November 3, 2026

U.S. Treasury Secretary Scott Bessent
Acting Commissioner
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Racial Nondiscrimination in Private Schools, IRS and REG-119986-25

Dear Secretary Bessent,

The Legal Defense Fund (LDF), American Civil Liberties Union Foundation (ACLU), the Lawyers' Committee for Civil Rights Under Law, and the 34 additional undersigned organizations write to oppose the proposed rule from the Internal Revenue Service (IRS) and the U.S. Department of Treasury that would expand the IRS's power to revoke or deny the tax-exempt status of private educational institutions.[1] The U.S. Supreme Court has held the IRS has limited authority under the public policy doctrine to bar institutions from receiving tax-exempt status only when there is a clear consensus among all three branches of government prohibiting the institutions' policies or practices.[2] The IRS has exercised this authority sparingly to address explicit policies prohibiting Black students from admission based on race and limiting racial affiliation. The proposed rule, however, goes many steps further. It would allow the IRS to strip private universities and schools of their tax-exempt status if the school "adopts, maintains, or enforces any policy or practice that discriminates on the basis of race, color, or national or ethnic origin," "regardless of the intent behind or the legality of such discrimination"—including, for example, policies "defended as serving remedial or-diversity-related objectives."[3] The agency circularly defines "discrimination on the basis of race, color, or national or ethnic origin" as including "any discrimination on the basis of race, color, or national or ethnic origin for any purpose."[4] This new rule thus gives the IRS unfettered discretion to revoke private educational institutions' tax-exempt status based on vaguely-defined "discrimination" without any limiting principle, including constitutionality. Because of the extreme consequences of losing tax-exempt status, this threat alone could cause institutions to end lawful initiatives, harming Black students and other students of color as well as society as a whole. The proposed rule should be withdrawn in its entirety.

I. Black Students and Other Students of Color Continue to Experience Discrimination by Private Educational Institutions

More than 70 years after *Brown v. Board of Education*[5] and forty years after *Bob Jones University v. United States*,[6] significant racial disparities continue to exist in both PK-12 and

[1] Racial Nondiscrimination in Private Schools, 91 Fed. Reg. 56811 (Sept. 4, 2026), https://www.federalregister.gov/documents/2026/09/04/2026-18127/racial-nondiscrimination-in-private-schools (hereinafter "Proposed Rule").
[2] *Bob Jones Univ. v. United States*, 461 U.S. 574, 598 (1983)
[3] Proposed Rule at 56815.
[4] *Id.*
[5] 347 U.S. 483 (1954).
[6] 461 U.S. 574.

higher education at every stage, from admissions to enrollment to graduation to faculty hiring.[7] Private schools today enroll more white students and fewer students of color compared to public schools and public charter schools,[8] particularly in the South,[9] where the legacy of private segregation academies persists. Higher educational institutions also continue to admit students of color at far lower rates compared to their proportion of the college-age population.[10] Private educational institutions must do more, not less, to close these racial disparities.

II. **The Proposed Rule Exceeds the IRS's Authority and is Arbitrary and Capricious.**

For decades, IRS revenue rulings and procedures have required private educational institutions to have a "'racially nondiscriminatory policy as to students" as a condition of receiving tax-exempt status, while permitting policies that seek to affirmatively advance that goal.[11] The IRS now proposes to grant itself exclusive authority to determine what constitutes "racial discrimination" and to revoke or deny tax-exempt status to educational institutions based on that determination.[12] The proposed rule exceeds the IRS's authority and conflicts with its existing revenue rulings and procedures. The IRS also fails to adequately account for the costs and benefits of the rule. Because the proposed rule exceeds the IRS's authority and is arbitrary and capricious, it must be withdrawn.

In order for an agency action to be valid under the Administrative Procedure Act (APA), it must be within the agency's statutory authority[13] and be the product of "reasoned decisionmaking."[14] Agency actions, including regulations, are arbitrary and capricious in violation of the APA when, among other things, the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[15] Such flawed reasoning can include a failure to

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[7] *E.g.* DIANA ELLSWORTH, ET AL., MCKINSEY & CO., RACIAL AND ETHNIC EQUITY IN U.S. HIGHER EDUCATION 4 (2022), https://www.mckinsey.com/~/media/mckinsey/industries/education/our%20insights/racial%20and%20ethnic%20equity%20in%20us%20higher%20education/racial-and-ethnic-equity-in-us-higher-education.pdf.
[8] Katherine Schaeffer, *U.S. Public, Private and Charter Schools in 5 Charts*, PEW RES. CTR. (Jun. 6, 2024), https://www.pewresearch.org/short-reads/2024/06/06/us-public-private-and-charter-schools-in-5-charts/.
[9] Steven Suitts, *Separate and Unequal Schools: The Past Is Future*, SOUTHERN SPACES (May 14, 2024), https://southernspaces.org/2024/separate-and-unequal-schools-past-future/.
[10] Jeremy Ashkenas, et al., *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago,* N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html; Laura Lumpkin, et al., *Flagship Universities Say Diversity is a Priority. But Black Enrollment in Many States Continues to Lag,* WASH. POST (Apr. 18, 2021 7:00 AM ET), https://www.washingtonpost.com/education/2021/04/18/flagship-universities-black-enrollment/. *See also* ANDREW HOWARD NICHOLS, EDTRUST, "SEGREGATION FOREVER"?: THE CONTINUED UNDERREPRESENTATION OF BLACK AND LATINO UNDERGRADUATES AT THE NATION'S 101 MOST SELECTIVE PUBLIC COLLEGES AND UNIVERSITIES (2014), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf; Oyin Adedoyin, *What Happened to Black Enrollment?,* CHRON. HIGHER ED. (Aug. 18, 2022), https://www.chronicle.com/article/what-happened-to-black-enrollment?bc_nonce=n3ni9yfkj13tat6mhlzx4&cid=reg_wall_signup; INST. OF ED. SCI., NAT'L CTR. FOR ED. STATISTICS, THE CONDITION OF EDUCATION 2020: COLLEGE ENROLLMENT RATES (2020), https://nces.ed.gov/programs/coe/pdf/coe_cpb.pdf;
[11] *E.g.* Rev. Proc. 75-50, 1975-2 C.B. 587.
[12] *See generally* Proposed Rule.
[13] 5 U.S.C. § 706(2)(C).
[14] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 53 (1983).
[15] *Id.* at 43.

