COMMENTS ON PROPOSED REGULATIONS
Racial Nondiscrimination in Private Schools
REG-119986-25, 91 Fed. Reg. 56,811 (September 4, 2026)
November 3, 2026

Internal Revenue Service
CC:PA:01:PR (REG-119986-25)
Room 5503
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted electronically via www.regulations.gov

Re: Comments on Proposed Regulations, Racial Nondiscrimination in Private Schools, REG-119986-25, 91 Fed. Reg. 56,811 (Sept. 4, 2026) ("NPRM")

We submit these comments on the notice of proposed rulemaking titled Racial Nondiscrimination in Private Schools. We are professors of law who study the law of tax-exempt organizations and write here in our individual capacities.

We conclude that the proposed regulations should be withdrawn.

Bob Jones University v. United States upheld the IRS's denial of exemption to schools whose practices contravened a fundamental public policy. Establishing such a policy requires the sustained convergence of all three branches of government on the same position, and the Court required that convergence to be beyond doubt. The NPRM rests instead on a single divided decision addressing two universities and on executive orders that reverse from one administration to the next.

Moreover, *Bob Jones* recognized that entitlement to exemption "depends on meeting certain common law standards of charity." That common law condemns restrictions that exclude a group from a charitable benefit but not those that direct a benefit toward one. The IRS has recognized remediation of discriminatory harm as a charitable purpose continuously since 1959, through regulations, published revenue rulings, revenue procedures reaffirmed as recently as 2019, and the formal legal advice of its Office of Chief Counsel. The Preamble engages three items in that record and does not mention the remainder. And the standard the NPRM would impose is unlimited in scope, and indifferent to purpose in a statutory scheme built on purpose.

If the administration believes *Students for Fair Admissions* requires this result, it needs to ask Congress to change the law.

Respectfully submitted,

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cc: Hon. Scott Bessent, Secretary of the Treasury
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EXECUTIVE SUMMARY

The NPRM would deny or revoke the tax-exempt status of any § 501(c)(3) private school that adopts, maintains, or enforces a policy or practice discriminating on the basis of race, color, or national or ethnic origin, in the administration of any program the school operates or supports, for any purpose. It would delete the provisions of Revenue Procedure 75-50 that have authorized minority-favoring admissions and financial assistance programs since 1975. Part I introduces these comments and Part II describes the proposed regulations. Parts III through VI set out four independent grounds requiring withdrawal.

- T**he NPRM exceeds the authority *Bob Jones* conferred.** That decision permitted the IRS to act only where a fundamental public policy is established beyond doubt through the convergence of all three branches of government over decades. A single, divided decision and recent executive orders subject to reversal by the next administration do not supply that convergence. See Part III.

- **The NPRM is inconsistent with the charitable standard it claims to implement.** *Bob Jones* recognized that entitlement to exemption "depends on meeting certain common law standards of charity." Common law condemns restrictions that exclude a group from a charitable benefit, but permits criteria that direct a benefit toward one. The NPRM collapses that distinction without acknowledging this key principle of common law. See Part IV.

- **The *NPRM* reverses sixty years of the agency's own guidance without acknowledgment.** The record includes the 1959 regulation, a 1972 regulation treating a private foundation's ethnic-minority scholarship program as consistent with § 501(c)(3), ten published revenue rulings from 1967 through 1977, six Chief Counsel memoranda from 1968 through 1989, two determinations concerning Kamehameha Schools, revenue procedures the agency expressly retained in 2019, and private letter rulings approving race-conscious scholarship programs as recently as 2024. The Preamble engages three items in that record and does not engage the rest. That record documents a construction of § 501(c)(3) consistent with what the common law permits, and it establishes the position the NPRM departs from without explanation. See Part V and Appendix A.

- **The NPRM is arbitrary and capricious.** The economic analysis examines scholarships and admissions while the regulatory text reaches every program a school administers or supports, a category the Preamble dismisses as "relatively narrow, miscellaneous." The standard supplies no criteria for what conduct is prohibited and disregards purpose in a statutory scheme built on purpose. And

Treasury and the IRS nowhere acknowledge or explain their departure from the agency's own longstanding position. Each of these is also among the grounds above; together they show a failure of reasoned decisionmaking the Administrative Procedure Act does not permit. See Part VI.

Requested action. *The proposed regulations should be withdrawn. If Treasury and the IRS proceed, Part VII sets out the minimum the Administrative Procedure Act requires before a final rule may issue.*

I. INTRODUCTION

A. The Question These Comments Address

On September 4, 2026, the Treasury Department and the Internal Revenue Service published a notice of proposed rulemaking titled Racial Nondiscrimination in Private Schools (the "NPRM").[1] The administration presents the NPRM as an application of the principle that all persons should be treated equally under the law. That principle is not in dispute. What is in dispute is whether the IRS has authority to determine that a purpose it has recognized as charitable for sixty years has ceased to be charitable and whether it has followed the law in attempting to do so.

Organizations pursuing the elimination of prejudice and discrimination have done so under a Treasury regulation in force since 1959, under published revenue rulings the IRS has never withdrawn, and under a revenue procedure the agency expressly reaffirmed in 2019.[2] The NPRM would strip exemption from such organizations, not because they fail the charitable purpose standard, but because of the means by which they choose to pursue that purpose. An equality principle as applied to the government's longstanding treatment of charitable organizations requires that the IRS not single out organizations for adverse treatment based on the means they choose to pursue a purpose the agency itself recognizes as charitable. The NPRM does exactly that.

These comments rest on four legal grounds, each sufficient to require withdrawal: that the NPRM exceeds the authority *Bob Jones University v. United States* conferred;[3] that it is inconsistent with the common law charitable standard on which § 501(c)(3) is grounded; that it reverses the agency's longstanding guidance without acknowledgment; and that it is arbitrary and capricious under the Administrative Procedure Act (APA). Parts III through VI develop each in turn.

Two features of the NPRM inform each of these grounds and warrant notice at the outset.

The first is the gap between the rule the NPRM would impose and the rule its Preamble analyzes. Proposed § 1.501(c)(3)-2(b) reaches "any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program." The final term is a residual category with no limit. The Preamble's economic analysis addresses scholarships and admissions. It characterizes everything else a school does as a "relatively narrow, miscellaneous group of activities" whose effects would be "insignificant." A regulation whose text extends to curriculum, faculty hiring, student organizations, and cultural programming, but whose supporting analysis assumes those activities are peripheral, fails to satisfy the APA's requirement of reasoned decisionmaking.[4]

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[1] Racial Nondiscrimination in Private Schools, 91 Fed. Reg. 56,811 (proposed Sept. 4, 2026) (to be codified at 26 C.F.R. pt. 1) (REG-119986-25, RIN 1545-BS05).
[2] *See* Part V *infra*.
[3] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
[4] 5 U.S.C. § 706(2)(A); *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The second is the absence of any intent requirement. The Preamble rests on *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*,[5] which applied the Equal Protection Clause and its understanding of Title VI. Both require proof of discriminatory purpose.[6] Section 501(c)(3) itself conditions exemption on an organization being operated for exempt purposes, and so many other doctrines giving that condition content asks why an organization acts as it does. But the NPRM reaches discrimination "for any purpose." By those words it makes the organization's purpose irrelevant. It eliminates § 501(c)(3)'s focus upon charitable purpose. Under that standard a school that operates a scholarship program to remedy its own documented history of exclusion stands in the same position as a school that refuses to admit minority students. Nothing in the Preamble explains why purpose, which governs every other question in this field, is irrelevant to this one.

B. Identity and Interest of Commenters

We submit these comments in our individual capacities as professors of law who study the law of tax-exempt organizations. Philip Hackney is a Professor of Law at the University of Pittsburgh School of Law and previously served as an attorney in the Office of Chief Counsel of the Internal Revenue Service, where his work included the private school nondiscrimination rules the NPRM would revise. Ellen Aprill is the John E. Anderson Professor Emerita of Tax Law at LMU Loyola Law School, Los Angeles. She served as an attorney-advisor in the Office of Tax Policy at the Department of the Treasury, where her work included the development of regulations under section 501(c)(3). She has written on the public policy doctrine and the revocation of exempt status for more than three decades. Neither of us represents any organization affected by the proposed regulations. Institutional affiliations are provided for identification only; these comments reflect our own views and not those of our institutions.

C. What These Comments Do Not Argue

We note that these comments do not argue that *SFFA* was wrongly decided. They do not argue that racial discrimination in education is permissible. They do not address whether race-conscious remediation is sound policy. They address instead whether the charitable standard of § 501(c)(3) permits such remediation.

[5] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
[6] Washington v. Davis, 426 U.S. 229, 239-42 (1976); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977); Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (Title VI).

II. BACKGROUND

This Part II describes what the proposed regulations would do, what they preserve, what they delete, as well as what the Treasury and the IRS said and did not say about the scope and economic effects of the rule. The legal arguments that follow from this Part are developed in Parts III through VI. The purpose of this description is to establish the regulatory text and Preamble record against which those arguments are made.

A. Operative Text

The proposed regulations would add new Treasury Regulation § 1.501(c)(3)-2 to 26 CFR Part 1, titled "Racial nondiscrimination requirement for private schools." The proposal is issued under the Secretary's general rulemaking authority in § 7805(a) and would apply to taxable years beginning after May 31, 2027.

Proposed Regulation § 1.501(c)(3)-2(a) states the general rule: a private school must be operated exclusively for one or more exempt purposes within the meaning of Treasury Regulation § 1.501(c)(3)-1(d) to be an organization described in § 501(c)(3). It further provides that a private school that fails to satisfy the nondiscrimination requirement of paragraph (b) is not an organization described in § 501(c)(3) for taxable years beginning after May 31, 2027.

Proposed Regulation § 1.501(c)(3)-2(b) states the operative prohibition in full:

> A private school is not operated exclusively for exempt purposes if it adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin in the administration of any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program. For purposes of this section, discrimination on the basis of race, color, or national or ethnic origin includes any discrimination on the basis of race, color, or national or ethnic origin for any purpose.

Section 1.501(c)(3)-2(c) defines "private school" as an organization described in § 501(c)(3) and classified as an educational organization described in § 170(b)(1)(A)(ii). That is, a private school includes any private primary or secondary school, college, professional or trade school, or university. Governmental units and their instrumentalities are excluded.

Three features of the proposed rule warrant attention. First, the prohibition applies to "any policy or practice." The text supplies no threshold. Section 501(c)(3)'s own "exclusively" requirement reads as absolute on its face. The Supreme Court and the regulations alike read the exclusively requirement to permit insubstantial non-exempt activity.[7] Whether the NPRM's "any" admits a similar insubstantiality standard is a

[7] Better Bus. Bureau of Washington D.C. v. U.S., 326 U.S. 279, 283 (1945) ("an organization must be devoted to [its exempt] purposes exclusively. This plainly means that the presence of a single non-[exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or

question Treasury and the IRS leave open in the regulatory text and the Preamble. Second, the enumerated categories conclude with an unlimited catchall: "other school-administered or school-supported program." The preceding examples do not limit that catchall, which reaches every program a school administers or supports. Third, the definition of discrimination explicitly extends to policies or practices that discriminate "for any purpose." Thus, the proposed rule operates without regard to the school's intent or the program's goal. It does not ask whether the purpose is remedial, educational, or otherwise benign.

B. What the Preamble Says is Preserved

The proposed regulations do not repeal or amend Treasury Regulation § 1.501(c)(3)-1(d)(2)(ii), which provides that the term "charitable" includes "the promotion of social welfare by organizations designed to . . . eliminate prejudice and the regulation discrimination" (the "charitable anti-discrimination purpose"). That provision remains in effect.

The Preamble, however, adds a provision not in the language of that regulation. It states that the proposed regulations do not end a private school's ability "to take actions or adopt policies intended to eliminate prejudice and discrimination, consistent with existing Treasury Regulation § 1.501(c)(3)-1(d)(2), provided the organization achieves these purposes by means other than actions or policies that discriminate on the basis of race, color, or national or ethnic origin."[8]

In the Preamble's Explanation of Provisions, Treasury and the IRS also state that the proposed regulations preserve the ability of private schools to maintain a religious mission, curriculum, or program of observance, and to select students on the basis of religious affiliation or membership. The Preamble states that the use of a religiously-based criterion does "not become discrimination on the basis of race, color, or national or ethnic origin merely because members of the relevant religious community may also share ancestry or ethnic characteristics (so long as the selection criteria is based solely on religion and not on shared ancestry or ethnic characteristics)."[9]

The operative regulatory text of proposed regulation § 1.501(c)(3)-2(b), however, contains no such religious exception. The text prohibits "any policy or practice that discriminates on the basis of race, color, or national or ethnic origin . . . for any purpose" without qualification. A school whose religious admissions criteria correlate with ancestry or ethnic characteristics would need to rely on Preamble language, which does not have the force of law, or some other form of law to avoid the prohibition contained in the language of the proposed regulation. The significance of this gap between the

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importance of truly [exempt] purposes."); Treas. Reg. § 1.501(c)(3)-1(c)(1) (an organization will be considered to operate exclusively for exempt purposes "only if it engages primarily in activities which accomplish" an exempt purpose; furthermore, "[a]n organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.").

[8] 91 Fed. Reg. at 56,815.

[9] *Id.*

Preamble's religious protection and the regulatory text, as well as its relationship to the Court's treatment of religious justifications in *Bob Jones* itself, is developed in Part VI.

C. What the NPRM Would Delete

If finalized as proposed, the regulations would modify Revenue Procedure 75-50, 1975-2 C.B. 587, as updated by Revenue Procedure 2019-22, 2019-22 I.R.B. 1260, by deleting two specific provisions. The Preamble states that these provisions "would be incompatible with the new rules."[10]

The first provision to be deleted is the second sentence of Section 3.02 of Rev. Proc. 75-50, which currently provides: "[a] policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students."

The second provision to be deleted consists of the third and fourth sentences of Section 4.05 of Rev. Proc. 75-50, which currently provide:

> Consistent with section 3.02, *supra*, scholarships and loans that are made pursuant to financial assistance programs favoring members of one or more racial minority groups that are designed to promote a school's racially nondiscriminatory policy will not adversely affect the school's exempt status. Financial assistance programs favoring members of one or more racial groups that do not significantly derogate from the school's racially nondiscriminatory policy similarly will not adversely affect the school's exempt status.

These provisions have been in effect since 1975. They were expressly retained when the IRS updated Revenue Procedure 75-50 in 2019. Rev. Proc. 2019-22 modified certain provisions of Rev. Proc. 75-50 but left the minority-favoring program authorizations in Sections 3.02 and 4.05 intact. Apart from these two deletions, all other provisions of Rev. Proc. 75-50 as modified by Rev. Proc. 2019-22 would remain in effect. Revenue Ruling 71-447[11] is not formally amended by the proposed regulations.

D. The NPRM's Legal Theory

The Preamble's Explanation of Provisions states that the proposed regulations are grounded in three propositions. First, *Bob Jones* established that racial discrimination in education violates a fundamental public policy of the United States.[12] Second, Treasury and the IRS state that *SFFA* establishes that race-conscious programs, including those defended as serving remedial or diversity-related objectives, constitute

[10] *Id.*
[11] Rev. Rul. 71-447, 1971-2 C.B. 230.
[12] 461 U.S. 574 (1983).

racial discrimination.[13] Third, on the basis of these two propositions, the Treasury and the IRS assert in the Preamble that "all forms of racial discrimination in education, regardless of the intent behind or the legality of such discrimination (for example, where such discrimination is defended as serving remedial or diversity-related objectives), are against a fundamental public policy of the United States."[14]

The Preamble identifies the sources of this fundamental public policy: "antidiscrimination law such as the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1964, Supreme Court case law such as *Brown* to *Runyon* to *Bob Jones* to *Students for Fair Admissions*, and the actions taken by the Executive Branch to ensure racial nondiscrimination is instituted throughout the United States."[15] The executive branch actions cited in footnote 3 to the Preamble are three executive orders: Executive Order 10730 (1957, authorizing the National Guard to enforce desegregation at Little Rock); Executive Order 14173 (Jan. 21, 2025, directing agency heads to create plans to deter illegal discrimination, including at higher education institutions); and Executive Order 14280 (April 23, 2025, directing the Secretary of Education and Attorney General to take action to prevent racial discrimination in school disciplinary systems).

E. The Regulations' Reach and the Preamble's Economic Analysis

The Preamble acknowledges in footnote 6 that "private primary and secondary schools were not directly affected by *SFFA*."[16] As the basis for applying the proposed regulations to K-12 schools, it points to "several prominent advisors to private primary and secondary schools anticipated that this decision would ultimately come to apply to K-12 private schools as well and advised schools to adapt their admissions processes accordingly." The sources cited for this proposition are two law firm client advisories published in 2023.[17] The Preamble cites no judicial decision holding that *SFFA* applies to K-12 private schools, no congressional legislation extending *SFFA*'s principles to K-12 private schools, and no executive order directed specifically at K-12 private school admissions under *SFFA*.

