The Accessibility Paradox:

Method-of-Administration Disparate Impact and the Recursive Failure of Disability Rights Enforcement Architecture

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Abstract

On April 17, 2026, seven days before the compliance deadline for the 2024 Title II web accessibility rule was scheduled to take effect, the United States Department of Justice published an Interim Final Rule extending that deadline by one year. The action was taken without the notice-and-comment process ordinarily required by the Administrative Procedure Act, marking the first use of an Interim Final Rule to modify disability accessibility regulation in the history of the Americans with Disabilities Act. The sequence of events is not an isolated regulatory episode. It is a particular instance of a general pattern that has characterized the enforcement architecture of Section 504 of the Rehabilitation Act and of ADA Title II since both statutes entered force.

This Article argues that the cumulative procedural complexity of disability rights enforcement in the United States, together with the pattern of regulatory retreat exemplified by the April 2026 Interim Final Rule, constitutes a method of administration that disparately impacts the population the statutes exist to protect. The analysis distributes across three statutory pathways with different targets: Section 504 of the Rehabilitation Act reaches the Department of Justice and other executive agencies under 29 U.S.C. § 794(a), with methods-of-administration obligations implemented at 28 C.F.R. § 39.130(b)(3) for DOJ's own programs and activities; ADA Title II reaches the state and local public entities whose implementation of federal guidance produces downstream disparate impact, with methods-of-administration obligations at 28 C.F.R. § 35.130(b)(3); and Administrative Procedure Act review reaches discrete final agency actions, including Interim Final Rules, under 5 U.S.C. §§ 702, 706. Federal agencies are not "public entities" within the meaning of ADA Title II; the argument against DOJ's own conduct proceeds exclusively under Section 504 and the APA. The three pathways run in parallel and reinforce each other.

The Article identifies three structural features of current enforcement architecture that produce this disparate impact: overlapping statutory pathways with inconsistent procedural requirements, regulatory carve-outs not grounded in statutory text (with the guaranty exemption at 28 C.F.R. § 41.3(e)(3) as the principal case study), and procedural complexity that imposes differential cognitive, temporal, and financial cost on a protected class whose defining characteristics include, for many of its members, reduced capacity to absorb that cost. The Article develops the doctrinal basis for relief under *Alexander v. Choate*'s meaningful-access standard, situates the argument within the post-*Loper Bright* administrative law environment, and identifies injunctive relief targeting the enforcement architecture itself as the appropriate remedy. Part VII includes a reflexive disclosure concerning the publication venues that house disability rights scholarship, which are themselves recipients subject to Section 504 and whose own enforcement architecture is subject to the analysis developed here. The Article concludes by identifying the pathways through which the framework can be developed: administrative complaint, declaratory judgment action, and the incorporation of method-of-administration claims into existing Section 504 litigation as a generally applicable second count.

Keywords: Section 504; Rehabilitation Act; ADA Title II; disparate impact; methods of administration; meaningful access; *Alexander v. Choate*; *Cummings v. Premier Rehab Keller*; *Loper Bright*; Civil Rights Restoration Act; guaranty exemption; Interim Final Rule; disability rights; cognitive accessibility; regulatory architecture; administrative law; assistive technology; probabilistic systems; universal design; injunctive relief; civil rights enforcement.

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I. Introduction

On April 17, 2026, the Department of Justice filed with the Office of Information and Regulatory Affairs an Interim Final Rule extending the compliance deadlines for the 2024 ADA Title II web accessibility rule by one year.[1] The rule was scheduled for Federal Register publication on April 20, 2026. Seven days before the original compliance deadline was to take effect, the federal agency charged with enforcing disability civil rights law had pushed that deadline past the population of disabled users for whom the rule existed.

The extension is reported by the Department as discretionary regulatory relief responsive to resource constraints identified by public entity recipients.[2] The extension is not within the scope of this Article. What is within the scope of this Article is the pattern the extension exemplifies.

The pattern is familiar to any practitioner, scholar, or complainant engaged with Section 504 of the Rehabilitation Act or ADA Title II. Disabled persons seeking protection under these statutes confront an enforcement architecture characterized by overlapping statutory regimes with inconsistent procedural requirements, regulatory carve-outs that narrow coverage without statutory authorization, administrative exhaustion doctrines that displace private remedies, judicial interpretations that limit available damages, and publication gatekeeping that controls the development of the doctrine itself. The cumulative effect of this architecture is that the protected class bears a systematically higher procedural cost to invoke the statutory protection than the non-disabled comparators whose access the statutes were designed to equalize.

This Article argues that the enforcement architecture itself constitutes a method of administration that disparately impacts the population the statutes exist to protect, and that this disparate impact is actionable under the statutes' own methods-of-administration regulations: 28 C.F.R. § 39.130(b)(3) for the Department of Justice's own programs and activities under Section 504; 28 C.F.R. § 35.130(b)(3) for state and local public entity implementation under ADA Title II; and 45 C.F.R. § 84.68(b)(3)[3] and parallel agency regulations for recipients of federal financial assistance. A jurisdictional clarification is appropriate at the outset. ADA Title II's "public entity" definition at 42 U.S.C. § 12131(1) is limited to state and local government instrumentalities and does not reach federal agencies.[4] Federal agencies are reached, however, by Section 504 as applied to executive agencies under 29 U.S.C. § 794(a), and by Administrative Procedure Act review of discrete final agency actions.[5]

The pond analogy clarifies the structure. A federal agency sits at the edge of a pond into which it drips discriminatory architecture. Downstream, state and local governments implementing the architecture draw from the pond and the drinking population is affected. Title II reaches the state and local governments doing the drawing. Section 504 reaches the federal agency doing the dripping in its capacity as executive agency. APA review reaches specific drips as discrete final agency actions. No single statute encompasses the entire causal chain. The three statutes together do.

The Department of Justice is an executive agency under 29 U.S.C. § 794(a). Its rulemaking, coordination, guidance, and enforcement practices are programs or activities conducted by that executive agency. The implementing regulation

[1] Interim Final Rule, Accessibility of Web Information and Services of State and Local Government Entities, 91 Fed. Reg. (to be codified Apr. 20, 2026) (extending compliance deadlines at 28 C.F.R. § 35.200 by one year for both population tiers).

[2] Department of Justice, Interim Final Rule Preamble (Apr. 17, 2026) (identifying public entity comments submitted in response to the October 2025 regulatory agenda and the February 2026 Interim Final Rule submission to OIRA as the basis for the extension).

[3] The methods-of-administration provision was redesignated from former 45 C.F.R. § 84.4(b)(4) to 45 C.F.R. § 84.68(b)(3) by HHS final rule, 89 Fed. Reg. 40180 (May 9, 2024), effective July 8, 2024. The substantive text was preserved verbatim; only the section number was changed. Throughout this Article, citations are to the current § 84.68(b)(3).

[4] 42 U.S.C. § 12131(1); *see also Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 94 (2d Cir. 2000) (federal government not a "public entity" under Title II).

[5] 29 U.S.C. § 794(a) (Section 504 prohibition extends to "any program or activity conducted by any Executive agency"); 5 U.S.C. §§ 702, 704, 706 (APA review of final agency action).

for the Department's own conduct is 28 C.F.R. Part 39, which includes the methods-of-administration prohibition at § 39.130(b)(3).[6] The state and local governments that implement federal civil rights guidance, including through their own Section 504 and Title II compliance obligations, are public entities subject to Title II and recipients subject to Section 504 in their own right. Their implementation of federal guidance does not shield them from Title II liability where the implementation produces disparate impact; 28 C.F.R. § 35.130(b) reaches public entity conduct "directly or through contractual, licensing, or other arrangements."[7] The April 17, 2026 Interim Final Rule, together with other specific federal rulemaking products and guidance documents, constitutes discrete final agency action reviewable under the APA. Article III standing for the IFR challenge rests on the continuing-injury theory: the extension of compliance deadlines does not merely delay agency action but affirmatively continues the discriminatory condition that the underlying 2024 rule was designed to remediate, producing concrete and particularized injury to the protected class during the extension period. The ripeness inquiry is satisfied for the same reason. The challenge is accordingly available under 5 U.S.C. § 706(2)(A) and (D) on arbitrary-and-capricious and procedural-defect grounds.

The claim advanced here is doctrinally modest in its components. The methods-of-administration disparate impact framework is settled, operating under regulations that have been in force since 1977 and 1980 respectively.[8] The *Alexander v. Choate* meaningful-access standard is Supreme Court precedent.[9] The specific object of analysis, the enforcement architecture itself, is what is novel. The claim is that the procedural system for invoking disability rights protection is not exempt from the disability rights analysis the system was designed to conduct. If the protected class systematically bears higher cost to invoke the protection than the non-disabled comparator, and if the architecture that produces that cost is susceptible to redesign consistent with the statutory objective, then the architecture is a method of administration that violates the regulations cited above, the statutes they implement, and the judicial meaningful-access standard.

Part II of this Article sets out the statutory and regulatory framework, including the text of Section 504 and ADA Title II, the three relevant methods-of-administration regulations, the jurisdictional allocation among Section 504, Title II, and APA review, and the Supreme Court's construction of meaningful access in *Alexander v. Choate* and subsequent cases. Part III develops the disparate impact analysis as applied to the enforcement architecture, identifying the three structural features that produce disparate burden: overlapping statutory pathways, regulatory carve-outs not grounded in statutory text, and procedural complexity that imposes differential cost on a protected class whose defining characteristics include reduced capacity to absorb that cost. Part IV conducts a detailed case study of the guaranty exemption at 28 C.F.R. § 41.3(e)(3), showing that this regulatory carve-out is inconsistent with Section 504's plain text, inconsistent with how the federal government itself classifies guaranty and insurance transactions for other purposes, and particularly vulnerable to challenge under *Loper Bright Enterprises v. Raimondo*. Part V addresses the protected class analysis, focusing on the subset of disabled persons for whom cognitive, temporal, and financial burden is itself a definitional barrier. Part VI develops the remedy analysis, identifying structural injunctive relief in the *Olmstead* pattern as appropriate, consistent with existing doctrinal frameworks, and not foreclosed by *Cummings v. Premier Rehab Keller* or by separation of powers concerns regarding structural injunctions against federal agencies. Part VII presents a reflexive disclosure concerning the publication venues for disability rights scholarship and the probabilistic assistive technology tools used in its production, both of which are themselves recipients or providers subject to the analysis developed here. Part VIII identifies four pathways through which the framework can be developed in practice, leading with method-of-administration counts in existing litigation as the strategically preferable near-term approach.

[6] 28 C.F.R. § 39.130(b)(3) (DOJ's Section 504 regulation for its own programs and activities).

[7] 28 C.F.R. § 35.130(b).

[8] 45 C.F.R. § 84.68(b)(3), promulgated 42 Fed. Reg. 22676 (May 4, 1977); 28 C.F.R. § 35.130(b)(3), promulgated 56 Fed. Reg. 35694 (July 26, 1991); 28 C.F.R. § 39.130(b)(3), promulgated by DOJ for its own Section 504 obligations.

