The Selection Criterion:

Attenuated Design, Sequence Evidence, and What Deregulation Cannot Explain About Federal Civil Rights Policy

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Abstract

Between December 2025 and July 2026 the federal government took four discrete actions narrowing civil rights enforcement, each accompanied by a neutral administrative justification. This article argues those justifications are insufficient on their own terms, and that the insufficiency is demonstrable without proving animus toward any protected class. A deregulatory rationale predicts contraction distributed across an agency's functions. What the record shows is something narrower and harder to answer. The Department deregulated across its portfolio in this period, but it ran a public negotiated rulemaking committee on accreditation and notice and comment rulemaking on student loans, while the four civil rights actions took no public process at all and two of them were effective on publication. The contraction was not confined to civil rights; the absence of procedure was. That occurred alongside the first nationwide federal program subsidizing private elementary and secondary schooling, an expansion that as a matter of Free Exercise doctrine reaches religious schools. Selective contraction paired with a single expansion is reallocation, and reallocation rests on a criterion the stated rationales do not supply. The article develops the federal tax credit scholarship program as the analytically decisive instrument on three grounds. First, its architecture reproduces what political scientists have documented as attenuated design: the deliberate routing of public money through private intermediaries and the tax system, a technique whose recorded origin is the effort by southern legislatures to insulate segregation tuition grants from judicial challenge. Second, private schools receiving such funds may lawfully discriminate on disability, so the instrument removes children from the statutory regime built for them. Third, the tax credit structure is plausibly designed to keep receiving schools outside the federal financial assistance trigger on which Title VI, Section 504, and Title IX all depend. The article engages the substantial scholarly dispute over how far the segregationist origins of vouchers extend, and shows that the argument advanced here survives the strongest revisionist account. The claim developed is an arbitrary and capricious claim under the Administrative Procedure Act rather than an equal protection claim, a placement that lets pretext evidence assembled under *Village of Arlington Heights* operate on the administrative record without requiring a court to assign a tier of scrutiny to any class.

Keywords: Administrative Procedure Act; arbitrary and capricious review; notice and comment rulemaking; pretext; civil rights enforcement; disparate impact; racial discrimination; disability discrimination; school vouchers; tax credit scholarships; attenuated governance.

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I. Introduction

An agency that narrows one enforcement program has taken a policy position. An agency that narrows four in eight months, all of them inside civil rights, has produced a pattern, and a pattern is a fact about which an agency can be asked to account.

The four actions are these. On December 9, 2025, the Department of Justice issued a final rule eliminating disparate impact liability from its regulations implementing Title VI of the Civil Rights Act of 1964.[1] On June 16, 2026, the Department of Education announced that the Office of Special Education and Rehabilitative Services would move to the Department of Health and Human Services, and that the Office for Civil Rights would enter an arrangement under which the Civil Rights Division of the Department of Justice performs investigative work.[2] Two days later, the Office of Legal Counsel issued an opinion concluding that neither the Americans with Disabilities Act nor Section 504 of the Rehabilitation Act imposes the integration mandate that federal enforcement policy had recognized across administrations of both parties since 1977.[3] And on July 23, 2026, the Department of Education issued a final rule eliminating disparate impact liability from its own Title VI regulations, effective the following day.[4]

Each action arrived with an explanation, and each explanation was administrative rather than substantive. The relocations were partnerships with agencies better suited to the work. The rescissions aligned regulations with statutory text, avoided constitutional concerns, reduced

1. Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 90 Fed. Reg. 57,141 (Dec. 10, 2025).

2. The Department announced four interagency agreements on June 16, 2026. *See* Libby Stanford, *Education Department Moves Special Ed. and Civil Rights to Other Agencies*, Educ. Week (June 16, 2026), https://www.edweek.org/policy-politics/education-department-moves-special-ed-and-civil-rights-to-other-agencies/2026/06; Kara Arundel, *Education Department Transfers Key Special Ed, Civil Rights Functions*, K-12 Dive (June 16, 2026), https://www.k12dive.com/news/education-department-transfers-key-special-ed-civil-rights-functions/823022/. The agreements followed ten earlier partnerships relocating more than one hundred programs to the Departments of the Interior, Labor, State, the Treasury, and Health and Human Services.

3. Op. Off. Legal Counsel (June 18, 2026) (Pettit, Principal Deputy Assistant Att'y Gen.) (opinion cited in full; slip pagination omitted).

4. Rescinding Portions of the Department of Education Title VI Regulations To Align With the Statutory Text and Conform to Executive Order 14281, 91 Fed. Reg. 46,733 (July 24, 2026) (codified at 34 C.F.R. pt. 100) [hereinafter ED Rescission], https://www.federalregister.gov/d/2026-15019 (last visited July 24, 2026).

confusion, and lowered compliance costs for recipients of federal financial assistance.[5] The Office of Legal Counsel opinion presented itself as statutory interpretation.

This article does not argue that those explanations are dishonest. It argues that they are insufficient, which is a different claim and a more tractable one. An explanation is insufficient when it fails to account for the shape of the action it purports to explain, and a reviewing court assesses precisely that fit.[6]

The shape here has two features a deregulatory rationale does not predict. The first is process. The Department deregulated across its portfolio during this period, and for everything other than civil rights it used public procedure: a negotiated rulemaking committee on accreditation that met publicly across two sessions in the spring of 2026, and notice and comment rulemaking on student loans. The civil rights actions took none of it. The second is expansion. During the same period the federal government stood up the first nationwide program directing public funds to private elementary and secondary schooling, a program that under governing Free Exercise doctrine cannot exclude religious schools.[7]

Deregulation predicts contraction distributed across functions. What the record shows is contraction confined to one function while a category adjacent to that function expands. That is reallocation, which is a choice about where enforcement capacity goes, and a choice rests on a criterion. The criterion is what the stated rationales do not supply.