The Preamble's economic analysis identifies three categories of economic effect: compliance costs for private schools; changes in the recipient population of scholarships and loans; and the charitable giving behavior of donors to scholarship funds.[18] The affected entities are described as "the 18,000 private elementary, secondary, and post-

[13] 91 Fed. Reg. at 56,815.
[14] 91 Fed. Reg. at 56,815.
[15] *Id.*
[16] 91 Fed. Reg. at 56,816, n. 6.
[17] Smith, Kristin L., *6 Steps for Private and Independent Schools in the Wake of the SCOTUS Affirmative Action Ruling* (2023) https://www.fisherphillips.com/en/insights/insights/private-andindependent-schools-scotus-affirmative-action-ruling. Pass, Caryn G., Grace H. Lee, Janice P. Gregerson, and Ashley E. Sykes, *No More Affirmative Action: What Does the Supreme Court's Decision Mean for Independent Schools?* (2023) https://www.venable.com/insights/publications/2023/07/nomore-affirmative-action-what-does.
[18] 91 Fed. Reg. at 56,817-56,818.

secondary schools in the United States that currently qualify for tax exempt status and the 750,000 students attending these schools who may qualify for scholarships allocated on the basis of racial, ethnic, or national identity."[19]

The economic analysis does not include costs associated with curriculum content or course offerings, faculty hiring or fellowship programs, student affinity organizations, research centers or academic institutes, cultural programming, mentorship programs, or targeted recruitment and outreach activities. Each of these categories falls within the reach of "other school-administered or school-supported program" as that phrase appears in proposed regulation § 1.501(c)(3)-2(b). The Preamble addresses this gap in a single sentence, stating that while the regulations "might also affect any other school-supported programs or education policies administered by private schools, the Treasury Department and the IRS assume that any economic effects arising from this relatively narrow, miscellaneous group of activities would be insignificant."[20]

The Preamble cites none of the published guidance through which the IRS implemented the charitable anti-discrimination purpose: the revenue rulings from 1967 through 1977, the 1972 regulation treating a private foundation's ethnic-minority scholarship program as consistent with § 501(c)(3), or the 2019 retention of Revenue Procedure 75-50's minority-favoring provisions. Nor does it acknowledge the analytical framework the Service applied in the intervening decades, which general counsel memoranda and the determinations regarding Kamehameha Schools document.[21] Part V discusses this record.

F. The K-12 Origins of the Doctrine

The judicial history underlying the nondiscrimination requirement for private schools arose, with one exception, in the K-12 context. *Brown v. Board of Education*,[22] addressed K-12 public schools. *Green v. Connally*,[23] addressed K-12 private schools. Revenue Ruling 71-447 addressed private schools generally. *Bob Jones* involved a university that also operated an elementary and secondary school, consolidated with a case involving a K-12 school.

In contrast, *SFFA* addressed Harvard College, a private university and federal funding recipient, and the University of North Carolina, a state university. The case was decided under the Equal Protection Clause of the Fourteenth Amendment, which is also the standard under Title VI.[24] The Court's majority held that the admissions programs at these two specific institutions failed strict scrutiny because they "lack sufficiently

[19] *Id.* at 56,816.
[20] *Id.* at 56,817.
[21] We do not suggest that a preamble must canvass nonprecedential internal advice. We do suggest that an agency abandoning a framework it applied for two decades must say so.
[22] 347 U.S. 483 (1954).
[23] 330 F. Supp. 1150 (D.D.C. 1971).
[24] The Court held that UNC's program violated the Equal Protection Clause and that Harvard's violated Title VI. The analysis was the same, because Title VI "proscribes only those racial classifications that would violate the Equal Protection Clause or Title VI." *SFFA*, 600 U.S. at 198 n.2 (quoting Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003)).

focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[25] The majority simultaneously preserved space for race-conscious consideration, stating that universities "may consider" how race affected an applicant's life and "how he or she overcame discrimination, inspired others, or developed skills."[26] Three Justices dissented and would have upheld the programs entirely.[27]

The proposed regulations apply a broad uniform standard — "any policy or practice . . . for any purpose" — to all private schools covered by proposed regulation § 1.501(c)(3)-2(c), from small K-12 institutions to major research universities, without distinguishing between them. Moreover, it fails to address why *SFFA*'s holding about two specific universities under specific constitutional and statutory doctrines establishes the same fundamental public policy for all private schools regardless of type, size, or relationship to the federal government.

[25] 600 U.S. at 230.
[26] *Id.*
[27] *SFFA*, 600 U.S. 181, 317 (2023) (Sotomayor, J., dissenting, joined by Kagan and Jackson, JJ.); see also *id.* at 384 (Jackson, J., dissenting) (Justice Jackson took no part in the consideration or decision of the Harvard case).

Part III: THE PROPOSED REGULATIONS EXCEED THE IRS'S LAWFUL AUTHORITY UNDER *BOB JONES*

Bob Jones imposed limits on the Service's authority to deny exemption on public policy grounds. This Part sets out those limits and shows how the NPRM exceeds them.

A. What Congress Enacted

Section 501(c)(3) provides that corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" are exempt from federal income tax.[28] That language has appeared in substantially the same form in every revenue act since 1894.[29] Understanding why Congress enacted it is essential to evaluating whether the proposed regulations fall within the authority it confers on the IRS and Department of Treasury.

The provision reflects a common law tradition stretching back centuries. As the Supreme Court observed in *Bob Jones*, "tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England. The origins of such exemptions lie in the special privileges that have long been extended to charitable trusts."[30]

The legislative history confirms that Congress viewed the exemption in these terms. In enacting the first charitable exemption provision in 1894, Congress understood that charities "were to be given preferential treatment because they provide a benefit to society."[31] In 1924, the Court restated the governing understanding: "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."[32] The public benefit rationale for the related charitable contribution deduction reflects the same logic: as Senator Hollis explained in floor debate on the Revenue Act of 1917, "For every dollar that a man contributes to these public charities, educational, scientific, or otherwise, the public gets 100 percent."[33]

The Court in *Bob Jones* distilled this history into a governing principle: entitlement to exemption "depends on meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[34]

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[28] I.R.C. § 501(c)(3). The provision also lists other purposes – testing for public safety, fostering national or international sports competition, and preventing cruelty to children or animals.
[29] Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 556 (exempting companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary associations); Act of Aug. 9, 1909, ch. 6, § 38, 36 Stat. 112; Act of Oct. 3, 1913, ch. 16, § 2(G), 38 Stat. 172.
[30] 461 U.S. 574, 588 (1983).
[31] *Id.* at 590 (citing 26 Cong. Rec. 585-586 (1894)).
[32] Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924).
[33] 55 Cong. Rec. 6728 (1917).
[34] 461 U.S. at 586.

That common law foundation matters. The Court confirmed in *Bob Jones* that the common law charitable standard is the starting point. The IRS administers the standard Congress enacted when it wrote "charitable" into the Internal Revenue Code (Code). The question of what constitutes a "charitable" purpose is a question of law, not a matter committed to IRS discretion.

B. The Scope and Limits of Treasury's Rulemaking Authority

The proposed regulations are issued under § 7805(a), which authorizes the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement of" the Code.[35] This provision confers a general rulemaking grant, not a specific delegation of authority to redefine the charitable standard.

Bob Jones confirmed that the IRS has authority to determine in the first instance whether a particular entity qualifies as "charitable" under § 501(c)(3).[36] It also confirmed that "in an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems."[37]

These are not trivial grants of authority. But they have limits that bear directly on the proposed regulations.

First, the Court stated that "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[38] This is a demanding standard. The IRS is not authorized to deny exemption based on ordinary public policy preferences, contested policy questions, or executive branch priorities of the moment. The standard is fundamental public policy, a category whose content the Court itself defined by reference to decades of convergence from all three branches of government. That standard has implications not only for when the IRS may invoke the doctrine, but also for how a regulation implementing it must be written. The proposed regulations satisfy neither requirement, as Parts IV and VI develop.

Second, and relatedly, in response to Justice Powell's concurrence, the Court disclaimed the broader reading of its own opinion. Justice Powell specifically addressed the institutional limits of IRS authority: "I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote 'public policy.'"[39] Chief Justice Burger's majority opinion responded directly, stating

[35] I.R.C. § 7805(a).
[36] 461 U.S. at 597–98.
[37] *Id.* at 596.
[38] *Id.* at 592.
[39] *Id.* at 611 (Powell, J., concurring).

that Justice Powell "misreads the Court's opinion" and that "[t]he Court's opinion does not warrant that interpretation."[40]

The Court's reason for finding that concern unfounded was that the policy before it was "sufficiently clear."[41] Justice Powell had himself conceded that "if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education."[42] On that policy, the IRS had grounds to act. Where a policy is not sufficiently clear, the concern about overreach remains.

The Court also described how a fundamental public policy comes to exist. Where Congress has explicitly legislated on an issue, the question is settled. The Court offered as an example the Service's 1921 regulation denying exemption for proscribed political activity, issued "before the Congress itself added such conduct as a disqualifying element."[43] Where Congress has not legislated, the Service may act only on the convergence of all three branches, and its authority in that circumstance is derivative. The Service can recognize a convergence the other branches have produced; it cannot create one.

The Service understood these limits. Explaining *Bob Jones* to its own personnel the following year, the Exempt Organizations function wrote that the decision establishes that the Service does not have "authority to decide which policies are sufficiently 'fundamental' to require denial of exempt status," and that "[t]he Service will continue to be guided by the actions of the executive, the legislative, and the judicial branches of government when determining whether public policies have become sufficiently fundamental and so clearly established as to require denial of tax exemption."[44]

C. The Requirement of Three-Branch Convergence

Against this background, *Bob Jones* held that the IRS permissibly denied exemption to racially discriminatory private schools because they violated fundamental public policy. But the holding rested on a specific and demanding evidentiary predicate: all three branches of the federal government had converged on the prohibition of racial discrimination in education over a period of more than a quarter century.

The Court catalogued this convergence in detail. From the judicial branch: B*rown v. Board of Education*,[45] and an "unbroken line of cases" following it establishing that

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[40] *Id.* at 598 n.23.
[41] 461 U.S. at 598 n.23.
[42] *Id.* at 607.
[43] *Id.* at 597.
[44] I.R.S., 1984 EO CPE Text, B. Update on Private Schools and Impact of *Bob Jones University v. U.S.* Continuing professional education texts were training materials prepared by the Exempt Organizations function for annual instruction of Service personnel. They are not guidance, do not bind the Service or taxpayers, and carry no precedential weight. They are evidence of the agency's contemporaneous understanding of the doctrine it administered, prepared for the instruction of the personnel who applied it.
[45] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

racial discrimination in education violates a "most fundamental national public policy."[46] From Congress: Titles IV and VI of the Civil Rights Act of 1964, in which Congress "clearly expressed its agreement that racial discrimination in education violates a fundamental public policy," along with the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, and the Emergency School Aid Act of 1972, which the Court cited as further testimony "to the public policy against racial discrimination."[47] From the executive: numerous executive orders "demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination."[48]

The Court described the position of all three branches as "unmistakably clear."[49] The evidence of convergence was not unmistakable because any single branch had acted. It was unmistakable because all three branches had acted, consistently, over decades, in the same direction. The Court cautioned that this convergence was the source of the IRS's authority to act, not the IRS's own judgment about what public policy required.[50]

The Court canvassed Titles IV and VI of the Civil Rights Act of 1964, the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, and the Emergency School Aid Act of 1972, along with executive orders issued across five administrations between 1948 and 1981.[51] The Preamble cites the Civil Rights Act of 1964 and three executive orders, one of which the Court already counted, two of which issued in 2025.[52] The Preamble adds *SFFA* and two recent executive orders to the record *Bob Jones* compiled.

The question is therefore not whether a fundamental public policy against invidious racial exclusion in education exists. *Bob Jones* settled that question. It is whether anything in the four decades since extended that fundamental public policy to include the remediation of discriminatory harm as a form of discrimination in education. For that extension, the Preamble offers one sharply divided Supreme Court decision and two executive orders issued in 2025.

Executive orders that reverse from one administration to the next are, by definition, not fundamental public policy. They are the ordinary policy changes that democratic governance produces. As Professor Roger Colinvaux has noted, "[t]his is public-policy whiplash, not a sign of the fundamental agreement necessary to invoke *Bob Jones*."[53]

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[46] 461 U.S. at 593.
[47] *Id.* at 594.
[48] *Id.* at 595.
[49] *Id.* at 598.
[50] *Id.* at 598 ("it would be anomalous for the Executive, Legislative and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared").
[51] 461 U.S. at 594-95 (citing Exec. Order No. 10730, 3 C.F.R. 389 (1954-1958 Comp.), among the executive actions "demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination").
[52] 91 Fed. Reg. at 56,815 & n.3 (citing Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), and Exec. Order No. 14280, 90 Fed. Reg. 17,533 (Apr. 23, 2025)).
[53] Roger Colinvaux, *Charitable Giving and Civil Rights: A Defense of Private Remedial Action*, 135 YALE L.J. 549, 606 (2025).

The Preamble's own acknowledgment narrows its cited judicial support further. Footnote 6 states that "private primary and secondary schools were not directly affected by *SFFA*."[54] The basis the Preamble offers for applying the NPRM to those schools is that "several prominent advisors to private primary and secondary schools anticipated that this decision would ultimately come to apply to K-12 private schools as well."[55] The sources cited are two law firm client advisories.[56] Whatever weight *SFFA* carries for the universities it addressed, the agency concedes that the decision did not reach the institutions that constitute the majority of the private schools the NPRM would govern. Treasury and the IRS offer, in place of judicial authority, the anticipatory advice of two law firms. That is not three-branch convergence. It is an agency prediction on questionable support about what the courts might later hold.

D. Congressional Ratification

The Court in *Bob Jones* did not rest on three-branch convergence alone. It found "an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings," and it identified the evidence.[57]

Congress held hearings one month after the Service announced its position in July 1970, and repeatedly thereafter. Over the following twelve years "no fewer than 13 bills" were introduced to overturn the interpretation, and none emerged from committee — during a period in which Congress "enacted numerous other amendments to § 501 . . . including an amendment to § 501(c)(3) itself."[58] The Court acknowledged that "[n]on-action by Congress is not often a useful guide," but found "the non-action here is significant."[59]

The Court said the evidence "goes well beyond the failure of Congress to act on legislative proposals," because Congress "affirmatively manifested its acquiescence in the IRS policy" when it enacted § 501(i) in 1976, denying exemption to social clubs whose "charters or policy statements provide for discrimination against any person on the basis of race, color, or religion."[60]

The Court found the committee reports on § 501(i) "[e]ven more significant." Both reports cited *Green v. Connally* as establishing that "discrimination on account of race is inconsistent with an educational institution's tax exempt status."[61] The *Bob Jones* Court concluded that those references "cannot be read other than as indicating approval of the standards applied to racially discriminatory private schools by the IRS subsequent to 1970, and specifically of Revenue Ruling 71-447."[62]

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[54] 91 Fed. Reg. at 56,816, n. 6.
[55] *Id.*
[56] Smith *supra* note 17*;* Pass *supra* note 17.
[57] 461 U.S. at 599-600.
[58] *Id.* at 600.
[59] *Id.*
[60] *Id.* at 601.
[61] *Id.* (citing S. Rep. No. 1318, 94th Cong., 2d Sess., at 7-8 & n.5 (1976), and H.R. Rep. No. 1353, 94th Cong., 2d Sess., at 8 & n.5 (1976)).
[62] 461 U.S. at 601-02.

The NPRM has no counterpart. Congress has held no hearings and introduced no bills addressing whether race-conscious remediation by charitable organizations is consistent with exempt status. There is no congressional act manifesting approval of the position the proposed regulations would adopt. And § 501(i), the single provision by which Congress has addressed racial discrimination in the exempt organizations context, reaches an organization whose "charter, bylaws, or other governing instrument . . . or any written policy statement" contains "a provision which provides for discrimination against any person on the basis of race, color, or religion."[63] It does not reach race-conscious remediation. Congress has not amended § 501(i) in fifty years.

E. What the Convergence Established

The convergence *Bob Jones* found was itself race-conscious. Executive Order 10730, which the Preamble cites, deployed military forces to ensure that Black students could enter a public high school in Little Rock.[64] The desegregation decrees that followed *Brown* assigned students by race.[65] The governmental actions that constituted the fundamental public policy against racial discrimination in education were actions taken in express consciousness of race, for the purpose of remedying the effects of exclusion.

The guidance the Service issued to implement Revenue Ruling 71-447 treated such measures as permissible: section 3.02 of Revenue Procedure 75-50 provides that a policy "that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students."[66] The proposed regulations would treat the same measures as grounds for revocation.

The convergence test, applied to this record, points in the opposite direction from what the proposed regulations assert.

For sixty years, the IRS's own administrative practice, representing the executive branch's settled position, explicitly authorized race-conscious remediation as consistent with exempt status.[67] Congress, through repeated legislative action in the civil rights context, never prohibited race-conscious remediation by private charitable organizations. And the judicial branch, from *Bakke* (1978) through *Grutter* (2003)

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[63] I.R.C. § 501(i).

[64] Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957); see 91 Fed. Reg. at 56,815 n.3 (citing the order); *Bob Jones*, 461 U.S. at 594-95 (same).

