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

WORKING DRAFT · JULY 2026

THE SELECTION CRITERION

Attenuated design, sequence evidence, and what deregulation cannot explain about federal civil rights policy

Four rollbacks of civil rights enforcement in eight months. Each one arrived with a neutral explanation about paperwork and cost. None of them explains why this was the only area of the Department that lost its public hearing.

Travis Gilly · Real Safety AI Foundation

START HERE

EVERY SINGLE ONE OF THESE HAS A BORING EXPLANATION.

A regulation was simplified to match the words of the statute. An office was moved to an agency better suited to the work. A legal opinion read a law more carefully than the last one did. Compliance costs went down.

Take any one of them on its own and the explanation holds. That is what makes this hard, and it is why nobody has been able to point at a single document and say there, that is the problem.

SO STOP LOOKING AT THEM ONE AT A TIME.

THE CLAIM

THE EXPLANATION IS NOT DISHONEST. IT IS INCOMPLETE, AND THAT IS ENOUGH.

A court reviewing a federal agency asks a narrow question: does the reason the agency gave actually account for what the agency did? If it does not, the agency has to try again. Nobody has to prove that anyone lied.

Cutting red tape predicts one thing: cuts spread across everything the agency regulates. That is not what happened. The Department kept regulating money the normal way, with committees and comment periods and effective dates a year out. Civil rights got none of that.

CUTTING RED TAPE DOES NOT CHOOSE A SUBJECT. SOMETHING ELSE DID THE CHOOSING.

Sources Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2)(A).

THE SHAPE OF THE ARGUMENT

FOUR MOVES, AND NONE OF THEM REQUIRE READING ANYONE'S MIND.

STEP 1

LAY OUT THE RECORD

Five government actions, all dated, all public, all inside civil rights.

STEP 2

COMPARE THE PROCESS

The same department gave money rules a public hearing and gave these none.

STEP 3

FOLLOW THE INSTRUMENT

The money going out the door uses a design with a court record attached to it.

STEP 4

ASK THE NARROW QUESTION

Not why did they do it. Whether the reason they gave explains the pattern.

Sources Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977); Dep't of Commerce v. New York, 588 U.S. 752, 139 S. Ct. 2551, 2575–76 (2019).

PART I

THE RECORD

Five actions in eight months, every one of them on the public record.

December 2, December 10, June 16, June 18, July 23. Nothing here is secret and nothing here is disputed.

THE SEQUENCE

EIGHT MONTHS.

1 **December 2, 2025**

Government lawyers issue an internal opinion narrowing when the Education Department may consider race at all.

2 **December 10, 2025**

The Justice Department deletes from its own rules the theory used to challenge practices that harm one racial group more than another.

3 **June 16, 2026**

Special education administration goes to Health and Human Services. Civil rights investigation goes to the Justice Department.

4 **June 18, 2026**

A legal opinion declares that the duty to serve disabled people in the community rather than in institutions does not exist.

5 **July 23, 2026**

The Education Department deletes the same theory from its own rules. Effective the next morning.

Sources Constitutionality of Race-Based Department of Education Programs, 49 Op. O.L.C. __, slip op. at 6–8 (Dec. 2, 2025); 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); Libby Stanford, Education Department Moves Special Ed. and Civil Rights to Other Agencies, Educ. Week (June 16, 2026); Op. Off. Legal Counsel (June 18, 2026) (Pettit, Principal Deputy Assistant Att'y Gen.); 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).

TWO DEPARTMENTS, ONE DECISION

THESE WERE NOT TWO AGENCIES HAPPENING TO AGREE.

An order signed in 1980 gives the Attorney General the job of approving this kind of civil rights regulation government-wide. The Education Department says in its own published rule that it acted through the Justice Department's coordination process, and that Justice reviewed and approved the result.

That matters for a practical reason. The usual answer to a pattern spanning two agencies is that agencies act independently and coincidences happen. Here the government has already written down that they did not act independently.

ONE APPROVING AUTHORITY. ONE ACTION, PUBLISHED TWICE.

Sources 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), at 46,741 (citing Exec. Order No. 12,250, Leadership and Coordination of Nondiscrimination Laws, 45 Fed. Reg. 72,995 (Nov. 4, 1980)).

WHAT WAS ACTUALLY REMOVED

THIS CLOSED THE ONLY DOOR THERE WAS.

