State of California
Office of the Attorney General

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June 13, 2025

Submitted via Federal eRulemaking Portal (Regulations.gov)

The Honorable Chris Wright
Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

RE: Significant Adverse Comment and Request for Immediate Withdrawal of Direct Final Rule "Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities" – Docket ID DOE-HQ-2025-0015 (90 Fed. Reg. 20783) (May 16, 2025)

On behalf of the Attorneys General of California, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawai', Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin (States), we submit a significant adverse comment and request for immediate withdrawal of the Direct Final Rule *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities* (DFR), published by the United States Department of Energy (DOE) in the Federal Register on May 16, 2025.[1] The DFR rescinds the decades old regulation promulgated under Section 504 of the Rehabilitation Act of 1973 (Section 504) that requires a recipient to design and construct new facilities (or certain alterations of existing facilities) to make them readily accessible to and usable by people with disabilities.[2] This arbitrary and capricious agency action fails to adhere to the procedures required by law by bypassing opportunity for review and comment prior to issuance and does not consider the interests of the States and the public, including the continued accessibility barriers faced by people with disabilities. We request immediate withdrawal of this unlawful revocation of long-standing standards that require the nation's buildings and facilities to be accessible to and usable by people with disabilities.

[1] *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities* 90 Fed. Reg. 20783 (May 16, 2025) (to be codified at 10 C.F.R. pt. 1040) [hereinafter *Rescinding Regulations*].

[2] 10 C.F.R. § 1040.73.

I. DOE'S IMPERMISSIBLE USE OF THE DIRECT FINAL RULE VIOLATES THE APA

DOE impermissibly seeks to circumvent notice and comment rulemaking required under the Administrative Procedure Act (APA) and rescind critical provisions implementing Section 504 by direct final rule, effective July 15, 2025, unless significant adverse comments are received by June 16, 2025.[3] The agency purports to use the direct final rule to rescind "unnecessary and unduly burdensome" provisions.[4]

The Administrative Conference of the United States (ACUS), an independent federal agency established by Congress to promote "efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies,"[5] recognizes that agencies may use direct final rulemaking only where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking," and "concludes that the rule is unlikely to elicit any significant adverse comments."[6] In such circumstances, the agency should publish in the Federal Register that it is proceeding by direct final rule and explain "the basis for the agency's finding that it is unnecessary to undertake notice-and-comment rulemaking."[7]

Here, DOE violates the APA by using the direct final rulemaking process to limit public input into the agency's rescission of the Section 504 provisions regarding new construction requirements. First, the narrow good cause exception to notice and comment does not apply here, nor does the agency invoke any other exception to APA rulemaking. DOE must therefore undertake notice and comment procedures for its proposed rescissions. Second, the agency impermissibly raises the standard for what constitutes "significant adverse comments" that would prevent the rule from becoming effective next month. Third, DOE fails to provide adequate notice of the legal authority for this action. And fourth, the agency must commit to withdrawing the rule after receiving any significant adverse comments such as this one.

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[3] *See generally Rescinding Regulations*, 90 Fed. Reg. at 20783-84.

[4] *Id.*

[5] 5 U.S.C. § 594(1).

[6] Admin. Conf. of the U.S., *Administrative Conference Recommendation 2024-6, Public Engagement in Agency Rulemaking Under the Good Cause Exemption* 4 (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf [hereinafter "ACUS 2024–6"]); *see also* 5 U.S.C. § 553(b)(B); Off. of the Fed. Reg., A Guide to the Rulemaking Process 9 (2011), https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf (explaining that direct final rulemaking is appropriate where a rule "would only relate to routine or uncontroversial matters").

[7] ACUS 2024–6, *supra* note 6, at 5; *see also* Todd Garvey, Cong. Rsrch. Serv., R41546, *A Brief Overview of Rulemaking and Judicial Review* (Mar. 27, 2017) https://www.congress.gov/crs-product/R41546 (noting "even a single adverse comment" is sufficient to withdraw a direct final rule).