[65] *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[66] Rev. Proc. 75-50, 1975-2 C.B. 587,

[67] *See, e.g.*, Treas. Reg. § 53.4945-4(b)(5), Example 2; Rev. Rul. 67-250, 1967-2 C.B. 182; I.R.S. Gen. Couns. Mem. 33,752 (Feb. 12, 1968); Rev. Proc. 75-50, 1975-2 C.B. 587, as updated by Rev. Proc. 2019-22, 2019-22 I.R.B. 1260 (§§ 3.02, 4.05); I.R.S. Gen. Couns. Mem. 39,117 (Jan. 13, 1984) (approving minority-only scholarship program at school with history of exclusion as furthering nondiscriminatory purpose); I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989) ("The racial restriction must be of the type against which federal policy is directed."); *see also* I.R.S. Tech. Adv. Mem., Kamehameha Schools/Bernice Pauahi Bishop Estate (conference date Feb. 4, 1999) (on file with authors) (concluding that the Estate's ancestry-based admissions restriction "remains consistent with current fundamental public policy"). Part V and Appendix A document this record in full.

through *Fisher* (2016), consistently recognized carefully tailored race-conscious programs as constitutionally permissible.[68]

Moreover, *SFFA* did not completely repudiate this line of authority. The majority stated that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life."[69] That the Court found it necessary to preserve even that narrow consideration indicates a holding less categorical than the proposed regulations adopt. The judicial branch has not spoken with the categorical clarity that *Bob Jones*'s "no doubt" standard requires. Three Justices would have upheld the programs in their entirety.[70]

The contrast with the history following *Brown* is striking. In the years after that decision, courts established the foundational principle, Congress legislated in the Civil Rights Acts, and the executive enforced desegregation through presidential action and administrative practice. When the IRS finally acted in 1970-1971,[71] it was following an unmistakable national consensus that had been building for sixteen years, and Congress ratified its action, as Part III.D describes. Here the IRS acts against its own longstanding administrative doctrine, and in reliance on a judicial decision whose application to private schools the Preamble itself acknowledges is not established.

F. The Realization of Justice Powell's Warning

Justice Powell concurred in *Bob Jones* specifically to warn against the institutional danger of treating the public policy doctrine as a broad grant of IRS authority. He was prescient. Tax exemptions provide, in his words, "one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life."[72] An IRS that can deny exemption based on an administration's current policy preferences, asserted to be fundamental public policy, can impose governmental orthodoxy on independent civil society. An agency so empowered inverts the purpose the exemption regime serves.

The proposed regulations realize Justice Powell's fears. They take a 6-3 judicial decision, declare it to reflect fundamental public policy, and use the tax exemption mechanism to impose that policy on private schools without the legislative ratification *Bob Jones* required. Treasury and the IRS do so against their own longstanding administrative practice to the contrary. Further, they do so in a domain where private charitable organizations have historically exercised the independent judgment about the public good that the exemption regime exists to shelter.

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[68] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. Univ. of Tex., 579 U.S. 365 (2016).
[69] 600 U.S. at 230.
[70] *Id.* at 317 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting); *id.* at 384 (Jackson, J., joined by Sotomayor and Kagan, JJ., dissenting) (Justice Jackson did not participate in the Harvard case and issued her opinion with respect to the University of North Carolina case only).
[71] *See Bob Jones*, 461 U.S. at 578-79 (describing the July 1970 announcement and the formalization of the policy in Rev. Rul. 71-447); Rev. Rul. 71-447, 1971-2 C.B. 230.
[72] 461 U.S. at 609.

IV. THE COMMON LAW OF CHARITABLE TRUSTS AND REMEDIAL DISCRIMINATION

Parts III and IV address different defects. The Court described the public policy inquiry as whether activities "so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of 'charitable' status."[73] That inquiry thus depends upon the public benefit requirement. *Bob Jones* drew on the common law twice: to establish what "charitable" means, and to establish that a charitable purpose may not be contrary to public policy. The requirement that a charitable purpose not be illegal or contrary to public policy is itself a proposition of charitable trust law.[74]

But the common law does not identify which policies are fundamental for purposes of tax exemption. For that the *Bob Jones* Court looked elsewhere: to the convergence of all three branches, measured against a threshold higher than the common law's. As Part III.B explains, a declaration of non-charitable status "should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[75] The content of fundamental public policy thus comes from outside the common law. What counts as a charitable purpose does not. Part III addresses the first question. This Part addresses the second.

The NPRM invokes *Bob Jones* as its authority. But *Bob Jones* rested on the common law of charitable trusts. The Court found that the IRS "properly considered principles of charitable trust law in determining whether the institutions in question may truly be considered 'charitable,' for purposes of entitlement to the tax benefits conferred by § 170 and § 501(c)(3)."[76] That common law has long distinguished between trait-based restrictions that deny a group assistance and those that direct assistance toward a group. It condemns the former as invidious. It does not condemn the latter. The NPRM collapses that distinction without acknowledging that the common law on which its own authority rests draws it.

A. Section 501(c)(3)'s "Charitable" Purpose Takes Its Content from the Common Law of Charitable Trusts

As described in Part III above, § 501(c)(3) exempts organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."[77] But the Code does not define "charitable." Whether the term carried its narrow popular sense or its broader legal sense remained unsettled until the 1959 Treasury regulations resolved that question by adopting the term's "generally

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[73] 461 U.S. at 597-98.
[74] Restatement (Second) of Trusts § 377 cmt. c (1959); Rev. Rul. 71-447, 1971-2 C.B. 230; *see* Bob Jones, 461 U.S. at 591.
[75] 461 U.S. at 592.
[76] *Id.* at 587 n.11.
[77] I.R.C. § 501(c)(3) ("religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.").

accepted legal sense."[78] That sense "is derived from the law of charitable trusts and is broader than the ordinary sense of the term, which generally means the relief of the poor and distressed."[79]

The Supreme Court confirmed that approach in *Bob Jones*. The Court found "unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity."[80] It observed that "[t]he form and history of the charitable exemption and deduction sections of the various income tax acts reveal that Congress was guided by the common law of charitable trusts."[81] Congress said as much. The House Report on the Tax Reform Act of 1969 described "charitable" as "a term that has been used in the law of trusts for hundreds of years."[82]

The IRS administers the charitable standard Congress enacted. *Bob Jones* rejected the argument that only Congress may construe § 501(c)(3): "[i]n the first instance . . . the responsibility for construing the Code falls to the IRS," subject to congressional override and judicial review.[83] But a court, not the agency, determines whether the Service has construed the Code correctly. Section 706 "specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action," including where the statute is ambiguous. Under the APA, it "remains the responsibility of the court to decide whether the law means what the agency says."[84] That Congress left "charitable" undefined supplies no contrary delegation: "[a]n ambiguity is simply not a delegation of law-interpreting power."[85]

The *Bob Jones* Court described how the IRS exercised its authority. For more than sixty years the Service, in construing these provisions, "referred consistently to principles of charitable trust law."[86] An interpretation that departs from that law is not a construction of the standard Congress enacted. The Service's own construction was consistent for six decades. Part V documents it. If the NPRM is inconsistent with what

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[78] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959), T.D. 6500, 25 Fed. Reg. 11,737 (Nov. 26, 1960); *see* Ellen P. Aprill, *Once and Future Revocation of Tax Exemption: Public Policy, Illegality, Terrorism, and Charitable Purpose*, 79 TAX LAW. 277, 319-20 (2026). (describing the withdrawal of the 1956 proposed regulations adopting the narrow popular meaning and the adoption of the legal sense in 1959 following an extensive study); Colinvaux, *supra* note 53, at 568-69.

[79] Staff of the Joint Comm. on Tax'n, 109th Cong., Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations 16-17 (JCX-29-05, Apr. 19, 2005).

[80] *Bob Jones*, 461 U.S. at 586.

[81] *Id.* at 588 n.12. The Court reserved whether Congress intended to incorporate "any aspects of charitable trust law other than the requirements of public benefit and a valid public purpose." 461 U.S. at 588 n.12. The distinction between exclusionary and inclusionary restrictions operates within those requirements. Whether aid to a trait-restricted class confers a public benefit is the public benefit question, and the common law answers it by asking whether the restriction withholds a community resource from part of the community or directs resources toward an existing disadvantage.

[82] H.R. Rep. No. 91-413, pt. 1, at 43 (1969), quoted in *Bob Jones*, 461 U.S. at 588 n.12.

[83] *Id.* at 596-97.

[84] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 392 (2024) (emphasis in original); *id.* (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment)).

[85] *Id.* at 398 (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)).

[86] *Bob Jones*, 461 U.S. at 597.

“charitable” means under the common law, it is in excess of statutory authority regardless of the policy goals it serves.

B. The Common Law and Trait-Based Restrictions

It has long been commonplace for settlors of charitable trusts to include racial and other trait-based restrictions on donated property. Examples from the reported cases include gifts to a school for "poor white male orphans," a park "for white people only," a scholarship fund for white male Protestants, and an asylum for "respectable white women."[87] Until the mid-twentieth century, these restrictions were routinely upheld.[88]

Courts applying that same tradition, however, upheld trusts directing assistance toward racial minorities. Trusts for the education of Black people in the South were established and administered as ordinary charitable trusts. Northern philanthropists created private foundations specifically to provide education to formerly enslaved people and their descendants. They included the Peabody Fund (1868), the John F. Slater Fund (1882), and the General Education Board (1903). All operated as recognized charities and were among the organizations Congress exempted when it enacted the modern charitable exemption in 1913.[89]

State courts treated such trusts as charitable as a matter of course. In 1962, the California Supreme Court upheld as a valid charitable trust a testamentary trust for the care, support, and education of minor Black children whose parents had been imprisoned for political offenses.[90] The court analyzed the beneficiary class in detail, found it "an indefinite part of the community" with "adequate standards to guide [the] trustees," but did not suggest that the racial designation raised any question regarding charitable validity.[91] The same year, the Rhode Island Supreme Court applied *cy pres* to preserve a trust "for the education of the colored people of the Southern States" after the designated school ceased operating, treating the racial designation as evidence of the testator's general charitable intent.[92] The state attorney general and a guardian ad litem participating raised no objection to the racial purpose.[93]

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[87] *See* Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230, 231 (1957); Evans v. Newton, 382 U.S. 296, 297 (1966); Lockwood v. Killian, 172 Conn. 496, 375 A.2d 998 (1977); In re Long's Estate, 5 Pa. D. & C.3d 602, 604 (Ct. C.P. 1978); *see* also Restatement (Third) of Trusts § 28 cmt. f (2003).
[88] Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463, 477 (2002).
[89] Colinvaux, *supra* note 53, at 566.
[90] In re Robbins' Estate, 57 Cal. 2d 718, 723-24, 371 P.2d 573 (1962).
[91] *Id.* The Reporter's Notes to comment f of § 28 of the Third Restatement of Trusts observe that "[n]o issue was raised, apparently quite deliberately, either by the parties or the court with respect to the racial restriction." Restatement (Third) of Trusts section 28, Reporter's Notes to cmt. f (2003).
[92] New England Yearly Meeting of Friends v. Anthony, 95 R.I. 251, 186 A.2d 340, 341 (1962).
[93] *Id.*

C. The Common Law Distinguishes Invidious Exclusion from Remedial Inclusion

As charitable trust law developed during and after the civil rights era, courts began removing trait-based restrictions they identified as invidious.[94] Courts struck restrictions that excluded a group from a charitable benefit and upheld restrictions that directed a benefit toward such a group. They upheld restrictions where the stated justification was remediation of past discrimination.

The Restatement (Third) of Trusts states both the distinction and the analysis supporting it. The Restatement of the Law of Charitable Nonprofit Organization restated the same framework in 2021, adopting a list of charitable purposes "identical to the list found in Restatement Third, Trusts § 28,"[95] and describes comment f as providing that terms restricting the benefit of charitable assets "are invalid if they involve 'invidious' discrimination."[96] Three features of the Restatement (Third) of Trusts section 28 comment f bear directly on the NPRM.

First, comment f frames invidiousness in terms of exclusion. "When a scholarship or other form of assistance or opportunity is to be awarded on a basis that, for example, explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or religious group, the restriction is ordinarily invidious and therefore unenforceable."[97] It illustrates "invidious" with three examples of exclusion: "a trust to provide land and maintenance for a playground from which Black children are excluded," "a trust to support a scholarship program for which no Roman Catholic may apply," and "a trust to provide research grants for which only 'white, Anglo-Saxon Protestants' may apply."[98]

Second, immediately following the discussion of invidiousness, the Restatement clarifies what the rule does not reach:

> This does not mean that a criterion such as gender, religion, or national origin may not be used in a charitable trust when it is a reasonable element of a settlor's charitable purpose and charitable motivation. Thus, the requirement that the purpose be of charitable character does not prevent alumnae or friends of a women's college from endowing a professorial chair or library fund for that college, or a Jewish man from leaving money to a university to establish a scholarship program, in the betterment of his religion as he sees it, to enable a rabbi or two each year to study in that university's philosophy department. Nor does it mean that a Norwegian immigrant who became wealthy in this country cannot establish a program of an otherwise charitable nature to aid, solely or by preference, other Norwegian immigrants or the children of Norwegian immigrants. Similarly, the law of charitable trusts as such does not object to what is

[94] Restatement (Third) of Trusts § 28 cmt. f (2003).
[95] Restatement of Charitable Nonprofit Orgs. § 1.01 cmt. b (Am. L. Inst. 2021)
[96] *Id.* § 4.01 cmt c.
[97] Restatement (Third) of Trusts § 28 cmt. f (2003).
[98] *Id.*

> sometimes called "affirmative action," attempting to respond to a social problem in its own terms, at least as reasonably perceived by a substantial (even if not majority) segment of society or of the affected community.[99]

None of those examples involves a finding that anyone wronged the beneficiaries. Affirmative action appears in that passage as the fourth in a series of ordinary applications of a general principle, not as a grudging exception. The general principle is stated in the passage's first sentence: a trait-based criterion may be used "when it is a reasonable element of a settlor's charitable purpose and charitable motivation."

Third, the Reporter's Notes to comment f collect the decisions the distinction reflects.[100]

Where a restriction excluded, courts struck it. In *Tinnin v. First United Bank*, the Mississippi Supreme Court refused to enforce a scholarship trust restricted to students "who are of the caucassian [sic] race and . . . none other," holding that "it is much too late to doubt that a major social policy of our society is that [an] entitlement one is eligible to enjoy on one's merits shall not be denied by reason of one's race, color or creed."[101] In *Home for Incurables of Baltimore v. University of Maryland Medical System Corp.*, the Maryland Court of Appeals excised a condition limiting a devise to housing "white patients" only, holding that "where a condition attached to a bequest is clearly illegal and violates a strong public policy, the illegal portion of the condition should be excised and the bequest enforced without regard for the illegal condition."[102]

Where a restriction increased inclusion, courts upheld it. The clearest case rested on remedial grounds. In *Trustees of the University of Delaware v. Gebelein*, the Delaware Chancery Court upheld a scholarship fund restricted to women, reasoning:

> The primary purpose of the Higgins' gift in trust to the University of Delaware is clearly to assist financially poor women who would be otherwise denied an equal educational opportunity at the college level . . . . I conclude . . . that the benign discrimination set forth in the Higgins' scholarship fund does not obstruct equal opportunity, but rather promotes it by compensating past acts of discrimination. Until such time . . . as the . . . polic[ies] of sexual equality in opportunities for higher education are achieved, the University . . . should . . . be free to distribute the scholarship funds here in issue in such a manner as to compensate for past and present inequalities in educational opportunities.[103]

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[99] *Id.*
[100] Restatement (Third) of Trusts section 28, Reporter's Notes to cmt. f (2003).
[101] Tinnin v. First United Bank of Mississippi, 502 So. 2d 659, 661, 664 (Miss. 1987), appeal after remand, 570 So. 2d 1193 (Miss. 1990).
[102] Home for Incurables of Baltimore v. University of Maryland Medical System Corp., 369 Md. 67, 797 A.2d 746, 750-51, 756 (2002); *see also* Grant Home v. Medlock, 292 S.C. 466, 349 S.E.2d 655 (Ct. App. 1986) (removing the racial but not the religious restriction from a trust directing operation of a home for "needy, white Presbyterians.");
[103] Trustees of the University of Delaware v. Gebelein, 420 A.2d 1191, 1196 (Del. Ch. 1980).

That is, the court held a trait-restricted charitable scholarship valid because it remediated the effects of past discrimination.

The IRS drew the same distinction in its own guidance for six decades. In 1975, the IRS Chief Counsel asked whether a restriction "could reasonably be expected to aggravate the disparity in the educational and social levels commonly achieved by the members of some minority groups when compared with the corresponding achievements of society as a whole."[104] In 1989, the Chief Counsel restated the standard: the disqualifying restriction is one that "excludes from participation in or denies the benefits of a program or activity to individuals solely on the basis of race so that it can reasonably be expected to aggravate the disparity."[105] Part V and Appendix A document the framework that distinguishes restrictions aggravating racial disparities from those ameliorating them. That framework is the tax-law expression of the distinction the Restatement of Trusts articulates and courts apply. The IRS did not invent it. It adopted it.

That distinction follows from the requirement that a charity confer a public benefit. An exclusionary restriction does not confer one; it withholds a community resource from part of the community on grounds unrelated to need or purpose. An inclusionary restriction may confer a public benefit because it directs resources toward curing an existing disadvantage. As the Restatement explains, affirmative action is unobjectionable because it attempts "to respond to a social problem in its own terms."[106] A race-neutral response to a race-specific problem is not a response to that problem. What matters, as Colinvaux puts it, is the reason for the restrictions: "To exclude a group from assistance because of animus is not charitable. To favor a group that is disadvantaged in some way, including because of societal discrimination, however, may be charitable."[107]

D. The NPRM's Conflict with the Common Law Standard

Proposed regulation § 1.501(c)(3)-2(b) prohibits "any policy or practice that discriminates on the basis of race, color, or national or ethnic origin" – and specifies that this includes "any discrimination . . . for any purpose." That language eliminates the distinction between exclusion and inclusion. Under the NPRM, a scholarship established to remedy a school's documented history of excluding minority students is treated in the same way as a policy of refusing to admit minority students. The common law treats these two policies as opposites. One is invidious and unenforceable. As to the other, "the law of charitable trusts as such does not object to what is sometimes called 'affirmative action.'"[108]

The NPRM does not cite the Restatement (Second) or (Third) of Trusts. It does not discuss the common law of charitable trusts at all. It cites *Bob Jones* for the public policy

[104] I.R.S. Gen. Couns. Mem. 36,363 (Aug. 7, 1975).
[105] I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989).
[106] Restatement (Third) of Trusts § 28 cmt. f (2003).
[107] Colinvaux, *supra* note 53, at 572-73.
[108] Restatement (Third) of Trusts § 28 cmt. f (2003).

doctrine while ignoring the charitable trust law on which *Bob Jones* grounded that doctrine.