adequately consider the costs of the proposed rule.[16] These same requirements apply when an agency revises its regulations.[17] Indeed, when an agency substantially alters an existing regulation, it must provide a "more detailed justification" for a change in policy when the "new policy rests upon factual findings that contradict those which underlay its prior policy" or where the previous policy has "engendered serious reliance interests that must be taken into account."[18]

A. *Supreme Court Precedent Only Permits the IRS to Prohibit Policies and Practices That Violate the Clear Consensus Position of All Three Branches of Government.*

The public policy doctrine is not the President's policy doctrine. As the Supreme Court has cautioned, a declaration that an organization is not "charitable," and therefore not entitled to tax exemption, "should be made only where there can be *no doubt* that the activity involved is contrary to a fundamental public policy"[19] because "the position of all three branches of the Federal Government was unmistakably clear."[20] The IRS has historically exercised its authority to deny tax-exempt status to private educational institutions sparingly, while focusing on schools with explicit policies discriminating against Black students.

While the IRS cites *Bob Jones University v. United States* in support of the proposed rule, the narrow ruling in that case cannot justify the sweeping authority the IRS claims. Decades after *Brown v. Board of Education* held racial segregation in public schools violated the U.S. Constitution,[21] and the Civil Rights Act of 1964 mandated the desegregation of public schools and prohibited racial discrimination by federal funding recipients,[22] private schools continued to deny Black students the ability to associate freely with white students and/or deny their admission entirely. In 1971, the IRS issued Revenue Ruling 71-447, declaring "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within . . . common law concepts . . . and accordingly does not qualify as an organization exempt from Federal income tax."[23] The IRS then moved to collect taxes from the Goldsboro Christian Schools and Bob Jones University. At the time the legal challenges to the IRS's actions went to the Supreme Court, Goldsboro excluded all Black students, while Bob Jones had revised its formerly whites-only policy to permit Black students to attend provided they did not engage in interracial dating.

The U.S. Supreme Court found the IRS had properly exercised its limited authority to deny a private educational institution tax-exempt status because the school does not meet the common-law definition of "charitable"—i.e., it is not serving a public purpose and is contrary to established public policy.[24] The Court held both schools' policies were unambiguously racially discriminatory based on Supreme Court precedents,[25] and therefore the IRS could bar the schools' 501(c)(3) status because "there can be no doubt as to the national policy" prohibiting such discrimination.[26] In so holding, the Court emphasized the "unbroken line of cases following

[16] *Michigan v. EPA*, 576 U.S. 743, 751–54 (holding action arbitrary and capricious for failure to consider cost of regulation).
[17] *Encino Motorcars, LLC v. Navarro,* 579 U.S. 211, 221 (2016) (explaining while "agencies are free to change their existing policies," they must "provide a reasoned explanation for the change").
[18] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).
[19] *Bob Jones Univ.,* 461 U.S. at 592 (emphasis added).
[20] *Id.* at 598.
[21] 347 U.S. 483 (1954).
[22] Pub. Law 88-352, 42 U.S.C. § 2000a *et seq.*
[23] 1971-2 C.B. 230.
[24] *Bob Jones Univ.*, 347 U.S. at 586. The Court also held the IRS's action did not violate the schools' free exercise rights under the Religion Clauses of the First Amendment. *Id.* at 602-03.
[25] *Id.* at 605.
[26] *Id.* at 598.

Brown v. Board of Education,"[27] federal civil rights statutes, and "numerous Executive Orders over the past three decades" prohibiting similar policies and practices.[28] The Court also highlighted the "unusually strong case of legislative acquiescence in and ratification by implication of the [IRS'] 1970 and 1971 rulings," pointing to several Congressional hearings on the issue, numerous failed bills that would have overridden the IRS's rulings, and Congress' decision to affirmatively bar racial segregation in private clubs in subsequent legislation.[29]

The historical context of the *Bob Jones* decision further illustrates that the IRS's position was the product of the clear, specific consensus among the three branches. The IRS's initial decision to deny tax-exempt status to private schools with explicit racially discriminatory policies was not *sua sponte*. Until 1970, the IRS granted tax-exempt status to private schools, without regard to their racial admissions policies.[30] The agency only changed its position after a three-judge panel of the District Court for the District of Columbia granted a preliminary injunction prohibiting the IRS from granting tax-exempt status to Mississippi private schools with explicit racially discriminatory admissions policies.[31] The IRS then formalized its new position in Revenue Ruling 71-447 and, later, Revenue Procedure 75-50, which required schools to publicly affirm their racially nondiscriminatory policies.[32] By contrast, when the IRS published proposed policy changes in 1978 that would have required schools to provide quantitative evidence of desegregation in order to qualify for tax-exempt status,[33] the measures were blocked by Congress.[34] This history emphasizes that the IRS cannot determine national policy on its own, but can only act to enforce the consensus position of all three branches.