Civil rights law bars schools that take federal money from discriminating. One way to prove discrimination is to show a policy that looks neutral on paper but falls much harder on one group. That is the theory these two rules deleted.

In 2001 the Supreme Court held that private citizens cannot take that theory into federal court at all. It could only be raised by filing a complaint with the agency that hands out the money. So for twenty-five years the agency rulebook was the entire mechanism, and deleting the rulebook ended the theory outright.

THE COURTHOUSE WAS ALREADY SHUT. THIS SHUT THE COMPLAINT DESK.

Sources Alexander v. Sandoval, 532 U.S. 275 (2001); 42 U.S.C. § 2000d; 42 U.S.C. § 2000d-1.

WHAT CHANGED WHEN THE WORK MOVED

AN OFFICE THAT HAS TO READ EVERY COMPLAINT IS NOT THE SAME AS A DIVISION THAT PICKS ITS CASES.

BEFORE

THE COMPLAINT DESK

- A parent files a complaint. The office takes it in and processes it as routine business.
- No lawyer required, no filing fee, no federal court procedure to learn.
- For most families this is the only enforcement door that was ever actually open.

AFTER

THE LITIGATING DIVISION

- A division of the Justice Department decides which cases are worth bringing.
- Selecting cases is what a litigating division is for, and it is not a criticism of it to say so.
- The grievance that used to be handled becomes a grievance that has to be chosen.

Sources Libby Stanford, Education Department Moves Special Ed. and Civil Rights to Other Agencies, Educ. Week (June 16, 2026); Kara Arundel, Education Department Transfers Key Special Ed, Civil Rights Functions, K-12 Dive (June 16, 2026).

ON THE RECORD, THE SAME DAY

THEY MOVED THE WORK BEFORE DECIDING WHO WOULD DO IT.

On the call announcing the transfer, senior Department officials said they had not yet worked out whether Justice Department staff would handle Education Department civil rights cases. Figuring out staffing, resources, and workload so that families still get relief was described as something the two departments would solve over the coming weeks.

This is the cleanest defect in the whole sequence and it needs no theory of motive. An agency has to consider the important parts of a problem before it acts. Who performs an enforcement function is an important part of moving an enforcement function.

WEEKS AFTER, NOT WEEKS BEFORE.

Sources Libby Stanford, Education Department Moves Special Ed. and Civil Rights to Other Agencies, Educ. Week (June 16, 2026); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

PART II

WHAT AN EXPLANATION HAS TO DO

The legal test is narrower and more useful than most people assume.

A court does not ask whether an agency had other motives. It asks whether the reason given fits the thing done.

IN PLAIN WORDS

THREE THINGS AN AGENCY OWES WHEN IT REVERSES ITSELF.

1 **Connect the reason to the act**
The explanation has to actually lead to the decision. A court is not allowed to invent a better reason on the agency's behalf.

2 **Admit that you are changing your mind**
Reversing a longstanding position without acknowledging the reversal is itself a defect.

3 **Account for who was relying on the old rule**
Not just the regulated companies. Everyone whose interests the old rule protected.

Sources Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020).

THE CASE THAT GOVERNS, READ HONESTLY

THE BEST PRECEDENT FOR THIS ARGUMENT ALSO CONTAINS THE BEST ANSWER TO IT.

WHAT IT FORBIDS

YOU CANNOT WIN IT THIS WAY

- A court may not throw out a rule because the agency probably had other reasons it did not mention.
- A court may not throw out a rule because it was shaped by an administration's politics or priorities.
- Agency policymaking, the Court said, is not a pure technical exercise sealed off from politics.

WHAT IT ALLOWS

YOU CAN WIN IT THIS WAY

- A court may refuse to accept a stated reason when the record shows it does not fit the decision.
- The Court found a disconnect between what was done and what was said, and that was enough.
- A judge, the Court wrote, does not have to display a naivete from which ordinary citizens are free.

SO THE ARGUMENT CANNOT BE THEY HAD POLITICS. IT HAS TO BE THE REASON DOES NOT FIT.

Sources Dep't of Commerce v. New York, 588 U.S. 752, 139 S. Ct. 2551, 2573, 2575–76 (2019) (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.); Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981)); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977).