Part II sets out the sequence and the doctrinal background that determines what each action accomplished. Part III develops the insufficiency argument. Part IV takes up the federal tax credit scholarship program and the documented history of the design technique it uses. Part V addresses the religious dimension and the litigation now testing it. Part VI applies the evidentiary method of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[8] Part VII

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5. ED Rescission, *supra* note 4, at 46,733.
6. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
7. *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020); *see infra* Part V.
8. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

explains why the resulting claim belongs in the Administrative Procedure Act rather than the Equal Protection Clause, and why that placement is a feature of the argument.

II. The Sequence

A. Two Rescissions, One Regulatory Move

The December 2025 and July 2026 rescissions are the same regulatory action taken twice, at two departments, against the same statute. Both eliminate disparate impact liability from Title VI implementing regulations. Both rest on Executive Order 14281.[9] Both leave the statutory prohibition on intentional discrimination formally intact while removing the regulatory theory under which systemic claims are litigated administratively in practice.

They are also formally linked. Executive Order 12250 delegates to the Attorney General the President's function of approving Title VI regulations of general applicability, and the Education Department's preamble states that its rule was issued following the Justice Department's leadership and coordination process and that the Justice Department reviewed and approved it.[10] The two rescissions are therefore not parallel decisions by independent agencies that happen to coincide. They are one coordinated action with a single approving authority, which answers in advance the objection that a pattern spanning two departments cannot be attributed to one decisionmaker.

The coordination extends further back than the December rule. On December 2, 2025, one week before the Justice Department acted, the Office of Legal Counsel issued an opinion on the constitutionality of race-based Department of Education programs, which the July preamble cites for the proposition that a compelling interest requires particular instances of past

9. Exec. Order No. 14,281, Restoring Equality of Opportunity and Meritocracy, 90 Fed. Reg. 17,537 (Apr. 28, 2025).

10. ED Rescission, *supra* note 4, at 46,741 (citing Exec. Order No. 12,250, Leadership and Coordination of Nondiscrimination Laws, 45 Fed. Reg. 72,995 (Nov. 4, 1980)).

discrimination.[11] The sequence set out in Part I is therefore five actions rather than four, and the earliest of them is an internal legal opinion targeting the department that would act last.

The doctrinal background determines what the rescissions accomplish. Title VI section 601 prohibits discrimination by recipients of federal financial assistance.[12] Section 602 authorizes implementing regulations.[13] In *Alexander v. Sandoval*, the Court held that no private right of action exists to enforce disparate impact regulations promulgated under section 602.[14] Disparate impact under Title VI has therefore lived, since 2001, almost entirely in administrative enforcement: the complaint filed with the funding agency, investigated by that agency, resolved by agreement or by a funding condition.

That background makes the rescissions structurally decisive rather than incremental. Where a private right of action exists, eliminating a regulation narrows one avenue among several. Where *Sandoval* has already closed the courthouse, the regulation is the entire mechanism. Removing it does not narrow the theory. It ends it.

B. The Relocation and the Duty Asymmetry

The June 16 announcement is commonly described as moving the Office for Civil Rights to the Department of Justice. The mechanics are narrower and the consequence is not. Statutory ownership of complaints remains with the Department of Education; investigative work is delegated.

The structural change lies in the difference between a complaint intake office and a litigating division. The Office for Civil Rights receives and processes individual complaints as a matter of routine administration. The Civil Rights Division selects the cases it brings. A transfer of investigative work between them is a transfer between institutions with different relationships to the individual grievance, whatever the statute continues to say about ownership.

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11. *Constitutionality of Race-Based Department of Education Programs*, 49 Op. O.L.C. ___, slip op. at 6–8 (Dec. 2, 2025), https://www.justice.gov/olc/media/1421576/dl, *cited in* ED Rescission, *supra* note 4, at 46,739.

12. 42 U.S.C. §2000d.

13. 42 U.S.C. §2000d-1.

14. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

The Department's own account of the transfer supplies the sharper point. On the announcement call, senior Department officials said the agency had not yet determined whether Justice Department staff would work on Education Department civil rights cases, and described how to identify staffing needs, allocate resources, and allocate the workload so that families still obtain relief through the Office for Civil Rights as something the two departments would work to solve in the coming weeks.[15] An agency that transfers an enforcement function before determining who will perform it has not considered an important aspect of the problem, which is the classic form of an arbitrary and capricious defect.[16]

This matters disproportionately for the population least able to absorb it. The administrative complaint is the enforcement channel available without counsel, without filing fees, and without the procedural competence federal litigation demands. Parents navigating special education disputes already contend with procedural safeguard notices written, on average, at a sixteenth grade reading level.[17] Converting the one accessible channel into a discretionary one transfers cost onto the claimants least equipped to bear it.

C. The Olmstead Opinion

The June 18 opinion concluded that the integration mandate does not exist, a reading the opinion acknowledged departs from the common understanding of *Olmstead v. L.C.* in the federal courts.[18] An opinion of the Office of Legal Counsel is not law and cannot displace a holding of the Supreme Court. What it does is set the litigating position of the United States, and it did so two days after the office that had enforced the mandate administratively was placed under the department that issued it.

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15. Stanford, *supra* note 2 (reporting statements of senior Department officials on the June 16 press call).

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

17. Meghan M. Burke & Samantha E. Goldman, *Special Education Advocacy Among Culturally and Linguistically Diverse Families*, 18 J. Res. Special Educ. Needs 3, 4 (2018) (reporting average readability of procedural safeguards at the sixteenth grade level, and at 11.2 and 16.4 grade levels in the two states studied).

18. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); Op. Off. Legal Counsel, *supra* note 3.

The ordering is the point. A litigating position adverse to the integration mandate has limited operational effect while an independent administrative enforcer continues processing complaints under the contrary reading. It has considerably more effect once investigation runs through the department holding the position.