Since *Bob Jones,* the IRS has only applied the public policy doctrine in limited circumstances,[35] and has never found that an educational institution violated the public policy doctrine unless the school had an explicit policy limiting the admission or association of Black students.[36] Nor has the IRS sought to apply the public policy doctrine to prohibit conduct other than racial discrimination. For example, despite Chief Justice Roberts' fear that "the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage,"[37] that has not come to pass.

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[27] *Id.* at 593.
[28] *Id.* at 595.
[29] *Id.* at 600-01.
[30] *Id.* at 577-78.
[31] *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970). The district court later ruled in favor of the plaintiffs on the merits, holding that private schools with explicit racially discriminatory admissions policies could not be granted tax-exempt status in light of the federal policy prohibiting racial segregation. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit v. Green,* 404 U.S. 997 (1971) (per curiam).
[32] 1975-2 C.B. 587.
[33] See Prop. Treas. Reg. § 4830-01, 43 Fed. Reg. 37,296, 37,297 (Aug. 22, 1978) ("This revenue procedure sets forth more definitive guidelines to identify those schools that in fact operate on a discriminatory basis even though they may claim to have racially nondiscriminatory policies."); Prop. Treas. Reg. § 4830-01-M, 44 Fed. Reg. 9,451, 9,452 (Feb. 13, 1979) ("After consideration of the comments and the testimony given at the hearings, the proposed revenue procedure [published in 43 Fed. Reg. 37,296] has been revised.").
[34] *Allen v. Wright,* 468 U.S. 737, 747-47 & n.16 (1984).
[35] Richard L. Schmalbeck, *Bob Jones and the Public Policy Doctrine, 35 Years Later*, *in* REVISITING BOB JONES UNIVERSITY: SEEKING CLARITY ON FUNDAMENTAL PUBLIC POLICY AFTER 35 YEARS (2018), https://ncpl.law.nyu.edu/wp-content/uploads/2022/07/Richard-L.-Schmalbeck.pdf#page=33 ("In areas outside of discrimination in education, the IRS rarely invokes the public policy doctrine. . . . It is worth noting that none of these PLRs required invocation of the public policy doctrine, even though it was mentioned in all of them, more or less in passing.").
[36] 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, 56-57 (2023). *See Calhoun Academy v. Commissioner*, 94 T.C. 284 (1990); *Virginia Education Fund v. Commissioner*, 85 T.C. 743 (1985).
[37] *Obergefell v. Hodges,* 576 U.S. 644, 711-12 (2015) (Roberts, CJ, dissenting).

B. *There Is No Three-Branch Consensus Barring Race-Conscious Action to Advance Diversity, Race-Based Remedial Programs, or Race-Neutral Diversity, Equity, Inclusion, and Accessibility Programs.*

In support of the proposed rule, the IRS points to 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."[38] With the exception of the decision in *Students for Fair Admissions v. Harvard (SFFA)*[39] and several 2025 executive orders by President Trump, none of these sources post-date *Bob Jones* or require the IRS to depart from its rulings and procedures at the time of that decision.

The IRS claims the Proposed Rule is "consistent with" *SFFA*,[40] but this is not so. The Supreme Court in *SFFA* ruled that the benefits of diversity did not provide a compelling interest justifying the consideration of race in college admissions at those schools as required by the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.[41] The decision did not even extend to military academy admissions,[42] let alone the range of private educational institutions at every level covered by the proposed rule. Indeed, the portions of the *SFFA* decision cited by the IRS focus on the particular harms of "race-based *state* action."[43] The IRS ignores the Supreme Court's statements that diversity remains a "commendable" goal[44] which can still be pursued consistent with the law,[45] and that even government actors may take race-based action to remedy discrimination.[46] Here, the IRS seeks to improperly overextend *SFFA* to regulate almost everything a private school does, including its "educational policy, admissions policy, scholarship or loan program, athletic program, or other school-administered or school-supported program,"[47] without acknowledging the limited scope of the *SFFA* decision and regardless of whether the school seeks to advance the "commendable" goal of diversity or to remedy discrimination.

Outside of the narrow context of race-based college admissions by the state and federally-funded actors, there is no consensus among all three branches of government that race-conscious decisions to advance diversity or race-based programs to remedy discrimination are prohibited. The courts, for example, explicitly recognize the legality of race- or gender-based hiring plans by private employers—like private schools—that remedy a "conspicuous . . .