THE PROCESS ASYMMETRY

ONE DEPARTMENT. ONE EIGHT-MONTH WINDOW. TWO DIFFERENT RULEBOOKS.

TRACK ONE

WHEN THE SUBJECT WAS MONEY

- A rulemaking committee announced in January, with deregulation first on its agenda.
- Public sessions in Washington, five days in April and five more in May.
- A proposed rule on student loans, then a comment period, then a final rule.
- Nothing can take effect before July 1, 2027.

TRACK TWO

WHEN THE SUBJECT WAS CIVIL RIGHTS

- Two final rules published with no proposal and no comment period.
- Both effective the same day they appeared in print.
- The civil rights office handed to another department by announcement.
- A legal opinion reversing decades of policy that no member of the public saw in draft.

THE DEPARTMENT NEVER STOPPED DEREGULATING. IT STOPPED LETTING THE PUBLIC WATCH.

Sources 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), at 46,740–41; 20 U.S.C. § 1098a; Reimagining and Improving Student Education — Federal Student Loan Program Final Regulations, FR Doc. 2026-08556 (Dep't of Educ. May 1, 2026); Saul Ewing LLP, The U.S. Department of Education Announces Rulemaking Committee to Reform Accreditation: What's Next? (Feb. 2026).

THE HONEST CONCESSION

PART OF THAT GAP IS LEGAL, AND SAYING SO MAKES THE REST HARDER TO DISMISS.

Congress requires the Education Department to run a formal negotiating process before it writes rules about student aid. So the committee and the comment period on the money side were not generosity. They were compulsory.

No comparable law applies to civil rights rulemaking. There, the general federal rulemaking statute was the only thing standing between the public and a rule written behind a closed door.

WHICH NARROWS THE QUESTION TO THIS: WHAT HAPPENED TO THE ONLY PROTECTION THAT EXISTED?

Sources 20 U.S.C. § 1098a; 5 U.S.C. § 553(a)(2).

THE EXEMPTION THEY USED

THE DEPARTMENT FOUND AN EXEMPTION. IT JUST DOES NOT USE IT ON MONEY.

The rulemaking statute exempts matters relating to grants and benefits. The Department's reasoning runs like this: civil rights conditions attach to federal money, federal money is grants and benefits, so the rule is exempt. Because that exemption covers the whole section, they also skipped the usual thirty-day wait. A rule published on July 24 took effect on July 24.

Follow that logic where it leads. Federal student aid is the textbook example of grants and benefits. If the theory were applied evenly, the student loan rules were exempt too. The Department ran those through a comment period anyway.

SAME CHARACTERIZATION. PUBLIC HEARING FOR MONEY, NONE FOR CIVIL RIGHTS.

Sources 5 U.S.C. §§ 553(a)(2), 553(d)(1); 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), at 46,740–41 (citing Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 217–18 (2022)); see 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).

SCALE OF THE THEORY

IF THAT READING IS RIGHT, THIS WHOLE BODY OF LAW CAN BE REWRITTEN WITH NO PUBLIC INPUT, FOREVER.

Every one of the main federal civil rights statutes for schools, hospitals, and other recipients works the same way. Take federal money, accept a condition against discriminating. Race and national origin. Sex. Disability. Age. Health care.

If changing one of those conditions counts as a matter relating to grants, then the rules implementing all of them are exempt from public comment permanently, in both directions, whoever is in office. The Department points to earlier times it used the same exemption on sex discrimination and disability rules, which confirms the reach rather than limiting it.

AN EXEMPTION THAT LARGE WORKS LIKE A STANDING KEY TO THE BUILDING.

Sources 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; 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), at 46,740–41.

PART III

THE INSTRUMENT

While enforcement contracted, one thing expanded, and its design has a court record.

The first nationwide federal subsidy for private schooling uses a structure built in 1962 to survive judicial review.

THE PROGRAM

PUBLIC MONEY REACHES PRIVATE SCHOOLS WITHOUT EVER LOOKING LIKE PUBLIC MONEY.

A taxpayer donates to a private scholarship organization and gets up to seventeen hundred dollars back as a federal tax credit. The organization gives a scholarship to a family. The family pays a private school. Roughly thirty states have signed on. The credit becomes available in tax year 2027.

Every link in that chain is private except the credit. There is no federal grant to a school anywhere in it. This is the first time the federal government has funded private schooling nationwide.