[9] *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

Part IX concludes.

Plaintiff Archetypes

The framework admits several plaintiff archetypes, each with distinct standing, injury, redressability, and defendant configurations. The archetypes are presented here to orient the analysis that follows; each is developed in Part VIII.

The recipient-level complainant. A disabled person who has been subjected to differential procedural burden by a federal-assistance recipient (a state agency, school district, hospital system, housing authority, or private recipient) in the recipient's administration of accommodations, grievances, or appeals. Standing runs through the recipient's conduct under 45 C.F.R. § 84.68(b)(3). Injury is the differential burden experienced. Redressability is modification of the recipient's challenged procedural architecture. Defendant is the recipient.

The Title II complainant. A disabled person who has been subjected to differential procedural burden by a state or local public entity in the entity's implementation of federal civil rights guidance. Standing runs through the public entity's conduct under 28 C.F.R. § 35.130(b)(3). Injury, redressability, and defendant parallel the recipient archetype, with the statutory track shifted from Section 504 to ADA Title II.

The federal-agency complainant. A disabled person who has been subjected to differential procedural burden arising from the Department of Justice's own Section 504 coordination practices, enforcement architecture, or discrete rulemaking and guidance products. Standing runs through the agency's own conduct under 28 C.F.R. § 39.130(b)(3) (for the agency's Section 504 obligations) and under the Administrative Procedure Act for review of discrete final actions. Injury is the differential burden produced by the agency's own architecture. Redressability is modification of the specific agency practice challenged. Defendant is the Department of Justice (and, where applicable, the Attorney General in her official capacity).

The count-addition plaintiff. A plaintiff with an existing Section 504 or ADA Title II claim in another context (employment, education, public benefits, housing, digital accessibility) who adds a methods-of-administration count alleging that the defendant's procedural architecture for processing the underlying claim itself constitutes cognizable disparate impact. Standing runs through the underlying action. Injury is the procedural burden layered atop the substantive claim. Redressability is modification of the defendant's procedural architecture as incident to resolution of the substantive claim. Defendant is the defendant in the underlying action.

The four archetypes are cumulative rather than exclusive. A single plaintiff may occupy more than one at once, and a well-pleaded complaint may allege method-of-administration violations against multiple defendants under multiple regulatory tracks.

II. Statutory and Regulatory Framework

A. Section 504 and Its Methods-of-Administration Regulation

Section 504 of the Rehabilitation Act of 1973 provides that "no otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance, or under any program or activity conducted by any Executive agency."[10] The statute's substantive prohibition reaches recipients of federal financial assistance and executive agencies, and its scope was clarified by the Civil Rights Restoration Act of 1987 to extend coverage to the full operations of an entity where any part of the entity receives

[10] 29 U.S.C. § 794(a).

federal financial assistance, subject to specified exceptions for private corporations.[11]

The methods-of-administration regulation operationalizing Section 504 is found at 45 C.F.R. § 84.68(b)(3) for Department of Health and Human Services recipients and in parallel regulations of every agency with Section 504 jurisdiction.[12] The HHS regulation provides in relevant part:

> A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:. . . (4) Utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons. . . [13]

The regulation is framed in effects terms. A recipient's criteria or methods of administration violate the regulation where they have the effect of subjecting qualified disabled persons to discrimination or of defeating or substantially impairing the objectives of the program with respect to disabled persons. The regulation does not require intentional discrimination. It does not require animus. It does not require that the challenged practice be directed at disabled persons specifically. It reaches facially neutral practices whose effect is discriminatory.

The Department of Justice's Section 504 coordination regulations at 28 C.F.R. Part 41 provide the interagency framework for Section 504 enforcement. 28 C.F.R. § 41.51(b)(3) contains the parallel methods-of-administration prohibition applicable across all federal agencies in their Section 504 coordination capacity.[14] The Department's coordination regulations also contain definitional provisions, including the definition of federal financial assistance at 28 C.F.R. § 41.3(e), which governs what transactions trigger Section 504 obligations. Part IV of this Article addresses the guaranty exemption contained in that definitional section.

B. ADA Title II and Its Methods-of-Administration Regulation

ADA Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[15] Public entity is defined to include "any State or local government," "any department, agency, special purpose district, or other instrumentality of a State or States or local government," and two specifically named entities (the National Railroad Passenger Corporation and any commuter authority).[16] The definition does not include federal agencies. Courts have consistently held that federal agencies and the federal government generally are not "public entities" within the meaning of Title II.[17] Federal agency obligations on the same subject matter are imposed through Section 504's application to executive agencies under 29 U.S.C. § 794(a), through Section 501 for federal-sector employment, and through Section 508 for federal electronic and information technology.

The Department of Justice's Title II regulations at 28 C.F.R. Part 35 contain the methods-of-administration prohibition at § 35.130(b)(3):

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[11] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28; codified as 29 U.S.C. § 794(b).

[12] 34 C.F.R. § 104.4(b)(4) (Education); 28 C.F.R. § 42.503(b)(3) (DOJ-enforced Section 504 programs); 49 C.F.R. § 27.7(b)(1)(iv) (Transportation); 24 C.F.R. § 8.4(b)(1)(iv) (Housing and Urban Development); 7 C.F.R. § 15b.4(b)(4) (Agriculture).

[13] 45 C.F.R. § 84.68(b)(3).

[14] 28 C.F.R. § 41.51(b)(3).

[15] 42 U.S.C. § 12132.

[16] 42 U.S.C. § 12131(1).

[17] *See, e.g.*, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 94 (2d Cir. 2000); *Fleming v. Yuma Regional Medical Center*, 587 F.3d 938, 940 n.1 (9th Cir. 2009) (Title II does not apply to federal agencies).

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or (iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.[18]

The Title II regulation is substantively parallel to its Section 504 counterpart. It prohibits both direct and indirect utilization of methods of administration that discriminate. It is framed in effects terms. It reaches third-party arrangements through the "contractual or other arrangements" language. And it includes an additional prong, subsection (iii), that prohibits perpetuation of discrimination between public entities under common administrative control. Subsection (b) also prohibits public entity discrimination conducted "directly or through contractual, licensing, or other arrangements,"[19] language that reaches state and local government implementation of federal guidance where the implementation produces disparate impact.

C. Section 504 as Applied to Executive Agencies and 28 C.F.R. Part 39

Section 504 extends the statute's anti-discrimination prohibition to "any program or activity conducted by any Executive agency."[20] This clause reaches federal executive agencies directly, independent of whether they are recipients of federal financial assistance from other sources.

The implementing regulation for the Department of Justice's own conduct under Section 504 is 28 C.F.R. Part 39, which contains the methods-of-administration prohibition at § 39.130(b)(3):

> The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap… (4) Utilize criteria or methods of administration the purpose or effect of which would (i) Subject qualified handicapped persons to discrimination; or (ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons…[21]

Part 39 is the operative methods-of-administration regulation for the Department's own programs and activities. Where the object of the method-of-administration analysis is the Department's own coordination, rulemaking, guidance, or enforcement conduct, the applicable regulation is 28 C.F.R. § 39.130(b)(3), not § 35.130(b)(3). The latter applies to the Department's external conduct as regulator of state and local public entities; the former applies to the Department's internal conduct as a federal executive agency subject to Section 504.

D. The Three-Track Jurisdictional Allocation

The analysis in this Article distributes across three statutory tracks. Each track has a distinct defendant class, a distinct causation theory, a distinct remedy, and a distinct procedural vehicle. A complete method-of-administration challenge to the enforcement architecture proceeds on all three tracks in parallel rather than through any single statute.

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[18] 28 C.F.R. § 35.130(b)(3).

[19] 28 C.F.R. § 35.130(b).

[20] 29 U.S.C. § 794(a). The "conducted by any Executive agency" language was added by the Rehabilitation Act Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982.

[21] 28 C.F.R. § 39.130(b)(3)-(4). Numbering reflects the regulation's internal structure; the methods-of-administration prohibition is substantively identical to that in 45 C.F.R. § 84.68(b)(3) and 28 C.F.R. § 35.130(b)(3).

Track one reaches the Department of Justice and other executive agencies under Section 504 and 28 C.F.R. Part 39. The defendant is the federal agency itself. The theory is that the agency's coordination, rulemaking, guidance, and enforcement practices are programs or activities conducted by an executive agency within the meaning of 29 U.S.C. § 794(a), and that those practices constitute methods of administration with disparate impact under 28 C.F.R. § 39.130(b)(3). The procedural vehicle is a declaratory judgment action with concurrent request for structural injunctive relief, brought under the APA's general waiver of sovereign immunity at 5 U.S.C. § 702.

Track two reaches state and local public entities under ADA Title II and 28 C.F.R. § 35.130(b). The defendant is the state or local government implementing federal civil rights architecture. The theory is that the implementation itself, considered apart from the federal source, constitutes a method of administration with disparate impact. The public entity cannot deflect liability upstream; it retains independent responsibility for non-discriminatory implementation under 28 C.F.R. § 35.130(b)'s "contractual or other arrangements" language. The procedural vehicle is private litigation under Title II, potentially consolidated or coordinated across jurisdictions.

Track three reaches discrete final federal agency actions under the Administrative Procedure Act. The defendant is again the federal agency, but the theory is narrower. The claim is that a specific rulemaking, guidance, or enforcement action is arbitrary, capricious, or not in accordance with law under 5 U.S.C. § 706(2)(A), or was adopted without required procedure under § 706(2)(D). The April 17, 2026 Interim Final Rule is a discrete final agency action of this character. The guaranty exemption at 28 C.F.R. § 41.3(e)(3), to the extent it narrows statutory coverage without textual grounding, is another. The procedural vehicle is an APA action for vacatur of the challenged agency action.

The three tracks converge in their practical effect. Track one produces declaratory and structural injunctive relief against DOJ's systemic architecture. Track two produces Title II liability against state and local implementers whose implementation of DOJ guidance produces disparate impact, which creates downstream litigation pressure on state and local entities to push back on federal guidance they anticipate will yield discriminatory implementation. Track three produces targeted vacatur of specific federal actions, which removes specific sources of discriminatory downstream architecture. The tracks are not cumulative in the sense of requiring exhaustion in any particular sequence; they operate in parallel and a plaintiff or advocacy coalition can pursue any combination of them simultaneously.

The metaphor that clarifies the structure: a federal agency sits at the edge of a pond into which it drips discriminatory architecture. State and local governments downstream draw from the pond, and the population drinking from their wells bears the consequences. Title II reaches the state and local governments doing the drawing. Section 504 reaches the federal agency doing the dripping in its capacity as executive agency. APA review reaches specific drips as discrete final agency actions. No single statute encompasses the entire causal chain. The three statutes together do.