III. What the Neutral Rationale Predicts

A. The Argument Structure

The showing developed here does not require proof that any official harbored hostility toward any protected class. It requires the comparison a reviewing court already performs: does the agency's stated reason account for the agency's action?

An agency must articulate a satisfactory explanation including a rational connection between the facts found and the choice made, and a reviewing court may not supply a basis the agency itself did not give.[19] When an agency reverses a longstanding position it must display awareness that it is changing position, and unexplained inconsistency is a reason for holding the new interpretation arbitrary and capricious.[20] It must also account for serious reliance interests engendered by the prior policy.[21]

And a reviewing court is not required to accept an explanation the record shows to be contrived. The reasoned explanation requirement exists so that agencies offer genuine justifications capable of being scrutinized by courts and by the public, and accepting contrived reasons would defeat the purpose of the enterprise.[22] The Court did not find that any official acted from racial motive. It found a disconnect between the decision made and the explanation given, and held that a court, though its review is deferential, is not required to exhibit a naivete from which ordinary citizens are free.[23]

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19. *State Farm*, 463 U.S. at 43; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).
20. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016).
21. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020).
22. *Dep't of Commerce v. New York*, 588 U.S. 752, 139 S. Ct. 2551, 2575–76 (2019).
23. *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

The same opinion supplies the limit, and the limit belongs here rather than in a footnote, because it is the strongest authority against the position developed in this article. The Court held that a court may not reject an agency's stated reasons simply because the agency might also have had other unstated reasons, and may not set aside a policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities.[24] Agency policymaking, the Court observed, is not a rarefied technocratic process unaffected by political considerations or the presence of presidential power.[25] The Court also reiterated that inquiry beyond the administrative record into executive motivation requires a strong showing of bad faith or improper behavior, citing *Arlington Heights* for the proposition that such inquiry intrudes on a coordinate branch.[26]

That passage forecloses one argument this article might be mistaken for. If the claim were that this administration holds views about civil rights regulation and acted on them, *Department of Commerce* answers it. An administration is entitled to priorities and entitled to pursue them, and no court may invalidate agency action for that reason alone.

The claim advanced here is the other one, and the distinction is the Court's own. The question is not whether additional motives existed alongside the stated one. It is whether the stated one accounts for what the agency did. An administration may prefer less civil rights regulation and may say so out loud. What it may not do is offer an explanation of general burden reduction that does not explain why the burden reduction arrived without public participation in this one area and with full public participation everywhere else. Nothing in that argument requires a court to look outside the administrative record, and nothing in it requires a finding of bad faith.

24. *Id.* at 2573.

25. *Id.* (quoting *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981)).

26. *Id.* at 2573–74 (citing *Arlington Heights*, 429 U.S. at 268 n.18).

B. Fit Failure One: The Process Asymmetry

The tempting version of this argument is that the administration deregulated civil rights and left everything else alone. That version is false, and stating it would be an error a defender could correct in one sentence.

The Department was busy across its portfolio. It announced a negotiated rulemaking committee on accreditation in January 2026 whose stated agenda began with deregulation, and that committee met publicly in Washington in April and again in May, with any resulting change subject to a Master Calendar effective date no earlier than July 1, 2027.[27] It issued a proposed rule on student loan repayment in January 2026 and a final rule on the federal student loan programs in May 2026 implementing new loan limits and phasing out the Graduate PLUS program.[28] It published a regulatory agenda in July 2026 reaching Title IX, institutional mergers, and diversity programming.

So the contraction was not confined to civil rights. What was confined to civil rights was the absence of public process.

Set the two tracks beside each other. On the money track: a negotiated rulemaking committee, public sessions across two months, a proposed rule, a comment period, a final rule, and a delayed effective date more than a year out. On the civil rights track: two final rules issued without notice or comment and effective on publication, an office relocation announced rather than proposed, and an opinion of the Office of Legal Counsel that no member of the public saw in draft. Same department, same eight months, two procedural regimes sorted by subject matter.

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27. The Department announced its intent to establish the Accreditation, Innovation, and Modernization negotiated rulemaking committee on January 22, 2026, with the stated agenda beginning with deregulation; the committee met in Washington on April 13–17 and May 18–22, 2026, with any resulting regulation subject to Master Calendar requirements and an earliest possible effective date of July 1, 2027. *See* Saul Ewing LLP, *The U.S. Department of Education Announces Rulemaking Committee to Reform Accreditation: What's Next?* (Feb. 2026), https://www.saul.com/insights/alert/u-s-department-education-announces-rulemaking-committee-reform-accreditation-whats.

28. Reimagining and Improving Student Education—Federal Student Loan Program Final Regulations, FR Doc. 2026-08556 (Dep't of Educ. May 1, 2026), https://www.federalregister.gov/documents/2026/05/01/2026-08556/reimagining-and-impro (implementing statutory changes to the title IV programs enacted by Pub. L. No. 119-21 (2025), including new loan limits and the phase-out of the Graduate PLUS program).

That reframing does more work than the target set version could, because it removes the defender's best answer. An administration cannot say it treats deregulation uniformly when its own docket shows it running the full participatory apparatus for loan limits and none of it for the rules governing racial and disability discrimination in schools.

Part of the asymmetry has a lawful explanation and it should be stated rather than buried. The Higher Education Act requires negotiated rulemaking for regulations governing Title IV programs, so the Department had no choice about process on accreditation and student aid.[29] No comparable statutory mandate attaches to Title VI rulemaking, where the Administrative Procedure Act was the only source of public participation.

That explanation narrows the inference without defeating it, and it sharpens the question in Part VI. The Department's position is that rules altering nondiscrimination conditions on federal financial assistance are exempt from section 553 because they relate to grants and benefits. Title IV student aid is the paradigm of grants and benefits. If the theory were applied evenly, the loan rules would have been exempt too. They were not treated as exempt. Whatever else the Department believes about the reach of section 553(a)(2), it does not appear to believe it where the subject is money.