A. DOE's Rescission Must Undergo Notice and Comment Procedures

As an initial matter, to enact this recission, DOE must use the same notice and comment process as it would to enact new regulations.[8] The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule."[9] Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[10]

While the APA creates exceptions to notice and comment rulemaking, none are applicable here. The APA provides an exception "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[11] The good cause exception is "narrowly construed and only reluctantly countenanced,"[12] and courts must "carefully scrutinize the agency's justification for invoking the 'good cause' exception."[13] It is not a tool for agencies to "circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."[14] Instead, the good cause exception is typically utilized "in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare."[15]

Here, DOE provides only a conclusory statement that these provisions are "unnecessary and unduly burdensome."[16] This stated justification for the use of a direct final rule does not satisfy the good cause requirement under the APA. First, DOE has it backward: the APA calls for a determination that the *notice and comment process* is "unnecessary," not the regulation.[17] DOE makes no such claim, much less provides any support for it. In any case, as discussed in detail *infra*, these regulations are necessary: they impact a wide array of DOE's federally assisted programs and recipients, and serve to facilitate meaningful access, prevent discrimination, and effectuate the goals of Section 504.

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[8] *See* 5 U.S.C. § 553.

[9] 5 U.S.C. § 551(5).

[10] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'" (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

[11] 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3) (exempting a substantive rule from publication or service requirements "for good cause found and published with the rule.").

[12] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

[13] *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010).

[14] *N. J. Dep't of Env't Prot. v. U.S. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).

[15] *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1339–40 (D.C. Cir. 2023).

[16] *Rescinding Regulations,* 90 Fed. Reg. at 20784.

[17] 5 U.S.C. § 553(b)(B); *see also* ACUS 2024–6, *supra* note 6, at 4 (explaining that direct final rulemaking is only appropriate where the agency "for good cause finds that it is 'unnecessary' to undertake notice-and-comment rulemaking" and "concludes that the rule is unlikely to elicit any significant adverse comments").

Moreover, the "unnecessary" prong of the good cause exception is usually "confined to those situations in which the administrative rule is a *routine* determination, *insignificant* in nature and impact, and *inconsequential* to the industry and to the public."[18] As this letter demonstrates, this rescission is plainly not an insignificant or merely technical change, and it is of great consequence to the public. DOE is substantively altering its regulations to eliminate accessibility requirements in new construction and alterations in a manner that is contrary to law. And as discussed *infra* [Sec. III], there is a significant and practical need for regulations that specify accessibility requirements and design standards so that the public is not harmed.

The "unnecessary" prong may also apply "when the agency lacks discretion regarding the substance of the rule."[19] As a threshold matter, it is the province of the judicial branch, not the Executive, "to say what the law is,"[20] But even where an agency claims a rescission is necessary to conform to current legal standards—which is not true here—public comment is important, for example to ensure that the agency action is not arbitrary and capricious for failure to consider "serious reliance interests"[21] or "important aspect[s] of the problem."[22] DOE thus "cannot simply brand [a prior action] illegal and move on."[23]

It would also not be "impracticable" for DOE to engage in notice and comment in this instance. The impracticability exception may apply where an agency "finds that due and timely execution of its functions would be impeded by the notice otherwise required [by the APA]."[24] However, impracticability "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety."[25] DOE has not articulated and the undersigned are not aware of any emergency situation or imminent safety threat that would

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[18] *Mack Trucks*, 682 F.3d at 94 (citing *Util. Solid Waste Activities Grp.,* 236 F.3d. 749, 755 (D.C. Cir. 2001) (emphasis added); *see also* Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 244 (2021) (explaining that APA legislative history clarified the meaning of "unnecessary" as instances involving "minor or merely technical amendment"); U.S. Dep't of Just., Attorney General's Manual on the Administrative Procedure Act (1947), https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1947iii.html ("'Unnecessary' refers to the issuance of a minor rule or amendment in which the public is not particularly interested.").

[19] ACUS 2024–6, *supra* note 6, at 2 (*citing Metzenbaum v. Fed. Energy Regul. Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (Notice and comment were not required for the agency's "nondiscretionary acts required by [statute]").

[20] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. 107, 177 (1803)).

[21] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[22] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[23] *Louisiana v. Dep't of Energy*, 90 F.4th 461, 475 (5th Cir. 2024) (finding DOE was required to consider alternatives to repealing a purportedly "invalid" rule *in toto*).

[24] *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

[25] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018); *see also Mack Trucks*, 682 F.3d at 93 (collecting cases).

justify rescinding accessibility requirements in new construction and alterations which have been in effect for decades.

Lastly, the regular notice and comment procedures are not "contrary to the public interest" here. This exception "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest."[26] For example, it would be contrary to the public interest to undertake notice and comment where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent."[27] Here, providing the public the opportunity to review and comment in a robust process in fact furthers the public interest in light of the longstanding critical protections afforded by Section 504. And DOE provides no information showing that adequate advance notice of changes to regulations regarding accessibility requirements in new construction and alterations would catalyze unlawful action against the public interest. On the contrary, DOE's proposed rescissions, if sustained, would have the effect of catalyzing actions that are otherwise unlawful under Section 504 because those who are subject to the statute's strictures may be lulled into believing that DOE has effectively abolished Section 504's accessibility mandates.