NOTE THE SHAPE, BECAUSE THE SHAPE IS THE ARGUMENT.

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

THE DESIGN HAS A NAME

ROUTING MONEY THROUGH PRIVATE HANDS TO KEEP THE GOVERNMENT'S FINGERPRINTS OFF IT.

A political scientist built a database of every private school choice program from 1953 to 2017 and interviewed the people who wrote them. She calls the technique attenuated governance: a government hides its own role in a policy by pushing the benefit through private organizations and the tax code.

Her central finding is that nobody stumbled into this design. It was chosen, and the record says what it was chosen for.

NOT AN ACCIDENT OF TAX POLICY. A METHOD, WITH AN AUTHOR AND A PURPOSE.

Sources Ursula Hackett, Attenuated Governance: How Policymakers Insulate Private School Choice from Legal Challenge, 47 Pol'y Stud. J. 237, 237, 250–51 (2019).

WHERE THE DESIGN COMES FROM

SEVEN STATES BUILT THIS AFTER BROWN, AND ONE OF THEM EXPLAINED WHY.

Between 1953 and 1964, legislatures in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia set up tuition grants as public schools faced desegregation. The programs were sued immediately. Virginia lost four cases in a decade.

The fix was structural. Stop handing money to schools; hand it to parents instead, and argue that the point is the benefit to the child even if the school ends up with the money. Louisiana went furthest and created a separate commission in 1962 to pay grants directly to children.

The state senator who ran the bill and then chaired that commission said in 1962 that administration was moved away from the state and local boards because grants to the child were the theory that would hold up in court.

THE PRIVATE ORGANIZATION BETWEEN THE STATE AND THE SCHOOL WAS THE WHOLE POINT OF IT.

Sources Hackett, Attenuated Governance, 47 Pol'y Stud. J. at 250–51 (quoting E. W. Gravolet, Jr.).

WHAT THE COURTS DID

BY 1970, EVERY ONE OF THEM WAS GONE.

Louisiana's scheme was enjoined in 1961 and the Supreme Court affirmed. The replacement commission met the same end in 1967 and that judgment was affirmed too. Courts in North Carolina, Virginia, and Mississippi struck down their versions. The Supreme Court held that closing public schools while funding the private schools that replaced them denied students equal protection, and that a federal court could block the grants and the tax exemptions outright.

The tax side followed. Federal courts cut off tax exemptions for racially discriminatory private schools, and the Supreme Court eventually upheld that position.

CAREFUL WITH THIS: THE COURTS STRUCK THEM DOWN FOR CLOSING SCHOOLS TO AVOID DESEGREGATION. THAT IS NOT WHAT IS ALLEGED HERE.

Sources Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962) (per curiam); Poindexter v. La. Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), aff'd, 389 U.S. 571 (1968) (per curiam); Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964); 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); Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), aff'd sub nom. Cannon v. Green, 398 U.S. 956 (1970); Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971); Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

THE COUNTER-EVIDENCE

THE STRONG VERSION OF THIS HISTORY IS WRONG, AND ECONOMISTS HAVE THE RECEIPTS.

WHAT THEY SHOW

THE STRONG CLAIM FAILS

- Virginia's grants were written to be race neutral so they would survive federal review, and were used to move students into integrated schools.
- A survey after two years found most families using grants for reasons unrelated to segregation.
- Of forty-six private schools that responded to a survey, only sixteen traced their founding to that era.
- Hard-line segregationists opposed the grants because they undercut the school closure strategy.

WHAT SURVIVES

THE NARROW CLAIM HOLDS

- Seven southern legislatures did enact tuition grants in response to desegregation.
- Federal courts did strike those programs down as evasions.
- The private intermediary was adopted for the stated purpose of surviving legal challenge.
- The critics dispute motive and effect. The claim here is about design.

Sources Phillip W. Magness, Art Carden & Vincent Geloso, James M. Buchanan and the Political Economy of Desegregation, 85 S. Econ. J. 715, 725–27, 733 (2018); Hackett, Attenuated Governance, 47 Pol'y Stud. J. at 250–51.

A PROBLEM WITH THE BORROWED MODEL

BY ITS OWN LOGIC, THIS PROGRAM SHOULD SURVIVE. SO THE ARGUMENT HAS TO CHANGE INSTRUMENTS.

