Policing Expressive Governance: A Framework for Judicial Review of Executive Viewpoint Retaliation

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Introduction

The gravest contemporary threats to expressive freedom do not always take the form of statutes or criminal sanctions. Increasingly, they take the form of procurement decisions, grant terminations, security-clearance revocations, and regulatory designations—the discretionary instruments of executive administration.[1] When

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[1] *See* Simona Grossi, *First Amendment and the Executive Power*, 78 U.C. L.J. (forthcoming), at 6–7, 19, 32, 34–38, 45, 47–48, 50–51, 55–56, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6190198.

the executive deploys these instruments to penalize disfavored viewpoints while preserving the appearance of ordinary governance, it engages in what I have elsewhere called *expressive governance*.[2] This phenomenon is doctrinally elusive precisely because it operates in domains where courts have long, and for sound institutional reasons, extended substantial deference to executive judgment.

A recent dispute crystallizes the problem. After a leading artificial intelligence company publicly maintained that its models could not be deployed for use in autonomous lethal weapons or the mass surveillance of citizens, and declined contract terms that would have required otherwise, the government designated the company a "supply-chain risk to national security"—a classification historically reserved for foreign adversaries—and moved to foreclose its commercial relationships across the federal defense ecosystem.[3] The designation was framed as a national security judgment.[4] But the sequence of events, the named targeting, and the disproportion of the response suggest a different object: retaliation for protected expression, accomplished through an administrative label.[5] One might resist this inference, reading the episode as the disciplining of a difficult counterparty rather

[2] *Id. See generally* SIMONA GROSSI, FIRST AMENDMENT AND EXECUTIVE POWER (Cambridge Univ. Press forthcoming 2027).

[3] These facts track the record in *Anthropic PBC v. U.S. Department of War*, 825 F. Supp. 3d 1101 (N.D. Cal. 2026).

[4] *See* Statement of Sec'y of War Pete Hegseth (Feb. 27, 2026) (designating Anthropic a "supply-chain risk" and asserting the step was necessary to protect national security), *quoted in* Complaint at 19, Anthropic PBC v. U.S. Dep't of War, No. 3:26-cv-01996 (filed Mar. 9, 2026) (ECF No. 1); U.S. Dep't of War, Statement on Anthropic Supply-Chain Risk Designation (Mar. 5, 2026) (stating the company and its products were "deemed a supply chain risk, effective immediately" on national-security grounds), *quoted in Pentagon Labels AI Company Anthropic a Supply Chain Risk*, AP, Mar. 6, 2026, https://perma.cc/HP2F-JDYL; *see also* Anthropic PBC v. U.S. Dep't of War, 825 F. Supp. 3d 1101 (N.D. Cal. Mar. 26, 2026) (describing the government's asserted national-security justification). The Department publicly cast the designation as a supply-chain and national-security determination rather than as a response to Anthropic's protected speech. *Cf.* Karen Freifeld et al., *Pentagon Informed Anthropic It Is a Supply Chain Risk, Official Says*, REUTERS (Mar. 5, 2026) (reporting that the Department deemed Anthropic's products a risk to the U.S. supply chain, a status previously reserved for foreign adversaries), https://www.reuters.com/technology/pentagon-informed-anthropic-it-is-supply-chain-risk-official-says-2026-03-05/.

[5] Brief of Amicus Curiae Prof. Simona Grossi in Support of Plaintiff's Motion for Summary Judgment, Anthropic PBC v. U.S. Dep't of War, 825 F. Supp. 3d 1101 (N.D. Cal. June 17, 2026) (ECF No. 201), https://perma.cc/AW4V-YZD7.

than retaliation for a viewpoint. The framework developed here does not foreclose that reading — it is designed to test it. Part IV takes up the objection directly.[6]

Building on work I have developed elsewhere,[7] this essay shows how the existing First Amendment doctrine supplies the governing principles to address expressive governance but lacks an administrable method calibrated to the low-visibility, discretion-cloaked form the problem now assumes. It then proposes such a method: a framework of three interlocking tools—a clear-statement requirement, a burden-shifting rule, and an evidentiary presumption of systemic distortion where the executive targets expressive intermediaries. The framework neither invents a new tier of scrutiny nor relaxes the deference that executive administration ordinarily warrants. Rather, it allocates proof and construes authority so that genuine managerial decisions remain insulated while viewpoint retaliation cloaked in discretionary form becomes detectable.