Nowhere in the Federal Register notice does DOE invoke any of the remaining exceptions to notice and comment rulemaking,[28] and agency action must be evaluated "solely by the grounds invoked by the agency."[29]

B. DOE Impermissibly Attempts to Raise the Standard for "Significant Adverse Comments"

Next, the DFR violates the APA because DOE attempts to impermissibly raise the bar for a "significant adverse comment" that would require the agency to withdraw the DFR. DOE mistakenly defines significant adverse comments as "ones which oppose the rule and raise, alone or in combination, a serious enough issue related to *each of the independent grounds* for the rule that a substantive response is required."[30] But DOE's attempt to apply a more exacting standard to the public's comments is inconsistent with widely accepted legal interpretations and longstanding agency practice.[31] Instead, the agency's unjustified heightened requirements

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[26] *Mack Trucks*, 682 F.3d at 95.

[27] *See Util. Solid Waste Activities Grp.*, 236 F.3d at 755.

[28] *See* 5 U.S.C. § 553(a)(1) (exception for "a military or foreign affairs function of the United States"); *id.* § 553(a)(2) (exception for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"); *id.* § 553(b)(A) (exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

[29] *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

[30] *See Rescinding Regulations*, 90 Fed. Reg. at 20783 (emphasis added).

[31] For example, in notice-and-comment rulemaking—where agencies have an obligation to respond to "significant comments received during the period for public comment," *Perez*, 575 U.S. at 96, this has been interpreted to include "comments that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted), or those which "raise points relevant to the agency's

impose an extra barrier to meaningful public participation in DOE's development of this rulemaking.

According to ACUS, "an agency should consider *any comment* received during direct final rulemaking to be a significant adverse comment if the comment explains why: (a) [t]he rule would be inappropriate, including challenges to the rule's underlying premise or approach; or (b) [t]he rule would be ineffective or unacceptable without a change."[32] Unlike the DFR, prior direct final rules advanced by DOE committed to responding to "adverse comments" or "significant adverse comments" without qualification.[33]

The heightened standard for adverse comments that the DFR articulates also deviates from the standard routinely applied by DOE and other agencies. For example, the statutory requirements for DOE Energy Conservation direct final rules instruct that the Secretary "shall withdraw the direct final rule if [] the Secretary receives 1 or more adverse public comments relating to the direct final rule" and determines that the comments provide a reasonable basis for withdrawal.[34] For the Environmental Protection Agency's direct final rulemaking on significant new uses for chemical substances, the agency's regulations state that it will withdraw a direct final rule "[i]f notice is received within 30 days after the date of publication that someone wishes to submit adverse or critical comments[.]"[35] And the Federal Aviation Administration's regulations likewise provide: "[if] we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective" and may issue a notice of proposed rulemaking, or may proceed by other means permissible under the APA.[36] These agencies' rules and practices demonstrate that DOE's threshold for "significant adverse comments" is artificially heightened in contrast with established interpretations that welcome public input.[37]

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decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA.*, 507 F.3d 706, 715 (D.C. Cir. 2007) (emphasis omitted).

[32] ACUS 2024–6, *supra* note 6, at 5 (emphasis added).

[33] *See, e.g.*, Implementation of OMB Guidance on Drug-Free Workplace Requirements, 75 Fed. Reg. 39443, 39444 (proposed July 9, 2010) (codified at 2 CFR pt. 902 and 10 CFR pt. 607) ("Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that 'good cause' exists under 5 U.S.C. § 553(b)(B) and 553(d) to make this rule effective . . . without further action, unless we receive adverse comment[.]"); Defense Priorities and Allocations System, 73 Fed. Reg. 10980, 10981 (proposed Feb. 29, 2008)) (codified at 10 CFR pt. 216 48 CFR pt. 911 and pt. 952) ("The direct final rule will be effective . . . unless significant adverse comments are received[.]"); Collection of Claims Owed the United States, 68 Fed. Reg. 48531, 48532 (Aug. 14, 2003) ("This rule will be effective . . . without further notice unless we receive significant adverse comment[.] If DOE receives such an adverse comment on one or more distinct amendments, paragraphs, or sections of this direct final rule, DOE will publish a timely withdrawal in the Federal Register indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment.").