Hackett's comparison is simple. Hidden design plus loud talk lost in court, because the talk supplied the purpose the statute hid. Hidden design plus quiet talk survived.

This administration is quiet on both. The published reasons are about statutory text, confusion, and compliance costs. Nobody said the part that sank Louisiana. On her scale, that predicts survival, and pretending otherwise would be dishonest.

Which leaves one question worth the whole paper: if nobody confesses, is there another kind of evidence that does the same work?

Sources Hackett, Attenuated Governance, 47 Pol'y Stud. J. at 250–51; Trump v. Hawaii, 585 U.S. 667 (2018).

THE CONTRIBUTION

A CALENDAR CANNOT BE WALKED BACK THE WAY A QUOTE CAN.

A legislator who announces that grants exist to keep schools segregated has told a court that the neutral words of the statute do not describe what the statute does. That is why those cases were winnable.

An agency that runs a public committee for accreditation, a comment period for loan limits, and neither for the rules on race and disability has shown a court the same mismatch without saying a word. Same question, different evidence.

And this evidence is sturdier. Statements get disavowed, blamed on one legislator, or dismissed as loose talk, which is much of what the travel ban case stands for. A docket cannot be disavowed. The dates belong to the agency.

Sources Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977); Trump v. Hawaii, 585 U.S. 667 (2018); Dep't of Commerce v. New York, 588 U.S. 752, 139 S. Ct. 2551, 2575–76 (2019).

THE DISABILITY DIMENSION

THE FEDERAL RULES SAY IT OUTRIGHT, SO NOTHING HAS TO BE INFERRED.

A public school owes a disabled child an individually designed education, a written plan built with the parents, and a hearing before a neutral officer if the family disagrees. Those entitlements belong to the child. None of them travel with the child.

1 **The entitlement disappears**

The regulation states that a child placed by a parent in a private school has no individual right to the services the child would have received in public school.

2 **A share replaces a right**

What may be available instead is a slice of the district's federal money, and the district makes the final call on what the child gets.

3 **The plan is downgraded**

The individualized education program is replaced by a services plan.

4 **The hearing goes away**

Disputes go through an administrative complaint rather than the due process hearing that holds the whole system together.

Sources 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1), 1414(d), 1415(b)(6), (f)(1)(A); 34 C.F.R. §§ 300.132(b), 300.133, 300.137(a), 300.137(b)(2), 300.138(b), 300.140, 300.511; Douglas N. Harris, Standard Empirical Policy Analysis Does Not Support Universal Vouchers/ESAs, 45 J. Pol'y Analysis & Mgmt. 1, 3 (2025).

A COMPARISON WORTH SITTING WITH

A PUBLIC SCHOOL TAKES THE CHILD. A VOUCHER SCHOOL MAY DECLINE.

A neighborhood public school has to enroll the children in its zone, with narrow exceptions, whatever their race, religion, disability, or academic record. Schools taking voucher and education savings account money may select on any of those grounds except race.

DISABILITY IS ON THE PERMITTED LIST.

This is not a new route either. Florida opened a disability-specific voucher in 1999, Ohio in 2003, Utah in 2005, Georgia in 2007, Oklahoma in 2010. Disabled children have been the entry door for private school choice for twenty-five years, which is why removing federal disability enforcement in 2026 lands on a population already pointed toward the private sector.

Sources Harris, Standard Empirical Policy Analysis Does Not Support Universal Vouchers/ESAs, 45 J. Pol'y Analysis & Mgmt. at 3; Crystal Zhan, School Choice Programs and Location Choices of Private Schools, 56 Econ. Inquiry 1622, 1627 tbl.1 (2018).

AN OPEN QUESTION, STATED AS OPEN

DO THE CIVIL RIGHTS STATUTES EVEN REACH A SCHOOL PAID THIS WAY?

All three of the main statutes switch on when a school receives federal financial assistance. A direct federal grant carries the obligations with it. A tax credit routed through donors and a private organization may not, and the answer is unsettled.

Stated conditionally, because that is the version that holds: if the structure keeps these schools outside the trigger, then public money is flowing into a sector the three central civil rights statutes do not reach, during the same months the enforcement machinery for those statutes was narrowed at both departments that run it.

THIS DECK DOES NOT ANSWER THAT. IT NOTES WHO BUILT THE STRUCTURE THAT RAISES IT, AND WHY.