What the NPRM leaves in place compounds the conflict. Treasury Regulation § 1.501(c)(3)-1(d)(2) remains in effect. The Preamble states that the proposed regulations "would not disturb the continued ability of an organization (including a private school) to take actions or adopt policies intended to eliminate prejudice and discrimination, consistent with existing § 1.501(c)(3)-1(d)(2), provided the organization achieves these purposes by means other than actions or policies that discriminate on the basis of race, color, or national or ethnic origin."[109] The NPRM preserves the charitable purpose and prohibits the means the common law recognizes as advancing it. A purpose that cannot be pursued is not preserved. The NPRM thus contradicts the common law on which § 501(c)(3) rests.

E. A New Policy, Not a Reinterpretation

The charitable standard that permitted remediation of discriminatory harm for six decades cannot now prohibit it unless something about the standard has changed. The Preamble asserts no such change in the common law's standard for charitable purpose.

The NPRM might therefore be defended on the ground that it does not create new fundamental public policy but merely reinterprets existing policy in light of changed understanding as to what discrimination in education entails. The common law of charitable trusts, as the Restatement itself acknowledges, "inevitably varies from time to time and place to place."[110] That defense fails for three reasons.

First, no such reinterpretation has taken place. No court has held that the charitable standard has ceased to recognize remediation of discriminatory harm as charitable. The Restatement (Third) of Trusts, reflecting the developments through *Bakke*, *Grutter*, and *Fisher*, states that the law of charitable trusts does not object to affirmative action.[111] In 1999, the Service considered whether intervening developments had changed the analysis. Reviewing the judicial decisions issued since Revenue Ruling 71-447, the national office concluded that "there have been no significant changes that would warrant a different conclusion" and that the ancestry-based admissions restriction "remains consistent with current fundamental public policy."[112] Furthermore, the IRS was applying that standard as recently as 2019, when it retained Rev. Proc. 75-50's provisions favoring racial minority groups.[113] And in April 2024, nine months after *SFFA* was decided, the Service granted a private foundation advance approval of scholarship procedures under which eligibility for some awards was restricted by heritage.[114]

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[109] 91 Fed. Reg. at 56,815.
[110] Restatement (Third) of Trusts § 28 cmt. f (2003).
[111] *Id.*
[112] I.R.S. Tech. Adv. Mem., Kamehameha Schools/Bernice Pauahi Bishop Estate (conference date Feb. 4, 1999) (on file with authors); *see* Appendix A.5 *infra*.
[113] Rev. Proc. 2019-22, 2019-22 I.R.B. 1260 (modifying Rev. Proc. 75-50 while retaining §§ 3.02 and 4.05).
[114] I.R.S. Priv. Ltr. Rul. 202426018 (Apr. 1, 2024) (granting advance approval under I.R.C. § 4945(g)(1) and (g)(3) of scholarship and educational grant procedures under which "some of these scholarships may

Second, the developments the Preamble relies upon are not developments in the common law. They interpret the U.S. Constitution and Title VI. The Constitution governs state action; Title VI governs recipients of federal financial assistance. Neither supplies the content of the charitable standard. As Professor Brennen has observed, the Court in *Bob Jones* "did not rule that the actions of a private § 501(c)(3) entity that would violate either the Constitution (if it were a state actor) or federal civil rights laws (if it were a recipient of federal financial assistance) would also necessarily violate established public policy."[115] Had constitutional impermissibility alone been sufficient, "there would have been no need for the Court in *Bob Jones* to examine the views of the executive and legislative branches of government."[116]

Third, and most fundamentally, the common law changes through the common law process. It changes as courts decide cases. When those decisions accumulate, the American Law Institute prepares a new Restatement to reflect them: the Second in 1959, the Third from 1992 to 2012, and a Fourth now under consideration.[117] The common law does not change because an agency issues a notice of proposed rulemaking. Congress can override the common law by statute. Treasury and the IRS cannot: the Service construes the standard, it does not supply its content.

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restrict eligibility to recipients who are of [a particular] heritage," and determining that the procedures satisfied the statutory requirement that grants be awarded "on an objective and nondiscriminatory basis"). Private letter rulings may not be used or cited as precedent. I.R.C. § 6110(k)(3). They reflect the agency's position on the facts presented at the time of issuance.

[115] David A. Brennen, *Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Institutions After* Students for Fair Admissions v. Harvard and UNC, 21 PITT. TAX REV. 49, 58 (2023).

[116] *Id.* at 59.

[117] Thomas P. Gallanis, *Time for a New Restatement*, 40 PROB. & PROP. 33 (2026).

V. THE IRS'S LONGSTANDING RECOGNITION OF REMEDIAL DISCRIMINATION AS A CHARITABLE PURPOSE

The NPRM does not reverse a marginal administrative position. It reverses a regulation in effect since 1959 and the consistent IRS guidance implementing that regulation. That guidance includes revenue rulings and revenue procedures, as well as a Treasury regulation treating a private foundation's ethnic-minority scholarship program as consistent with § 501(c)(3). A range of internal legal advice sets out the reasoning behind that guidance, and two national office determinations applied it in the private school admissions context.[118] This IRS framework treats race-conscious remediation as an expression of the charitable anti-discrimination purpose.

This Part discusses that record briefly, while Appendix A documents it in detail. The record serves two functions. It documents a construction of § 501(c)(3) consistent with what the common law of charitable trusts permits, which bears on the question Part IV addresses. And it establishes the longstanding position from which the NPRM departs, which Part VI addresses.

A. The 1959 Regulatory Foundation

In 1959, Treasury promulgated regulations adopting the legal sense of "charitable" for purposes of § 501(c)(3), as discussed in Part IV. Those regulations enumerate the purposes that term encompasses, among them "the promotion of social welfare by organizations designed to . . . eliminate prejudice and discrimination."[119] Treasury Regulation § 1.501(c)(3)-1(d)(2) has remained in effect, unchanged in this respect, for sixty-seven years.

Every subsequent piece of IRS guidance on this subject rests on the charitable standard those regulations establish.[120] Revenue Ruling 71-447, the ruling reviewed in *Bob Jones*, relied on it directly, citing it as evidence of "a public interest in eliminating racial discrimination."[121] The published rulings from 1967 forward approved organizations on

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[118] *See, e.g.*, Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959); Treas. Reg. § 53.4945-4(b)(5), Example 2; Rev. Rul. 68-655, 1968-2 C.B. 213; Rev. Rul. 71-447, 1971-2 C.B. 230; I.R.S. Gen. Couns. Mem. 36,363 (Aug. 7, 1975); Rev. Proc. 75-50, 1975-2 C.B. 587, as updated by Rev. Proc. 2019-22, 2019-22 I.R.B. 1260; I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989); *see also* I.R.S. Tech. Adv. Mem., Kamehameha Schools/Bernice Pauahi Bishop Estate (conference date Feb. 4, 1999) (on file with authors) (affirming a technical advice memorandum dated July 24, 1975). Each is discussed in Appendix A.

[119] Treas. Reg. § 1.501(c)(3)-1(d)(2); *see* Part IV.A *supra*.

[120] *See* Rev. Rul. 67-250, 1967-2 C.B. 182; Rev. Rul. 68-15, 1968-1 C.B. 244; Rev. Rul. 68-70, 1968-1 C.B. 248; Rev. Rul. 68-438, 1968-2 C.B. 209; Rev. Rul. 68-655, 1968-2 C.B. 213; Rev. Rul. 70-585, 1970-2 C.B. 115; Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Rul. 74-587, 1974-2 C.B. 162; Rev. Rul. 75-285, 1975-2 C.B. 203; Rev. Rul. 77-272, 1977-2 C.B. 191; Rev. Proc. 75-50, 1975-2 C.B. 587, as modified by Rev. Proc. 2019-22, 2019-22 I.R.B. 1260; Treas. Reg. § 53.4945-4(b)(5), Example 2, T.D. 7215, 37 Fed. Reg. 23,161 (Oct. 31, 1972). Each is discussed in Appendix A.

[121] Rev. Rul. 71-447, 1971-2 C.B. 230. This ruling reversed a contrary conclusion the Chief Counsel had reached four years earlier. I.R.S. Gen. Couns. Mem. 33,585 (Aug. 1, 1967) had determined that an "otherwise qualified nonprofit private school cannot be denied exemption . . . solely by reason of the fact that it limits its students to members of a particular race." In reversing, the Service identified what had

the basis that their activities were designed to eliminate prejudice and discrimination within the meaning of that regulation. Revenue Procedure 75-50's provisions favoring racial minority groups identified the programs the nondiscrimination requirement permits. The Chief Counsel's memoranda supplied the reasoning on which that guidance rested.

The NPRM does not repeal Treasury Regulation § 1.501(c)(3)-1(d)(2), and the Preamble claims to preserve it. But the NPRM prohibits race-conscious programs that the IRS long recognized as serving the charitable anti-discrimination purpose. The administrative practice Appendix A documents does not reflect ad hoc policymaking. It reflects the considered implementation of a regulatory standard that has governed § 501(c)(3) since 1959 and that the NPRM leaves in force.

B. Implementation Through Published Guidance, 1967-1977

The IRS implemented the charitable anti-discrimination purpose through ten published revenue rulings between 1967 and 1977. Those rulings approved organizations that directed housing investment toward integrated neighborhoods,[122] worked with schools to address racial tensions and ensure equal treatment of minority pupils,[123] arranged employment interviews for minority applicants,[124] investigated discrimination against minority groups and operated a speakers' bureau to publicize the findings,[125] counseled minority families about living in integrated neighborhoods,[126] built housing specifically for minority families affected by local discrimination,[127] provided capital to businesses in depressed urban areas inhabited mainly by low-income minority groups,[128] and recruited and educated members of minority groups to help them obtain entry into apprenticeship programs.[129]

The pattern across those ten rulings is consistent and unbroken: not once did the IRS suggest that pursuing the charitable anti-discrimination purpose required race-neutral means. Every approved activity took explicit account of race. Race-conscious means were the natural and recognized expression of anti-discrimination as a charitable purpose.

Revenue Ruling 71-447 is the foundational ruling on private school nondiscrimination and the only one of the ten the Preamble mentions.[130] Part V.A describes its grounding in the charitable anti-discrimination purpose, and Part VI.A addresses the Preamble's characterization of its holding.

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changed: *Brown* and its progeny, Titles IV and VI of the Civil Rights Act of 1964, and the 1959 regulation's recognition of a public interest in eliminating racial discrimination.

[122] Rev. Rul. 67-250, 1967-2 C.B. 182.
[123] Rev. Rul. 68-15, 1968-1 C.B. 244.
[124] Rev. Rul. 68-70, 1968-1 C.B. 248.
[125] Rev. Rul. 68-438, 1968-2 C.B. 209.
[126] Rev. Rul. 68-655, 1968-2 C.B. 213.
[127] Rev. Rul. 70-585, 1970-2 C.B. 115.
[128] Rev. Rul. 74-587, 1974-2 C.B. 162.
[129] Rev. Rul. 75-285, 1975-2 C.B. 203.
[130] Rev. Rul. 71-447, 1971-2 C.B. 230.

Revenue Ruling 77-272 warrants particular attention because it addressed the same question the NPRM addresses. The organization was "a school within the meaning of section 170(b)(1)(A)(ii) of the Code" — the same definitional provision the NPRM uses to define "private school" — with an admissions policy limited exclusively to American Indian students, operating under a Bureau of Indian Affairs contract implementing the Adult Vocational Training Act of 1956.[131] The IRS addressed Revenue Ruling 71-447, which conditioned the charitable status of private schools on a racially nondiscriminatory policy as to students, and held that the school's admissions policy "is not a type of racial restriction that is contrary to Federal public policy."[132] Proposed regulation § 1.501(c)(3)-2(b) would prohibit that school. The Preamble does not mention Revenue Ruling 77-272. It does not address whether charities serving American Indian students under federal programs retain their exemption. And it does not explain how a school implementing a federal statutory mandate can comply with a rule that prohibits race-conscious admissions for any purpose.

None of these rulings has been withdrawn or formally distinguished. They remain in the Internal Revenue Bulletin as published official IRS positions. Part VI.C. develops the consequences for compliance of the contradiction between them and the proposed regulations.

C. The 1972 Regulation

A Treasury regulation promulgated in 1972 and still in force describes a private foundation establishing "a program to provide 20 college scholarships per year for members of a certain ethnic minority," with eligibility limited to members of that minority residing in a single state.[133] The regulation concludes that the program "[i]s consistent with the existence of the foundation's exempt status under section 501(c)(3) and with the allowance of deductions under section 170 for contributions to the foundation," and that it "utilizes objective and nondiscriminatory criteria in selecting scholarship recipients from among the applicants."[134] A Treasury regulation thus characterizes as nondiscriminatory a program the NPRM would prohibit if a school administered it. The Preamble does not mention the regulation.

D. The Chief Counsel's Analytical Framework

Between 1968 and 1989, six memoranda from the IRS Office of Chief Counsel developed an analytical framework for evaluating racially restrictive charitable programs.[135] That framework distinguished restrictions that aggravate racial disparities from those that ameliorate them. It was grounded in the common law of charitable trusts and in *Brown*

[131] Rev. Rul. 77-272, 1977-2 C.B. 191.
[132] *Id.*
[133] Treas. Reg. § 53.4945-4(b)(5), Example 2; T.D. 7215, 37 Fed. Reg. 23,161 (Oct. 31, 1972).
[134] *Id.*
[135] I.R.S. Gen. Couns. Mem. 33,752 (Feb. 12, 1968); I.R.S. Gen. Couns. Mem. 36,363 (Aug. 7, 1975); I.R.S. Gen. Couns. Mem. 37,462 (Mar. 17, 1978); I.R.S. Gen. Couns. Mem. 39,082 (Nov. 30, 1983); I.R.S. Gen. Couns. Mem. 39,117 (Jan. 13, 1984); I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989). Each is discussed in Appendix A *infra*.

v. Board of Education. It was applied to the private school admissions context specifically.

The framework began in 1968, when the Chief Counsel approved a charitable deduction for a scholarship trust benefiting West Indian and Black students. It grounded the conclusion in the Restatement (Second) of Trusts: the beneficiaries of a charitable trust "may therefore be restricted by reference to race, sex, religion, geographic location or the like without adversely affecting their status as common law charities."[136] The IRS thus relied on the same common law source as the Supreme Court did later in *Bob Jones*.

Seven years later, in 1975, the Chief Counsel articulated the governing standard in the school admissions context. Addressing an ancestry-based admissions policy, the memorandum concluded that the discrimination *Brown* condemned and to which Revenue Ruling 71-447 is directed "properly is limited to discrimination that could reasonably be expected to aggravate the disparity in the educational and social levels commonly achieved by the members of some minority groups when compared with the corresponding achievements of society as a whole."[137]

The Chief Counsel restated that standard in 1989, explaining that a disqualifying restriction is one that "excludes from participation in or denies the benefits of a program or activity to individuals solely on the basis of race so that it can reasonably be expected to aggravate the disparity in the educational, economic or social levels of that group when compared with society as a whole."[138] Programs that aggravate disparities are disqualifying. Programs that ameliorate them are not.

Two features of this framework bear on the NPRM. First, the Chief Counsel expressly rejected the categorical approach the NPRM adopts. In 1983, reconsidering an earlier per se rule, the Chief Counsel found it "perhaps overly simplistic" and concluded that "a per se rule is inappropriate because facts and circumstances may exist where such a trust may not necessarily contribute to racial discrimination in education."[139] The memorandum offered an illustration: "a private educational trust which awards scholarships only for Caucasian students to attend a predominantly minority school could be said actually to discourage racial discrimination in education."[140] The Chief Counsel concluded that case-by-case examination was required.

Second, the timing of that rejection matters. *Bob Jones* was decided in May 1983. The memorandum rejecting the per se rule issued in November 1983. The IRS's own lawyers read *Bob Jones* and concluded it required contextual, purpose-sensitive analysis rather than categorical prohibition. The NPRM reinstates the per se rule the Chief Counsel rejected six months after the decision the Preamble claims as its authority. The Preamble does not mention any of these memoranda.