I. THE ANATOMY OF EXPRESSIVE GOVERNANCE

Expressive governance describes the executive's use of administrative tools—funding, contracting, licensing, personnel decisions, and regulatory designations—to shape incentives and penalize disfavored viewpoints while maintaining the form of ordinary governance.[8] It is distinguished from direct censorship not by its object but by its method. The government issues no prohibition on speech and prosecutes no speaker. It instead withdraws a contract, freezes a grant, revokes a clearance, or affixes a damaging designation, each action justified by reference to a managerial or security rationale that, on its face, falls within the executive's discretion. The distinction is one of method, not always of ultimate object: the executive's precise aim may range from silencing a view to avoiding public association with it, but what unites these actions and sets them apart from open prohibition is that the

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[6] The competing characterizations—retaliation for the company's protected expression, and an ordinary procurement impasse with a stubborn vendor—are precisely what the framework is built to adjudicate rather than assume. *See infra* Part IV (locating the protected expression in the company's publicly articulated safety position and showing how the burden-shifting rule sorts the two explanations).

[7] *See* Grossi, *supra* note 1.

[8] I use the term "expressive governance" to describe this phenomenon. *See* Grossi, *supra* note 1, at 5–9, 50–56; GROSSI, *supra* note 2.

penalty for a disfavored viewpoint is imposed through the ordinary instruments of administration rather than through a ban on speech.

Three features make the practice both effective and difficult to police. First, the instruments are facially neutral: nothing in a supply-chain designation or a clearance revocation announces a viewpoint-based purpose. Second, the decisions are discretionary and individualized—the very domains in which courts have declined to second-guess the executive. Third, the asserted justification typically arrives after the fact and at a high level of generality—"national security," "supply-chain risk," "mission alignment"—rendering the divergence between asserted and actual purpose systematically hard to detect. The result is a mode of governance that achieves the suppressive effect of censorship while presenting it to a reviewing court as routine administration.

The class of potential targets is broad. The infrastructure through which speech is produced, organized, and disseminated—press entities, publishing and distribution channels, digital platforms, professional networks, and the firms and institutions that generate and carry information—depends largely on discretionary federal contracts, grants, licenses, and approvals. Each such dependency is a potential lever. That breadth is what gives expressive governance its reach: The same administrative tools that sustain a vast ecosystem of expressive activity can, turned to a punitive end, be used to discipline it.[9]

The constitutional injury is not confined to the immediate target. Because the practice operates through generally available levers—contracts, grants, licenses—every entity dependent on those levers learns that a disfavored public position may invite administrative reprisal. The resulting chill is structural: It contracts the space for public debate among a broad class of similarly situated speakers, not only the named party. That systemic dimension is central to why one-case-at-a-time adjudication is an inadequate response, a point developed below. The point is not that direct censorship lacks a systemic dimension—each visible act of suppression teaches a wider audience—but that expressive governance is distinctively resistant to case-by-case correction.[10] Because the motive is concealed behind a facially valid

[9] *See* Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1 (2012); *see also* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996).

[10] The contrast lies not in the existence of structural chill but in the adequacy of case-by-case correction: Ordinary censorship presents a discrete, visible act that adjudication can reach, whereas

rationale and the tactic migrates freely across administrative forms—from clearance to contract to designation—an adjudication that invalidates one instrument leaves the practice free to reappear in another. As a result, the structural chill persists even as individual actions are struck down.

The practice is not peculiarly American, and the comparative record clarifies both its mechanism and its danger. What I describe as expressive governance is the domestic species of a now-familiar genus that scholars of democratic backsliding have documented across constitutional democracies: the migration from overt censorship to what Kim Lane Scheppele has called *autocratic legalism*, in which those in power discipline the press, the bar, the academy, and civil society through facially ordinary legal instruments—licensing, tax and regulatory enforcement, the allocation of public advertising, accreditation, and procurement—rather than through criminal prohibition.[11] The instruments vary by jurisdiction, but the logic is constant: suppression conducted through the routine machinery of administration, where it is least visible to the public and least legible to a reviewing court.[12] The comparative literature also carries a lesson for doctrine. As Adam Chilton and Mila Versteeg have shown, constitutional guarantees tend to lose practical force when political incentives turn against them and the rights lack the institutional scaffolding to resist, so that de jure protection and de facto practice come apart precisely when protection matters most.[13] A First Amendment attentive only to the historically familiar forms of censorship will systematically fail to detect the administrative forms that have become the preferred instruments of expressive control. The

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expressive governance conceals motive behind a facially valid rationale and migrates across administrative forms, so that invalidating one instrument leaves the practice free to reappear in another. That is why the comparative literature discussed above treats the phenomenon as systemic rather than episodic.