[34] 42 U.S.C. § 6295(p)(4)(C)(i).

[35] 40 C.F.R. § 721.170(d)(4)(i)(B).

[36] 14 C.F.R. § 11.13.

[37] In another deviation from established notice-and-comment processes that facilitate public participation, DOE is not contemporaneously publishing the public comments it has received in response

C. DOE Does Not Cite Adequate Legal Authority for the DFR

The DFR also does not provide adequate "reference to the legal authority under which the rule is proposed."[38] As an initial matter, Executive Order Number 12,250, Leadership and Coordination of Nondiscrimination Laws, which was signed 45 years ago in 1980, delegates authority to the Attorney General to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions" such as Section 504 of the Rehabilitation Act of 1973.[39] But the DFR does not mention any involvement by the Department of Justice in the rescission of the Section 504 regulations at issue here. Furthermore, to the extent DOE provides any rationale for its rescissions, it relies on the agency's mischaracterization of the regulations, discussed in detail at *infra*-Section IV, which do not stand for the principles the agency, claims nor support the action it wishes to take.

D. DOE Must Rescind the DFR After Receiving This Significant Adverse Comment

Lastly, once DOE receives a significant adverse comment, such as ours, DOE must withdraw the direct final rule. Failure to withdraw the rule would be contrary to the APA's requirement that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments."[40]

Here, DOE states that in response to significant adverse comments it will either withdraw the rule or "issu[e] a new direct final rule" that responds to the comments.[41] But that is not the proper procedure. A significant adverse comment undermines the agency's finding that there is good cause to bypass notice and comment rulemaking, including through issuing a new direct

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to this DFR. *Compare* Department of Energy, *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities,* Regulations.gov (June 13, 2025, 10:45 AM ET), https://www.regulations.gov/document/DOE-HQ-2025-0015-0001 (4,881 comments received and 0 comments publicly posted on June 13, 2025, 10:45 AM ET) *with* Department of Justice, *Withdrawing the Attorney General's Delegation of Authority,* Regulations.gov (June 13, 2025, 10:45 AM ET), https://www.regulations.gov/document/DOJ-OAG-2025-0003-0001 (11,868 comments received and 11,211 publicly posted on June 13, 2025, 10:45 AM ET).

5 U.S.C. § 553(b)(2); *cf. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. 657, 683–84 (2020) (finding interim final rule satisfied this requirement where the agency's request for comments "detailed [its] view that they had legal authority" to promulgate exemptions under two statutes).

[39] Exec. Order No. 12,250, Leadership and Coordination of Nondiscrimination Laws, § 1– 2 (Nov. 2, 1980).

[40] 5 U.S.C. § 553(c); *see also Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *cf. Little Sisters of the Poor*, 591 U.S. at 686 (finding interim final rule satisfied APA § 553(c) comment requirement where agency "requested and encouraged public comments on all matters addressed in the rules" (cleaned up)).

[41] *Rescinding Regulations,* 90 Fed. Reg. at 20783.

final rule.[42] DOE had permissible avenues available to it to facilitate expeditious rulemaking if it desired: it could have issued a "companion proposed rule" alongside the direct final rule in order to be well-positioned to proceed with notice-and-comment rulemaking in the event the DFR was withdrawn.[43] However, DOE chose not to do so, and DOE may not undercut the public's right to lawful process required under the APA due to the agency's haste.

II. STATUTORY AND REGULATORY FRAMEWORK

A. The DFR Fails to Consider and Contradicts the Purpose of Section 504 of the Rehabilitation Act of 1973 and its Implementing Regulations

The Rehabilitation Act of 1973 was enacted to "empower individuals with disabilities to maximize... independence, and inclusion and integration into society, through... the guarantee of equal opportunity..." and to "initiate and expand services to groups of individuals [with disabilities] (including those who are homebound or institutionalized) who have been underserved in the past."[44] Section 504 expressly prohibits discrimination against people with disabilities under any program or activity receiving federal financial assistance, or any program or activity conducted by any federal executive agency or the United States Postal Service, including any state or local governments, universities, and private organizations.[45] The Rehabilitation Act also established the Architectural and Transportation Barriers Compliance Board (Access Board) to establish and maintain minimum guidelines and requirements for accessibility standards issued pursuant to several statutes and to "promote accessibility throughout all segments of society."[46]

Despite these critical statutory requirements, no regulations were published in the immediate years following the 1973 enactment of Section 504. As a result, although government agencies and their programs and activities were required to ensure access to people with disabilities, they lacked any guidance on implementing this requirement. Although the Ford administration had drafted Section 504 regulations, they remained unpublished at the time he left office. In April 1977, people with a variety of disabilities launched protests at federal offices

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[42] *See* ACUS 2024–6, *supra* note 6, at 2 (noting public engagement may be "especially important" where notice and comment does not occur because it can "help agencies determine whether the good cause exemption is applicable.").

