanding of how crumbling school infrastructure exacerbates the racial disparities in student achievement on studies like the 2014 report of the Government Accountability Office; it must engage parents, teachers, and students in communities like Detroit and Baltimore where Black students’ have been deprived of clean water and classroom instruction due to the condition of their schools. Bearing witness to the urgent needs of communities of color and other underserved communities is significant to ensure government action is timely, targeted and results oriented. While agencies occasionally engage in listening sessions as a precursor to policymaking, we encourage the administration to institutionalize broader and more regular use of this practice. Listening sessions can also offer a scoping role, as well as serving more targeted purposes when specific rulemakings are under consideration.

Stakeholders from grassroots organizations or direct-service organizations should be treated as partners in the policymaking process, with perspectives as important as those of industry groups and state and local governments. Representatives of directly impacted communities should be included the establishment of advisory boards, task forces and commissions. This means that they must not only be provided opportunities to comment, but should be part of the institutional apparatus, with full voting privileges and committee leadership opportunities. It will also be important to ensure that the meetings and materials for these groups are at times and in language accessible to community members.

An example of this is Louisiana’s creation of an oversight council for implementation of its justice reinvestment legislation, which includes individuals that had direct experience with the criminal legal system. The Department of Justice and U.S. Parole and Sentencing Commissions should similarly bring directly-impacted people into the decision-making process; and to address the school-to-prison pipeline, the Justice and Education Departments should proactively engage students that have been subjected to and witnessed police violence in their schools and communities, and develop and support policies and programs that are responsive to their needs. Similarly, HUD and other agencies should engage with Black unhoused individuals, Black renters, Black homeowners, Black-owned lending institutions, local housing and economic

⁵³ Monthly School Survey Dashboard 2021, Dept. of Educ., available at <https://ies.ed.gov/schoolsurvey/>.

justice organizations and other stakeholders in close proximity to the problem in order to understand the full scope of housing barriers.

Agencies should dedicate resources to directly engage people and organizations that represent the range of needs in the Black community and other underserved communities. The government must consider intersectional identities and experiences in their work to advance equity – including the unique challenges faced by Black people with disabilities, Black LGBTQ community members, Black immigrants, Black people in rural communities and others. Agencies must also be equipped with the knowledge that Black communities are not monolithic. Therefore, when engaging communities and stakeholders, agencies must ensure perspectives from a broad swath of communities are included – diversity based on income level, age, gender identity, immigrant status, disability, language, and whether they live in a rural, suburban, or urban community.

Principle 3: Innovate to reach people where they are and maximize community engagement

The notice and comment period is an important tool for agencies to solicit and review feedback from underserved communities, but many individuals and organizations that have critical insight may not know how to navigate this process or even know that it exists. Many organizations that represent communities of color and other vulnerable communities are often under-resourced and under-staffed, which presents difficulties when an individual must choose between responding to a federal notice or focusing on their urgent work. Additionally, in considering the racial broadband gaps, relying on processes that require internet access may simply reproduce inequitable results. To further racial equity, the community engagement process must not depend on the ability of impacted communities to monitor and seek out opportunities to comment. There must instead be a continuum of engagement where the government takes active steps to reach impacted communities and to proactively identify policy reforms that may be needed. The administration should directly engage with organizations and individuals in underserved communities to ask for feedback on what method of communication is most effective. Furthermore, agencies must remain in contact with communities and demonstrate how their engagement led to changes in policies or programs.

Agencies must be innovative in *how* they reach stakeholders throughout the process. In some cases, this may require a culture shift. For instance, agencies should hire racially diverse staff at every level, including department leadership, and provide sufficient resources for staff to meaningfully engage community members. This includes valuing community organizing, not only as a tool of campaigning, but also as a tool of governing. It would be a worthy investment of time and resources to go directly to the people in places like grocery stores, school expos, beauty salons, barber shops, music festivals, and other high-traffic locations. Local civil rights and grassroots organizations would be well situated to offer further guidance on how organizing strategies may be adopted at the government level to boost participation and input.

The following are additional recommendations for how to engage communities and other stakeholders:

- Agencies should consider direct outreach strategies to reach community representatives in schools, jails and prisons, shelters, community centers and other locations, to directly engage disadvantaged students, incarcerated people, unhoused people, voters and others.
- Agencies should view racial justice organizations as partners in the work, serving as collaborators in developing the policy or program from its incubation stages onward.
- Agencies should continue and increase opportunities for in-person and virtual engagement. It is essential that there are opportunities for questions and a back-and-forth discussion between agency leaders and community members.
- Agencies should utilize a variety of communication tools both to solicit input for policymaking and to inform communities about government programs, and should develop digital community engagement tools that are simple to navigate and transparent.

Equity requires that the government leverage its human and fiscal resources to innovate in how they reach underserved communities. Moreover, federal agencies must be transparent about the specific changes they will make to improve stakeholder and community engagement to build greater trust and provide for ongoing accountability.

Conclusion

We thank OMB for the opportunity to provide our recommendations on these important issues. This administration's commitments to racial justice and equity are promising steps, and we look forward to seeing concrete reforms that will have a lasting impact on Black communities. We would welcome further discussion and can be reached via email at mhaberle@naacpldf.org.

Best regards,



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