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[38] Proposed Rule at 56815.
[39] 600 U.S. 181 (2023).
[40] Proposed Rule at 56816.
[41] 600 U.S. at 230.
[42] *See Id.*at 213 n.4 (stating that the decision does not extend to military academy admissions).
[43] Proposed Rule at 56814-15.
[44] *Students for Fair Admissions, Inc.,* 600 U.S. at 214.
[45] *Id.* at 284 (Thomas, J. concurring) (explaining that "universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means"); *Id.* at 285 (Thomas, J., concurring) ("Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies."); *id.* at 317 (Kavanaugh, J., concurring) ("And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."). *See also City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment) ("A State can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race. . . . Such programs may well have racially disproportionate impact, but they are not based on race.") (internal quotation marks omitted); *see id.,* at 509 (plurality opinion of O'Connor, J.) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.").
[46] *Students for Fair Admissions, Inc.,* 600 U.S. at 207.
[47] 91 Fed. Reg. 56819 (proposed § 1.501(c)(3)–2 (b)).

imbalance in traditionally segregated job categories."[48] Nor is there consensus that race-neutral diversity, equity, or inclusion efforts are impermissible in areas such as scholarships or other school programs. Indeed, many members of Congress have spoken in the wake of the Supreme Court's decision to emphasize the continued importance and legality of diversity, equity, and inclusion efforts,[49] as have courts.[50]

C. *The Proposed Rule Would Improperly Give the IRS Unfettered Discretion to Define Racial Discrimination and Create Confusion About What Conduct is Prohibited.*

The proposed rule exceeds the IRS's authority under *Bob Jones* by giving the agency broad discretion to define "racial discrimination" in the absence of a three-branch consensus on what constitutes national policy. Because the proposed rule exceeds the agency's authority, it should be withdrawn.

The IRS has invoked its authority under 26 U.S.C. § 7805(a) to justify this proposed rulemaking,[51] but this provision does not grant the agency the power it claims. While this provision undoubtedly gives the IRS broad and primary authority to interpret the tax code,[52] that authority is not unlimited and cannot justify this sweeping proposal. For example, earlier this year, in *Keysight Techs., Inc. v. United States*, the Court of Federal Claims held that the Treasury exceeded its broad rulemaking authority under § 7805(a) where a proposed regulation was "untethered to congressional grants of authority or the underlying statutory context."[53]

The proposed rule similarly exceeds the IRS's power. The proposed rule does not require the IRS to conform its definition of "racial discrimination" to the consensus of all three branches

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[48] *Johnson v. Transportation Agency, Santa Clara Cnty.*, 480 U.S. 616, 630 (1987); *see also United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

[49] *See, e.g.*, Joseph Biden, Remarks on the United States Supreme Court Decision on Affirmative Action (June 29, 2023), https://www.presidency.ucsb.edu/documents/remarks-the-united-states-supreme-court-decision-affirmative-action-college-admissions-and (asking colleges to "not abandon their commitment to ensure student bodies of diverse backgrounds and experience" and directing the Department of Education "to analyze what practices help build a more inclusive and diverse student bod[y] and what practices hold that back[.]"); Tri-Caucus Leaders Statement (Jun 29, 2023), https://capac.house.gov/press-release/tri-caucus-leaders-denounce-supreme-courts-decision-gutting-race-conscious-admissions (denouncing *SFFA* decision and noting that it does not "impact race-conscious processes outside the scope of university admissions"); Congressional Caucus Leaders Statement (July 11, 2025), https://capac.house.gov/press-release/congressional-caucus-leaders-introduce-resolution-affirming-diversity-equity (six Congressional Caucuses introducing "a joint resolution affirming that diversity, equity, and inclusion, and accessibility are fundamental to the American Dream and to our national prosperity, safety, and democracy"); Leader Jeffries Statement (Jan. 23, 2025), https://jeffries.house.gov/2025/01/23/leader-jeffries-statement-on-diversity-equity-and-inclusion/ ("Diversity, equity and inclusion are American values"); Representative Lee Letter to Department of Education (Feb. 27, 2025), https://summerlee.house.gov/sites/evo-subsites/summerlee.house.gov/files/evo-media-document/rep-lee-letter-to-ed-ocr-re-dear-colleague-letter.pdf (denouncing Department of Education's Dear Colleague Letter); Congresswoman Waters Letter (Jan. 24, 2025), https://democrats-financialservices.house.gov/uploadedfiles/01.24_deia_eoflup.pdf (distinguishing workplace diversity initiatives from race-based college admissions in *SFFA*); Congresswoman Waters Press Release (Dec. 13, 2025), https://waters.house.gov/media-center/press-releases/congresswoman-waters-demands-answers-on-implementation-of-anti-deia-executive-orders (denouncing "anti-equity executive orders" that "weaponize civil rights enforcement");

[50] *See, e.g.*, *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189, 2025 WL 4936000, at *2 (4th Cir. Mar. 14, 2025) (Diaz, concurring) ("[P]eople of good faith who work to promote diversity, equity, and inclusion deserve praise, not opprobrium. For when this country embraces true diversity, it acknowledges and respects the social identity of its people. When it fosters true equity, it opens opportunities and ensures a level playing field for all. And when its policies are truly inclusive, it creates an environment and culture where everyone is respected and valued. What could be more American than that?").

[51] Proposed Rule at 56812.

[52] S*ee Bob Jones Univ.*, 461 U.S. at 596.

[53] 182 Fed. Cl. 433, 444 (2026).

or any accepted framework. Instead, the proposed rule gives the IRS unfettered discretion to define racial discrimination to suit its own purposes. The proposed rule would permit denial of tax exemption for any school that "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."[54] The proposed rule also provides no limiting factor: "discrimination on the basis of race, color, or national or ethnic origin," it explains, includes "*any* discrimination on the basis of race, color, or national or ethnic origin for *any* purpose."[55] The proposed rule provides no further clarity on how the IRS might interpret and enforce this provision.