E. Meaningful Access Under Alexander v. Choate

The Supreme Court construed the substantive scope of Section 504 in *Alexander v. Choate*, holding that the statute's prohibition of discrimination on the basis of handicap reaches practices that deny meaningful access to the benefits a recipient provides.[22] Justice Marshall, writing for a unanimous Court, grounded the meaningful access standard in the legislative history of Section 504 and in the practical recognition that discrimination against disabled persons "was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference, of benign neglect."[23]

The meaningful access standard was further developed in *School Board of Nassau County v. Arline*,[24] which

[22] *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

[23] *Id.* at 295.

[24] 480 U.S. 273, 287-88 (1987).

applied the standard to employment context; in *Olmstead v. L.C.*,[25] which applied the standard to integration of institutionalized persons with disabilities into community settings; and in the 2024 HHS final rule implementing Section 504 digital accessibility requirements, which incorporated meaningful access as the governing standard for digital recipient obligations.[26]

The standard has two components that are material to the analysis developed here. First, meaningful access requires more than formal availability; the benefit must be practically reachable by the disabled person. A government service that is nominally open to all but whose access architecture imposes barriers that non-disabled users do not confront is not providing meaningful access. Second, meaningful access is measured against the access that non-disabled comparators receive. If non-disabled persons receive the benefit at substantially lower cost, the disabled person's access is not meaningful unless the cost differential is independently justified.

The claim developed in the remainder of this Article is that the statutory protection itself is a benefit within the meaning of *Choate*, and that the enforcement architecture through which the protection is invoked must be measured against the meaningful access standard. If invoking the statutory protection imposes cost on the protected class that non-disabled comparators do not confront in analogous legal contexts, the architecture fails the *Choate* standard with respect to the protected class.

F. The Private Right of Action Question and the Lemahieu Anchor

A threshold doctrinal question must be addressed before the claim developed in this Article can proceed. In *Alexander v. Sandoval*, the Supreme Court held that private plaintiffs cannot enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964 through an implied private right of action, because the text of Title VI itself prohibits only intentional discrimination and the disparate-impact regulations accordingly exceed the statute's private-right-of-action scope.[27] Because Section 504 of the Rehabilitation Act is modeled on Title VI and incorporates its enforcement structure by cross-reference,[28] *Sandoval*'s holding raises the question whether private plaintiffs can enforce Section 504's methods-of-administration regulation under 45 C.F.R. § 84.68(b)(3) and the parallel Title II regulation at 28 C.F.R. § 35.130(b)(3), which on their face reach facially neutral practices with disparate impact.

The answer is that private plaintiffs can enforce these regulations where the regulations are properly understood as authoritative constructions of the statutes' own meaningful-access requirement rather than as extensions of statutory coverage beyond intentional discrimination. The Ninth Circuit addressed this question directly in *Mark H. v. Lemahieu*, which held that Section 504's implementing regulations, including those prohibiting methods of administration with discriminatory effect, are privately enforceable where they construe the statute's prohibition of disability discrimination rather than extend it.[29] The doctrinal move is straightforward. Section 504's substantive prohibition of disability discrimination, as construed in *Alexander v. Choate*, reaches practices that deny meaningful access to the benefits a recipient provides.[30] A method of administration that produces the outcome *Choate* prohibits, by imposing cost on the protected class that non-disabled comparators do not confront, violates the statute's meaningful-access requirement as

[25] 527 U.S. 581, 601 (1999).

[26] Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066 (May 9, 2024), codified at 45 C.F.R. Part 84.

[27] *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001).

[28] 29 U.S.C. § 794a(a)(2) (incorporating the remedies, procedures, and rights set forth in Title VI for Section 504 claims against recipients).

[29] *Mark H. v. Lemahieu*, 513 F.3d 922, 937-38 (9th Cir. 2008) (holding that regulations construing Section 504's substantive prohibition are enforceable through the statute's private right of action, and distinguishing such regulations from those that extend beyond the statute's scope).

[30] *Choate*, 469 U.S. at 299.

Choate construed it. The methods-of-administration regulation at 45 C.F.R. § 84.68(b)(3) is properly understood as the Department of Health and Human Services's authoritative construction of that statutory requirement, enforceable under Section 504's private right of action as recognized in *Barnes v. Gorman* through the Title VI cross-reference.[31] The claim developed in this Article accordingly does not depend on a pure disparate-impact theory that *Sandoval* foreclosed. It depends on meaningful access under *Choate*, operationalized through methods-of-administration regulations that construe the *Choate* requirement, as the Ninth Circuit recognized in *Lemahieu*. The parallel analysis applies to ADA Title II's implementing regulation at 28 C.F.R. § 35.130(b)(3) and to the Department of Justice's own Section 504 regulation at 28 C.F.R. § 39.130(b)(3), each of which operates as an authoritative construction of the corresponding statute's meaningful-access requirement.

III. The Enforcement Architecture as Method of Administration

Limiting Principles

Because the argument developed in this Part could be read more broadly than intended, three limiting principles are stated at the outset. First, this Article does not argue that all procedural complexity in the federal civil rights enforcement architecture is unlawful. Legal procedure necessarily encodes requirements that impose cost on all litigants, and the argument reaches differential cost imposed on a population whose defining characteristics include reduced capacity to absorb that cost, not cost imposed on litigants generally. Second, this Article does not argue for identical treatment of all procedural features. The strongest cases for relief are those in which the state or a covered entity produces public-facing enforcement architecture that functions as a required gateway to statutory rights, with procedural features whose cumulative effect systematically burdens the protected class. More remote procedural features, and features whose differential cost on the protected class is speculative or minimal, fall outside the argument's operational reach. Third, this Article does not argue that the enforcement architecture must satisfy universal accessibility. It argues that public-facing enforcement architecture must satisfy a reasonable-modifications standard that reaches the cognitive subset of the protected class, as the Supreme Court's construction of the statute in *Choate* requires, without reaching all members of the general public regardless of capacity.

A. The Benefit as the Protection Itself

The anti-discrimination protections of Section 504 and ADA Title II are benefits within the meaning of the statutes they establish. This is not a metaphorical claim. The Supreme Court has repeatedly characterized civil rights statutes as creating benefits conferred by Congress on the protected class, enforceable through the mechanisms Congress has provided.[32] The protections are what the statutes do.

Where a recipient's method of administration imposes differential cost on the protected class for invoking the substantive protection the statute creates, that method of administration subjects the protected class to discrimination on the basis of disability within the meaning of the applicable methods-of-administration regulation. The specific regulation varies by the identity of the defendant: 28 C.F.R. § 39.130(b)(3)(i) for the Department of Justice's own conduct as a federal executive agency, 28 C.F.R. § 35.130(b)(3)(i) for state and local public entities, and 45 C.F.R. § 84.68(b)(3)(i) and parallel agency regulations for recipients of federal financial assistance. The analysis is substantively parallel across

[31] *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (confirming Section 504's private right of action through Title VI incorporation).

[32] *See Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (recognizing implied private right of action under Title IX and characterizing the statute as "unquestionably intended to benefit" the protected class); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286 (1998) (same with respect to Title IX); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (treating Title VI as creating a benefit to the protected class).

the three regulations; the differences are jurisdictional, not doctrinal. The point is not that the protection is being denied on its merits; the point is that the procedural cost of obtaining the protection is systematically higher for the protected class than for any non-disabled comparator, with the result that the protected class receives less benefit per unit of effort than the population the statute was intended to equalize with non-disabled persons.

The structure of the argument does not depend on any particular feature of the enforcement architecture being uniquely or independently defective. It depends on the cumulative effect of the architecture imposing differential cost on a population whose defining characteristics include, for many of its members, reduced capacity to absorb that cost. The analysis that follows identifies three structural features of the enforcement architecture whose cumulative effect produces the disparate impact at issue.

B. Structural Feature One: Overlapping Statutory Pathways with Inconsistent Requirements

A disabled person seeking civil rights relief in the United States encounters at least six distinct statutory pathways, each with distinct procedural requirements. Section 504 of the Rehabilitation Act governs recipients of federal financial assistance. Section 501 of the Rehabilitation Act governs federal executive branch employment. Section 503 of the Rehabilitation Act governs federal contractors. Section 508 of the Rehabilitation Act governs federal agency electronic and information technology. ADA Title I governs employment. ADA Title II governs state and local government. ADA Title III governs public accommodations. The Fair Housing Amendments Act governs housing. The Air Carrier Access Act governs air travel. The Architectural Barriers Act governs federally constructed buildings. IDEA governs educational services for children with disabilities. Individual state statutes often provide parallel or broader protections.

Each of these statutes has its own administrative exhaustion requirements, its own enforcement agency, its own regulatory interpretations, its own remedies, its own statutes of limitation, and its own judicial gloss. Whether a given claim properly proceeds under ADA Title II or Section 504, or both, or one rather than the other, is a question that requires substantive legal analysis to answer. Whether administrative exhaustion is required before judicial review is a question that varies by statute and by agency. Whether particular damages are available depends on which statute the claim is brought under and on the constitutional status of the enforcement mechanism.

The complexity is not accidental. It is the product of Congress enacting successive statutes over roughly thirty-five years, each directed at particular contexts, each building on the existing framework rather than replacing it. The architecture is path-dependent and reflects historical accretion rather than systematic design. But the complexity, whatever its provenance, imposes real cost on disabled complainants. The cost takes several forms. There is the cognitive cost of identifying which statutory pathway applies to a given claim. There is the temporal cost of navigating administrative exhaustion in multiple parallel agencies. There is the financial cost of obtaining competent legal counsel whose expertise spans the several statutory regimes. And there is the opportunity cost of time, attention, and energy that the disabled person must expend on the procedural architecture rather than on substantive engagement with the discrimination itself.

Non-disabled persons seeking relief in analogous legal contexts do not confront this particular form of cumulative complexity. A non-disabled plaintiff alleging employment discrimination on the basis of race, for example, has essentially one federal pathway (Title VII) with one primary enforcement agency (EEOC) and a well-developed procedural architecture. A non-disabled plaintiff alleging sex discrimination in education has essentially one federal pathway (Title IX). A disabled plaintiff alleging discrimination in public services may have claims under ADA Title II, Section 504, the relevant state disability law, and potentially under additional federal statutes depending on the specific services at issue. The procedural architecture the disabled plaintiff must traverse to obtain a remedy is simply more extensive than the architecture any non-disabled comparator traverses.

The disparate cost is itself the disparate impact. The architecture imposes systematically higher procedural burden on the protected class in the process of invoking the protection, and the burden is felt by the protected class specifically because the disabled person is the one seeking the remedy the architecture controls access to.

C. Structural Feature Two: Regulatory Carve-Outs Not Grounded in Statutory Text

The second structural feature is the accretion of regulatory carve-outs that narrow the scope of statutory protection without grounding in the statute itself. The principal case study developed in Part IV of this Article is the guaranty exemption at 28 C.F.R. § 41.3(e)(3), which defines federal financial assistance for Section 504 purposes as excluding "a contract of insurance or guaranty," language that does not appear in Section 504 of the Rehabilitation Act.[33] The exemption is regulatory, not statutory, and its consistency with the statute is contestable.