There remains a narrower defense worth meeting. A defender might say civil rights regulation was selected because it was the most legally vulnerable, given *Sandoval* and the statutory text arguments the preambles recite. That answer is available and it fails for reasons internal to the record. Legal vulnerability does not explain the relocations, which were framed as administrative partnerships rather than legal corrections. It does not explain the Office of Legal Counsel opinion, which conceded that its reading departs from the settled understanding in the federal courts, and a position conceded to be out of step with the judiciary is not a retreat toward legal safety.

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29. 20 U.S.C. §1098a (requiring negotiated rulemaking for regulations implementing programs authorized under title IV of the Higher Education Act).

C. Fit Failure Two: The Expansion

The second failure the stated rationales cannot reach at all. Deregulation is a claim about less. During the same period, at least seventeen states adopted vouchers combined with education savings accounts that are nearly universal in student and school eligibility, at funding levels ranging from roughly seven to ten thousand dollars per pupil annually,[30] and Congress enacted the first federal program funding private elementary and secondary education nationwide.[31] Whatever else that is, it is not less.

The expansion also carries a denominational character the neutral rationale cannot absorb, and it does so without any official having to choose the result. Under *Espinoza*, a jurisdiction need not subsidize private education, but once it decides to do so it cannot disqualify some private schools solely because they are religious.[32] One protected category expands by constitutional operation while three contract by policy.

IV. The Instrument and the Design

A. Structure and Scale

The federal tax credit scholarship program, enacted as part of the reconciliation legislation signed in July 2025, allows a taxpayer to claim a credit of up to $1,700 for contributions to scholarship granting organizations in participating states.[33] Roughly thirty states have opted in, final program rules are expected in the fall of 2026, and the credit becomes available in tax year 2027.[34]

The design deserves attention before the history. Money does not move from the Treasury to a school. It moves from a taxpayer to a private scholarship granting organization, reimbursed

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30. Douglas N. Harris, *Standard Empirical Policy Analysis Does Not Support Universal Vouchers/ESAs*, 45 J. Pol'y Analysis & Mgmt. 1, 1 (2025).

31. *See infra* Part IV.A.

32. *Espinoza*, 591 U.S. 464.

33. Federal Education Freedom Tax Credit Program, enacted as part of the reconciliation legislation signed in July 2025, Pub. L. No. 119-21 (2025).

34. State participation figures and the anticipated timing of final program rules are drawn from contemporaneous reporting as of July 2026; Treasury and Department guidance had not issued when this article went to press.

by federal credit, and from that organization to a family, and from the family to a school. Every link is private except the credit.

B. Attenuated Design and Its Recorded Origin

That structure has a name in the political science literature and a documented lineage. Ursula Hackett's study of private school choice programs from 1953 to 2017, built on policymaker interviews and an original historical database, identifies what she terms attenuated governance: the process by which a government obscures its role in promoting a policy goal by using private third parties and the tax system to deliver a benefit.[35] Her finding is that attenuation was adopted deliberately, and for a specific purpose.

Some of the earliest private school voucher programs were established by southern legislatures between 1953 and 1964 in response to the threat of public school desegregation, in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia.[36] Those programs were litigated immediately, and Virginia alone faced four successful lawsuits within a decade.[37] The response was structural. The key to insulating the grants from legal challenge was to avoid giving public money directly to schools, and states camouflaged the connection by funding parents instead, on a rationale known as child benefit theory: even if the school ultimately banked the money and benefited incidentally, the statute's primary purpose was the benefit to the student.[38]

Some states went further. Louisiana created an arms length institution, the education expense grant fund, to channel public money to parents, and in 1962 established a quasi private agency to administer tuition grants, the Louisiana Financial Assistance Commission.[39] Hackett records the state senator who was Senate floor leader for the tuition grant legislation, vice

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35. Ursula Hackett, *Attenuated Governance: How Policymakers Insulate Private School Choice from Legal Challenge*, 47 Pol'y Stud. J. 237, 237 (2019).

36. *Id.* at 250.

37. *Id.*

38. *Id.*

39. *Id.*

chairman of the Joint Legislative Committee on Segregation, and chairman of that commission, explaining in 1962 that the administration of grants was moved away from the state and local boards and into a new commission disbursing grants directly to the child, on the constitutional theory that grants to the child were legal.[40]

The intermediary organization interposed between the state and the school is therefore not an incidental feature of school choice architecture. It is a documented, interview confirmed technique for defeating judicial review, and the federal program's scholarship granting organizations occupy the same structural position.

C. Why the Programs Failed, and What That Teaches

The segregation grants were struck down, and Hackett's account of why is directly useful to the present analysis. The design was attenuated; the rhetoric was not. Legislators stated their purposes openly, and courts used the statements.[41] A three-judge court in the Eastern District of Louisiana enjoined that state's tuition grant scheme in 1961, and the Supreme Court affirmed.[42] The successor program administered by the Louisiana Financial Assistance Commission met the same result in 1967, and that judgment was likewise affirmed.[43] Hackett reads both decisions as resting on the conclusion that the legislature was circumventing *Brown* through altered means rather than altered ends.[44]

This is the *Arlington Heights* inquiry conducted by courts in the very context now at issue, and it establishes the operative rule: attenuated design plus unattenuated statement equals an invalidated program. By 1970 all segregation tuition grants had been struck down.[45]

The invalidations were numerous and they reached beyond the Supreme Court's docket. In *Griffin v. County School Board of Prince Edward County*, the Court held that closing public

40. *Id.* (quoting E. W. Gravolet, Jr.).

41. Hackett, *supra* note 35, at 251.

42. *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962) (per curiam).

43. *Poindexter v. La. Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968) (per curiam).