[43] *See* ACUS 2024–6, *supra* note 6, at 6 ("If the agency previously requested comments in a companion proposed rule . . . the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule" after DFR is withdrawn due to significant adverse comments); *see also* OFF. OF THE FED. REG., *supra* note 6, at 9 ("If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely."); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1057 (N.D. Cal. 2018) (EPA published a proposed rule alongside its direct final rule; after receiving negative comments on the proposed rule, the agency withdrew the direct final rule and proceeded with revisions on the proposed rule track).

[44] 29 U.S.C. § 701; Rehabilitation Act of 1973, 87 Stat. 355, Pub. L. No. 93–112.

[45] 29 U.S.C. § 794.

[46] 29 U.S.C. § 794.

across the country.[47] The longest sit-in took place in San Francisco and lasted nearly one month, ending only when the Section 504 regulations had been signed.[48] Many of the protesters were willing to expose themselves to risk and sacrifice access to the medical equipment and personal aides that assisted them in their daily lives because of how vital these regulations were—and still are—to them and people with disabilities across the country.[49] The importance of and need for Section 504 regulations remains the same today.

Three years later, in 1980, President Carter issued an executive order requiring each agency covered by Section 504 to "issue appropriate implementing directives (whether in the nature of regulations or policy guidance)."[50] And, in the same year, DOE promulgated Section 504 regulations that largely mirror the regulations that would be erased if this Rule goes into effect. Like the statute, the regulations prohibit discrimination based on disability, providing that no person with a disability shall be subjected to discrimination "because a recipient's facilities are inaccessible to or unusable by handicapped persons."[51] And the regulations clarify that this duty not to discriminate requires that a recipient design and construct new facilities (or certain alterations of existing facilities) to make them readily accessible to and usable by people with disabilities.[52] The requirement applies to "each facility or part of a facility constructed by, on behalf of, or for the use of a recipient."[53] The regulations reflect a careful balance of requiring newly constructed facilities to abide by accessibility standards while allowing greater flexibility for existing facilities. The regulations also deem compliance with the Uniform Federal Accessibility Standards (UFAS) to be compliance with the new construction and alterations requirements. *Id.* The UFAS provide clear practical guidelines for developers including wheelchair passage widths, ramps specifications, and parameters for accessible parking spaces.[54] Without this section, which DOE has slated for removal, recipients lose imperative guidance as to which facilities must be accessible to people with disabilities and what standards constitute compliance.

To support repealing this regulation, DOE cites only the general prohibition of discrimination against people with disabilities. But that provision alone is not sufficient to address physical access barriers that continue to exist for people with disabilities.

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[47] Alyssa Eveland, Nat'l Park Serv., *504 Protest: Disability, Community, and Civil Rights* (Mar. 21, 2024), https://www.nps.gov/articles/000/504-protest-disability-community-and-civil-rights.htm.

[48] *Id.*

[49] *Id.*

[50] Exec. Order No. 12,250, 28 C.F.R. Part 41 (1980).

[51] 10 C.F.R. § 1040.71.

[52] 10 C.F.R. § 1040.73.

[53] *Id.*

[54] U.S. Access Bd., *Uniform Federal Accessibility Standards (UFAS)* (1984), https://www.access-board.gov/aba/ufas.html.

III. THERE IS A SIGNIFICANT AND PRACTICAL NEED FOR THE REGULATIONS TO SPECIFY ACCESSIBILITY STANDARDS

More than 1 in 4, over 70 million, adults in the United States have a disability.[55] The U.S. Centers for Disease Control and Prevention notes that barriers, including structural obstacles "can make it extremely difficult or even impossible for people with disabilities to function."[56] For example, an architectural feature as seemingly simple as stairs leading to a building entrance can prevent a person using a wheelchair from entering that building independently. In a 2023 survey, 70.4% of respondents reported that they have arrived at a public building only to realize they could not access the building.[57]

Building accessibility is a longstanding obstacle for people with disabilities in a variety of settings.[58] This is due in no small part to widespread noncompliance with various accessibility standards. For example, the Access Board, the federal agency responsible for enforcing the Architectural Barriers Act of 1968, received 341 complaints during fiscal year 2024.[59] In 2024, the California Commission on Disability Access received 4319 complaints and demand letters alleging violations of state and federal accessibility standards.[60] In fiscal year 2023-2024, approximately 30% of disability discrimination complaints received by the Illinois Office of the

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[55] U.S. Ctrs. for Disease Control and Prevention, *CDC Data Shows Over 70 Million Adults Reported Having a Disability* (Jul. 16, 2024), https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html.