Beyond the guaranty exemption, additional regulatory carve-outs and limitations narrow Section 504 and ADA Title II coverage in ways that must be learned, tracked, and rebutted by every complainant. The recipient definition's "ultimate beneficiary" exclusion operates in some contexts to remove downstream users of federal assistance from coverage.[34] The "principal engagement" requirement for Section 504's corporate coverage limits the enumerated-category coverage to entities principally engaged in education, health care, housing, social services, or parks and recreation.[35] Various fundamental alteration and undue burden exceptions limit the obligation to accommodate.[36]

Each exception and limitation has legitimate roots. Each is defensible in isolation. But the cumulative effect is that the statutory protection, which reads in the text as broad and categorical, is in practice narrow and case-specific, available only to the complainant who successfully navigates around each exception in turn. The complainant who lacks the resources to conduct the analysis, or who cannot sustain the procedural engagement necessary to contest each exception, loses access to the protection regardless of whether the exceptions would properly apply to the complainant's case on the merits.

The disparate impact analysis does not require that any particular exception be improper in every case. It requires only that the cumulative effect of the exceptions be to impose differential cost on the protected class, and that the protected class be the class that systematically bears that cost. The cognitive and resource demands of navigating a dense network of regulatory exceptions fall on the claimant, not on the recipient. The recipient invokes exceptions as defensive shields. The claimant must anticipate, analyze, and rebut each one. For a protected class whose defining characteristics include reduced cognitive, temporal, and financial capacity, the exception architecture is itself a method of administration that imposes disparate burden.

D. Structural Feature Three: Procedural Complexity and Differential Cost

The third structural feature is the overall procedural complexity of disability rights enforcement, understood as the aggregate cognitive, temporal, and financial cost of invoking the protection. This feature is related to but distinct from the first two. Overlapping statutes (feature one) and regulatory carve-outs (feature two) are specific elements of the architecture; procedural complexity is the aggregate effect of those elements together with additional procedural features that are not themselves exceptions or pathway choices but that impose independent burden.

Administrative complaint processes at the Office for Civil Rights, at the Equal Employment Opportunity Com-

[33] 29 U.S.C. § 794(a) (containing no guaranty exemption).

[34] *See Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (airlines not recipients because federal assistance flowed to airports rather than to airlines).

[35] 29 U.S.C. § 794(b)(3)(B).

[36] 45 C.F.R. § 84.84(g); 28 C.F.R. § 35.164.

mission, at the Department of Housing and Urban Development, and at other agencies typically require written documentation meeting specific formal requirements, adherence to limitations periods that vary by agency and by claim type, and engagement with investigative processes that can extend for years.[37] Judicial review of administrative determinations requires exhaustion in many contexts. The decision whether to pursue administrative remedies, private litigation, or both is itself a legal question that requires counseling.

The cumulative cognitive cost of this architecture is substantial. It is also, for a large portion of the protected class, disproportionate to their capacity. The protected class under Section 504 and ADA Title II includes persons with diagnosed executive function impairments, cognitive disabilities, intellectual disabilities, traumatic brain injury, long COVID cognitive sequelae, chronic pain with associated cognitive effects, and psychiatric conditions that impair sustained attention and task completion. These diagnostic categories are not marginal within the protected class. They define substantial portions of it. For these members of the protected class, engaging with the enforcement architecture is itself a disabling task.

The situation is not parallel to the general observation that law is complex and that non-disabled persons also struggle with it. Non-disabled persons also struggle with stairs, and the law has concluded that the observation is not a defense to the claim that stairs deny meaningful access to persons in wheelchairs. The relevant comparison is not between disabled and non-disabled persons in the abstract. It is between the disabled person seeking disability rights protection and the non-disabled person seeking any other legal protection. The non-disabled person is not systematically constrained by the protected characteristics that define the disability rights claimant's burden. The disability rights claimant's procedural cost is tied to the same characteristics that entitle the claimant to the substantive protection. That coincidence is not accidental; it is constitutive of the claim.

E. Structural Feature Four: Legalese and the Text of the Law

A fourth structural feature is the specialized language convention used in the drafting of statutes, regulations, and judicial decisions. The convention imposes cognitive cost on readers beyond the cost imposed by the substantive complexity of the underlying legal content. This additional cost is what is meant by the term "legalese": syntactic conventions including deeply nested subordination, long sentence length with multiple embedded clauses, archaic and foreign-language survivals (Latin and Law French), terms of art whose technical definitions diverge from ordinary meaning, and stylistic conventions (passive voice, nominalization, absence of explanatory prose) that favor formal precision over communicative accessibility.[38]

The cognitive cost of legalese is independent of the cognitive cost of the substantive legal content. A statute stating that a disabled person may file a complaint with a specified agency within a specified time period is substantively straightforward. The same statute written with the conventional apparatus of legalese, introducing cross-references to other provisions, nesting the time limitation inside conditional clauses, using passive voice and nominalization, and invoking terms of art, imposes cognitive cost on the reader that is not required by the underlying substance. The cost is an artifact of the drafting convention, not of the regulatory content.

For the cognitive subset of the protected class identified in the preceding subsection, legalese operates as an additional barrier layered atop the already-analyzed procedural complexity. Executive function impairment, working

[37] *See* 45 C.F.R. Part 80 Subpart B (HHS OCR complaint procedures); 34 C.F.R. Part 100 Subpart C (ED OCR complaint procedures); 29 C.F.R. § 1614.105 (EEOC pre-complaint counseling requirements for federal sector claims).

[38] The foundational scholarly treatment is David Mellinkoff, *The Language of the Law* (1963). Peter M. Tiersma, *Legal Language* (1999), extends and updates Mellinkoff's analysis with attention to contemporary legal writing. Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (2006), documents plain language reform efforts and empirical research on comprehension costs of conventional legal drafting.

memory limitations, sustained attention deficits, and related diagnostic features impose disproportionate cost on the reader confronting conventional legal drafting, independent of the reader's substantive capacity to understand the legal content once extracted from the drafting convention. The 2010 Plain Writing Act recognized the problem for federal agency public-facing communications but did not reach the underlying statutes, regulations, or judicial decisions through which the substantive law is promulgated.[39]

The full treatment of legalese as a method of administration, including its interaction with the fundamental constitutional right of self-representation recognized in *Faretta v. California* and the right of meaningful access to courts recognized in *Tennessee v. Lane*, is beyond the scope of this Article. The present Article identifies legalese as a structural feature of the enforcement architecture alongside the three features analyzed in preceding subsections, notes its particular severity for the cognitive subset of the protected class, and reserves the full doctrinal treatment for separate development. For present purposes, the point is that the text of the law itself is not exempt from the method-of-administration analysis the Article develops. A statute or regulation whose drafting convention imposes differential cognitive cost on the protected class is a method of administering the underlying legal protection, and the analysis of its consistency with 28 C.F.R. § 39.130(b)(3), 28 C.F.R. § 35.130(b)(3), and 45 C.F.R. § 84.68(b)(3) proceeds on the same terms as the analysis of the other features examined here.

IV. The Guaranty Exemption as Case Study

A. *The Exemption's Regulatory Origin and Statutory Status*

Section 504 of the Rehabilitation Act prohibits discrimination under any program or activity receiving federal financial assistance.[40] The statute does not define federal financial assistance. The Department of Justice's coordination regulations provide the operative definition at 28 C.F.R. § 41.3(e), which states in relevant part that federal financial assistance means "any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Federal agency provides or otherwise makes available assistance."[41] Each exclusion operates as a regulatory carve-out. The procurement contract exclusion and the guaranty exclusion are the two principal exclusions at issue in the present analysis.

Neither exclusion is found in the text of Section 504. The statute prohibits discrimination under any program or activity receiving federal financial assistance without qualifying the term financial assistance to exclude any particular category of transaction. The exclusions are regulatory constructs layered onto the statutory text by the agency charged with interpreting and coordinating the statute.

A regulation not grounded in statutory text is vulnerable to challenge where the regulation operates to narrow the statute's scope. That vulnerability has changed in character with the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[42] which overruled *Chevron* deference to agency interpretations of ambiguous statutes. Under *Chevron*, a reviewing court was required to defer to an agency's reasonable interpretation of an ambiguous statutory term. Under *Loper Bright*, a reviewing court must exercise independent judgment in determining the meaning of a statute, treating agency interpretations as at most persuasive authority.[43] The implication for regulatory carve-outs

[39] Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (requiring federal agencies to use "plain writing" in documents issued to the public, but not reaching the text of regulations themselves).

[40] 29 U.S.C. § 794(a).

[41] 28 C.F.R. § 41.3(e).

[42] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), *overruling Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[43] *Loper Bright*, 603 U.S. at 412-13.

that narrow statutory protection without textual grounding is substantial. A regulation that excludes a category of transactions from federal financial assistance without statutory anchor is now subject to judicial re-examination under the plain-text standard.

B. Federal Agency Classification of Insurance and Guaranty Transactions as Assistance

The guaranty exemption's instability is heightened by its inconsistency with how the federal government itself classifies insurance and guaranty transactions for other purposes. The analysis here draws on three bodies of federal practice that treat insurance and guaranty as assistance.

First, the Catalog of Federal Domestic Assistance (now the System for Award Management's Assistance Listings) classifies political risk insurance, loan guarantees, and insurance guaranty programs as forms of federal assistance. Overseas Private Investment Corporation political risk insurance is assigned CFDA number 70.003 "Foreign Investment Insurance" and is tracked as federal assistance to the insured party.[44] Small Business Administration loan guaranty programs are classified as federal assistance and tracked on USAspending.gov as assistance awards to the beneficiary rather than as procurement contracts.[45] Federal agency treatment is thus that insurance and guaranty constitute assistance.

Second, the Small Business Administration has taken the position in its own civil rights guidance that recipients of PPP loans are recipients of federal financial assistance for purposes of civil rights obligations during the life of the loan.[46] Courts have applied the SBA's characterization to find Title IX obligations attaching to PPP-receiving entities.[47] The SBA's treatment of guaranty-backed assistance as financial assistance for civil rights purposes is precisely inconsistent with the DOJ's Section 504 coordination regulation's treatment of the same category of transactions.

Third, the 2024 HHS final rule implementing Section 504 digital accessibility obligations at 45 C.F.R. § 84.84 applies to recipients providing or making available web content or mobile applications "directly or through contractual, licensing, or other arrangements."[48] The rule's "or other arrangements" language is broad enough to encompass transactional structures that fall outside the narrow categories the DOJ's coordination regulation excludes. The HHS rulemaking thus anticipates a broader reach of the underlying statute than the DOJ coordination regulation's exclusions would suggest.

The pattern is that other federal agencies and HHS's own rulemakings treat insurance, guaranty, and transactional arrangements more broadly than the DOJ coordination regulation's exclusions acknowledge. The DOJ coordination regulation is the outlier. Its exclusions were adopted at a time when *Chevron* deference made the regulation's consistency with the statute a non-issue because the agency's interpretation controlled. That is no longer the doctrinal background against which the regulation is evaluated.