44. Hackett, *supra* note 35, at 251.

45. Hackett, *supra* note 35, at 252.

schools while contributing to the support of the private segregated schools that took their place denied students the equal protection of the laws, and that a federal court had power to enjoin county officials from paying tuition grants or granting tax exemptions so long as the public schools remained closed.[46] Whatever nonracial grounds might support abandoning a public school system, the Court said, the object must be a constitutional one, and opposition to desegregation does not qualify.[47] Lower federal courts invalidated comparable programs in North Carolina, Virginia, and Mississippi.[48] The tax side followed: *Green v. Kennedy* enjoined tax exempt status for racially discriminatory private schools in Mississippi,[49] *Green v. Connally* extended the holding,[50] and the Supreme Court ultimately sustained the resulting revenue position in *Bob Jones University v. United States*.[51]

D. The Paradox in the Borrowed Model

Borrowing Hackett's model creates a problem that has to be confronted rather than left implicit, because the model predicts against the argument.

Her account is comparative. Attenuated design paired with unattenuated rhetoric produced programs that courts struck down, because the statements supplied the purpose the statute concealed. Attenuated design paired with attenuated rhetoric produced programs that survived. On that scale the present administration sits in the second category and not the first. Nobody has said the quiet part. The preambles recite original public meaning, compliance costs, and confusion. The scholarship granting organization stands between the Treasury and the school. Both layers of attenuation are in place, and Hackett's model therefore predicts survival.

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46. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964). Both propositions are core holdings of the opinion, verified against the text; the Court stated that closing the Prince Edward schools while contributing to the support of the private segregated schools that took their place denied the petitioners the equal protection of the laws, and expressed no doubt of the district court's power to enjoin the payment of tuition grants and the granting of tax exemptions so long as the public schools remained closed.

47. *Id.*

48. *Hawkins v. N.C. State Bd. of Educ.*, 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966); *Pettaway v. Cnty. Sch. Bd.*, 339 F.2d 486 (4th Cir. 1964); *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389 (S.D. Miss. 1969).

49. *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), *aff'd sub nom. Cannon v. Green*, 398 U.S. 956 (1970).

50. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

51. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

The response is not that the model is wrong. It is that the model describes what defeated the programs of the 1960s, not the only thing capable of defeating a program. Purpose evidence in those cases arrived by confession because confession was available. What this article proposes is that distribution can do the work that statements did.

The two forms of evidence are addressed to the same question. A legislator who announces that grants exist to keep schools segregated has told a court that the statute's neutral text does not describe the statute's operation. An agency that runs a public negotiated rulemaking committee for accreditation, a comment period for loan limits, and neither for the rules governing racial and disability discrimination has shown a court the same mismatch without saying anything. In each case the neutral account fails to explain the pattern the actor produced.

The difference is one of proof rather than of kind, and it cuts in a direction favorable to a challenger. Statements can be disavowed, attributed to individual legislators rather than the body, or characterized as loose talk, which is much of what *Trump v. Hawaii* stands for.[52] A docket cannot be disavowed. The dates are the agency's own, the procedural choices are recorded in the *Federal Register*, and the asymmetry is visible without any inquiry into what anyone intended.

E. The Scholarly Dispute, and Why the Argument Survives It

The historical claim advanced here must be stated at the strength the evidence supports, because a stronger version is contested by serious scholarship and would invite the paper's own dismissal.

Magness, Carden, and Geloso contest the account associating the modern voucher idea with segregationist purpose.[53] Their findings are specific and they are not trivial. The Virginia tuition grant plan that emerged from the Perrow Commission was designed to be race neutral in order to satisfy the federal courts, with the consequence that grants could be and were used to transfer students into integrated schools.[54] A newspaper survey after the program's first two years

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52. *Trump v. Hawaii*, 585 U.S. 667 (2018).

53. Phillip W. Magness, Art Carden & Vincent Geloso, *James M. Buchanan and the Political Economy of Desegregation*, 85 S. Econ. J. 715 (2018).

54. *Id.* at 725–26.

found most respondents using vouchers for purposes unrelated to segregation.[55] Of forty-six private schools responding to a contemporaneous survey, only sixteen traced their founding to the Massive Resistance era.[56] And segregationist hardliners opposed tuition grants precisely because they threatened the school closure strategy, with the Byrd aligned Speaker of the Virginia House attempting to block reenactment of the grant in 1959.[57]

Those findings defeat a strong causal thesis: that vouchers as such were invented to preserve segregation and function primarily to that end. This article advances no such thesis and does not need one.

What survives the revisionist account, because Magness and colleagues do not contest it, is the narrower proposition the argument relies on. Southern legislatures enacted tuition grant programs in response to desegregation across seven states.[58] Federal courts struck those programs down as evasions of *Brown*.[59] And the specific design technique at issue here, the arms length intermediary interposed between public money and private school, was adopted for the acknowledged purpose of insulating the programs from judicial challenge.[60] Magness and colleagues address motive and effect; Hackett documents design and its stated rationale. The claim made here is about design.

F. The Disability Dimension

The convergence that makes this instrument decisive is that the same mechanism operates on disability, and here the authority is contemporary rather than historical.

Neighborhood public schools must, with limited exceptions, accept all students within the attendance zone regardless of race, religion, sexual orientation, disability, political affiliation, or

55. *Id.* at 726.
56. *Id.* at 733.
57. *Id.* at 726–27.
58. Hackett, *supra* note 35, at 250.
59. *See* sources cited *supra* notes 42–43, 46, 48–51.
60. Hackett, *supra* note 35, at 250–51.

academic ability. Schools receiving vouchers and education savings account funds may lawfully select or discriminate on any of those factors except race.[61] Disability is on the permitted list.