[56] U.S. Ctrs. for Disease Control and Prevention, *Disability Barriers to Inclusion* (Apr. 3, 2025), https://www.cdc.gov/disability-inclusion/barriers/index.html#cdc_generic_section_4-physical-barriers.

[57] Suzanne Perea Burns, et al., *Accessibility of public buildings in the United States: a cross-sectional survey*, 39 DISABILITY & SOC'Y 2988, 2994 (Aug. 20, 2023).

[58] *See, e.g.*, U.S. Government Accountability Off., *K-12 Education: School Districts Need Better Information to Help Improve Access for People with Disabilities* GAO-20-448 (Jun. 30, 2020), https://www.gao.gov/products/gao-20-448 (a national survey finding two-thirds of school districts had facilities with physical barriers that may limit access); Ctrs. for Medicare & Medicaid Services, *Increasing the Physical Accessibility of Health Care Facilities* (May 2017), https://www.cms.gov/sites/default/files/repo-new/23/Issue-Brief-Increasing-the-Physical-Accessibility-of-Health-Care-Facilities.pdf ("Despite federal requirements that health care providers ensure equal access to programs, services, and facilities for people with disabilities, physical accessibility remains a considerable challenge."); Samara Scheckler, et al., Joint Center for Housing Studies Harvard Univ., *How Well Does the Housing Stock Meet Accessibility Needs? An Analysis of the 2019 American Housing Survey*, (Mar. 2022), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_housing_stock_accessibility_scheckler_2022_0.pdf (finding "the US housing stock does not regularly incorporate accessibility, and includes very few housing units that offer multiple accessibility features.").

[59] U.S. Access Bd., *U.S. Access Board Resolves 85 Architectural Barriers Act Complaints Through Corrective Action in Fiscal Year 2024* (Oct. 18, 2024), https://www.access-board.gov/news/2024/10/18/u-s-access-board-resolves-85-architectural-barriers-act-complaints-through-corrective-action-in-fiscal-year-2024/.

[60] Cal. Comm'n on Disability Access, *State and Federal Complaints and Demand Letters Report for 2024*, https://www.dgs.ca.gov/CCDA/Resources/Page-Content/California-Commission-on-Disability-Access-Resources-List-Folder/State-and-Federal-Complaints-and-Demand-Letters-Report-for-2024.

Attorney General's Disability Rights Bureau were related to physical accessibility issues.[61] These complaints underscore why it is critically important for agencies like DOE to provide guiding regulations that clearly outline construction requirements and specify which accessibility standards constitute compliance. The DFR seeks to remove this longstanding guidance, which will lead to greater confusion and noncompliance.

IV. RESCINDING SECTION 504 REGULATIONS IS ARBITRARY AND CAPRICIOUS

The DFR is arbitrary and capricious and must be withdrawn. Pursuant to the Administrative Procedure Act, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[62] A rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[63] When an agency seeks to rescind an existing rule, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[64] However, a detailed justification is necessary when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[65] Thus, a rule rescinding a prior rule is arbitrary and capricious if "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" and the agency fails to provide one.[66] Moreover, an agency must "examine[] the relevant data and articulate[] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[67]

Here, DOE has entirely failed to consider an important aspect of the problem and has offered a cursory explanation for its decision that runs counter to the evidence before the agency. To rescind a nearly 30-year-old regulation, DOE offers only four short sentences:

> "Given the general prohibition on discriminatory activities and related penalties, see 10 CFR 1040.71, DOE finds these additional provisions unnecessary and unduly burdensome. It is DOE's policy to give private entities flexibility to comply with the law

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[61] Illinois Off. of the Att'y Gen. Disability Rights Bureau, *Investigation and Technical Assistance Activity Report on Fiscal Year 2023-2024* (Jul. 26, 2024), https://illinoisattorneygeneral.gov/Page-Attachments/DRBAnnualInvestigativeandTechnicalAssistanceActivity23-24.pdf.