C. The Exemption's Differential Effect

The guaranty exemption, whatever its abstract merits, operates in practice to shield an identifiable class of federal transactions from civil rights coverage. PPP loans, SBA loan guarantees, OPIC and DFC political risk insurance,

[44] System for Award Management, Assistance Listing 70.003 (Foreign Investment Insurance).

[45] *See* 2 C.F.R. § 200.40 (defining federal financial assistance for grants management purposes to include loan guarantees).

[46] Small Business Administration, *Information for Faith-Based Organizations Concerning CARES Act Programs* (2020) ("Receipt of a loan through any SBA program constitutes Federal financial assistance and carries with it the application of certain nondiscrimination obligations."). The guidance was cited as binding in *Buettner-Hartsoe v. Baltimore Lutheran High School Association*, 2022 WL 2869041 (D. Md. July 21, 2022).

[47] *Buettner-Hartsoe*, 2022 WL 2869041.

[48] 45 C.F.R. § 84.84.

federal mortgage insurance (FHA), federal deposit insurance (FDIC insurance obligations running to insured depository institutions), and various other federally guaranteed transactions all flow to recipients whose programs and activities may be affected by the recipient's discriminatory practices. The exemption's effect is to deny civil rights coverage to the populations affected by those recipients' practices while preserving coverage for the same populations where the federal money flows through grants rather than guarantees.

There is no principled reason why disability civil rights coverage should turn on the transactional structure of the federal financial relationship rather than on the fact of federal support. The statute's concern is with federal financial support of recipient programs, not with the particular structure through which the support flows. The regulatory carve-out introduces a structural distinction the statute does not make, with the effect of narrowing coverage.

Because the disabled persons who would be affected by coverage of guaranty-backed recipients are members of the same protected class as the disabled persons who are affected by coverage of grant-backed recipients, the carve-out's effect is to treat members of the protected class differently based on the unrelated circumstance of which kind of federal transaction supports the recipient whose practice affects them. That unequal treatment is itself a method of administration that subjects some qualified disabled persons to discrimination within the meaning of 45 C.F.R. § 84.68(b)(3) and 28 C.F.R. § 41.51(b)(3), administered by the coordinating agency that promulgated the exemption in the first place.

V. The Protected Class and Cognitive Accessibility

A. The Cognitive Subset of the Protected Class

Section 504 and ADA Title II protect qualified individuals with disabilities, defined to include persons with physical or mental impairments that substantially limit one or more major life activities.[49] The protected class is not homogeneous, and the impact of procedural complexity on the class is not uniform. The analysis in Part III identified a subset of the protected class for whom procedural complexity itself is a principal barrier: persons with executive function impairments, cognitive disabilities, intellectual disabilities, traumatic brain injury, long COVID cognitive sequelae, chronic pain with associated cognitive effects, and psychiatric conditions affecting sustained attention.

This cognitive subset is substantial. Executive function impairment is a defining diagnostic criterion of Attention Deficit Hyperactivity Disorder, which affects approximately 4.4 percent of American adults and 11 percent of American children under current diagnostic standards.[50] Autism spectrum disorder affects approximately 2.8 percent of American children and an increasing adult-diagnosed population.[51] Traumatic brain injury produces cognitive sequelae in a substantial fraction of patients, with an estimated 5.3 million Americans living with long-term TBI-related disability.[52] Long COVID with cognitive effects affects a material fraction of the estimated 17 million Americans with Long COVID, with cognitive symptoms reported in a substantial majority of long-duration cases.[53] Chronic pain affects approximately 20 percent of American adults, with associated cognitive effects documented in the clinical literature on "fibro fog" and related phenomena.[54] Psychiatric conditions affecting attention, including major depressive disorder, generalized

[49] 42 U.S.C. § 12102(1); 29 U.S.C. § 705(20)(B).

[50] R.C. Kessler et al., "The Prevalence and Correlates of Adult ADHD in the United States: Results From the National Comorbidity Survey Replication," 163 Am. J. Psychiatry 716 (2006); Centers for Disease Control and Prevention, National Survey of Children's Health (2022).

[51] Centers for Disease Control and Prevention, Autism and Developmental Disabilities Monitoring Network (2023 data).

[52] Brain Injury Association of America, Statistics (2023).

[53] Centers for Disease Control and Prevention, Long COVID Household Pulse Survey (2024).

[54] J. Dahlhamer et al., "Prevalence of Chronic Pain and High-Impact Chronic Pain Among Adults, United States, 2016," 67 MMWR Morb. Mortal. Wkly. Rep. 1001 (2018).

anxiety disorder, PTSD, and bipolar disorder, collectively affect a further substantial portion of the adult population.[55]

The cognitive subset is not an edge case. It is substantial and overlapping. The architecture of disability rights enforcement falls on this subset with disproportionate weight because the architecture requires sustained executive function, working memory engagement, attention to procedural detail, and the capacity to integrate multiple legal frameworks into coherent strategic decisions. The protected class's defining characteristics are, for a substantial fraction of the class, precisely the characteristics that make procedural complexity an independent barrier.

B. Cognitive Accessibility as an Element of Meaningful Access

The meaningful access standard of *Alexander v. Choate* has, in the judicial interpretation developed since 1985, been primarily applied to physical and sensory access. Courts have ordered physical accommodation of wheelchair users. Courts have ordered provision of auxiliary aids and services for deaf and blind users. Courts have, less frequently, addressed intellectual disability in the context of discrete services. The application of the meaningful access standard to cognitive accessibility of procedural systems is less developed.

The under-development of cognitive accessibility in disability rights doctrine is itself a feature of the enforcement architecture. Doctrine develops where cases are brought. Cases are brought where plaintiffs and their counsel can successfully navigate the procedural system. The procedural system imposes cognitive burden. Plaintiffs who lack the resources to overcome that burden do not bring cases. The doctrinal frontier therefore recedes from the cognitive-access issues that most affect the cognitive subset of the protected class. The architecture self-reinforces against examination.

The 2024 HHS final rule implementing Section 504 digital accessibility requirements at 45 C.F.R. § 84.84 represents a partial recognition of cognitive accessibility as an element of meaningful access. The WCAG 2.1 Level AA standard incorporated by the rule includes cognitive accessibility success criteria including predictable navigation, plain language where feasible, and avoidance of interaction patterns known to disadvantage users with cognitive disabilities.[56] The incorporation of these criteria into federally binding regulation is recent, and the criteria apply to digital web content and applications rather than to the broader enforcement architecture. But the existence of the criteria establishes that cognitive accessibility is a cognizable element of Section 504 compliance. The argument advanced here extends that recognition from digital interfaces to the enforcement architecture through which the rights underlying those interface obligations are vindicated.

VI. Remedies

A. Injunctive Relief Is Available

The Supreme Court's decision in *Cummings v. Premier Rehab Keller*[57] held that emotional distress damages are not available under Section 504 or other Spending Clause civil rights statutes. The decision narrowed the damages available to private Section 504 plaintiffs in material respects. It did not eliminate Section 504 remedies.

Cummings leaves available injunctive relief, declaratory relief, attorney's fees under 29 U.S.C. § 794a(b), and administrative enforcement remedies including OCR corrective action orders and, ultimately, termination of federal financial assistance.[58] Compensatory damages for economic harm are strongly defensible post-*Cummings*, though the

[55] National Institute of Mental Health, Statistics (2023).

[56] Web Content Accessibility Guidelines 2.1, Level AA success criteria including 3.1 Readable, 3.2 Predictable, and 3.3 Input Assistance.

[57] *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022).

[58] *Cummings*, 142 S. Ct. at 1576 (Kavanaugh, J., joining majority in part) (noting that injunctive and declaratory relief remain

post-*Cummings* circuit landscape on the precise contours of recoverable economic damages under Spending Clause statutes is not yet uniformly settled. For the framework developed in this Article, the primary remedy sought is injunctive: restructuring of the enforcement architecture to eliminate the disparate impact identified. Injunctive relief is unambiguously available and has been the principal mechanism for systemic disability rights reform since the passage of the underlying statutes.

The injunctive remedy pursued here is structural rather than individual. The framework does not seek individualized accommodation for a particular complainant's navigation of the existing architecture. It seeks redesign of the architecture itself. The distinction matters for the shape of the remedy and for its relationship to existing doctrine. Structural injunctive relief has been central to every major disability rights victory since *Southeastern Community College v. Davis*[59] and *Olmstead v. L.C.*[60] The structural remedy is adapted to defendants who control systems rather than single transactions, and the Department of Justice, in its capacity as coordinating and enforcing agency, controls a system rather than a single transaction.

B. The Olmstead Model: Court-Supervised Agency Plan Development

Separation of powers concerns regarding structural injunctions against federal executive agencies are familiar and have been the subject of sustained doctrinal development. The pertinent question is not whether courts may order federal agencies to restructure internal architecture, but how. Courts have answered the question consistently across civil rights contexts since *Swann v. Charlotte-Mecklenburg Board of Education*.[61] The answer is the remedial framework articulated in *Olmstead v. L.C.* and its progeny: the court identifies the legal violation and sets outcome benchmarks; the agency develops the specific compliance plan; the court retains continuing supervisory jurisdiction to review the plan and its implementation.[62]

The *Olmstead* framework addresses the separation of powers concern by preserving agency discretion over the specific form of compliance while holding the agency accountable to the outcome metrics the court has identified as required by the statute. Courts do not dictate the unified intake portal's user interface. Courts do not prescribe the sentence structure of plain-language guidance. Courts identify the disparate impact, order the agency to develop a responsive plan, set benchmarks for measuring whether the plan is adequate, and retain jurisdiction to enforce the benchmarks. The framework has been applied to federal agencies in subsequent civil rights litigation and has withstood separation of powers challenge.

The relief sought in the framework developed here would track this model. The court would (i) declare that identified features of the Department of Justice's enforcement architecture constitute methods of administration with disparate impact under 28 C.F.R. § 39.130(b)(3) and 29 U.S.C. § 794(a); (ii) order the Department to develop and submit a plan responsive to the identified violations; (iii) set benchmarks for the plan, measured by cognitive accessibility outcomes, complaint intake completion rates across protected class members, and comparable metrics; and (iv) retain jurisdiction for periodic review of the plan and its implementation. The specific design of the plan would be the Department's. The benchmarks against which the plan is measured would be the court's.

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available).

[59] *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

[60] 527 U.S. 581 (1999).

[61] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

[62] *Olmstead v. L.C.*, 527 U.S. 581, 603-05 (1999) (contemplating State-developed integration plan with continuing judicial oversight rather than judicially dictated remedy).

C. Illustrative Elements of a Responsive Plan

The elements that follow are illustrative of the measures a responsive plan might include. They are not directives the court would issue to the Department. They are presented here as examples of the kind of remedial steps an agency plan might take to address the identified disparate impact, consistent with the remedial flexibility the *Olmstead* framework preserves.