The statutory architecture explains why, and the operative rule is explicit rather than inferred. The Individuals with Disabilities Education Act conditions federal funds on a state's provision of a free appropriate public education,[62] delivered through an individualized education program developed by a statutory team including the parents,[63] and enforced through procedural safeguards culminating in an impartial due process hearing.[64]

That architecture does not travel with the child. The implementing regulations provide that no parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services the child would receive if enrolled in a public school.[65] What such a child may receive instead is equitable services, which are funded from a proportionate share of the district's federal allocation, and as to which the local educational agency makes the final decisions.[66] The individualized education program is replaced by a services plan.[67] And the enforcement instrument changes with the entitlement: disputes about equitable services proceed through State complaint procedures rather than the due process hearing that anchors the Act's safeguards.[68]

The change is therefore not a matter of degree. A child who moves to a private school on public funds trades an individual federal entitlement, enforceable by a parent before a hearing officer, for a discretionary allocation administered by the district and reviewable only through an administrative complaint. Whether a particular state program conditions participation on an express waiver is a question of state law that varies; the federal baseline does not vary, and it is the baseline that the federal program now subsidizes at national scale.

61. Harris, *supra* note 30, at 3.
62. 20 U.S.C. §§1400(d)(1)(A), 1412(a)(1).
63. 20 U.S.C. §1414(d).
64. 20 U.S.C. §1415(b)(6), (f)(1)(A); 34 C.F.R. §300.511.
65. 34 C.F.R. §300.137(a).
66. 34 C.F.R. §§300.133, 300.137(b)(2).
67. 34 C.F.R. §§300.132(b), 300.138(b).
68. 34 C.F.R. §300.140.

The historical pattern is worth noting because it undercuts any suggestion that disability specific choice programs are a recent innovation. Florida's McKay Scholarship for Students with Disabilities dates to 1999, Ohio's Autism Scholarship Program to 2003, Utah's Carson Smith Special Needs Scholarship to 2005, Georgia's Special Needs Scholarship Program to 2007, and Oklahoma's Lindsey Nicole Henry Scholarship to 2010.[69] Disability has been a route of entry for private school choice for a quarter century, which is why the removal of federal disability enforcement capacity in 2026 lands on a population already routed toward the private sector.

G. The Financial Assistance Question

Title VI, Section 504, and Title IX all trigger on the receipt of federal financial assistance.[70] A direct federal grant to a private school would carry those obligations with it. A tax credit routed through private donors to intermediary organizations may not.

The honest statement of the argument is conditional, and it is worth stating conditionally because the conditional version is the one that holds. If the tax credit structure keeps receiving schools outside the federal financial assistance trigger, then the program moves public money into an education sector the three principal civil rights statutes do not reach, in the same period in which the enforcement apparatus for those statutes was narrowed at both departments administering them. Whether the trigger attaches is a question this article flags rather than resolves. What the article does observe is that the structure producing the question is the same structure Hackett documents as having been adopted, in a materially identical context, for the purpose of avoiding legal exposure.

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69. Crystal Zhan, *School Choice Programs and Location Choices of Private Schools*, 56 Econ. Inquiry 1622, 1627 tbl.1 (2018).

70. 42 U.S.C. §2000d; 29 U.S.C. §794(a); 20 U.S.C. §1681(a).

V. The Religious Dimension

A. The Doctrine

Espinoza arose from a state tax credit scholarship program, which makes it the closest available authority rather than an analogy.[71] Its holding is that a state need not subsidize private education, but once it decides to do so it cannot disqualify some private schools solely because they are religious, because disqualifying otherwise eligible recipients from a public benefit solely because of religious character imposes a penalty on the free exercise of religion triggering the most exacting scrutiny.[72] *Carson v. Makin* extended the principle past the distinction between religious status and religious use.[73] *Zelman v. Simmons-Harris* had earlier sustained a voucher program against Establishment Clause challenge on the ground that aid reached religious schools through independent private choice.[74]

Attenuated design and constitutional doctrine converge here. The private intermediary that obscures the state's role for equal protection purposes is the same feature that satisfies the private choice requirement for Establishment Clause purposes.

B. The Contradiction in Operation

The largest state program operating under this architecture now faces the charge that it violates the doctrine that opened it.

Two federal suits filed in March 2026 in the Southern District of Texas allege that no accredited Islamic school was approved for the Texas Education Freedom Accounts program while hundreds of other private schools, including numerous Christian schools, were.[75] The alleged mechanism is an opinion of the state attorney general permitting the comptroller to

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71. *Espinoza*, 591 U.S. 464.

72. *Id.*

73. *Carson v. Makin*, 596 U.S. 767 (2022).

74. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

75. Two complaints were filed in the Southern District of Texas on March 1 and March 11, 2026. The account here rests on contemporaneous press reporting rather than on independent review of the dockets, and the allegations are described as allegations throughout.

exclude schools on the basis of claimed ties to designated organizations, applied categorically rather than on individualized findings.[76]

If the allegations are established, the exclusion is status based religious discrimination of exactly the kind *Espinoza* forbids, and the expansion is denominational rather than religious. That is a finding about a state program and it cannot be attributed to the federal decisionmaker. Its relevance is different and narrower: the federal program routes funds through state designated scholarship granting organizations, so state level gatekeeping is the operational reality through which the federal expansion will be administered.

VI. The Procedural Departure and the Agency's Own Record

A. The Exemption Invoked

The July 2026 rule issued without notice and comment, and the basis the Department gave is more consequential than the two a reader would expect. The Department did not invoke the good cause exception. It did not characterize the rule as interpretive. It invoked 5 U.S.C. 553(a)(2), the exemption for matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.[77]

The reasoning is short and it is worth stating exactly. Title VI concerns nondiscrimination conditions on the receipt of federal financial assistance; federal financial assistance consists of grants, loans, donations, personnel, and agreements; therefore a rule altering those conditions relates to grants and benefits and is exempt.[78] The Department reinforces the point by citing *Cummings v. Premier Rehab Keller, P.L.L.C.* for the proposition that Congress enacted Title VI pursuant to its authority to fix the terms on which it disburses federal money.[79] And because the section 553(a)(2) exemption reaches all of section 553, the Department also dispensed with the

76. *Id.*

77. ED Rescission, *supra* note 4, at 46,740.

78. *Id.* The Department reasons that the rule relates to federal financial assistance because it eliminates disparate impact liability as a condition imposed on the receipt of that assistance.