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[136] I.R.S. Gen. Couns. Mem. 33,752 (Feb. 12, 1968).
[137] I.R.S. Gen. Couns. Mem. 36,363 (Aug. 7, 1975).
[138] I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989).
[139] I.R.S. Gen. Couns. Mem. 39,082 (Nov. 30, 1983).
[140] *Id.*

The Service taught the same framework to its own staff. A 1982 continuing professional education text surveyed the case law on racially restricted scholarship trusts and found that "[t]here appears to be no case involving a private scholarship trust in which such a racial limitation or exclusion was declared invalid or illegal." It concluded that "it may be more advisable to adopt a facts and circumstances test, rather than a boilerplate rule, that racially limited scholarship trusts are not charitable per se," citing section 4.05 of Revenue Procedure 75-50 as the model.[141] A 1984 text explaining *Bob Jones* told Service personnel that the decision establishes that the Service does not have "authority to decide which policies are sufficiently 'fundamental' to require denial of exempt status"; furthermore, it noted that "[t]he Service will continue to be guided by the actions of the executive, the legislative, and the judicial branches of government."[142]

E. Revenue Procedure 75-50 and the Provisions the NPRM Would Delete

Revenue Procedure 75-50, published November 6, 1975, and updated in 2019, codified the operational requirements for private school nondiscrimination.[143] It superseded Revenue Procedure 72-54, which had addressed only publicity requirements. Revenue Procedure 75-50 expanded substantially on that predecessor, and among its additions were two provisions expressly authorizing minority-favoring programs. Neither appeared in the 1972 procedure. Both are proposed for deletion.

Section 3.02's second sentence and section 4.05's third and fourth sentences of Revenue Procedure 75-50, quoted in Part II.C, authorized minority-favoring programs in admissions, facilities, programs, and financial assistance. The fourth sentence of section 4.05 did more: it permitted financial assistance programs that "do not significantly derogate from the school's racially nondiscriminatory policy" without requiring that they affirmatively promote it. [144] The NPRM eliminates it, substituting "for any purpose" with no quantum limitation.

The IRS updated Revenue Procedure 75-50 in 2019, modifying certain provisions while expressly retaining both minority-favoring authorizations.[145] The Preamble does not address that retention. An agency that reaffirmed these provisions seven years ago owes a fuller account of why they are now incompatible with the charitable standard than the single sentence of explanation the Preamble provides.[146]

Section 4.07 of the same Revenue Procedure provides further evidence of the framework's direction: "The existence of a racially discriminatory policy with respect to

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[141] I.R.S., 1982 EO CPE Text, N. IRC 4945 — Scholarship Grants to Individuals and the Validity of Racially Restricted Scholarship Trusts, https://www.irs.gov/pub/irs-tege/eotopicn82.pdf.
[142] I.R.S., 1984 EO CPE Text, B. Update on Private Schools and Impact of Bob Jones University v. U.S., https://www.irs.gov/pub/irs-tege/eotopicb84.pdf.
[143] Rev. Proc. 75-50, 1975-2 C.B. 587.
[144] *Id.*
[145] Rev. Proc. 2019-22, 2019-22 I.R.B. 1260.
[146] 91 Fed. Reg. at 56,815 ("If these regulations are finalized as proposed, certain portions of Rev. Proc. 75–50, concerning private schools favoring racial minority groups with respect to admissions, facilities and programs, and financial assistance, would be incompatible with the new rules.").

employment of faculty and administrative staff is indicative of a racially discriminatory policy as to students. Conversely, the absence of racial discrimination in employment of faculty and administrative staff is indicative of a racially nondiscriminatory policy."[147] Under the IRS's own framework, a school that actively diversified its faculty was demonstrating compliance. The NPRM would treat the same program as a potential ground for revocation.

F. The Kamehameha Schools Determinations

The IRS has twice considered, twenty-four years apart, whether the same private school's ancestry-based admissions policy violates the public policy doctrine. Both times it concluded the policy was permissible.

In 1975, the Chief Counsel concluded that Kamehameha Schools' practice of limiting admissions to applicants with at least one Native Hawaiian ancestor fell outside the scope of Revenue Ruling 71-447. It recommended "that the service should not regard the restrictive admissions practices of the trust as barring it from a charitable status under Code sections 170 and 501(c)(3)."[148] In 1999, the IRS national office overruled a field office recommendation to revoke the trust's exemption based on the same admissions policy.[149]

The NPRM proposes to strip § 501(c)(3) tax-exempt status from private schools maintaining ancestry-based or race-conscious admissions policies. The IRS twice examined that precise question as to an actual school and twice declined to revoke. We do not suggest that a preamble must cite internal advice or written determinations. We do suggest that an agency must acknowledge reversing a position it twice declined to take. The school still operates under the policy the Service twice approved.

Kamehameha's admissions policy remains contested in the federal courts, although not as a matter of exempt status. The Ninth Circuit, sitting en banc, held that the same admissions policy did not violate 42 U.S.C. § 1981.[150] Litigation seeking to compel the school to abandon the policy is currently pending in the District of Hawaii.[151] A policy that a court of appeals has held lawful, and that remains in active litigation, is not one to which there "can be no doubt."

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[147] Rev. Proc. 2019-22, 2019-22 I.R.B. 1260.
[148] I.R.S. Gen. Couns. Mem. 36,363 (Aug. 7, 1975); see Appendix A.5.
[149] I.R.S. Tech. Adv. Mem., Kamehameha Schools/Bernice Pauahi Bishop Estate (conference date Feb. 4, 1999) (on file with authors); *see* Randall Roth, *The Kamehameha Schools Admissions Policy Controversy*, 5 Int'l J. Not-for-Profit L. (2002), https://www.icnl.org/resources/research/ijnl/the-kamehameha-schools-admissions-policy-controversy. *at n.6;* Brennen, *supra* note 115, at 58 n.43.
[150] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (en banc) (holding that the school's Native Hawaiian admissions preference did not violate § 1981 where it served a remedial purpose).
[151] Students for Fair Admissions v. Trustees of Estate of Bishop, 351 F.R.D. 241 (D. Haw. 2026).

G. The Most Recent Example of IRS Practice

As recently as April 2024, nine months after *SFFA* was decided, the IRS approved scholarship and grant procedures under which eligibility for some awards was restricted to recipients of a particular heritage. It found those procedures satisfied the Code's requirement that grants be awarded on an objective and nondiscriminatory basis.[152]

H. Conclusion

The record summarized here establishes two important points. The IRS recognized remediation of discriminatory harm as an expression of the charitable anti-discrimination purpose continuously from 1967 through at least 2024, across published guidance, a Treasury regulation, internal legal advice, and determinations addressed to an actual school. And the agency's operational position had not changed when the NPRM issued.

Both bear on the grounds these comments raise. The first documents a construction of § 501(c)(3) consistent with what the common law permits, as Part IV explains. The second establishes the position from which the NPRM departs without explanation, which Part VI addresses.

[152] I.R.S. Priv. Ltr. Rul. 202426018 (Apr. 1, 2024) (approving under I.R.C. § 4945(g)(1) and (g)(3) scholarship and grant procedures under which "some of these scholarships may restrict eligibility to recipients who are of [a particular] heritage," and finding the procedures satisfied the statutory requirement that grants be awarded "on an objective and nondiscriminatory basis"). Private letter rulings may not be cited as precedent, I.R.C. § 6110(k)(3), but they reflect the agency's operational position at the time of issuance.

VI. THE NPRM IS ARBITRARY AND CAPRICIOUS UNDER THE ADMINISTRATIVE PROCEDURE ACT

The APA requires an agency issuing a rule with the force of law to "examine the relevant data and articulate a satisfactory explanation for its action."[153] The NPRM does neither.

A. The NPRM Does Not Acknowledge or Explain Its Reversal of the Agency's Longstanding Position

Under the APA, an agency changing a longstanding position must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy."[154] Where the prior position has generated serious reliance interests, "it would be arbitrary or capricious to ignore such matters."[155]

An agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[156] But it must do so "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[157] In such cases, the Court explained, "it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[158]

Both conditions are present. The NPRM's premise contradicts the premise of six decades of guidance, and the prior policy engendered reliance in instruments that cannot be unwound.

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[153] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see* 5 U.S.C. § 706(2)(A) (a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also* 5 U.S.C. § 553(c) (requiring the agency to consider "the relevant matter presented" and to incorporate in the rule "a concise general statement of [its] basis and purpose").

[154] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (emphasis in original); *see* 5 U.S.C. § 706(2)(A).

[155] *Fox*, 556 U.S. at 515; *see* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30, 33 (2020) (quoting *Fox,* and holding that the agency "was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns"); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 224 (2016) (vacating where "the agency in fact gave almost no reasons at all" and its "lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law").

[156] *Fox*, 556 U.S. at 515.

[157] *Id.*

[158] *Id.* at 515-16. Unexplained inconsistency now bears on two inquiries rather than one. Under *Chevron*, unexplained inconsistency was "at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act" — the agency's interpretation still received deference. National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-57 (1983)). *Loper Bright* eliminated that deference unless an applicable statute grants the agency discretionary interpretive authority; thus, in most cases, a reviewing court now determines the best reading of the statute itself. *Loper Bright*, 603 at 412-13.

Part V and Appendix A document what the NPRM reverses: a regulatory provision in effect since 1959, another since 1972, and six decades of IRS guidance implementing it. The Preamble engages only three of these items. It identifies the language to be removed from Revenue Procedure 75-50. It preserves Treasury Regulation § 1.501(c)(3)-1(d)(2) while prohibiting the means by which the IRS has given that regulation effect. It characterizes the NPRM as "[i]ncorporating the long-standing holding of Rev. Rul. 71-447 in regulatory text." That ruling held that a private school without a racially nondiscriminatory policy does not qualify as charitable within the common law concepts reflected in §§ 170 and 501(c)(3). The ruling grounded that holding in the charitable anti-discrimination purpose, citing Treasury Regulation § 1.501(c)(3)-1(d)(2) as evidence of "a public interest in eliminating racial discrimination." The ruling did not hold that a policy favoring racial minority groups in order to promote nondiscrimination was itself discrimination, and four years later the Service answered that question the other way in Revenue Procedure 75-50. The NPRM does not codify the ruling's holding. It extends the holding to conduct the holding did not reach, while deleting the guidance that implemented the ruling for fifty years. A reasoned explanation would not rest on a mischaracterization of the ruling it claims to codify.

The Preamble does not engage the rest. It does not mention the other revenue rulings issued between 1967 and 1977. It entirely ignores Example 2 of Treasury Regulation § 53.4945-4(b)(5), which treats a private foundation's ethnic-minority scholarship program as consistent with exempt status under § 501(c)(3). It does not examine the reasoning of the Chief Counsel memoranda. It does not assess the impact the proposed rule would have on its two Kamehameha Schools determinations. It does not address what the Restatement of Trusts or the common law of charitable trusts provides on the question it has raised. Finally, it fails to address the agency's decision in 2019 to retain Revenue Procedure 75-50's minority-favoring provisions while modifying other provisions of the same procedure.[159]

This internal legal advice, albeit nonprecedential, demonstrates that Treasury and the IRS here abandon an analytical framework the Service applied for two decades without acknowledging that it existed. An agency cannot display awareness that it is changing position while leaving unmentioned the position it is changing.

Treasury and the IRS do not offer an explanation for these departures. They reverse the agency's longstanding position on the means of pursuing the anti-discrimination charitable purpose. If an agency abandons an analytical framework its own Office of Chief Counsel developed across two decades, it must at minimum say so and explain why. The NPRM does not.

Moreover, reliance interests here are substantial and unaddressed. Private donors established testamentary bequests, endowed scholarship funds, and foundations in reliance on guidance the IRS published and maintained for fifty years.[160] Many are now

[159] Each of these authorities is set out in Part V and discussed in Appendix A.

[160] Rev. Proc. 75-50, 1975-2 C.B. 587, §§ 3.02, 4.05, as modified by Rev. Proc. 2019-22, 2019-22 I.R.B. 1260 (authorizing admissions, facilities, program, and financial assistance policies favoring racial minority groups where the purpose and effect is to promote a school's racially nondiscriminatory policy,

deceased. Their instruments cannot be amended by agreement. Modification requires a *cy pres* or equitable deviation proceeding in state court, with notice to the state attorney general and a judicial finding that the original purpose has become impracticable or unlawful. The Preamble acknowledges that some scholarship funds are donor-restricted but treats the problem as minor because "only a minority of scholarship dollars are restricted by the donor's intention."[161] That reasoning confuses dollars with instruments. The cost of modifying a charitable trust instrument is incurred per proceeding, not in proportion to the value of the fund. A small endowed scholarship established by a will executed in 1985 may cost more to modify in state court than the fund holds.

An agency that changes position may answer that the applicable law has changed. Treasury and the IRS assert that *SFFA* established a fundamental public policy against race-conscious programs in education. Part III addresses why that showing does not meet the standard *Bob Jones* set. But they make no claim that the standard at issue, set out in Part IV, has changed. That is, Treasury and the IRS do not assert that the common law of charitable trusts has changed, even though the Preamble's account of Revenue Ruling 71-447 identifies that common law as the source of the standard. Congress has not amended § 501(c)(3). The Preamble does not reach the question of whether *SFFA* or any other authority has changed the charitable standard. It never asks what the charitable standard requires.

B. The Economic Analysis Evaluates a Narrower Rule Than the NPRM Would Impose

The NPRM's economic analysis examines a rule narrower than that in the proposed regulations. Proposed regulation § 1.501(c)(3)-2(b) reaches "any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program." The final term is a residual category. It is not limited by the enumerated items, and it reaches every program a school administers or supports.

The Preamble's economic analysis, however, addresses only two of those categories: scholarship and loan criteria, and admissions policies. It does not analyze athletic programs, which the regulatory text names expressly.[162] Nor does it analyze curriculum or course offerings, faculty hiring or fellowship programs, student organizations, research centers or academic institutes, cultural programming, mentorship programs, or targeted recruitment. Each of these falls within the reach of the regulatory text. The Preamble addresses the gap in a single sentence, stating that while the regulations "might also affect any other school-supported programs or education policies administered by private schools, the Treasury Department and the IRS assume that any

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and providing that scholarship and loan programs so designed "will not adversely affect the school's exempt status").

[161] 91 Fed. Reg. at 56,817.

[162] *Id.* at 56,819 (regulatory text); *id.* at 56,817 (stating that the proposed regulations are "not expected to affect private school athletic programs where inclusion is generally based on athletic ability, not race or ethnicity").

economic effects arising from this relatively narrow, miscellaneous group of activities would be insignificant."[163]

Treasury and the IRS thus characterize as a "relatively narrow, miscellaneous group of activities" everything a school does beyond admissions and scholarships. That characterization cannot be reconciled with the regulatory text. Either the residual category reaches the full range of school activity, in which case the economic analysis examined a fraction of the rule, or it does not, in which case the regulatory text should say so.

The Preamble does not analyze the cost of *cy pres* proceedings to modify charitable trust instruments, the cost of amending foundation governing documents, or the administrative and legal costs of reviewing institutional programs against a standard the NPRM does not define. As Part VI.A explains, the cost of a modification proceeding is incurred per instrument and bears no relation to the size of the fund. Nor is modification assured. *Cy pres* requires a court to approximate the donor's original intent as nearly as possible, and where that intent was specifically to benefit students of a particular heritage, a court may conclude that no adequate substitute exists. A trustee in that position would hold an instrument it cannot modify and face a federal standard it cannot satisfy.

Four of the regulatory determinations in the Preamble's Special Analyses section depend on this analysis, and each therefore shares its defects.[164] The Preamble's cost-benefit assessment under Executive Orders 12866 and 13563 examined two categories of activity and produced an estimate of 750,000 affected students that cannot be derived from the single source it cites. The Secretary certified under the Regulatory Flexibility Act that the NPRM will not have a significant economic impact on a substantial number of small entities. Treasury and the IRS determined under the Unfunded Mandates Reform Act that the NPRM imposes no mandate exceeding the statutory expenditure threshold.

And the Preamble states under Executive Order 13132 that the NPRM has no federalism implications, imposes no substantial direct compliance costs on State and local governments, and does not preempt State law.

That Order defines policies with federalism implications as those having “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” A rule whose compliance mechanism for endowed funds runs through state courts, with State attorneys general participating, has such effects whether or not it imposes compliance costs or preempts State law.

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[163] *Id.* at 56,817.

[164] 91 Fed. Reg. at 56,816 (Executive Orders 12866 and 13563), 56,818 (Regulatory Flexibility Act certification, Unfunded Mandates Reform Act determination, and Executive Order 13132 federalism statement).

Appendix B sets out each determination, the requirement that governs it, and the Preamble's own statements that cannot be reconciled with it. Each determination rests on the same analysis, and each carries its own governing requirement.

C. The Standard Cannot Be Administered Consistently or Obeyed in Good Faith

The standard the NPRM imposes cannot be administered consistently or obeyed in good faith. The defects below are presented as failures of reasoned decisionmaking. Several would also support claims under other provisions of § 706.

1. Scope and Indeterminacy. The residual category has no stated limit, and the Preamble provides no guidance on its reach. A school cannot determine from the regulatory text whether offering a course in Latino or Native American history constitutes an "educational policy" that discriminates on the basis of race, whether supporting a Black student union, a Hispanic student association, or an Asian Pacific American coalition constitutes a "school-supported program" that does so, or whether recruiting at historically Black colleges for faculty positions falls within the prohibition. The standard for tax-exempt status must provide ascertainable criteria for prohibited conduct; moreover, that requirement is heightened where the standard reaches expressive and associational activity.[165] The NPRM also fails to give adequate notice of the conduct it would prohibit.[166] The standard presents the same vagueness defect the court found fatal in *Big Mama Rag*, a case that, like the proposed regulations, involved a regulation interpreting permissible purposes under § 501(c)(3).