First, consolidation or cross-referencing of procedural requirements across the overlapping statutes would reduce the cognitive cost of pathway identification. The Department of Justice, in its coordination capacity under 28 C.F.R. Part 41, already operates across the relevant statutory regimes. A unified intake portal for complaints arising under Section 504, ADA Title II, and related statutes would not displace the underlying statutory distinctions; it would reduce the pre-complaint cognitive burden of identifying the appropriate pathway. Such a portal has been proposed repeatedly by disability rights advocates and has been consistently deferred as resource-constrained.[63]

Second, plain-language public-facing guidance on the scope and operation of Section 504 and ADA Title II, written at a reading level accessible to the cognitive subset of the protected class, would reduce the cost of substantive legal analysis that is currently required of complainants. The Department of Education's Office for Civil Rights has produced guidance of this character for specific issues; the Department of Justice has not done so systematically. The measure would be a direct application of 45 C.F.R. § 84.84's cognitive accessibility principles to the Department's own communicative outputs.

Third, restructuring or elimination of regulatory carve-outs not grounded in statutory text would reduce the substantive complexity of coverage analysis. The guaranty exemption at 28 C.F.R. § 41.3(e)(3) is the principal case study. Elimination of the exemption, or narrowing it consistent with *Loper Bright*'s requirement that regulatory interpretations reflect the best reading of statutory text, would eliminate a significant source of coverage uncertainty that disproportionately burdens complainants who lack the resources to contest each exception.

Fourth, expansion of accessible complaint intake mechanisms, including oral intake for complainants whose disabilities affect written communication, complaint assistance from agency staff, and telephonic and video complaint procedures, would reduce the formal documentation burden imposed on complainants. Variants of these mechanisms exist in some agency enforcement programs.[64] Generalizing them across Section 504 enforcement would align practice with the *Choate* meaningful access standard.

Fifth, public notice of the pattern of regulatory retreat exemplified by the April 2026 Interim Final Rule, together with a binding prospective commitment to use notice-and-comment rulemaking for modifications to disability rights regulations, would address the use of expedited rulemaking procedures to bypass the class's opportunity to object to modifications adverse to its interests. The Administrative Procedure Act contemplates notice-and-comment as the default; Interim Final Rules are a limited exception for which the agency must show good cause. The prior pattern of using IFRs to narrow disability rights protections after the class has relied on the preexisting regulations is itself a method of administration subject to 28 C.F.R. § 39.130(b)(3)'s prohibition on methods of administration that defeat or substantially impair accomplishment of the program's objectives.

These elements are illustrative rather than directive. An agency plan developed under the *Olmstead* framework might adopt all of them, some of them, or different measures addressing the same outcome benchmarks. The point is that remedial flexibility is available to the agency while accountability for the benchmarks is retained by the court.

[63] *See* Disability Rights Education and Defense Fund, Policy Recommendations for Section 504 Enforcement (various years).

[64] *See* 34 C.F.R. § 100.7(b) (ED OCR provision for complainant assistance).

D. The Universal Design Consequence

Structural redesign of the enforcement architecture along the lines sketched above would produce substantial ancillary benefits for non-disabled users of the same architecture. Consolidated intake, plain-language guidance, reduced regulatory complexity, and expanded accessible mechanisms benefit every complainant and every potential complainant. The universal design consequence is familiar from physical disability rights doctrine, where accessibility improvements (curb cuts, captioning, ramped entrances) benefit non-disabled persons as well as the protected class.

The universal design consequence strengthens the case for injunctive relief rather than weakening it. The disability rights statutes do not require that only disabled persons benefit from the remedy. They require that the remedy address the disparate impact the disabled person has demonstrated. Where the remedy also produces ancillary benefits to non-disabled persons, the result is more, not less, consistent with the statutes' objectives. The statutes were enacted against a background recognition that accessible design benefits everyone, and that the failure to design accessibly harms the protected class most acutely while also imposing inefficiencies on the population as a whole.

VII. Reflexive Disclosure: Publication as Method of Administration

This Part addresses the publication architecture for disability rights scholarship, of which this Article itself is a specimen. The architecture is relevant to the Article's substantive argument for three reasons. First, the publication venues for legal scholarship are predominantly housed within universities and operated by entities that receive federal financial assistance within the meaning of Section 504. Second, the publication architecture imposes procedural burden on scholars whose analysis depends on presenting novel arguments through formal peer review or student-edited law review channels. Third, the burden falls differentially on scholars from the cognitive subset of the protected class, including scholars whose analytical contribution is produced with the assistance of speech-to-text and generative AI assistive technology whose use is not uniformly accepted by publication venues.

A. Venues as Recipients

Law reviews are published by law schools, which are operated by universities. Universities receive federal financial assistance through research grants, student financial aid including Pell grants and federally guaranteed or subsidized student loans, work-study programs, federal support for library infrastructure, and, in the case of state universities, general state appropriations that include federal pass-through components. Under the Civil Rights Restoration Act of 1987, the entire university is covered by Section 504 where any part of the university receives federal financial assistance.[65] The law school is part of the university. The law review is published by the law school. The law review is thus within the scope of Section 504 obligations running against the university as a whole.

Peer-reviewed journals published by commercial publishers including Elsevier, Sage, Springer Nature, and Wiley are operated by corporate entities that receive federal financial assistance in multiple forms. Several of these publishers hold material federal contract portfolios with U.S. government agencies, providing a potential statutory basis for Section 504 coverage under § 794(b)(3)(C) ("to the extent that it receives federal financial assistance").[66] Additional federal financial assistance to these publishers flows through federally funded research grants to authors whose work is published in the journals, through federally funded library subscriptions that pay for institutional access, and through pass-through arrangements with universities and government laboratories.

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[65] 29 U.S.C. § 794(b)(2).

[66] Federal contract portfolios of commercial academic publishers are reflected in USAspending.gov records; coverage analysis under § 794(b)(3)(C) will depend on the specific contracts and their relationship to the publisher's editorial operations, a question this Article does not purport to resolve for any particular publisher.

The coverage analysis is not free of complication. The question whether the publishing operations of a law review or commercial journal are within the covered "program or activity" of the university or corporate recipient depends on the statutory coverage pathway under 29 U.S.C. § 794(b). For universities under § 794(b)(2), the entire operation is covered. For corporate recipients under § 794(b)(3), the coverage is narrower and depends on the specific pathway under (A), (B), (C), or (D). The analysis here does not purport to resolve the full coverage question for every potential publication venue. It suffices for present purposes to note that the architecture of legal academic publication substantially overlaps with the architecture of Section 504 obligations.

B. Publication Architecture as Disparate Impact

The procedural architecture of legal academic publication imposes cognitive, temporal, and financial costs on authors. These costs include the formatting and citation requirements specific to the venue; the submission fees required by some venues; the expedite-review norms that require authors to manage parallel submissions across dozens of venues simultaneously; the response timelines that require sustained engagement over months; and the peer review process, which imposes revision demands on a timeline set by the journal rather than the author. The aggregate effect of these features is that successful publication requires sustained executive function, temporal flexibility, and financial resources at scales that fall differentially on the cognitive subset of the protected class.

The architecture also imposes differential burden on scholars using assistive technology whose use is not uniformly accepted by publication venues. Generative AI drafting assistance is currently subject to varying and often restrictive policies across journals.[67] Many venues require disclosure; some prohibit certain uses; policies are not uniform and change frequently. Speech-to-text tools whose output requires downstream editing produce different formatting characteristics than direct typewritten production, and may interact with plagiarism detection systems in ways that disadvantage the user without the user's capacity to anticipate or mitigate the effect.

For authors in the cognitive subset of the protected class, assistive technology is not a luxury. Speech-to-text compensates for dysgraphia, fine motor difficulties, and executive function barriers to sustained written production. Generative AI assists with formatting, structural organization, and citation management that impose disproportionate cost on executive-function-impaired authors. Restriction of these tools operates as restriction of accommodation. The cumulative effect is that scholars in the cognitive subset of the protected class confront systematically higher barriers to publication than scholars without the same impairments, with the result that disability rights scholarship is disproportionately produced by and about the non-cognitive portions of the protected class. Doctrinal development is thereby skewed toward the issues most salient to the populations able to navigate the architecture, and away from the issues most salient to the populations whom the architecture excludes.

This Article is itself a test case. The author is a member of the cognitive subset of the protected class. The analytical contribution is the author's; the structural formatting and portions of the prose drafting were produced with the assistance of speech-to-text software and a generative AI tool operating under the author's direction. The disclosure in the Acknowledgments is intended to satisfy relevant publication norms while simultaneously establishing the methodological point: without assistive technology of this character, the argument developed here would not have been producible by this author on any reasonable timeline, and would likely have been producible only by scholars without the impairments that make the argument salient. The architecture of disability rights scholarship, in ruling assistive technology in or out on a venue-by-venue basis without systematic consideration of accessibility consequences, is itself subject to the method-of-administration analysis this Article develops.

[67] *See, e.g.*, Nature Editorial, "Tools such as ChatGPT threaten transparent science; here are our ground rules for their use" (Jan. 2023); *Science* authorship policies (2024); *Taylor & Francis* AI policies (2024).

C. Cognitive Offloading as Accommodation

The broader principle implicated by the preceding analysis is that cognitive offloading through assistive technology is a legitimate accommodation rather than a compromise of intellectual work. The contrary view dominates a large portion of contemporary discourse about AI, with lines of argument running from Nicholas Carr's *The Shallows*[68] through ongoing concerns about "AI dependence" and the claimed decline of unmediated cognition. The literature consistently proceeds from a normative baseline of the non-disabled brain operating at capacity, treats offloading as a decline from that baseline, and treats the mediating tools as threats to intellectual autonomy.

This normative framing is inconsistent with the disability rights analytical frame developed in this Article. For users whose cognitive capacity is constrained by disability, offloading is not a decline from a healthy baseline; it is the mechanism through which participation becomes possible in the first place. The disability studies literature on interdependence, including the work of Mia Mingus and Eli Clare, makes the broader point that independence is a myth and that accommodation through distributed cognition is how human intellectual work has always functioned.[69] AI-mediated offloading is a new instance of an old pattern, not a novel decline from a mythical unmediated past.

The moral asymmetry in current discourse operates as follows. Accommodation-style tools, including spellcheck, autocomplete, calculators, calendars, GPS navigation, voice assistants, and internet search, are used routinely by the non-disabled population without stigma. The same categories of tools used by disabled persons to compensate for documented impairments attract objections framed as concern for intellectual integrity. The asymmetry is not about cognition. It is about the visibility of accommodation. When the accommodation is invisible, built into tools the non-disabled population uses without marking, it is unremarkable. When the accommodation is visible, because it produces a trace the user did not type in the moment or because the disabled identity is named, it triggers status anxiety among the population whose social rank depends on appearing unaccommodated. That status anxiety gets dressed up as concern for intellectual integrity. It is not concern for intellectual integrity. It is the same pattern the disability community has confronted in every accommodation debate going back to the introduction of corrective lenses.