Sources 42 U.S.C. § 2000d; 29 U.S.C. § 794(a); 20 U.S.C. § 1681(a); Hackett, Attenuated Governance, 47 Pol'y Stud. J. at 250–51.

THE RELIGION LANE

NOBODY HAD TO DECIDE THAT THIS MONEY WOULD REACH RELIGIOUS SCHOOLS.

In 2020 the Supreme Court took up a state tax credit scholarship program and held that a state does not have to subsidize private education, but once it does it cannot shut out schools just for being religious. Two years later the Court extended that past the line between what a school is and what it teaches. An earlier decision had already blessed vouchers reaching religious schools when families chose them independently.

SO WHILE THREE PROTECTED GROUPS LOST GROUND BY POLICY, ONE GAINED IT BY OPERATION OF LAW.

There is a design point hiding in that. The private organization that blurs the government's role for equal protection purposes is the same feature that satisfies the private choice requirement on the religion side. One structure, two doctrines, both satisfied.

Sources Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020); Carson v. Makin, 596 U.S. 767 (2022); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

THE CONTRADICTION IN OPERATION

THE LARGEST PROGRAM OF THIS KIND IS ACCUSED OF VIOLATING THE DOCTRINE THAT OPENED IT.

Two lawsuits filed in federal court in Texas in March 2026 allege that not one accredited Islamic school was approved for the state's program while hundreds of other private schools, including many Christian schools, were. The alleged mechanism is a state legal opinion letting the comptroller exclude schools over claimed ties to designated organizations, applied as a category rather than school by school.

These are allegations, and this account rests on press reporting rather than a review of the court files. If they hold up, the exclusion is the exact kind of religious discrimination the 2020 decision forbids.

THEN THE EXPANSION HAS A DENOMINATION.

Sources Complaints filed Mar. 1 and Mar. 11, 2026, S.D. Tex. (allegations described from contemporaneous press reporting; dockets not independently reviewed); Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020).

PART IV

THE CLAIM

Where this goes, who can bring it, and what a court would actually be asked.

An administrative claim about a mismatch, not a constitutional claim about anyone's heart.

FIRST OBJECTION

SKIPPING THE HEARING LAWFULLY DOES NOT PUT A RULE BEYOND A JUDGE.

The exemption the Department used excuses it from the procedures for writing a rule. It does not remove the rule from judicial review, and it does not make the decision one the law leaves entirely to the agency. A rule that never needed a comment period still cannot be arbitrary.

If anything the exemption raises the stakes. With no comments, the record is whatever the agency wrote in its own explanation. That explanation is the entire universe of reasoning available to defend the rule.

THEY NARROWED THE CASE TO ONE DOCUMENT, AND THEN WROTE THE DOCUMENT.

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

INSIDE ONE DOCUMENT

THE SAME RULE IS DESCRIBED THREE WAYS, AND EACH ONE BUYS A DIFFERENT EXEMPTION.

1. **For the small business statute, it changes nothing**
   The rule imposes no new substantive obligation and all recipients remain bound by the regulations already in place.

2. **For the deregulation order, it saves money**
   The rule is a deregulatory action expected to lower total costs. A rule that changes nothing does not produce savings.

3. **For the unfunded mandates statute, it is a civil rights measure**
   It claims an exemption reserved for rules that establish or enforce rights against discrimination based on race, color, religion, sex, national origin, age, or disability.

IT CANNOT BE A CIVIL RIGHTS RULE WHEN THAT HELPS AND A GRANTS MATTER WHEN THAT HELPS.

Sources 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), at 46,741–42 (invoking 2 U.S.C. § 1503(2)); Dep't of Commerce v. New York, 588 U.S. 752 (2019).

WHO WAS RELYING ON IT

THEY ASKED WHO RELIED ON THE RULE AND THEN COUNTED ONLY THE SCHOOLS.

The Department concluded that recipients have little or no reliance interest, on the reasoning that a 2001 Supreme Court decision cast doubt on the regulations long ago, that enforcement has been sporadic since, and that the rule lifts burdens rather than adding them.

Every party in that analysis receives federal money. The people who relied on a rule against discrimination are the students and families it existed to protect, and they do not appear in the reliance discussion at all.

HALF OF THE REQUIRED INQUIRY, AND THE MISSING HALF IS THE HALF THE STATUTE NAMES.