[62] 5 U.S.C. § 706(2)(a); *see also United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

[63] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

[64] *Fox Television Stations, Inc.*, 556 U.S. at 515.

[65] *Id.*

[66] *Id.* at 515-516.

[67] *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (quoting *State Farm*, internal quotation marks omitted).

> in the manner they deem most efficient. One-size-fits-all rules are rarely the best option. Accordingly, DOE finds good reason to eliminate this regulatory provision."[68]

First, DOE's assertion that these provisions are "unnecessary and unduly burdensome" because the regulation, in a separate provision, prohibits discrimination is unsupported.[69] The prohibition of discrimination alone is not sufficient to address physical access for people with disabilities as required by Section 504. In relying on this rationale, DOE has failed to consider both the historical and present need for these regulations, as detailed in *supra* Sections II and III. DOE's rationale also runs counter to evidence in the legislative record. In support of early versions as well as the final bill that enacted Section 504, members of Congress cited "shameful oversights" in the treatment of people with disabilities that caused them to be "shunted aside, hidden, and ignored" and characterized the legislation as a "national commitment to eliminate the glaring neglect" of people with disabilities.[70] The Supreme Court has recognized, "elimination of architectural barriers was one of the central aims of the [Rehabilitation] Act" and explained that Congress viewed discrimination against people with disabilities to be mostly the product of "thoughtlessness and indifference—of benign neglect."[71] Contrary to DOE's stated rationale, clear standards that outline how covered entities must comply with the central aim of the law are wholly necessary and help reduce the burden of compliance by providing clarification and standards by which to measure accessibility. The Department has acted in an arbitrary and capricious manner by rescinding the regulatory provision that supports Congress's central aim in enacting Section 504 and continues to be critical today.

Next, DOE makes a cursory statement about its policy to grant private entities flexibility in compliance and calls the regulation a "one-size-fits-all" rule.[72] Again, DOE entirely fails to consider an important aspect of the problem and offers a rationale that runs counter to the statutory purpose. The DFR would change what DOE calls a "one-size-fits-all" rule to a "free-for-all" that sets no standard for compliance. This would increase the burdens on both DOE when figuring out how to determine compliance and recipients who do not have the benefit of clear construction standards from the outset. Section 504 provides a national baseline for accessibility, and developers have the flexibility to provide greater accessibility. Not only are developers reliant on this baseline, but so too are other industries. For example, the UFAS, the standards the regulations identify for compliance, require a minimum width for doorways.[73] This minimum width correlates to the standard size of wheelchairs, and both wheelchair manufacturers and building developers rely on this baseline to ensure accessibility. Without a clear standard like this, recipients would have difficulty ensuring people using wheelchairs can pass through doorways in their facilities. Furthermore, the regulation on its face offers flexibility and is not "one-size-fits-all" but rather offers standards tailored for different types of facilities.

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[68] *Rescinding Regulations*, 90 Fed. Reg. at 20784.
[69] *Id.*
[70] 117 Cong. Rec. 45974 (1971); 118 Cong. Rec. 526 (1972).
[71] *Alexander v. Choate*, 469 U.S. 287, 297 (1985).
[72] *Rescinding Regulations*, 90 Fed. Reg. at 20784.
[73] UFAS, *supra* note 54, at 4.2.

Both the regulation and UFAS, the standards for compliance, account for new construction separate from alterations to existing facilities. This is a critical point of flexibility built into the regulation and the standards. Congress and DOE had the option to pass a statute and regulations that forced covered entities into a "one-size-fits-all" requirement, but instead chose to make this compromise thus balancing the need for accessible buildings with construction limitations. Moreover, DOE has offered no evidence to support its characterization of the regulation and opted out of a rulemaking process that would have permitted the creation of a robust record through public comment. DOE has acted in an arbitrary and capricious manner by offering a rationale that fails to consider and contradicts the historical record.

V. THE DFR FAILS TO CONSIDER AND CONTRADICTS THE STATES' INTERESTS IN ROBUST FEDERAL REGULATION OF SECTION 504

The DFR is arbitrary and capricious because it entirely fails to consider the States' significant interests, and its rationale runs counter to the evidence States present in this comment. The States have a strong interest in protecting our residents with disabilities from discrimination and in ensuring they have access to buildings and facilities that do not present architectural barriers. Section 504 and its implementing regulations are especially important because DOE's federal funds are awarded not only to private entities, but also to the States themselves. DOE has awarded the State of California, for example, 14 funding awards totaling approximately $1 billion.[74] To the State of Illinois, DOE has awarded 11 funding awards totaling approximately $500 million.[75] It is imperative that private entities and the states themselves have clear guidance for compliance with federal requirements.