Publication architecture that treats disability-related AI use as academically suspect while treating functionally equivalent AI use in other contexts as unremarkable adopts the moral asymmetry as policy. That policy adoption is a method of administration. It imposes on disabled scholars an additional burden of justification, disclosure, and defense that non-disabled scholars using equivalent tools do not bear. The disparate impact analysis proceeds on those terms.

D. Probabilistic Systems as Method of Administration

The analysis extends further. Generative AI systems, large language models, and other probabilistic tools used as accommodation by members of the cognitive subset of the protected class are themselves subject to the method-of-administration framework developed in this Article, and the particular character of their probabilistic output produces a distinctive form of disparate impact.

Probabilistic systems by design produce outputs that include errors at non-zero rates. The errors are not systematically announced; the user must identify them through review. Commercial and institutional practice has responded by disclosing the error rate in general terms ("AI can make mistakes; verify important information") and allocating verification responsibility to the user. This allocation is a method of administration. It shifts labor from the system provider, who is the party with the information and technical capacity to reduce the error rate, to the user, who must

[68] Nicholas Carr, *The Shallows: What the Internet Is Doing to Our Brains* (2010).

[69] *See* Mia Mingus, Access Intimacy, Interdependence, and Disability Justice (2017); Eli Clare, *Brilliant Imperfection: Grappling with Cure* (2017). On the broader tradition of distributed cognition, *see* Edwin Hutchins, *Cognition in the Wild* (1995); Andy Clark, *Supersizing the Mind* (2008).

expend cognitive effort on review that the provider has not performed.

The cognitive effort required for effective review of probabilistic output is substantial. Catching a drafting error that introduces a fabricated citation requires the user to verify each citation independently. Catching a factual hallucination requires the user to verify each factual claim. Catching a subtler error, such as the improper introduction of privileged, private, or contextually inappropriate information into a draft intended for public release, requires the user to review the full output with an evaluative eye, holding in working memory both the content the output should contain and the content it should not contain, while attending to formal structural features including formatting, citation style, and argument coherence. This is a demanding cognitive task on its own. For users in the cognitive subset of the protected class, whose executive function, working memory, and sustained attention may be impaired, it is a disproportionate cognitive task.

The user population most likely to use generative AI as accommodation overlaps substantially with the user population least able to perform effective verification review of its output. The overlap is not accidental. It is produced by the same disability characteristics that motivate the use of the accommodation in the first place. An author with executive function impairment uses generative AI to reduce the cognitive cost of sustained structural drafting. The use of the tool reduces cost for tasks within the tool's reliable competence. The use of the tool increases cost for tasks of verification, review, and error-catching that the tool's probabilistic character imposes on the user. The reduction and the increase are not symmetric. The reduction addresses cognitive burdens that are routine and diffuse. The increase addresses cognitive burdens that are episodic, high-stakes, and concentrated at moments of review. For a user whose cognitive resources are constrained, the concentrated burden of verification may exceed the cognitive budget available, even where the diffuse burden of production has been reduced.

The doctrinal analysis does not depend on any particular categorization of the AI system. If the system is classified as a tool, product liability and accessibility frameworks that govern products sold or distributed as accommodation apply. If the system is classified as a service, ADA Title III and Section 504 (where the provider is a recipient of federal financial assistance) reach the service provider's design choices and disclosure practices. If the system is characterized as an agent with independent legal or moral status, civil rights obligations applicable to persons run against the agent directly. In each category, the operative question is whether the system's design and disclosure practices have disparate impact on the protected class. The category assignment is doctrinally inert for this analysis.

An illustrative class of cases arises where a probabilistic system introduces into user-facing output content that the user had not directed the system to produce, including references to information the system has been given as private context rather than as authorized content. The user then bears the cost of identifying and removing the unauthorized content before release. Where the user is a member of the cognitive subset of the protected class, the review and removal effort draws on the same cognitive resources that the user's disability constrains. The more sensitive the unauthorized content, the higher the cognitive stakes of the review. The provider, having designed the system to treat all context as potential draft material without principled distinction between authorized content and background context, has allocated the entirety of the privacy-verification burden to the user. The allocation is a method of administration.

The remedial implications for AI system providers include, but are not limited to, the following. First, providers should conduct systematic analysis of whether their systems' error rates and error types impose differential verification burden on users in the cognitive subset of the protected class. Second, providers should design output modalities that reduce the user's verification burden where the user is known or likely to be using the system as accommodation, including proactive flagging of high-risk output categories (privacy-sensitive content, factual claims at the edge of the model's training distribution, citations) rather than blanket disclosures that shift all verification responsibility to the user. Third, provider terms of service and disclosure practices that allocate verification responsibility to the user without consideration of the user's capacity to perform the verification are themselves methods of administration that may constitute disparate impact. Fourth, AI system providers that receive federal financial assistance through any of the § 794(b)(3) pathways are subject to Section 504 directly for these practices, and AI system providers who contract with public entities are reached under ADA Title II through the "contractual or other arrangements" language of 28 C.F.R. § 35.130(b).

The argument is doctrinally continuous with the argument developed in Parts III and IV of this Article. Enforcement architecture imposes cognitive cost on the protected class in the process of invoking protection. Accommodation technology, when the accommodation is itself probabilistic and shifts verification burden to the user, imposes cognitive cost on the protected class in the process of using the accommodation. Both are methods of administration. Both are cognizable under the methods-of-administration regulations: 28 C.F.R. § 39.130(b)(3) where the provider is a federal executive agency, 28 C.F.R. § 35.130(b)(3) where the provider operates under contractual or other arrangements with a state or local public entity, and 45 C.F.R. § 84.68(b)(3) where the provider is a recipient of federal financial assistance. Both are redressable through structural injunctive relief that targets the architecture rather than the individual transaction.

E. Implications

The reflexive disclosure is not a criticism of any particular venue. It is an illustration of the recursive character of the problem. The enforcement architecture of disability rights disparately burdens the protected class. The publication architecture through which scholarship about the enforcement architecture is produced and disseminated is itself part of the enforcement architecture, in the sense that it determines which arguments reach decision-makers and which do not. The protected class bears differential cost in both architectures. The cost in each architecture is linked to the protected characteristics that entitle the class to substantive protection.

The implication for the substantive argument is that the argument cannot be fully made from within the existing architecture. Partial arguments will reach the venues the architecture admits; the full argument, which includes the architecture itself as object, cannot be fully tested without the participation of the cognitive subset of the protected class whom the architecture systematically excludes. This is not a reason to abandon the argument. It is a reason to present it with explicit acknowledgement of its limits, and to invite the participation of members of the protected class whose voices the existing architecture has not yet admitted.

VIII. Pathways for Development

The pathways set out below are presented in the order of their strategic priority. The doctrinally simplest and most immediately actionable pathway, method-of-administration counts in existing litigation, is treated first; it is the pathway through which the framework is most likely to accumulate judicial recognition in the near term. The administrative complaint pathway is a predicate for subsequent federal-agency litigation and is treated second. The declaratory judgment and structural injunctive pathways, which present the most ambitious version of the framework, are treated third. The Administrative Procedure Act procedural considerations, including how to frame the federal-agency claim so as to avoid the programmatic-challenge bar, are treated fourth.

A. Method-of-Administration Counts in Existing Litigation

The most immediately feasible pathway is the addition of method-of-administration counts in existing Section 504 and ADA Title II litigation. Where an individual plaintiff brings suit against a recipient or public entity alleging discrimination with respect to a specific program, the plaintiff can add a count alleging that the defendant's procedural practices for responding to accommodation requests, handling complaints, or administering the program constitute a method of administration with disparate impact under the applicable methods-of-administration regulation. The count does not depend on the architectural argument developed in this Article; it invokes the same regulations for a narrower application. The cumulative effect of such counts being added across ongoing litigation is to establish judicial familiarity with the methods-of-administration disparate impact framework in the procedural context, which provides the doctrinal foundation for the broader architectural challenge.

The strategic advantages of the count-addition pathway are substantial. First, the count leverages the existing procedural posture, factual development, and discovery work of the underlying litigation, imposing low marginal cost on plaintiffs and plaintiff counsel. Second, the count produces judicial rulings on the methods-of-administration framework without requiring the court to confront the full architectural challenge. Third, as rulings accumulate across defendants and jurisdictions, the doctrinal foundation for the broader claim strengthens. Fourth, defendants in the underlying litigation have substantially less ability to defend on separation-of-powers or programmatic-challenge grounds than federal agencies do, making the count a less contested vehicle for establishing the substantive disparate impact analysis.

Contexts in which such counts can be added at marginal cost include the following. In employment accommodation litigation under Section 504 or ADA Title I, plaintiffs can add counts alleging that the defendant's accommodation-request processing practices constitute methods of administration with disparate impact under the applicable regulation (45 C.F.R. § 84.68(b)(3) or 29 C.F.R. § 1630 for ADA Title I; Title II plaintiffs would use 28 C.F.R. § 35.130(b)(3)). In educational accommodation litigation under Section 504 and ADA Title II, plaintiffs can add counts alleging that the institution's accommodation processing, grievance, and appeals architecture constitutes methods of administration with disparate impact. In public benefits litigation, plaintiffs can add counts alleging that the administering agency's procedural architecture for processing benefit applications, accommodations, and appeals constitutes methods of administration. In publisher and digital accessibility litigation under the 2024 HHS final rule at 45 C.F.R. § 84.84, plaintiffs can add counts alleging that the recipient's accessibility response architecture constitutes methods of administration. In housing discrimination litigation under Section 504 and the Fair Housing Amendments Act, plaintiffs can add counts alleging that the housing provider's reasonable accommodation processing constitutes methods of administration.

Each context produces precedent on a component of the broader architectural argument. Employment cases build out the accommodation-request processing analysis. Educational cases build out the grievance and appeals architecture analysis. Public benefits cases build out the eligibility and review architecture analysis. Digital accessibility cases build out the accessibility response architecture analysis. Housing cases build out the reasonable accommodation processing analysis. As the cases accumulate, the core doctrinal move (treating procedural architecture as a cognizable method of administration subject to disparate impact analysis) becomes settled law in specific contexts. The architectural challenge to federal enforcement architecture becomes defensible not as a novel extension, but as a generalization of settled applications.

B. Administrative Complaint

The administrative complaint pathway is a necessary predicate to federal-agency litigation and is strategically valuable in its own right for the evidentiary record it produces. The Department of Justice's Civil Rights Division receives complaints alleging violations of ADA Title II and coordinates Section 504 enforcement under 28 C.F.R. Part 41. Parallel agencies (HHS Office for Civil Rights, Department of Education Office for Civil Rights, Department of Housing and Urban Development) receive complaints under their respective Section 504 jurisdiction.

A complaint alleging that the Department's own enforcement architecture constitutes a method of administration that subjects qualified disabled persons to discrimination under 28 C.F.R. § 39.130(b)(3) (DOJ's Section 504 regulation for its own programs), in conjunction with method-of-administration claims against covered state, local, and recipient conduct under 28 C.F.R. § 35.130(b)(3) and 45 C.F.R. § 84.68(b)(3), can be filed under existing complaint procedures.