The Federal Register notice only further obscures this definition. It explains that, under the proposed rule, "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[.]"[56] The notice also points to Executive Order 14280 to justify the proposed changes,[57] which is ostensibly focused on preventing racial discrimination in school disciplinary systems but takes aim at race-neutral measures designed to ensure schools do not have disciplinary policies that would illegally have an unjustified disparate impact on protected groups.[58] The citation to this executive order implies the IRS intends to prohibit such lawful practices under the rule. Thus, under the proposed rule, the IRS would not even be bound by the law and could unilaterally declare things to be racial discrimination even if under existing precedent, such actions would not constitute racial discrimination.

Adding to the confusion, the notice goes on to state that the Proposed Rule:

> [W]ould 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.

Id. It is impossible to square these contradictory assertions and entirely unclear what actions private schools may properly take to eliminate prejudice and discrimination—despite the three-branch consensus and the IRS's prior position that such actions can be found permissible.

Further, the new rule contradicts IRS's own regulations, which have long recognized "promotion of social welfare by organizations designed to . . . eliminate prejudice and discrimination" as a lawful charitable purpose.[59] Following this understanding, the IRS itself has issued rulings that are inconsistent with the proposed rule, which have not been repealed—rulings that permit, for example, tax-exempt status for organizations formed to "ameliorate the housing needs of minority groups."[60] These inconsistent rulings create confusion, and the IRS

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[54] Proposed Rule at 56819 (proposed § 1.501(c)(3)–2 (b)).
[55] *Id.*
[56] *Id.* at 56815 (emphasis added).
[57] *Id.*
[58] *Id.*
[59] 26 C.F.R. § 1.501(c)(3)-1(d)(2).
[60] *See, e.g.*, Rev. Rul. 67-250, 1967-2 C.B. 182; Rev. Rul. 68-70, 1968-1 C.B. 248; Rev. Rul. 68-655, 1968-2 C.B. 213; Rev. Rul. 70-585, 1970-2 C.B. 115; Rev. Rul. 77-272, 1977-2 C.B. 191; Rev. Rul. 75-285, 1975-2 C.B. 203; Rev. Rul. 74-587, 1974-2 C.B. 162.

has not adequately explained the change in policy here, in violation of the Administrative Procedure Act.[61]

The IRS's proposal significantly diverges from the agency's limited authority to determine and enforce national policy under the public policy doctrine, which "is precisely the kind of agency overreach *Loper Bright* was designed to foreclose."[62] The IRS may not invoke its broad authority to "restructur[e] federal law to its own liking"[63] and should repeal the proposed rule.

D. *The IRS Could Exercise Its Authority Under the Proposed Rule to Infringe on Constitutional Rights.*

The uncertain scope of this rule gives the IRS broad discretion to apply these vague restrictions arbitrarily. The proposed rule thus raises fundamental First and Fifth Amendment concerns.

As courts have recognized, the First Amendment was introduced by the Founders partly to prevent discriminatory taxes, and the "discriminatory denial of tax exemptions can impermissibly infringe free speech."[64] When, like here, a rule leaves a "latitude for subjectivity," it opens the door to "selective application" of tax law—"one of the very evils that the [Constitutional] vagueness doctrine is designed to prevent."[65]

At the same time, the proposed rule provides "inadequate notice of the conduct it purports to prohibit," and is thus void for vagueness under the Fifth Amendment's Due Process Clause.[66] "Although due process does not require 'impossible standards' of clarity,"[67] it does require "guardrails" providing "fair notice of what conduct is prohibited."[68] Put simply, a regulation may be unconstitutionally vague if it contains "terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application[s]"[69] or if it "authorizes or even encourages arbitrary and discriminatory enforcement."[70] Here, the proposed rule is vague in both ways. It fails to provide adequate notice of the prohibited conduct, as discussed above, and permits arbitrary enforcement.

In the absence of guardrails, the IRS could abuse the discretion granted to it in the proposed rule to target particular schools based on their viewpoint or other partisan considerations. The IRS has reportedly developed plans to revoke the tax-exempt status of

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[61] *See FCC*, 556 U.S. at 515 (holding that an agency must "display awareness that it is changing position" (emphasis omitted)).
[62] *Keysight Techs., Inc.,* 182 Fed. Cl. at 444 (discussing *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024)).
[63] *Id.* at 440.
[64] *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 (D.C. Cir. 1980).
[65] *Id.*
[66] *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 534 (N.D. Cal. 2020) (internal quotations omitted); *see also Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (concluding challenged statute was "unconstitutionally vague on its face because it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what [the regulated party] must do in order to satisfy the statute").
[67] *Kolender*, 461 U.S. at 361 (quoting *United States v. Petrillo*, 332 U.S. 1, 7–8 (1947)).
[68] *Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 544 (internal citation and quotation marks omitted).
[69] *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also United States v. Williams*, 553 U.S. 285, 306 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.").
[70] *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

organizations that are not politically aligned with the current administration.[71] President Trump has also repeatedly and publicly threatened to revoke the tax-exempt status of specific private universities he dislikes.[72] For example in April 2025, his administration reportedly directed then-IRS Acting Chief Counsel De Mello to revoke Harvard's tax-exempt status.[73] Because the proposed rule does not confine the IRS's authority to revoke tax-exempt status to instances where schools' policies violate a consensus position of all three branches of government, it could be weaponized by this and future administrations to target other schools based on their viewpoint.