The States also have an interest in ensuring developers build accessible facilities that comply with federal law. Rescinding this regulation is likely to create confusion for developers, resulting in reduced architectural accessibility for people with disabilities and increased complaints to state agencies. Deleting regulations that (1) require accessible construction and (2) identify which standards constitute compliance also sends a message that implementation of accessible design standards is not necessary at all. For those that do attempt to implement accessible design, they will be left with no guidance as to which facilities must comply and which standards constitute compliance.

This is particularly concerning in states where state agencies play a role in ensuring compliance with nondiscrimination and accessible design requirements. For example, to ensure enforcement of nondiscrimination and accessible design laws and regulations, the California Attorney General and/or the California Civil Rights Department have been vested with the

[74] USAspending.gov, *Prime Awards and Transactions California* (2025), https://www.usaspending.gov/search?hash=42acc7ec35ca584623e9df0243298936.

[75] USAspending.gov, *Prime Awards and Transactions Illinois* (2025), https://www.usaspending.gov/search?hash=5c8a26c4af7a3b6f9df498df6a639e86.

authority to investigate complaints and bring legal actions to remedy violations.[76] Like California, the Disability Rights Bureau of the Office of the Illinois Attorney General is authorized to investigate and litigate against entities to remedy violations of the Illinois Environmental Barriers Act[77] and its implementing code, the Illinois Accessibility Code.[78] The regulation that DOE proposes to rescind is critical to understanding the federal standards that DOE recipients must comply with for projects located within the each of our States. The States not only have a strong interest in combatting nondiscrimination against people with disabilities but are also authorized to enforce these laws. A gap in federal guidance will lead to less compliance and greater barriers for people with disabilities who will turn to the States to remedy violations. By releasing a DFR rather than the traditional Notice of Proposed Rulemaking in order to rescind a long-standing regulation, DOE has failed to assess the impact on or consult with any stakeholders, including States.

VI. CONCLUSION

In conclusion, Section 504 and its implementing regulations play a critical role in preventing discrimination and ensuring access for people with disabilities. The States have an interest in ensuring that State residents are not subjected to discrimination on the basis of disability and have access to a built environment that minimizes architectural barriers for people with disabilities. Regulations that provide guidance to developers regarding accessible design standards have historically been and continue to be necessary for proper implementation of Section 504's requirements. The DFR rescinding DOE's Section 504 regulations is an arbitrary and capricious action that fails to abide by rulemaking procedures. Proper enforcement of Section 504 is an issue of vital importance to our States, our residents, and our communities. For all of these reasons, we strongly oppose the DFR *Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities* and request that it be withdrawn.

Sincerely,

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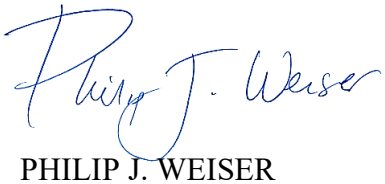
Arizona Attorney General

[76] Cal. Const., art. V, § 13; Cal. Gov't Code §§ 4458, 11136; Cal. Civ. Code § 55.1; Cal. Health and Saf. Code § 19958.5.

[77] 410 ILCS 25/6.

[78] 71 Ill. Adm. Code 400.



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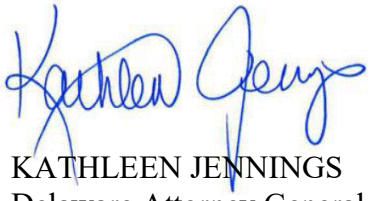

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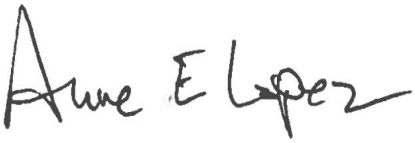

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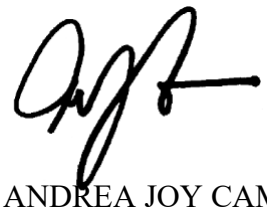

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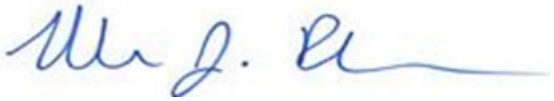

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