Sources 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), at 46,738; Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016); Alexander v. Sandoval, 532 U.S. 275 (2001).

KEEP THIS PARAGRAPH

THE DEPARTMENT AGREED THAT NUMBERS CAN PROVE INTENT. THAT IS THE WHOLE METHOD.

In the same document, the Department accepts that unequal effects can be evidence of deliberate discrimination, says deleting the liability theory does not stop anyone from examining such data, and notes that the Department and private litigants both use statistical disparity as an indicator of intent.

Read that against what this deck has been doing. If a pattern in the numbers is admissible to show what a school district meant, then a pattern in the dates is admissible to show what an agency meant.

THEY ENDORSED THE INFERENCE ON THE WAY TO DELETING IT.

Sources 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), at 46,738; Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

STANDING

AN ARGUMENT NOBODY CAN FILE IS AN ESSAY. SO HERE IS WHO FILES IT.

1 **The organizational route mostly closed in 2024**

The Supreme Court rejected the theory that an advocacy group is injured because a policy forces it to spend money responding. That loss explains some of the silence, and it is not the same as consent.

2 **The procedural route is open and fits**

A person with a real interest who was denied a procedural protection may sue to enforce the procedure without meeting the usual tests for immediacy and redress. The interest still has to be real.

3 **The rule took effect immediately, which helps**

There is no argument that the injury waits on some future enforcement decision. It already happened.

4 **States are the realistic plaintiffs**

A state suing the federal government gets special consideration on standing, and has the resources to carry a case for years.

Sources FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024); Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992); Summers v. Earth Island Inst., 555 U.S. 488 (2009); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012); Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

A DELIBERATE CHOICE

FILING THIS AS A DISCRIMINATION CASE WOULD SINK THE DISABILITY HALF OF IT.

Constitutional law grades classifications. Race gets the most demanding review. Disability does not: in 1985 the Court declined to give intellectual disability that status and applied the weakest standard, though it still struck the law down because the record showed no rational purpose. A bare desire to harm an unpopular group has never counted as a legitimate reason at any level.

Put both groups in one constitutional claim and a court will sort them. The race half travels with the strong standard and the disability half travels with the weak one.

THE ADMINISTRATIVE CLAIM DOES NOT SORT ANYONE. IT ASKS WHETHER THE REASON FITS THE RECORD.

Which is why breadth becomes an asset. A pattern hitting one group would require proving hostility toward that group. A pattern spanning three, run through the same procedural shortcut every time, only requires the agency to explain the pattern it made.

Sources City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Romer v. Evans, 517 U.S. 620 (1996); 5 U.S.C. § 706(2)(A); Alexander v. Sandoval, 532 U.S. 275 (2001).

THE CLAIM

AN AGENCY IS ALLOWED TO CHANGE ITS MIND. IT STILL HAS TO EXPLAIN THE SHAPE OF WHAT IT DID.

The government says it was simplifying. Simplifying does not choose. Every action here is defensible alone, and together they leave a question the explanation never reaches.

The men who wrote the Louisiana grants lost them because they said the quiet part while their statute said nothing. This time the design and the talking are both careful, so a doctrine that waits for a confession has nothing to wait for.

IF THE POINT WAS TO REDUCE PAPERWORK, WHY DID THE PUBLIC GET A SEAT AT EVERY TABLE EXCEPT THIS ONE?

Sources Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Dep't of Commerce v. New York, 588 U.S. 752, 139 S. Ct. 2551, 2575–76 (2019); 5 U.S.C. § 706(2)(A).

Travis Gilly, *The Selection Criterion* (working draft v1.0, July 2026)

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

Cal. Dep't of Educ. v. Bennett, 849 F.2d 1227, 1236 (9th Cir. 1988).

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City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969).

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Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964).

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Humana of S.C., Inc. v. Califano, 590 F.2d 1070, 1082 (D.C. Cir. 1978).

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Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

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Romer v. Evans, 517 U.S. 620 (1996).

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

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

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5 U.S.C. § 553(d)(1).

5 U.S.C. § 701(a)(2).

5 U.S.C. § 706(2)(A).

20 U.S.C. § 1098a.

20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

20 U.S.C. § 1414(d).

20 U.S.C. § 1415(b)(6), (f)(1)(A).

20 U.S.C. § 1681(a).

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