There is good reason to believe the IRS will go too far in enforcing an erroneous conception of anti-discrimination law. The current administration has taken sweeping action across sectors to announce and enforce unprecedented and unsupported conceptions of racial discrimination. In February 2025, the Department of Education issued a Dear Colleague Letter taking the unprecedented position that "diversity, equity, and inclusion" programs (which the letter did not undefine) were discriminatory and threatening the loss of federal funding if schools continued to pursue such programs.[74] This effort was stopped in court,[75] but the Department of Education has reiterated its belief that diversity, equity, and inclusion programs are discriminatory and has opened numerous investigations into educational institutions[76] on weak legal grounds. Further, in July 2025, the Department of Justice issued similar guidance stating that diversity, equity, and inclusion programs, including "unlawful proxy discrimination" in the form of "cultural competence," "lived experience," or "geographic targeting" criteria, could violate federal law.[77] Civil rights organizations issued a response disputing the guidance's understanding of antidiscrimination law.[78] These are only a few of many instances in which the current administration has distorted civil rights laws to pursue its agenda.

In light of these constitutional concerns, the IRS should not seize the discretion to determine compliance with civil rights laws. While the IRS's interpretation of antidiscrimination law would not be entitled to deference following the Supreme Court's decision in *Loper Bright*, as discussed above, it would still have the potential to chill lawful behavior.

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[71] James Franey, *Trump Admin Set to Target George Soros Nonprofit, Southern Poverty Law Center and CAIR in Major Tax Crackdown: Sources*, N.Y. POST (Aug. 27, 2026), https://nypost.com/2026/08/27/business/trump-admin-set-to-target-george-soros-nonprofit-in-tax-crackdown/.

[72] @realDonaldTrump, Truth Social (Apr. 25, 2025), https://truthsocial.com/@realDonaldTrump/posts/114342374504628520?utm_source=gemini; Rebecca Shabad, *Trump Says He Will Revoke Harvard's Tax-Exempt Status,* NBC NEWS (May 2, 2025 10:33 EDT), https://www.nbcnews.com/politics/donald-trump/trump-says-will-revoke-harvard-universitys-tax-exempt-status-rcna204398.

[73] Jacob Bogage & Jeff Stein, *Trump Administration Asks IRS to Revoke Harvard's Tax-Exempt Status*, WASH. POST (Apr. 16, 2025), https://www.washingtonpost.com/business/2025/04/16/trump-harvard-tax-exempt-irs/.

[74] Letter from Craig Trainor, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., to Colleagues (Feb. 14, 2025).

[75] *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025); *see also NAACP v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 53, 66 (D.D.C. 2025); *Am. Fed'n of Tchrs. v. U.S. Dep't of Educ.*, 796 F. Supp. 3d 66 (D. Md. 2025).

[76] *See, e.g.*, U.S. Dep't of Educ., U.S. Department of Education Investigates Five Medical Schools as Trump Administration Pushes to End Racial Discrimination in Admissions (Jul. 22, 2026), https://www.ed.gov/about/news/press-release/us-department-of-education-investigates-five-medical-schools-trump-administration-pushes-end-racial-discrimination-admissions (announcing five new investigations in addition to 15 new investigations from June and discussing "illegal, discriminatory" DEI programs).

[77] Mem. from Pamela Bondi, Att'y Gen. of the U.S., to All Federal Agencies, Re: Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination (Jul. 29, 2025), https://www.justice.gov/ag/media/1409486/dl [https://perma.cc/8H9X-GUBE].

[78] NAACP Legal Defense & Education Fund, Inc. et al., *The Department of Justice's Guidance for Recipients of Federal Funding on Unlawful Discrimination: What You Need to Know* (2025), https://www.naacpldf.org/wp-content/uploads/2-LDF-et-al.-Fact-Sheet-on-AG-Bondi-DEIA-Memo.pdf.

E. *The IRS Does Not Have Expertise to Make Accurate Decisions About What Constitutes "Racial Discrimination" In the Absence of a Three-Branch Consensus.*

The IRS is particularly poorly equipped to exercise the proposed rule's discretion because it lacks the expertise necessary to make decisions regarding the proper interpretation of the Civil Rights Act of 1964, the Equal Protection Clause, or other civil rights laws. Congress empowers each agency to assist it on a "limited range of matters" within that agency's defined area of expertise.[79] It does so because, "in our increasingly complex society, replete with ever changing and more technical problems," Congress must retain the ability to "delegate power under broad general directives" to subject matter experts.[80] Still, a delegation of power in one area does not permit the IRS to extend its authority to other regulations and act as a "sort of junior-varsity [Department of Justice]."[81]

The IRS's own enabling statute sets forth its expertise: The Oversight Board requires its members to have experience in one or more of several tax-related areas: management of large service organizations, customer service, federal tax laws, information technology, organization development, and needs and concerns of taxpayers and small businesses.[82] The Commissioner of Internal Revenue, on the other hand, shall "have a demonstrated ability in management."[83] Notably, there is no requirement for experience in areas of civil rights law and no evidence that IRS employees can perform "'the most exacting [] examination' required to determine when a specific type of racial discrimination is unlawful." [84] Nor is there hidden in the IRS's enabling statute the "highly consequential power" to define and regulate unlawful discrimination beyond the settled public policy of the three branches.[85]