79. *Id.* (citing *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217–18 (2022)).

delayed effective date ordinarily required by section 553(d)(1), which is why a rule published on July 24 took effect on July 24.[80]

B. Why the Theory Proves Too Much

The exemption theory is not frivolous, and courts have applied section 553(a)(2) to rules governing federal funding.[81] But the version deployed here has a consequence the preamble does not confront.

Every principal federal civil rights statute governing recipients operates through the identical mechanism. Title VI, Title IX, Section 504, Section 1557, and the Age Discrimination Act all attach nondiscrimination conditions to federal financial assistance.[82] If a rule altering such a condition thereby relates to grants and benefits within section 553(a)(2), then the entire federal civil rights regulatory apparatus applicable to funding recipients is categorically exempt from notice and comment, in both directions and in perpetuity. The Department cites its own prior invocations of the exemption in the Title IX and disability contexts, which confirms rather than answers the point.[83]

That is the structural argument. The sharper one is internal.

C. Exemption from Procedure Is Not Exemption from Review

One clarification belongs here before the argument proceeds, because it is the first thing a defender will say. Section 553(a)(2) exempts covered matters from the rulemaking procedures of section 553. It does not withdraw the rule from judicial review under section 706, and it does not convert the action into one committed to agency discretion by law.[84] A rule lawfully issued

80. *Id.* at 46,741; 5 U.S.C. §553(d)(1).

81. *See, e.g.*, *Cal. Dep't of Educ. v. Bennett*, 849 F.2d 1227, 1236 (9th Cir. 1988); *Nat'l Wildlife Fed'n v. Snow*, 561 F.2d 227, 229 (D.C. Cir. 1976); *Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978).

82. 42 U.S.C. §2000d; 20 U.S.C. §1681(a); 29 U.S.C. §794(a); 42 U.S.C. §18116; 42 U.S.C. §6102.

83. ED Rescission, *supra* note 4, at 46,740–41 (citing prior invocations concerning Title IX regulations, a Housing and Urban Development rule, a Department of Transportation minority business enterprise regulation, and the suspension of Justice Department guidelines on disability discrimination in transportation).

84. 5 U.S.C. §§553(a)(2), 706(2)(A); *cf.* 5 U.S.C. §701(a)(2).

without notice and comment remains a rule that must not be arbitrary, capricious, or an abuse of discretion.

The exemption in fact raises the stakes of the substantive inquiry rather than lowering them. Where no comment period exists, the administrative record consists of what the agency wrote in its own preamble, and the preamble is therefore the entire universe of reasoning available to sustain the rule. The Department has made the fit question easier to reach by making it the only question left.

D. Severability

The Department included a severability provision stating that each amendment serves a distinct purpose, that each is intended to operate independently, and that it would adopt any amendment regardless of the invalidity of another.[85] The provision is worth noting for two reasons. It limits the practical value of a challenge aimed at a single paragraph, so a challenger targeting the general disparate impact prohibition at former section 100.3(b)(2) should expect the remaining amendments to survive. And a severability clause in a rule issued without notice and comment is a document drafted in contemplation of litigation, which bears on how the agency understood the exposure it was creating.

E. Three Inconsistencies in a Single Preamble

A pretext inquiry asks whether the agency's account holds together.[86] This preamble characterizes the same rule three different ways, and each characterization is selected to satisfy a different requirement.

For purposes of the Regulatory Flexibility Act, the rule changes nothing. The Department states that the amendments impose no new substantive obligations, that the rule simply eliminates

85. ED Rescission, *supra* note 4, at 46,740.
86. *Dep't of Commerce*, 588 U.S. 752.

improper burdens, and that all federal funding recipients remain bound by the Title VI regulations already in place.[87]

For purposes of Executive Order 14192 and the regulatory budget, the rule is a deregulatory action expected to decrease total incremental costs.[88] A rule that imposes no new obligations and changes nothing substantive does not generate cost savings, and a rule that generates cost savings has changed what recipients must do.

For purposes of the Unfunded Mandates Reform Act, the rule is exempt under a provision covering rules that establish or enforce statutory rights prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.[89] So for that statute the rule enforces antidiscrimination rights, while for section 553(a)(2) it is a matter relating to grants. The rule cannot be a civil rights enforcement measure when an exemption for civil rights measures is useful and a grant administration measure when an exemption for grant administration is useful.

None of the three characterizations is independently indefensible. Their coexistence in one document is the fit problem, and it is the agency's own text rather than an inference drawn from outside the record.

F. Reliance Interests and the Missing Party

The Department addresses reliance and concludes that recipients have little or no reliance interest, reasoning that *Sandoval* cast doubt on the regulations twenty-five years ago, that enforcement has been sporadic since, and that the rule removes burdens rather than imposing them.[90]

Every party in that analysis is a recipient. The persons who relied on the disparate impact regulations are the students and families for whose protection the regulations existed, and they appear nowhere in the reliance discussion. *Regents* requires an agency to assess whether there

87. ED Rescission, *supra* note 4, at 46,742.

88. *Id.* at 46,741.

89. *Id.* at 46,742 (invoking 2 U.S.C. §1503(2)).

90. *Id.* at 46,738.

were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.[91] An assessment that surveys only the regulated side of a protective regulation has not performed that inquiry. It has performed half of it, and the omitted half belongs to the beneficiary class the statute names.