Further, an examining agent applying this standard cannot know what criteria to apply. Whether a school's cultural programming, curriculum, or student organizations fall within the prohibition will depend on the individual agent's judgment about what the residual category reaches and what constitutes discrimination "for any purpose." Organizations will bear the cost of that uncertainty through examination, document production, and the duration of an investigation before any authoritative answer emerges. Revenue Procedure 75-50's safe harbors and the Chief Counsel's framework

[165] Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1034-35 (D.C. Cir. 1980) ("regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials"; holding the Treasury definition of "educational" for purposes of § 501(c)(3) "so vague as to violate the First Amendment and to defy our attempts to review its application in this case"). The court distinguished Cammarano v. United States, 358 U.S. 498 (1959), which involved regulations applicable to lobbying by for-profit entities. It explained that the regulations upheld there were "nondiscriminatory" provisions intended to put "everyone in the community . . . on the same footing," unlike regulations that "leave room for discriminatory denial of tax-exempt status." *Big Mama Rag*, 631 F.2d at 1035 n.7. *See* also FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253-54 (2012) (*Fox II*) (holding that agency standards must give regulated parties fair notice of what conduct is prohibited).

[166] 5 U.S.C. § 553(b)(3) (a notice of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved"). The Preamble states that the NPRM supplies a "clear, enforceable standard" and would "provide administrative certainty for IRS personnel." 91 Fed. Reg. at 56,815. Neither the regulatory text nor the Preamble identifies what the residual category covers, and the Preamble's only statement on the subject characterizes the activities that category reaches as a "relatively narrow, miscellaneous group." Id. at 56,817. A notice that describes the rule's reach as narrow while the text reaches every program a school administers or supports does not describe the terms or substance of the rule proposed.

distinguishing aggravation from amelioration provided the needed guidance. The NPRM eliminates both of these sources. It supplies nothing in their place.

The indeterminacy runs in both directions. Proposed regulation § 1.501(c)(3)-2(b) is broad enough to reach a course in African American history as an "educational policy" that makes distinctions based on race. But Treasury Regulation § 1.501(c)(3)-1(d)(2) remains in force, Revenue Ruling 68-15 approving work with schools to address racial tensions among pupils has never been withdrawn, and the Preamble states that schools retain the ability to pursue the charitable anti-discrimination purpose. A school cannot determine which reading governs. Neither can an examining agent.

The gap between the Preamble and the regulatory text compounds the problem. The Preamble states that the use of a religiously based selection criterion does not become prohibited discrimination merely because members of the relevant religious community share ancestry or ethnic characteristics.[167] Proposed regulation § 1.501(c)(3)-2(b) contains no such exception. It prohibits any policy or practice discriminating on the basis of race, color, or national or ethnic origin, for any purpose, without qualification. A school whose religious admissions criteria correlate with ancestry would be relying on Preamble language that does not carry the force of law, as would an examining agent who declined to pursue the matter. A different agent examining a different school might well reach a different result based on the regulatory text.

2. Intent, Purpose and Proportionality. The proposed regulations would provide that all forms of racial discrimination in education contravene fundamental public policy "regardless of the intent behind or the legality of such discrimination (for example, where such discrimination is defended as serving remedial or diversity-related objectives)."[168] Intent is not merely absent from the standard. The agency has declared it irrelevant. The same sentence declares legality irrelevant. A program that complies with the Equal Protection Clause, Title VI, and *SFFA* may nonetheless disqualify the school that administers it.

A violation of the Equal Protection Clause requires proof of discriminatory purpose, not merely disparate racial impact.[169] Title VI prohibits only intentional discrimination.[170]

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[167] 91 Fed. Reg. at 56,815. The Preamble's religious accommodation sits uneasily with *Bob Jones* itself. The University's interracial dating prohibition rested on its interpretation of scripture, and the Court held that the government's interest in eradicating racial discrimination in education "substantially outweigh[ed] whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." 461 U.S. at 604. The NPRM extends an accommodation for religiously based selection criteria that *Bob Jones* declined to extend, while declining to extend any accommodation for remedial purposes that the IRS's own guidance recognized for six decades. Whatever the merits of the religious accommodation, and there may be independent constitutional and statutory grounds for it, the asymmetry is unexplained.

[168] 91 Fed. Reg. at 56,815.

[169] Washington v. Davis, 426 U.S. 229, 239 (1976) ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

[170] Alexander v. Sandoval, 532 U.S. 275, 280 (2001) ("it is similarly beyond dispute — and no party disagrees — that § 601 prohibits only intentional discrimination").

SFFA, the very case the IRS relies upon for its proposed regulations, situates its analysis in this line of authority, identifying the "core purpose" of the Equal Protection Clause by reference to *Washington v. Davis* among other decisions.[171]

The NPRM imposes liability without any requirement of intent. Its operative language reaches discrimination "for any purpose." A private school operating a scholarship program to remedy its own documented history of exclusion violates the standard identically to a private school intentionally refusing to admit minority students. It is harder to prove a state body engaged in impermissible racial discrimination under the Constitution, which requires discriminatory purpose, than to lose federal tax exemption under the NPRM, which requires none.

Section 501(c)(3) asks a different question from that of the Constitution. It asks not why an actor acted but what an organization is operated for. The NPRM departs not only from constitutional doctrine, but also from the purpose requirement in § 501(c)(3) itself. Congress conditions exemption on an organization being "organized and operated exclusively for" specified exempt *purposes*.[172] Construing that requirement, the Supreme Court held in *Better Business Bureau* that "the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption," an inquiry directed at purposes rather than effects.[173] Other provisions and doctrines applicable to § 501(c)(3) organizations also turn on purpose. The inurement and private benefit doctrines ask whether an organization is operated to serve private interests. The commerciality doctrine examines an organization's purposes and manner of operation. The educational methodology test distinguishes education from propaganda by asking what an organization is attempting to accomplish.[174] Across the sector, exempt organizations law proceeds by facts and circumstances analysis, and what those analyses seek to determine is the purpose for which an organization operates. Congress conditioned § 501(c)(3) on purpose. The NPRM removes purpose from the one inquiry it addresses.

The IRS has recognized the role of purpose when confronting discrimination. In 1976, the Chief Counsel suggested that "the nature of the public policy test on which the Service's policy is founded may inject a similar 'purpose or intent' element into these cases," drawing the analogy from the constitutional distinction between de jure and de

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[171] *SFFA*, 600 U.S. at 206 (citing *Palmore v. Sidoti*, *Loving v. Virginia*, *Washington v. Davis*, and *McLaughlin v. Florida* as decisions reflecting the "core purpose" of the Equal Protection Clause).
[172] I.R.C. § 501(c)(3) (emphasis added).
[173] *Better Business Bureau*, 326 U.S. at 283; *see* Treas. Reg. § 1.501(c)(3)-1(c)(1) (an organization is operated exclusively for exempt purposes "only if it engages primarily in activities which accomplish one or more of such exempt purposes," and "[a]n organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose").
[174] On private inurement and private benefit, see Treas. Reg. § 1.501(c)(3)-1(c)(2), (d)(1)(ii); American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989). On commerciality, see *Better Business Bureau*, 326 U.S. at 283-84; Living Faith, Inc. v. Commissioner, 950 F.2d 365, 372-73 (7th Cir. 1991) (examining whether an organization's manner of operation and purposes were commercial). On educational methodology, see Rev. Proc. 86-43, 1986-2 C.B. 729 (distinguishing educational presentation from propaganda by reference to the organization's purpose and method).

facto segregation.[175] The framework the Chief Counsel developed in the years that followed applied that understanding of purpose in evaluating race-conscious programs.[176]

The NPRM's "for any purpose" standard thus removes purpose from consideration of discrimination while so many other doctrines under § 501(c)(3) remain based on purpose. An organization may engage in substantial commercial activity and retain exemption if its purposes are charitable. It may confer private benefit if the benefit is incidental to an exempt purpose. It may present controversial material if its methodology produces education rather than propaganda. But under the NPRM it may not adopt any policy that takes account of race, no matter the purpose of the policy. The Preamble offers no explanation for removing the purpose inquiry that so many other doctrines in the field retain. The proposed regulations create an irreconcilable conflict with the statute.[177]

The consequence the NPRM attaches is also disproportionate. An organization that fails the standard articulated in the proposed regulations loses exemption from federal income tax, the ability to receive deductible charitable contributions under section 170, eligibility to issue tax-exempt bonds, and in many states exemption from state income and property tax, along with the range of other benefits and eligibilities that attach to status as an organization described in section 501(c)(3).[178] The NPRM attaches those consequences to "any policy or practice," without regard to purpose, materiality, or the availability of any lesser remedy.

Some thirty years ago Congress introduced a new statutory regime, the intermediate sanctions of § 4958, precisely to calibrate punishment to fault for exempt organizations. Before 1996, revocation was the IRS's only remedy for private inurement. Congress enacted this regime because it recognized that revocation was a disproportionate response that punished an organization's charitable beneficiaries for the conduct of its insiders.[179] The intermediate sanctions regime imposes excise taxes on certain insiders who received an excess benefit and on the managers who approved it. The remedy falls on the wrongdoer, and the organization's exemption ordinarily remains intact. Congress thus legislated a graduated remedy to avoid attaching total revocation to conduct that does not go to an organization's fundamental charitable character.

The NPRM moves in the opposite direction. It attaches the most severe consequence available under the Code to any race-conscious policy or practice, for any purpose, with

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[175] I.R.S. Gen. Couns. Mem. 36,799, at n.27 (July 28, 1976) (citing Keyes v. School District No. 1, 413 U.S. 189, 208 (1973)).
[176] *See* Appendix A.3 *infra*.
[177] 5 U.S.C. § 706(2)(C) (a reviewing court shall hold unlawful and set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); see Part IV supra (developing the inconsistency between the NPRM and the charitable standard § 501(c)(3) incorporates).
[178] *See* Bazil Facchina, Evan Showell & Jan E. Stone, *Privileges and Exemptions Enjoyed by Nonprofit Organizations: A Catalog and Some Thoughts on Nonprofit Policymaking,* 28 U.S.F. L. REV. 85 (1993).
[179] I.R.C. § 4958; *see* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1311, 110 Stat. 1452, 1475 (1996); H.R. Rep. No. 104-506, at 53-59 (1996) (describing revocation as an inadequate and disproportionate remedy and explaining the rationale for intermediate sanctions).

no threshold and no alternative remedy. An insider who extracts excessive compensation from a charity triggers excise taxes and the organization retains its exemption. Under the NPRM, a school administering a single endowed scholarship established by a deceased donor for students of a particular national origin would lose its exemption entirely, harming the student body that forms its charitable class.

3. The Defects Cannot be Cured. Treasury and the IRS cannot cure the defects with clarifying language. They are not drafting imprecisions. They follow from the NPRM's premise that race-conscious remediation and invidious exclusion are the same. Every body of law the Preamble invokes as authority for the charitable standard, including *Bob Jones*, the common law of charitable trusts, the IRS's own guidance, and the statute itself, distinguishes these concepts. Clarifying language would have to either reintroduce that distinction, which would abandon the NPRM's premise, or maintain the collapse, which reproduces the unworkable standard already on the page.

PART VII: CONCLUSION AND REQUESTED ACTION

The proposed regulations should be withdrawn.

Each of the four grounds set out above is independently sufficient. Together they describe a rulemaking that invokes *Bob Jones* as its authority while departing from (1) the convergence requirement *Bob Jones* imposed, (2) the charitable standard *Bob Jones* held governs § 501(c)(3), and (3) six decades of the agency's own considered guidance, and (4) the explanation the APA requires of an agency that reverses its position. The NPRM nowhere explains its departure from the longstanding position of the IRS in guidance, and it addresses almost none of that guidance. In its place, the NPRM would impose a standard that no examining agent can apply consistently and that no institution can comply with in good faith.

If the administration believes *SFFA* requires this result for private schools the appropriate avenue is Congress. Congress has legislated repeatedly in the civil rights context. It has never prohibited race-conscious remediation by charitable organizations. Congress, however, can act to change this understanding of § 501(c)(3), and Congress can be held accountable for acting. A rulemaking cannot.

Should Treasury and the IRS proceed notwithstanding these comments, the following are the minimum the APA requires.

First, Treasury and the IRS must demonstrate three-branch convergence on the proposition the NPRM asserts: that remediation of discriminatory harm, not merely invidious exclusion, is contrary to fundamental public policy. Executive orders subject to reversal by the next administration and one 6-3 Supreme Court decision limited to college and university admissions policies[180] do not satisfy a standard the Court described as requiring that there "can be no doubt."

Second, Treasury and the IRS must engage the common law of charitable trusts. They must address the Restatement (Second) and (Third) of Trusts, the distinction those authorities draw between exclusionary and inclusionary restrictions, and the state court decisions applying it. They must explain how the charitable standard Congress enacted can be read to condemn what the common law supplying its content does not.

Third, Treasury and the IRS must acknowledge and explain the departure from the agency's own guidance. That guidance includes Treas. Reg. § 53.4945-4(b)(5), Example 2, Revenue Rulings 67-250, 68-15, 68-70, 68-438, 68-655, 70-585, 71-447, 74-587, 75-285, and 77-272, and the 2019 retention of Revenue Procedure 75-50's minority-favoring provisions. They must also acknowledge the analytical framework the Service applied in administering that guidance, which the Chief Counsel's General Counsel Memoranda 33,752, 36,363, 37,462, 39,082, 39,117, and 39,792, and the two Kamehameha Schools determinations record. We do not suggest that a preamble must cite nonprecedential internal advice or written determinations. We do suggest that an

[180] *SFFA* was 6-3 in the UNC decision and 6-2 in the Harvard decision because Justice Jackson was recused in the latter.

agency abandoning a framework it applied for two decades must say so, and must explain in particular why the per se approach the Chief Counsel found "perhaps overly simplistic" and rejected in November 1983, six months after *Bob Jones,* is now appropriate.

Fourth, Treasury and the IRS must give serious consideration to the reliance interests the prior guidance generated, including those of donors who established testamentary bequests and endowed funds under that guidance and who cannot now be consulted. They must analyze the cost of *cy pres* proceedings per instrument rather than in proportion to fund value.

Fifth, Treasury and the IRS must analyze the scope of the rule that the NPRM would in fact impose. If the residual category reaches curriculum, faculty hiring, student organizations, research centers, and cultural programming, the economic analysis must address them. If it does not reach them, the regulatory text must say so. Treasury and the IRS must withdraw and reissue the Regulatory Flexibility Act certification following that analysis.

Sixth, Treasury and the IRS must supply ascertainable criteria for what the standard prohibits. They must identify what the residual category covers and state whether purpose is relevant and, if not, explain why purpose governs every other question under section 501(c)(3) but not this one.

We would welcome the opportunity to discuss these comments with Treasury or IRS personnel. We would ask that one of us be allowed to testify at the public hearing on December 2, 2026.

APPENDIX A

THE ADMINISTRATIVE RECORD: IRS GUIDANCE RECOGNIZING REMEDIATION OF DISCRIMINATORY HARM AS A CHARITABLE PURPOSE, 1959–2024

This Appendix documents the guidance Part V summarizes. It is organized by type of authority: Treasury regulations, published revenue rulings, General Counsel memoranda, revenue procedures, and written determinations. Within each category the material appears chronologically. The Preamble to the NPRM addresses three items in this record: Treasury Regulation § 1.501(c)(3)-1(d)(2), which it claims to preserve; Revenue Ruling 71-447, which it cites as authority; and Revenue Procedure 75-50, two provisions of which it would delete. It does not cite or discuss any of the remainder.

A.1 Treasury Regulations

Treasury Regulation § 1.501(c)(3)-1(d)(2) (1959). Congress has never defined "charitable" in the Code, leaving open whether the term carried its narrow popular sense of relief of the poor or its broader legal sense as developed in the law of charitable trusts.[181] Treasury proposed the narrow popular meaning in 1956. Following an extensive study, it withdrew those proposed regulations in 1959 and issued new proposed regulations adopting the legal sense.[182] Those regulations were finalized as Treasury Decision 6500.[183]

The provision enumerates the purposes the legal sense of "charitable" encompasses. It includes: "the promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency."[184]

The regulation was promulgated during the civil rights movement's fight for racial equality and explicitly elevated the elimination of prejudice and discrimination to a recognized purpose of charitable organizations under federal tax law. It has remained in effect, unchanged in this respect, for sixty-seven years. The Supreme Court confirmed in *Bob Jones* that Congress "was guided by the common law of charitable trusts" in enacting the charitable exemption and that the IRS "properly considered principles of charitable trust law" in applying it.[185]

Every revenue ruling and revenue procedure that follows in this Appendix rests on this provision. So does the internal legal advice that supported them. The revenue rulings approved organizations because their activities were designed to eliminate prejudice and discrimination within its meaning. Revenue Ruling 71-447 cited it as evidence of a

[181] *See* Aprill, *supra* note 78, at 319-20; Colinvaux, *supra* note 53, at 568-69.
[182] *Id.*
[183] T.D. 6500, 25 Fed. Reg. 11,737 (Nov. 26, 1960).
[184] Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).
[185] 461 U.S. 574, 587 n.11, 588 n.12 (1983).

public interest in eliminating racial discrimination. Revenue Procedure 75-50's minority-favoring provisions gave it operational effect.