Consistent with Congress's limited deferrals of authority, courts regularly confine an agency's authority to that agency's statutorily authorized expertise. The Court in *Community Television of Southern California v. Gottfried*, for example, determined that the Federal Communication Commission (FCC) was barred from considering potential violations of the Rehabilitation Act, an Act it did not administer, when making license renewal decisions.[86] The Rehabilitation Act was "patterned after Title VI of the Civil Rights Act of 1964" and thus "responsibility for enforcing it" lay with "agencies administering the federal financial assistance programs."[87] Accordingly, the Court explained that because the FCC—like the IRS—is "not a funding agency" with authority to enforce either the Rehabilitation Act or Title VI, absent explicit congressional directive, it should not "inquir[e] specifically" into potential violations of said acts when making licensing decisions.[88]

Similarly, when the Federal Power Commission attempted to "prohibit discriminatory employment practices on the part of its regulatees," the Court held in *NAACP v. Federal Power Commission* that the "use of the words 'public interest' in a regulatory statute is not a broad

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[79] David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 413 (1999-2000).
[80] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).
[81] *Id.* at 427 (Scalia, J., dissenting).
[82] 26 U.S.C. § 7802(b)(1).
[83] 26 U.S.C. § 7803(a)(1)(A).
[84] David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 420 (1999-2000) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)).
[85] *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).
[86] 459 U.S. 498, 510 (1983).
[87] *Id.*
[88] *Id.*

license to promote the general public welfare."[89] Instead, "public interest" in a regulatory statute takes "meaning from the purpose of the regulatory legislation."[90] The Court explained:

> It is useful again to draw on the analogy of federal labor law. No less than in the federal legislation defining the national interest in ending employment discrimination, Congress in its earlier labor legislation unmistakably defined the national interest in free collective bargaining. Yet it could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest," Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees.[91]

NAACP thus "teaches that the scope of [the Treasury and IRS's public policy] power is limited to the purposes of the regulatory legislation and the agency's expertise."[92] While *Bob Jones* allows the IRS to defer to the *settled* policy determinations of all three branches, nothing in the IRS's enabling statutes gives it "original jurisdiction" over statutes it does not enforce or areas in which it lacks any expertise or experience.[93]

F. *The IRS Fails to Adequately Assess the Costs of the Proposed Rule or Regulatory Alternatives.*

The IRS has failed to accurately assess the costs of its proposed rule or provide any intermediate penalties. These impacts would harm hundreds of thousands, if not millions, of Black students and other students of color as well as society as a whole. Yet the proposed rule ignores these costs, focusing primarily on the costs associated with changing any race-based scholarship programs.[94]

1. The Proposed Rule Would Require All Private Schools to Incur Additional Legal and Other Costs.

Losing tax-exempt status is referred to as the death penalty for nonprofits for good reason. For private educational institutions, such a loss means not only the loss of their exemption from federal income taxes—including exemption on taxable endowment income—but also the loss of the ability to receive tax deductible contributions pursuant to 26 U.S.C. § 170. This change, in turn, hampers universities' abilities to not only fundraise but to apply for most grants.

The threat of revocation of tax-exempt status, combined with the vagueness of the proposed rule and the lack of any limiting principle or exception, will thus be chilling and lead to confusion. Private educational institutions will scramble to conform with this unprecedented rule, with mere months to attempt compliance. Compounding this burden is that these private schools lack additional guidance on how to comply, because this proposed rule fails to comply with the requirement of three-branch consensus and does not reflect the settled policy views of the federal government. Because it is unclear what standards the IRS will apply, schools will have to incur additional legal costs and spend significant time and effort to attempt to interpret the restrictions and evaluate how to respond.

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[89] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 663, 669 (1976).
[90] *Id.* at 669.
[91] *Id.* at 671.
[92] David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 416 (1999-2000).
[93] *NAACP*, 425 U.S. at 669.
[94] Proposed Rule at 56816-17.

2. The Proposed Rule Would Threaten Additional Harm to Private Universities.

Beyond taxes and fundraising, private universities face a unique burden if tax-exempt status is removed: to qualify as an "institution of higher education" under the Higher Education Act of 1965 ("HEA") for all grants *other* than Title IV financial aid programs, an institution must be "a public *or other nonprofit institution*."[95] The Department of Education's regulations also *require* IRS recognition under § 501(c)(3) to qualify as a "nonprofit institute" for purposes of the HEA.[96] Finally, revocation of § 501(c)(3) status could deny access to the Public Service Loan Forgiveness Program for university employees, threatening a university's ability to attract and retain staff.[97]

3. The Proposed Rule Would Permit the IRS to Revoke or Deny Tax-Exempt Status to an Entire Institution Even if the Program in Question is Not a Substantial Part of Its Activities.

The proposed rule threatens an all-or-nothing loss of tax-exempt status without the guardrails that ordinarily constrain exemption analysis, allowing the IRS to use program-level concerns to issue an institution-wide existential sanction. Section 501(c)(3) requires an organization to be organized and operated exclusively for exempt purposes, but the governing regulation provides that an organization fails the operational test only if "more than an insubstantial part" of its activities is not in furtherance of an exempt purpose.[98] Article III and administrative courts apply the same limiting principle: "exclusively" does not mean "solely" or "absolutely without exception;" instead, exemption is lost only where a nonexempt purpose is substantial.[99] The IRS has not identified any threshold, *de minimis* exception, or administrable limiting principle that distinguishes an isolated or technical program-level concern from institution-wide noncompliance. In analogous exempt-organization contexts, by contrast, the IRS administers a regulatory framework that provides clear safe harbors and compliance pathways. Under regulations preventing nonprofits from conferring excess benefits for private gain, for example, a transaction is presumed not to be an excess benefit transaction if it is approved in advance by an independent authorized body, supported by appropriate comparability data, and contemporaneously documented.[100] Yet the IRS fails to consider a narrower rule or intermediate sanctions short of denying private educational institutions tax-exempt status for programmatic noncompliance.