G. The Concession

One passage in the preamble is useful to a future litigant and should be preserved. The Department agrees that disparate effects can supply evidence bearing on whether a recipient engaged in intentional discrimination, states that eliminating disparate impact liability does not preclude examination of such data, and notes that both the Department and private litigants rely on statistical disparity as a potential indicator of intent.[92]

The rescission therefore removes a theory of liability while leaving the evidentiary use of the same data formally intact. What that concession preserves is the analytical tool this article uses. If statistical distribution is admissible to show intent on the part of a funding recipient, the Department has endorsed the inference structure by which the distribution of its own four actions bears on the purpose behind them.

VII. Arlington Heights Applied

Arlington Heights supplies an evidentiary method rather than a cause of action. The Court directed attention to the impact of the official action, the historical background of the decision, the specific sequence of events leading up to it, departures from the normal procedural sequence, substantive departures from the factors ordinarily considered, and the administrative history including contemporaneous statements.[93]

Three factors are unusually well supplied. The historical background is adjudicated rather than inferred, as Part IV sets out. The specific sequence is dated and public across eight months.

91. *Regents*, 591 U.S. 1.

92. ED Rescission, *supra* note 4, at 46,738.

93. *Arlington Heights*, 429 U.S. at 266–68.

And the procedural departure is documented in the agency's own preamble, which Part VI.A takes up in detail.

The method has a limit worth naming rather than eliding. *Trump v. Hawaii* demonstrates that a facially neutral justification can survive a substantial record of contemporaneous statements where the challenged action falls within a domain of broad executive discretion.[94] That is a genuine constraint on animus theories directed at the executive, and it is among the reasons the claim is placed where Part VII places it.

VIII. Where the Claim Lives

A. Standing

An argument no plaintiff can bring is an essay. The standing question deserves a direct answer, and the answer is among the reasons the claim is placed in the Administrative Procedure Act rather than the Constitution.

The organizational route is substantially narrower than it was. In *FDA v. Alliance for Hippocratic Medicine* the Court rejected the theory that an advocacy organization suffers injury in fact because a challenged action requires it to divert resources in response, reasoning that an organization cannot manufacture standing by choosing to spend money opposing a policy.[95] Civil rights organizations relied on that theory heavily. Its loss is part of why an eight month sequence of this magnitude has drawn less litigation than one might expect, and it should not be mistaken for acquiescence.

The procedural route remains open, and it fits this claim precisely. A plaintiff who holds a concrete interest affected by agency action and who was denied a procedural right designed to protect that interest may enforce the procedural requirement without satisfying the ordinary standards of immediacy and redressability.[96] The concrete interest is still required and cannot

94. *Trump v. Hawaii*, 585 U.S. 667 (2018).
95. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024).
96. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

be supplied by generalized grievance.[97] But a student enrolled in a district receiving federal financial assistance, or that student's parent, holds exactly the interest the Title VI regulations were promulgated to protect, and the denial of notice and comment is the procedural injury. The same day effective date sharpens the point rather than weakening it, because it removes any argument that the injury awaits some future enforcement decision.

The zone of interests test poses no serious obstacle. The test as applied under the Administrative Procedure Act is not demanding, and the intended beneficiaries of a nondiscrimination regulation fall within the zone of the statute authorizing it.[98]

The most likely plaintiffs are states. A state challenging federal action receives special solicitude in the standing analysis,[99] and states possess the institutional capacity to sustain multi year litigation against the United States. That is a practical observation rather than a doctrinal one, but it bears on whether the argument developed here has a forum, and it identifies who is positioned to open one.

B. Why Not Equal Protection

The showing assembled above is not offered as an equal protection claim, for structural rather than tactical reasons.

Race and disability sit at different tiers. A racial classification receives strict scrutiny. Disability does not: *City of Cleburne* declined to treat intellectual disability as a quasi-suspect classification and applied rational basis review, invalidating the ordinance before it because the record disclosed no rational relationship to a legitimate interest.[100] Animus remains unavailable as a legitimate governmental purpose even at that tier.[101] But a single equal protection claim joining both classes invites a court to sort them, and the disability component then travels attached to the weaker standard.

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97. *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).
98. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).
99. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).
100. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).
101. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620 (1996).

The Administrative Procedure Act does not sort classes. It asks whether the agency's explanation accounts for the agency's action.[102] The multi class character of the sequence therefore enters an arbitrary and capricious claim as strength, because breadth is what defeats the deregulatory rationale. A pattern confined to one protected class would require the challenger to prove animus toward that class. A pattern spanning three, executed through repeated procedural shortcuts, requires only that the agency account for the pattern it produced.

The evidence is shared. The claims are separate. Pretext evidence assembled under *Arlington Heights* feeds the administrative record; it requires no tier of scrutiny, and it requires no court to find that anyone acted from hatred.

IX. Conclusion

The government's account of the last eight months is that it simplified. Simplification does not select.

What the record shows is a sequence of choices, each individually defensible and collectively unaccounted for, in which enforcement capacity was withdrawn from three protected categories while public money was directed toward a fourth through an instrument whose design technique was developed, on the record, to keep public money for private schooling beyond the reach of the courts.

An agency may change its mind. It may narrow its own regulations, reorganize its offices, and reverse its litigating positions. What it may not do is decline to explain the shape of what it did.

The sponsors of the Louisiana grants lost their programs because they described their purposes out loud while their statutes described nothing. The present administration has closed that gap, attenuating the design and the rhetoric together, and a doctrine that depends on catching an official saying the quiet part has nothing to catch. That is the reason a pretext argument here has to run on distribution rather than on statements.

102. 5 U.S.C. §706(2)(A); *State Farm*, 463 U.S. at 43.

The distribution is available. It is in the *Federal Register*, in the dates, and in the difference between a negotiated rulemaking committee that met publicly for two weeks about accreditation and a civil rights rule that was published and effective on the same morning. The question a reviewing court is being asked is not whether anyone in this government dislikes disabled children, or Black children, or Muslim children. It is narrower and it is answerable on the agency's own record: if the object was to reduce regulatory burden, why did the public get a seat at every table except this one.

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