The NPRM does not repeal or amend this provision. The Preamble states that the proposed regulations would not disturb an organization's ability to pursue the purpose it recognizes, "provided the organization achieves these purposes by means other than actions or policies that discriminate on the basis of race, color, or national or ethnic origin."[186]

Treasury Regulation § 53.4945-4(b)(5), Example 2 (1972). Promulgated as part of the regulations implementing § 4945, enacted in the Tax Reform Act of 1969.[187] Example 2 describes a private foundation establishing "a program to provide 20 college scholarships per year for members of a certain ethnic minority," with eligibility limited to members of that minority residing in a single state and an estimated applicant pool of at least 400 persons annually. The regulation concludes that the program "[i]s consistent with the existence of the foundation's exempt status under section 501(c)(3) and with the allowance of deductions under section 170 for contributions to the foundation," that it "utilizes objective and nondiscriminatory criteria in selecting scholarship recipients from among the applicants," and that the selection committee "appears likely to make objective and nondiscriminatory selections of grant recipients."

A Treasury regulation thus characterizes as nondiscriminatory and consistent with § 501(c)(3) a program the NPRM would prohibit if a school administered it. The regulation remains in force. The Preamble does not mention it.

A.2 Revenue Rulings

The IRS implemented the charitable anti-discrimination purpose through ten published revenue rulings between 1967 and 1977. Published revenue rulings are official statements of the agency's position on which taxpayers may rely. None of the ten has been withdrawn or formally distinguished. Each remains in the Internal Revenue Bulletin.

Rev. Rul. 67-250, 1967-2 C.B. 182. The first published ruling to apply the charitable anti-discrimination purpose. The IRS approved an organization formed "to educate the public about the need for making housing available to members of the public on a nondiscriminatory basis and to encourage investment in such housing." The organization urged banks and lending institutions to provide mortgage financing for such housing and brought together potential investors with contractors willing to build for open occupancy. The IRS held the organization qualified for exemption because its "activities are designed, through educational means, to eliminate prejudice and discrimination."

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[186] 91 Fed. Reg. at 56,815.

[187] T.D. 7215, 37 Fed. Reg. 23,161 (Oct. 31, 1972); *see* Tax Reform Act of 1969, Pub. L. No. 91-172, 1969-3 C.B. 10 (enacting I.R.C. § 4945).

Rev. Rul. 68-15, 1968-1 C.B. 244. The IRS approved an organization whose school committee "works with parents, teachers, and school officials to give them a better understanding of any racial and religious tensions that may be present in the community and to insure equal treatment of all pupils." The IRS held this charitable because the committee's work was "designed to contribute directly to lessening neighborhood tensions, eliminating prejudice and discrimination, and combatting community deterioration."

Rev. Rul. 68-70, 1968-1 C.B. 248. The IRS approved an organization that advanced "equal job opportunities in a particular community for qualified workers discriminated against because of race or creed," including by "arrang[ing] interviews for qualified applicants with potential employers" and "work[ing] with the public schools in placing students in actual job situations to gain work experience." The IRS held the organization qualified because its "activities are designed to eliminate prejudice and discrimination in the community."

Rev. Rul. 68-438, 1968-2 C.B. 209. The IRS approved an organization that "conducts investigations and research to obtain information regarding discrimination against minority groups," met with proprietors to encourage compliance with civil rights laws, published statistical findings, and "operates a speakers' bureau that provides speakers and discussion leaders to interested groups." The IRS held the organization qualified because its activities "directly contribute to the elimination of prejudice and discrimination, the defense of human and civil rights secured by law, and the lessening of neighborhood tensions."

Rev. Rul. 68-655, 1968-2 C.B. 213. The IRS approved an organization that "promotes racial integration in housing, lessens neighborhood tensions, eliminates prejudice and discrimination in housing, and prevents deterioration of neighborhoods," including by "counsel[ing] minority group residents about the problems of living in an integrated neighborhood," making loans "to families that cannot obtain such loans commercially but that otherwise are considered desirable residents," and purchasing homes to resell or lease "on an open occupancy basis." The IRS held the organization qualified because it was "striving to eliminate prejudice and discrimination and to lessen neighborhood tensions."

Rev. Rul. 70-585, Situation 2, 1970-2 C.B. 115. The IRS approved an organization "formed to ameliorate the housing needs of minority groups by building housing units for sale to persons of low and moderate income on an open occupancy basis." The housing was "available to members of minority groups with low and moderate income who are unable to obtain adequate housing because of local discrimination" and was "so located as to help reduce racial and ethnic imbalances in the community."

Rev. Rul. 71-447, 1971-2 C.B. 230. The foundational ruling on private school nondiscrimination and one of the three items the Preamble addresses. The IRS held that "a private school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code."

The ruling grounded that conclusion in the charitable anti-discrimination purpose. It stated: "A recognition of a public interest in eliminating racial discrimination is shown in section 1.501(c)(3)-1(d)(2) of the regulations providing that the 'promotion of social welfare' includes activities 'to eliminate prejudice and discrimination.'" The nondiscrimination requirement was thus an expression of the charitable anti-discrimination purpose, not a constraint overriding it. The same regulatory provision that made nondiscrimination mandatory was the provision that authorized minority-favoring programs designed to achieve it.

Rev. Rul. 74-587, 1974-2 C.B. 162. The IRS approved an organization devoting its resources "to programs designed to stimulate economic development in high density urban areas inhabited mainly by low-income minority or other disadvantaged groups," providing funds and working capital to businesses unable to obtain conventional financing. The IRS held that the organization's "program of aiding minority-owned businesses promotes the social welfare of the community, since it helps to lessen prejudice and discrimination against minority groups by demonstrating that the disadvantaged residents of an impoverished area can operate businesses successfully if given the opportunity and proper guidance." The ruling also found that the program relieved poverty, lessened neighborhood tensions arising from the lack of employment opportunities, and combated community deterioration.

Rev. Rul. 75-285, 1975-2 C.B. 203. The IRS approved an organization formed to eliminate discrimination against minority groups in the construction trades. The organization engaged in "recruiting and educating members of minority groups to further their efforts in obtaining entry into apprenticeship programs." Citing Treasury Regulation § 1.501(c)(3)-1(d)(2) and Rev. Rul. 68-70, the IRS held that the organization "is attempting to eliminate prejudice and discrimination in a charitable manner."

The ruling issued in 1975, the same year the Chief Counsel asked whether affirmative action plans were consistent with Rev. Rul. 71-447 and the same year Rev. Proc. 75-50 added the minority-favoring provisions the NPRM would delete.

Rev. Rul. 77-272, 1977-2 C.B. 191. The IRS considered an apprentice training school that limited admissions exclusively to American Indian students. The organization "operates as a school within the meaning of section 170(b)(1)(A)(ii) of the Code" – the same definitional provision the NPRM uses to define "private school" in proposed regulation § 1.501(c)(3)-2(c). The school had been created by a national labor union at the request of the Bureau of Indian Affairs to implement the policy goals of the Adult Vocational Training Act of 1956 and operated under a BIA cost reimbursement contract.

The IRS addressed Rev. Rul. 71-447 directly and concluded it did not bar exemption. The ruling reasoned that "Rev. Rul. 71-447's prohibition of racial discrimination by private schools is based on the principle that racial discrimination in education is contrary to Federal public policy and is therefore inconsistent with charitable exemption under section 501(c)(3) of the Code." Because the school's "admission policy is designed to implement certain statutorily defined Federal policy goals that are not in conflict with

Federal public policy against racial discrimination in education," the IRS held: "[i]t is not a type of racial restriction that is contrary to Federal public policy."

Three features of this ruling bear on the NPRM. The IRS applied a purpose-based analysis to a racially restrictive school admissions policy, asking not whether race was considered but what the consideration was for. It recognized that a race-restricted admissions policy implementing a congressional statute differs in kind from one designed to exclude. And proposed regulation § 1.501(c)(3)-2(b) would prohibit the school it approved. The Preamble does not mention Rev. Rul. 77-272, does not address whether charities serving American Indian students under federal programs retain their exemption, and does not explain how a school implementing a federal statutory mandate can comply with a rule that prohibits race-conscious admissions for any purpose.

A.3 General Counsel Memoranda

Between 1968 and 1989, the IRS Office of Chief Counsel developed an analytical framework for evaluating racially restrictive charitable programs across six memoranda. That framework distinguished restrictions that aggravate racial disparities from those that ameliorate them. It was grounded in the common law of charitable trusts and in *Brown v. Board of Education*, and it was applied to the private school admissions context specifically. The Preamble cites none of these memoranda.

General Counsel memoranda are internal legal advice from the Office of Chief Counsel to the operating divisions. They do not bind taxpayers and are not precedential. They are evidence of the agency's considered legal reasoning.

I.R.S. Gen. Couns. Mem. 33,752 (Feb. 12, 1968). The Chief Counsel considered a testamentary bequest establishing a scholarship fund that gave preference to persons born in the West Indies and authorized up to half of trust income for scholarship aid to Black students. The Chief Counsel approved the charitable deduction, grounding the conclusion in the common law of charitable trusts: "The potential recipients of direct benefits under trusts for any one or more of the aforesaid purposes may therefore be restricted by reference to race, sex, religion, geographic location or the like without adversely affecting their status as common law charities."

The memorandum cited the Restatement (Second) of Trusts §§ 368-373 and Scott on Trusts as authority, noting that this rule "appears to have been universally treated as appropriate for application to the establishment of trust funds for use in awarding scholarships." The common law source the Supreme Court would later confirm governs § 501(c)(3) was the IRS's own cited authority for approving race-restricted scholarship trusts, fifteen years before *Bob Jones*.

I.R.S. Gen. Couns. Mem. 36,363 (Aug. 7, 1975). The Chief Counsel considered whether Kamehameha Schools' practice of "effectively limiting the acceptable applicants for the basic school program to individuals who have at least one native Hawaiian ancestor should be treated as racially discriminatory action in the sense that is required to

preclude a school from being eligible for a charitable exemption under Code § 501(c)(3)."

The Chief Counsel acknowledged that "some of the broad language set out in Revenue Ruling 71-447 can be literally read as encompassing the general type of preferential admission program which is presented in this case," but concluded "that such a reading is not legally justifiable here." The memorandum then articulated the aggravate standard:

> Therefore, the kind of discrimination which Brown condemned and to which Rev. Rul. 71-447 is directed, in our opinion, properly is limited to discrimination that could reasonably be expected to aggravate the disparity in the educational and social levels commonly achieved by the members of some minority groups when compared with the corresponding achievements of society as a whole.

That is the aggravate standard, stated in 1975, applied to a private school's race-conscious admissions policy, and used to conclude that the policy fell outside Rev. Rul. 71-447's prohibition. The Chief Counsel found "no significant societal detriment is likely to be triggered by a continuation of the limited preference" and recommended "that the service should not regard the restrictive admissions practices of the trust as barring it from a charitable status under Code §§ 170 and 501(c)(3)."

The memorandum also endorsed affirmative action as a valid rationale in the private school context: "one of the bases for issuing technical advice favorable to the taxpayer was that the schools are in substance maintaining an 'affirmative action' plan by giving admissions preference to students with [Native Hawaiian] blood. We agreed to that rationale as a possible alternative basis for concluding that operation of the schools is consistent with Rev. Rul. 71-447." The Chief Counsel then asked the operating division to develop a proposed revenue ruling addressing "whether affirmative action plans are consistent with the requirements of Rev. Rul. 71-447," noting "the wide public interest in this question." That request was made in August 1975. Rev. Proc. 75-50, with its minority-favoring provisions in sections 3.02 and 4.05, issued three months later.

The Chief Counsel further observed that federal agencies administering programs subject to Title VI treated the school as nondiscriminatory. "Although Title VI of the Civil Rights Act of 1964 prohibits Federal financial assistance to institutions that are racially discriminatory, the USDA has continued to provide lunch programs to [the] schools," and the Department of Health, Education and Welfare "effectively treats the melange of racial and ethnic groups now living in [Hawaii] as precluding any school that serves a broad cross section of [Hawaii] residents from being racially discriminatory in any legally significant sense."

I.R.S. Gen. Couns. Mem. 37,462 (Mar. 17, 1978). The Chief Counsel concluded that a Caucasian-only scholarship trust was contrary to federal public policy. The memorandum revoked GCM 33,752's reasoning — that no clearly defined public policy existed against racial discrimination by private educational trusts — but expressly

preserved its outcome and reserved the minority-favoring question: "[w]e do not, however, necessarily reject the ultimate conclusion of that G.C.M. We have not yet determined whether that type of racial restriction is of the type which is contrary to expressed public policy."

The Chief Counsel thus recognized in 1978 that invidious and remedial restrictions raise distinct analytical questions and declined to resolve the second.

I.R.S. Gen. Couns. Mem. 39,082 (Nov. 30, 1983). The Chief Counsel reconsidered the per se approach of GCM 37,462 and rejected it. The memorandum found a categorical rule "perhaps overly simplistic" and stated: "we now believe that a per se rule is inappropriate because facts and circumstances may exist where such a trust may not necessarily contribute to racial discrimination in education." It offered an illustration: "a private educational trust which awards scholarships only for Caucasian students to attend a predominantly minority school could be said actually to discourage racial discrimination in education."

The Chief Counsel concluded that "an examination of the facts and circumstances on a case-by-case basis must be undertaken to determine whether such a trust actually fosters racial discrimination in education," and that unless a trust "can be specifically said to do so by its terms or operations and thereby clearly violate public policy, the well-established policy promoting private educational trusts should, on balance, prevail even where the benefits of the trust are limited to members of a particular race."

The timing of this memorandum bears directly on the NPRM. *Bob Jones* was decided in May 1983. GCM 39,082 issued in November 1983. The IRS's lawyers read *Bob Jones* and concluded it required case-by-case, purpose-sensitive analysis rather than categorical prohibition. The NPRM reinstates the per se rule the Chief Counsel rejected six months after the decision the Preamble claims as its authority.

I.R.S. Gen. Couns. Mem. 39,117 (Jan. 13, 1984). The Chief Counsel answered the question GCM 37,462 had reserved. The memorandum addressed whether an organization providing scholarship grants exclusively to minority students at a small liberal arts college that had operated under Jim Crow laws qualified for § 501(c)(3) exemption. The Chief Counsel concluded that "the scholarship grants in question can only have the effect of furthering educational purposes in a manner supporting a policy of nondiscrimination."

The memorandum cited Rev. Proc. 75-50 sections 3.02 and 4.05 as legal support. That citation confirms the minority-favoring provisions were understood by the IRS's lawyers as having a legal foundation.

I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989). The framework's final articulation. The Chief Counsel addressed a trust restricting benefits to "worthy and deserving white persons" and concluded the restriction "aggravates the burdens placed on those who have traditionally been the subject of discrimination and thereby fosters racial discrimination." The memorandum stated the standard:

> The racial restriction must be of the type against which federal policy is directed. In our view, it is of a type that excludes from participation in or denies the benefits of a program or activity to individuals solely on the basis of race so that it can reasonably be expected to aggravate the disparity in the educational, economic or social levels of that group when compared with society as a whole.

Summarizing GCMs 39,082 and 39,117, the Chief Counsel confirmed that "not all racially restrictive provisions are necessarily in conflict with fundamental public policy" and that an ameliorative program, one that "can only have the effect of furthering educational purposes in a manner supporting a policy of nondiscrimination," was permissible. Programs that aggravate racial disparities are disqualifying. Programs that ameliorate them are not.

The aggravate/ameliorate standard was first articulated in 1975 in the private school admissions context, grounded in the common law of charitable trusts and in *Brown*, developed across two decades of formal legal reasoning, and restated by the Chief Counsel in 1989. The NPRM abandons it, replacing it with "for any purpose," without acknowledgment. It reinstates the categorical approach the Chief Counsel found inadequate and replaces the framework developed in its place with a standard the IRS spent two decades recognizing as too crude to serve the doctrine's purposes.

A.4 Revenue Procedures

Rev. Proc. 72-54, 1972-2 C.B. 834. The IRS's first operational guidance implementing Rev. Rul. 71-447. It addressed only publicity requirements — how a school must make its racially nondiscriminatory policy known to all racial segments of the community served. It contained no provision addressing minority-favoring programs.

Rev. Proc. 75-50, 1975-2 C.B. 587. Published November 6, 1975, superseding Rev. Proc. 72-54. This is one of the three items the Preamble addresses. Rev. Proc. 75-50 expanded substantially on its predecessor, adding organizational requirements, provisions governing facilities and programs, scholarship and loan programs, faculty and staff, and annual certification. The IRS explained that "experience with private schools has shown a need for more specific guidelines to insure a uniform approach" to determining whether a school maintains a racially nondiscriminatory policy.

Among the additions were two provisions expressly authorizing minority-favoring programs. Neither appeared in Rev. Proc. 72-54. Both are proposed for deletion.

Section 3.02, second sentence: "A policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students."

Section 4.05, third and fourth sentences: "Consistent with section 3.02, supra, scholarships and loans that are made pursuant to financial assistance programs favoring members of one or more racial minority groups that are designed to promote a school's racially nondiscriminatory policy will not adversely affect the school's exempt status. Financial assistance programs favoring members of one or more racial groups that do not significantly derogate from the school's racially nondiscriminatory policy similarly will not adversely affect the school's exempt status."

The fourth sentence of section 4.05 establishes a materiality threshold. Programs that do not significantly derogate from a nondiscriminatory policy are permitted even without affirmatively promoting it. That threshold is the operational expression of the contextual, fact-sensitive approach GCM 39,082 adopted. The NPRM eliminates it, substituting "for any purpose" with no quantum limitation.

Section 4.07 of the same procedure treats faculty diversity as evidence of compliance: "The existence of a racially discriminatory policy with respect to employment of faculty and administrative staff is indicative of a racially discriminatory policy as to students. Conversely, the absence of racial discrimination in employment of faculty and administrative staff is indicative of a racially nondiscriminatory policy." Under the IRS's framework, a school that actively diversified its faculty was demonstrating compliance with the nondiscrimination requirement. The NPRM would treat the same program as a potential ground for revocation.