4. The Proposed Rule Ignores the Costs to Students, Faculty, and Society as a Whole.

The proposed rule ignores the costs to students and faculty at private education institutions, and to society as a whole. As discussed in Part I above, Black students and other students of color, as well as faculty of color, continue to face unjustified barriers to accessing and thriving in private schools. If private schools end lawful equal opportunity programs because of the threat of enforcement under this proposed rule, these individuals will face increased barriers

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[95] 20 U.S.C. § 1001(a) (emphasis added); *c.f. id.* § 1002(b)(1) (including for-profit institutions in the definition of "institution of higher education" for purposes of Title IV).
[96] *See* 34 C.F.R. § 600.2 ("A private institution is a 'nonprofit institution' only if it meets the requirements of paragraph (1) of this definition and is . . . Determined by the U.S. Internal Revenue Service to be an organization described in section 501(c)(3) of the Internal Revenue Code.").
[97] *See* 20 U.S.C. § 1087e(m)(3)(B)(i).
[98] *See* 26 U.S.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(c)(1).
[99] *See Living Faith, Inc. v. Commissioner*, 950 F.2d 365, 370–71 (7th Cir. 1991); *Manning Ass'n v. Commissioner*, 93 T.C. 596, 603–04 (1989).
[100] *See* Treas. Reg. § 53.4958-6(a).

to educational access. These changes will harm society as a whole: Researchers at Georgetown University estimated in 2021 that gaps in postsecondary attainment cumulatively cost the U.S. economy nearly $1 trillion per year.[101] This estimate does not include economic losses that are harder to quantify, such as impacts on health, public safety, and civic engagement.[102] By contrast, increasing education access grows the economy, and more access to highly-skilled occupations for talented women and Black men accounted for approximately "two fifths of growth in U.S. market GDP per person between 1960 and 2010."[103] Yet the IRS rule does not mention these costs or lost benefits at all.

When fully assessed, the costs of the proposed rule far exceed any benefits. As such, the IRS should withdraw the proposal.

III. **Conclusion**

The IRS can enforce national policy on racial discrimination; it cannot make it. The proposed rule would give the IRS unfettered discretion to determine what constitutes racial discrimination meriting revocation of tax-exempt status, exceeding its lawful authority under *Bob Jones*. Without sufficient guidance or guardrails, the proposed rule is likely to chill lawful expression and conduct and could be used to target schools in violation of the Constitution. Because the proposed rule fails to provide a reasoned basis for the regulation or the agency's change in position, it must be withdrawn.

Thank you for the opportunity to comment. If you have additional questions, please reach out to Amalea Smirniotopoulos, Senior Policy Counsel, Legal Defense Fund (asmirniotopoulos@naacpldf.org); Kellen McCoy, Counsel, Lawyers' Committee at Civil Rights Under Law (kmccoy@lawyerscommittee.org); and Alexis Alvarez, Staff Attorney, ACLU Racial Justice Program (alexisa@aclu.org).

Sincerely,

The Legal Defense Fund
American Civil Liberties Union Foundation
The Lawyers' Committee for Civil Rights Under Law
Advocating 4 Kids Inc.
American Federation of Teachers (AFT)
Alliance for Higher Education
American Association of University Women (AAUW)
Arab American Institute
Asian Americans Advancing Justice | AAJC
Association for Special Children and Families
Center for Children's Advocacy
Center for Responsible Lending
CenterLink

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[101] GEORGETOWN UNIVERSITY CENTER ON EDUCATION AND THE WORKFORCE, THE COST OF *ECONOMIC* AND *RACIAL INJUSTICE* IN POSTSECONDARY EDUCATION (2021), https://cew.georgetown.edu/cew-reports/publicbenefit/.
[102] *Id.*
[103] Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth*, 87 ECONOMETRICA 1439, 1441 (2019). *See also* Tyler Kepner, Baseball Rights a Wrong by Adding Negro Leagues to Official Records, N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/sports/baseball/mlb-negroleagues.html ("All of us who love baseball have long known that the Negro Leagues produced many of our game's best players, innovations and triumphs against a backdrop of injustice.").

Council on American-Islamic Relations
Disability Rights Education and Defense Fund
ED/OCR Alumni Collective
EdTrust
Education Law Center
Equal Justice Society
Fair Count Inc.
Feminist Majority Foundation
Grantmakers in the Arts
Institute for Women's Policy Research
Jewish Council for Public Affairs
Leadership Conference on Civil and Human Rights
League of United Latin American Citizens (LULAC)
National Association for the Advancement of Colored People (NAACP)
National Association of Social Workers
National Center for Youth Law
National Education Association
Public Advocacy for Kids (PAK)
Rural Coalition
Service Employees International Union (SEIU)
Solutions Not Suspensions
Southern Poverty Law Center
State Wide Education Organizing Committee
The Workers Circle