The complaint would identify the specific features of the enforcement architecture identified in Parts III and IV of this Article, adduce the disparate impact on the cognitive subset of the protected class, and request the injunctive relief discussed in Part VI.

The Department's disposition of such a complaint is predictable in part and unpredictable in part. The Department is unlikely to find violation against itself. The Department is required by its own regulations to investigate, document the investigation, and issue a written determination. The determination, whatever its substantive outcome, produces an administrative record that is evidence in subsequent judicial review. The administrative filing is accordingly an essential predicate to declaratory and injunctive litigation, not an independent endpoint.

C. Declaratory Judgment and Structural Injunctive Action

The declaratory judgment and structural injunctive pathway presents the most ambitious version of the framework. A declaratory judgment action seeking declaration that specific features of the enforcement architecture violate 28 C.F.R. § 39.130(b)(3) and 29 U.S.C. § 794(a), with concurrent request for injunctive relief under the Court's equitable authority and the Administrative Procedure Act at 5 U.S.C. §§ 702, 706, is the principal federal-agency judicial vehicle. Parallel or consolidated declaratory judgment actions against covered state and local public entities under 28 C.F.R. § 35.130(b)(3) and against covered recipients under 45 C.F.R. § 84.68(b)(3) and parallel agency regulations are the corresponding vehicles for those defendant categories. The action would name the Department of Justice, the Attorney General in her official capacity, and such other officials as have administrative control over the challenged features. Standing would be established through individual plaintiffs who have attempted to navigate the architecture and can document the differential burden.

The choice of venue presents familiar considerations. The United States District Court for the District of Columbia is available and has experience with administrative challenges to agency practice. A district in which a plaintiff resides and has experienced the challenged burden is also available under the APA venue provisions.[70] Circuit precedent on methods-of-administration disparate impact varies and should be considered in venue selection.

D. Sovereign Immunity, Cause of Action, and the APA § 702 Waiver

Before addressing the programmatic-challenge concern, this subsection consolidates the sovereign-immunity, cause-of-action, and waiver analysis that supports federal-agency litigation under the framework. The analysis has been referenced in the pathway discussion above; it is consolidated here because federal-agency litigation cannot proceed without clear resolution of each of four questions.

Source of substantive right. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), supplies the substantive prohibition against disability discrimination in programs or activities conducted by executive agencies. The methods-of-administration obligation is implemented through 28 C.F.R. § 39.130(b)(3) for the Department of Justice's own programs. The substantive right does not depend on the APA; the APA is the procedural vehicle, not the source of the right.

Source of cause of action. Section 504 is privately enforceable against federal agencies for declaratory and injunctive relief. The Supreme Court in *Lane v. Pena* analyzed the sovereign-immunity waiver for Section 504 actions against federal agencies, holding that the waiver does not extend to compensatory damages but leaving undisturbed the availability of declaratory and injunctive relief.[71] The Second Circuit and other courts of appeals have recognized

[70] 28 U.S.C. § 1391(e).

[71] *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Section 504 as a source of private right of action against federal agencies for non-damages relief.[72] The cause of action for the framework's federal-agency track runs through Section 504 directly, with the APA supplying only procedural machinery.

Source of waiver. The Administrative Procedure Act's general waiver of sovereign immunity at 5 U.S.C. § 702 waives sovereign immunity for claims seeking relief other than money damages against federal agencies and officers. The waiver applies regardless of whether the substantive cause of action arises under the APA itself or under a separate statute such as Section 504.[73] The § 702 waiver accordingly reaches Section 504 claims for declaratory and injunctive relief against the Department of Justice, regardless of whether the Court characterizes the action as APA review of final agency action or as a direct Section 504 suit.

Available remedy. The remedies available against the federal agency are declaratory relief and injunctive relief. Compensatory damages are unavailable under *Lane v. Pena*, and *Cummings v. Premier Rehab Keller* further limits available damages under Spending Clause statutes in ways that do not affect the injunctive-relief analysis.[74] The framework's principal remedy, as developed in Part VI, is structural injunctive relief in the *Olmstead* pattern, which remains available against federal agencies within the constraints discussed in Part VI.

The four answers together establish a complete cause-of-action chain for the federal-agency track: Section 504 supplies the substantive right and the cause of action, 5 U.S.C. § 702 supplies the sovereign-immunity waiver, and declaratory and injunctive relief are the available remedies. The framework does not require a theory of implied right of action under the APA's substantive review provisions; it treats the APA as procedural machinery for a Section 504 claim that is itself directly actionable.

E. Procedural Vehicle: APA Structural Challenges and the Programmatic-Challenge Bar

The Supreme Court's decision in *Lujan v. National Wildlife Federation* and its successor *Norton v. Southern Utah Wilderness Alliance* impose limits on APA challenges to agency operations. *Lujan* declined to permit review of a federal agency's aggregate land-use practices absent challenge to identifiable final agency actions.[75] *Norton* held that the APA does not authorize challenges to "the manner in which an agency is carrying out its statutory mandate" as distinct from challenges to discrete agency actions.[76] The two decisions together establish what is commonly called the programmatic-challenge bar: courts are generally not available for review of aggregate agency practice as such.

The programmatic-challenge bar is a real limitation on the scope of APA review, but it is not a bar to the federal-agency claim developed here. The framework addresses the programmatic-challenge concern through two complementary moves.

First, the framework identifies discrete final agency actions as the object of APA review even where the broader theory concerns aggregate practice. The April 17, 2026 Interim Final Rule is a discrete final agency action.[77] The guaranty exemption at 28 C.F.R. § 41.3(e) is a discrete regulation reviewable on its own terms. Specific guidance

[72] *See, e.g.*, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 94 (2d Cir. 2000) (distinguishing Title II inapplicability to federal agencies from Section 504's direct coverage).

[73] 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ."); *see also Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (applying § 702 waiver to non-APA causes of action seeking non-monetary relief against federal agencies).

[74] *Cummings v. Premier Rehab Keller*, 596 U.S. 212 (2022).

[75] *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890-92 (1990).

[76] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

[77] *See* 5 U.S.C. § 551(13); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (defining final agency action).

documents are discrete final agency actions. Each can be challenged individually, with the aggregate architecture argument presented as context rather than as the operative claim. This framing produces a series of targeted APA challenges rather than a single programmatic challenge, satisfying the *Lujan*/*Norton* requirement while still making the broader architectural point in cumulative effect.

Second, the Section 504 claim against the Department's own conduct is not an APA claim at all in the sense that *Lujan* and *Norton* address. Section 504 creates a direct cause of action against covered entities, including executive agencies for their own programs and activities.[78] The APA provides a procedural waiver of sovereign immunity and a general framework for judicial review, but the underlying cause of action is Section 504 itself. The claim is not "review this aggregate agency practice"; the claim is "declare that identified methods of administration violate Section 504, and order appropriate remedy." That framing, supported by discrete factual predicates (the identified methods of administration, the protected class's burden, the causal chain to disparate impact), is a direct civil rights action, not an APA programmatic challenge. The *Lujan* bar does not apply because the action is not seeking APA review of aggregate practice; it is seeking Section 504 declaratory and injunctive relief, grounded in specific methods of administration that the agency has adopted.

These framings do not eliminate all procedural risk. Defendants will argue that the Section 504 claim is a programmatic challenge in substance regardless of label. But the combination of discrete-action APA challenges and Section 504 direct actions, pursued in parallel, gives the architectural argument multiple procedural pathways with different vulnerability to programmatic-challenge objections. Not all pathways need to succeed on the merits; it is sufficient that some pathways produce judicial rulings on the methods-of-administration framework, because those rulings then support the broader claim.

An alternative non-litigation pathway is worth noting. The Administrative Conference of the United States has historically made recommendations on agency enforcement practice, and the ACUS recommendation process is available as a venue for raising disability-access concerns about agency procedural architecture. An ACUS recommendation, if adopted, becomes a formal recommendation to the executive branch and can shift agency practice without requiring litigation.[79] The ACUS pathway is slower than litigation but avoids the programmatic-challenge concern entirely because it operates through recommendation rather than judicial order.

IX. Conclusion

The enforcement architecture of Section 504 and ADA Title II disparately burdens the population the statutes exist to protect. The burden is cumulative, produced by the interaction of overlapping statutory pathways with inconsistent procedural requirements, regulatory carve-outs not grounded in statutory text, and procedural complexity that imposes differential cognitive, temporal, and financial cost on a protected class whose defining characteristics include, for many of its members, reduced capacity to absorb that cost. The burden is actionable under the methods-of-administration regulations that distribute across the three statutory tracks: 28 C.F.R. § 39.130(b)(3) for the Department of Justice's own programs and activities under Section 504; 28 C.F.R. § 35.130(b)(3) for state and local public entity implementation under ADA Title II; and 45 C.F.R. § 84.68(b)(3) and parallel agency regulations for recipients of federal financial assistance. Federal agencies are not themselves subject to Title II, but they are subject to Section 504 as executive agencies and to APA review of discrete final actions, and the combination reaches the federal source of the architecture

[78] *See* 29 U.S.C. § 794a(a)(2) (incorporating Title VI remedies for Section 504 actions against recipients); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (analyzing sovereign immunity waiver for Section 504 claims against federal agencies, resolving that damages claims are barred but not challenging the availability of declaratory and injunctive relief).

[79] *See* 5 U.S.C. § 591 et seq. (establishing ACUS); ACUS Recommendation 2020-5 (Agency Use of Electronic Communication in Civil Rights Enforcement) as an example of ACUS engagement with civil rights procedural architecture.

even where Title II does not.

The April 17, 2026 Interim Final Rule is an illustration of the pattern rather than an isolated episode. The Department, seven days before the compliance deadline for a regulation designed to protect digital accessibility for disabled users, used an expedited rulemaking procedure not previously applied to disability regulation to extend that deadline by a year. The class's opportunity to be heard before the extension took effect was minimal. The class's reliance on the prior regulation, having organized compliance resources and advocacy around the original deadline, was set aside. The sequence is predictable because it is instanced and re-instanced across the enforcement architecture. The class encounters a protection; the protection is narrowed by regulation or pushed back by rulemaking; the class organizes to invoke the narrower or delayed protection; the cycle repeats. Thirty-six years after the Americans with Disabilities Act and fifty-three years after the Rehabilitation Act, the pattern has not substantially changed.

The argument developed here does not depend on condemning any particular regulatory choice on its merits. It depends on the cumulative effect of the architecture imposing differential cost on the protected class, and on the established regulatory framework under which differential cost imposed through methods of administration is cognizable disparate impact. The framework is available. The doctrinal foundation is stable. The remedy is injunctive and is not foreclosed by *Cummings*. The pathways for development are administrative, declaratory-judgment, and count-addition in existing litigation. What is required is the filing.

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