Rev. Proc. 2019-22, 2019-22 I.R.B. 1260. The IRS updated Rev. Proc. 75-50, modifying the publicity requirements to permit publication on a school's internet homepage. It expressly retained the minority-favoring authorizations in sections 3.02 and 4.05. The Preamble does not address that retention.

A.5 Written Determinations

Technical advice memoranda and private letter rulings are written determinations under § 6110. Both apply law to a taxpayer’s facts and bind the Service as to that taxpayer and issue. Neither may be used or cited as precedent. I.R.C. § 6110(k)(3). A technical advice memorandum issues during examination at the request of a field office; a private letter ruling issues on a taxpayer’s request before the transaction.

I.R.S. Tech. Adv. Mem., Kamehameha Schools/Bernice Pauahi Bishop Estate (conference date Feb. 4, 1999). The issue presented was “[w]hether the subject organization’s restriction of admissions to children of Hawaiian ancestry is consistent with the requirements of exemption under section 501(c)(3) of the Internal Revenue Code.” The memorandum issued after the field office had recommended revoking the Estate’s exemption on that basis.[188]

[188] The memorandum is on file with the authors. It is unnumbered and was not published in the ordinary course, having been filed as Exhibit B to the Estate’s Supplemental Appendix to Form 1023, Reaffirmation Submission (Aug. 18, 1999). *See also* Roth, *supra* note 149, at n.6 (describing the memorandum as "unnumbered and undated, but referencing a conference date of Feb. 4, 1999," and filed as an exhibit to

The national office concluded that it was. Reviewing the judicial decisions issued since Revenue Ruling 71-447, the memorandum found that "there have been no significant changes that would warrant a different conclusion from that of the 1975 TAM to be reached today," noted that "additional legislation has been enacted regarding programs for Native Hawaiians that has been upheld by the courts," and concluded that "the Estate's admissions restriction for Native Hawaiians remains consistent with current fundamental public policy." Its stated conclusion was that "the Estate's admission policy is consistent with the requirements for recognition of exemption as an organization described in section 501(c)(3) of the Code."

The memorandum also quoted section 3.02 of Revenue Procedure 75-50 and stated that "Rev. Proc. 75-50, together with the provisions contained therein, has not been revoked, modified, or superseded." The Service thus confirmed in 1999 that the provisions the NPRM would delete remained in force.

The memorandum affirmed a technical advice memorandum dated July 24, 1975, addressing the same policy. As the 1999 memorandum describes it, the 1975 determination reasoned that "[a] strong argument can be made that the Kamehameha schools serve the special social and educational needs of a generally necessitous class of persons who because of their cultural heritage currently tend to be disadvantaged by reason of discrimination," and that "[t]he need for assistance to disadvantaged cultural groups which have had a history of being discriminated against because of their heritage was recognized by Congress in the enactment of the Native American Programs Act of 1974." The Service "also recognized that, in light of the past history and present status of the Schools, the Native Hawaiian preference did not arise from and does not create the sort of societal ills that are associated with racially discriminatory policies and that are addressed by Rev. Rul. 71-447." I.R.S. Gen. Couns. Mem. 36,363, discussed in section A.3 above, is the Chief Counsel's advice issued the following month, in August 1975.

The IRS thus addressed this question twice, twenty-four years apart, as to the same institution and the same policy, and reached the same conclusion both times. The Preamble mentions neither determination.

Kamehameha's admissions policy remains contested in the federal courts, though not as a matter of exempt status. The Ninth Circuit, sitting en banc, held that the same admissions policy did not violate 42 U.S.C. § 1981.[189] Litigation seeking to compel the school to abandon the policy is currently pending in the District of Hawaii.[190]

the school's reaffirmation submission, and noting that district IRS personnel had decided to revoke the exemption before being reversed by the national office); Brennen, *supra* note 115, at 58 n.43.

[189] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (en banc).

[190] Students for Fair Admissions v. Trustees of Estate of Bishop, 351 F.R.D. 241 (D. Haw. 2026).

The IRS has also regularly approved identity-based scholarship programs in private letter rulings, another type of written determination. Professor Colinvaux has compiled the relevant rulings.[191]

Two are worth particular mention:

I.R.S. Priv. Ltr. Rul. 9632024 (May 17, 1996). A private foundation proposed scholarships for students graduating from tribal colleges with two-year degrees to continue undergraduate study in science or mathematics at four-year institutions. The Service recited both Revenue Ruling 71-447 and Revenue Ruling 77-272 and then addressed the public policy question directly: "All tax-exempt organizations are subject to the general requirement that the purpose of the organization may not be contrary to public policy. This rationale has been used to deny tax exempt status for racially discriminatory schools and programs." It concluded that "[e]ven if attendance at a tribal college is deemed to be a racial classification, the Foundation's proposed scholarship program is consistent with public policy reflected in the traditional and long-standing relationship between the federal government and Indian tribes," citing Revenue Ruling 77-272.

The ruling is a direct application of the public policy doctrine to a program that functioned as a racial classification, and it relies on a revenue ruling the Preamble does not mention.

I.R.S. Priv. Ltr. Rul. 202426018 (Apr. 1, 2024). Nine months after *SFFA* was decided, the IRS granted advance approval under § 4945(g)(1) and (g)(3) of a private foundation's scholarship and educational grant procedures. The foundation stated that "given that one of your areas of focus is on supporting [a particular national] heritage, some of these scholarships may restrict eligibility to recipients who are of [that] heritage," and made the same statement regarding its grant program. The IRS approved both, determining that the procedures satisfied the statutory requirement that grants be "award[ed] . . . on an objective and nondiscriminatory basis."

The 2024 ruling bears on the argument that the charitable standard has evolved. An agency that says the standard has evolved in 2026 was applying the earlier standard only two years ago.

[191] Colinvaux, *supra* note 53, at 570 n.98 (collecting private letter rulings approving identity-based scholarship programs).

APPENDIX B

THE REGULATORY DETERMINATIONS

The Special Analyses section of the Preamble contains four determinations required by statute or executive order. Each rests on the economic analysis discussed in Part VI.B. Each asserts a conclusion that the Preamble's own statements contradict. This Appendix sets out, for each determination, the governing requirement, the Preamble's assertion, and why the assertion cannot be sustained.

B.1 Executive Orders 12866 and 13563: The Cost-Benefit Analysis

The requirement. Executive Orders 12866, issued in 1993, and 13563, issued in 2011, direct agencies to assess the costs and benefits of available regulatory alternatives and, where regulation is necessary, to select approaches that maximize net benefits.[192] Executive Order 13563 directs each agency to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[193] The Office of Information and Regulatory Affairs designated the rulemaking significant and subject to review under section 6(b) of Executive Order 12866 and section 1(b) of the July 4, 2025 Memorandum of Agreement between Treasury and OMB regarding review of tax regulations.[194]

The analysis the Preamble provides. The Preamble identifies three categories of economic effect: compliance costs for private schools, changes in the recipient population of scholarships and loans, and the charitable giving behavior of donors to scholarship funds. Its substantive discussion addresses scholarship and loan criteria and admissions policies.[195]

What the analysis omits. Proposed regulation § 1.501(c)(3)-2(b) reaches "any educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program." The final term is a residual category not limited by the enumerated items. The Preamble does not analyze curriculum or course offerings, faculty hiring or fellowship programs, student organizations, research centers or academic institutes, cultural programming, mentorship programs, or targeted recruitment. Each falls within the regulatory text's reach.

The Preamble addresses the omission in a single sentence: while the regulations "might also affect any other school-supported programs or education policies administered by private schools, the Treasury Department and the IRS assume that any economic effects

[192] Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).
[193] Exec. Order No. 13563, § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).
[194] 91 Fed. Reg. at 56,816.
[195] *Id.* at 56,816-17.

arising from this relatively narrow, miscellaneous group of activities would be insignificant."[196]

The Preamble also states that the NPRM is "not expected to affect private school athletic programs where inclusion is generally based on athletic ability, not race or ethnicity."[197] Athletic programs are one of the four domains the regulatory text names expressly. The Preamble thus predicts no effect on a category the rule reaches by its terms, without analyzing how the rule would apply to the administration of such programs.

The affected-population estimate. The Preamble states that the NPRM may affect "the 750,000 students attending these schools who may qualify for scholarships allocated on the basis of racial, ethnic, or national identity."[198] The sole source cited is a 1994 report of the General Accounting Office on minority-targeted scholarships.[199] That figure does not appear in the report, and the Preamble supplies no formula, intermediate inputs, dataset year, or uncertainty range from which it could be reconstructed.

Five features of the cited report bear on the estimate.

First, the report contains no national eligibility estimate. It surveyed institutions on the number of students who actually received minority-targeted scholarships, which is a different quantity from the number who may qualify for them.

Second, the report's principal rate is calculated within the minority student population, not within total enrollment. The report states that "[a]mong racial and ethnic minority students enrolled in undergraduate schools, about 7 percent received MTS during the 1991-92 school year," and notes that among all undergraduates the figure was approximately 1 percent.[200] A rate measured within the minority subpopulation cannot be applied to total enrollment.

Third, the report is exclusively postsecondary. Its scope covers undergraduate, graduate, and professional schools. It supplies no rate for primary or secondary schools, which the Preamble acknowledges are within the rule's scope.

Fourth, the report's definition of "minority-targeted scholarship" encompasses six eligibility criteria: race or ethnicity, age over forty, disability, sex, national origin, and religion. The NPRM reaches race, color, and national or ethnic origin.[201] The report's aggregate figures are therefore broader than the NPRM's categories, and the Preamble does not identify which table or category it used.

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[196] *Id.* at 56,817.
[197] *Id.*
[198] *Id.* at 56,816 & n.5.
[199] *Id.* (citing Linda G. Morra, Higher Education: Information on Minority-Targeted Scholarships, U.S. Gen. Accounting Office, GAO/HEHS-94-77 (Jan. 14, 1994), https://www.gao.gov/assets/hehs-94-77.pdf).
[200] HEHS–94–77, *supra* note 199, at 7 & n.5.
[201] *Id.* at 3.

Fifth, the report's undergraduate and graduate figures carry confidence intervals of plus or minus six percentage points,[202] with a response rate of 77 percent for the undergraduate and graduate sample.[203] On a point estimate of 7 percent, that uncertainty is substantial. The Preamble presents a single rounded figure without a range.

The scholarship research. The Preamble cites research in support of its analysis. Every source concerns postsecondary institutions: studies of admissions effects at selective colleges, an IPEDS finance dataset covering postsecondary endowment-restricted aid, and a 1994 GAO survey of undergraduate and graduate schools.[204] The Preamble cites nothing concerning primary or secondary schools, which the rule plainly reaches.

Why the analysis cannot support the determination. The analysis addresses a rule narrower than the one the NPRM would impose. It examines two categories of activity while the regulatory text reaches every program a school administers or supports. It produces a single quantitative estimate that cannot be derived from the source cited for it. And every source it cites concerns postsecondary institutions, while the rule governs private elementary and secondary schools as well. An agency directed to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible" cannot satisfy that direction by estimating the effects of a different and narrower rule.[205]

B.2 The Regulatory Flexibility Act Certification

The requirement. The Regulatory Flexibility Act requires an agency publishing a notice of proposed rulemaking to prepare an initial regulatory flexibility analysis describing the rule's impact on small entities.[206] An agency may forgo that analysis only by certifying that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities." The certification must be published in the Federal Register "along with a statement providing the factual basis for such certification."[207]

The Preamble's assertion. The Secretary certifies that the NPRM will not have a significant economic impact on a substantial number of small entities.[208]

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[202] *Id.* at 3, n.2.
[203] *Id.* at 55.
[204] 91 Fed. Reg. at 56,816 n.5 (GAO survey), 56,817 nn.7-9 (admissions studies, IPEDS Finance component, and affirmative action research).
[205] Exec. Order No. 13563, § 1(c), 76 Fed. Reg. at 3821.
[206] 5 U.S.C. § 603(a) ("Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities."); *see id.* § 603(b) (specifying required contents).
[207] 5 U.S.C. § 605(b) ("Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification.").
[208] 91 Fed. Reg. at 56,818.

What the Preamble says elsewhere. The Preamble states that Treasury and the IRS "do not have readily available parameters or models to precisely assess the extent of" the costs of modifying endowed scholarship funds.[209] It states that they "do not have the data to model the cost to schools (that currently discriminate based on race or ethnicity) of changing admission criteria to maintain compliance."[210] It states that they "do not have readily available parameters and models to quantify the number of taxpayers who make charitable contributions to support race-based scholarship funds administered by private schools."[211] And it assumes without analysis that effects arising from the residual category of covered activities "would be insignificant."[212]

Why the certification cannot stand. The factual basis the statute requires is absent. A certification that a rule will not significantly affect a substantial number of small entities requires an estimate of the rule's effects on those entities. The Preamble states three times that Treasury and the IRS lack the data or models to produce such an estimate for the categories of cost it identifies, and it does not analyze the categories it declines to examine. Smaller institutions bear compliance costs disproportionately: legal review of programs against an undefined standard, and modification of endowed instruments through state court proceedings, are costs incurred per institution and per instrument rather than in proportion to institutional size.

B.3 The Unfunded Mandates Reform Act Determination

The requirement. Section 202 of the Unfunded Mandates Reform Act requires an agency to assess anticipated costs and benefits before issuing a final rule containing a federal mandate that may result in expenditures in any one year by State, local, or Tribal governments in the aggregate, or by the private sector, of $100 million in 1995 dollars, adjusted annually for inflation.[213]

The Preamble's assertion. "These proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector, in excess of that threshold."[214]

What the Preamble says elsewhere. The three statements quoted in section B.2 above. Treasury and the IRS have no parameters or models to assess the cost of modifying

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[209] *Id.* at 56,817.
[210] *Id.* at 56,816.
[211] *Id.*
[212] *Id.* at 56,818.
[213] 2 U.S.C. § 1532(a) ("Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any general rule or final rule for which a general notice of proposed rulemaking was published that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing [specified assessments].").
[214] 91 Fed. Reg. at 56,818.

endowed funds, no data to model the cost of changing admissions criteria, and no parameters or models to quantify the effect on charitable contributions.

Why the determination cannot stand. A threshold determination requires an estimate of aggregate expenditures. The Preamble acknowledges that Treasury and the IRS have no basis for estimating the principal cost categories the NPRM would impose. An agency cannot determine that aggregate expenditures fall below a specified dollar threshold while acknowledging it cannot estimate those expenditures. The determination also extends to expenditures by State, local, and Tribal governments, which the Preamble denies without addressing the state court proceedings the rule's compliance mechanism requires. See section B.4.

B.4 Executive Order 13132: Federalism

The requirement. Executive Order 13132 defines "policies that have federalism implications" as those "that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[215] Where a policy has such implications, the order directs that an agency "closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States" and "carefully assess the necessity for such action," and that national action limiting State policymaking discretion "be taken only where there is constitutional and statutory authority for the action."[216] Section 6 of the Executive Order imposes additional consultation requirements where the rule also imposes substantial direct compliance costs on State and local governments or preempts State law.[217]

The Preamble's assertion. "These proposed regulations do not have federalism implications, do not impose substantial direct compliance costs on State and local governments, and do not preempt State law within the meaning of the Executive order."[218] The Preamble addresses the triggers of section 6 in this way. It does not apply the definitional test.

The compliance mechanism runs through state courts. Charitable trusts are creatures of state law. A trustee holding an instrument that restricts eligibility by race, color, or national or ethnic origin cannot conform to the NPRM by administrative decision. The instrument binds the trustee, and modification requires a proceeding in state court for cy pres or equitable deviation, with notice to the State attorney general, who supervises charitable trusts and appears in such proceedings. The NPRM would thus generate state court litigation and state enforcement activity as a direct consequence of federal regulatory action.

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[215] Exec. Order No. 13132, § 1(a), 64 Fed. Reg. 43,255, 43,255 (Aug. 10, 1999).
[216] *Id.* § 3(a), (b), 64 Fed. Reg. at 43,257.
[217] *Id.* § 6(b), (c), 64 Fed. Reg. at 43,257.
[218] 91 Fed. Reg. at 56,818.

The Preamble does not address what cy pres proceedings would require. Its only statement on the modification of restricted funds is that Treasury and the IRS lack models to assess the cost, and that restricted endowments "represent no more than 16 percent of total scholarship dollars."[219] That figure describes endowments restricted by any criterion, not those restricted by race, ethnicity, or national origin, and it measures dollars rather than instruments.

The federal standard and state law may conflict. The NPRM assumes that race-conscious charitable restrictions are impermissible. State courts applying state charitable trust law are not bound by that assumption. As Part IV.C documents, they have reached the opposite conclusion, including in *Trustees of the University of Delaware v. Gebelein*, which upheld a trait-restricted scholarship fund on the ground that the restriction "does not obstruct equal opportunity, but rather promotes it by compensating past acts of discrimination."[220]

Why the Preamble's Federalism determination cannot stand. A trustee could therefore hold an instrument that state law treats as a valid charitable trust, and that a state court has declined to reform, while the NPRM treats maintaining it as grounds for revoking the administering institution's exemption. Whether that constitutes preemption within the meaning of Executive Order 13132 is a question the Preamble does not reach, because it denies any federalism implications at all.

[219] *Id.*
[220] 420 A.2d at 1195-96.