[11] *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); *cf.* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). I develop the domestic application of these comparative insights in Grossi, *supra* note 1.

[12] *See* DAVID KAYE, SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET (2019); *see also* Grossi, *supra* note 1 (discussing media-licensing and state-advertising leverage, tax and regulatory enforcement, and administrative policing of protest as comparative analogues).

[13] *See* ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 5, 35–36, 200 (2020).

claim is not that the United States has followed any particular country's trajectory; it is that doctrine must be calibrated to the mechanism actually in use.

II. Principles in Place, Method Missing

The governing principles are not in doubt. The government may not use "legal sanctions and other means of coercion" to suppress disfavored speech,[14] and it may not "use the power of the State to punish or suppress disfavored expression."[15] The prohibition extends to indirect action: An official "cannot do indirectly what she is barred from doing directly" and so may not coerce private intermediaries into punishing speech on the government's behalf.[16] These principles were recently reaffirmed and applied to a series of executive actions against law firms targeted by name for their representation and advocacy, each of which courts found to constitute retaliation and viewpoint discrimination.[17]

The doctrinal architecture for retaliation claims is likewise settled. A claimant must show that it engaged in constitutionally protected activity, that the challenged action would chill a person of ordinary firmness from continuing that activity, and that the protected activity was a substantial motivating factor in the government's conduct.[18] Expression need not be verbal to qualify; conduct "sufficiently imbued with elements of communication" is protected, and speech on matters of public concern lies at the core of the Amendment's protection.[19] Once a claimant makes the requisite showing, the burden shifts to the government to demonstrate that it

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[14] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

[15] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 187–88 (2024).

[16] *See id.* at 188, 190; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963); *see also* Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning,"* LAWFARE (July 26, 2021), https://perma.cc/8R7D-75QT.

[17] *See* Perkins Coie LLP v. U.S. Dep't of Just., 783 F. Supp. 3d 105, 165 (D.D.C. 2025), *appeal docketed*, No. 25-5241 (D.C. Cir. July 2, 2025); Jenner & Block LLP v. U.S. Dep't of Just., 784 F. Supp. 3d 76, 94–99, 113 (D.D.C. 2025); Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of President, 784 F. Supp. 3d 127, 152–55 (D.D.C. 2025); Susman Godfrey LLP v. Exec. Off. of President, 789 F. Supp. 3d 15, 48–49 (D.D.C. 2025).

[18] Ariz. Students' Ass'n v. Ariz. Bd. of Regents, 824 F.3d 858, 867 (9th Cir. 2016); *see also* Lozman v. City of Riviera Beach, 585 U.S. 87, 90 (2018).

[19] Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 409–11 (1974)); Snyder v. Phelps, 562 U.S. 443, 451–52 (2011).

would have taken the same action absent any retaliatory motive.[20] Courts have long distinguished, in this setting, between permissible attempts to persuade and impermissible attempts to coerce.[21] And the government's discretion to decline a benefit has never included the power to condition it on the surrender of protected expression.[22]

Two evidentiary themes recur in the decided cases and bear emphasis. First, disproportion is probative of motive: Where the government, rather than simply declining to contract, moves to foreclose a target's relationships across an entire sector, the overbreadth of the response itself signals a punitive rather than managerial purpose.[23] Second, indirection does not launder the violation. The teaching that an official may not coerce private parties to suppress speech on the government's behalf applies with equal force whether the coercion runs through a regulator's informal pressure or through a designation that instructs third parties to sever ties with the target.[24]

The difficulty, then, is not the principle but its administration. In the expressive governance setting, the three features identified above—facial neutrality, discretion, and post hoc justification—operate to obscure the very motive the retaliation inquiry must locate. A court applying settled doctrine still needs a method for surfacing viewpoint motive when the government has framed its action as a discretionary security or managerial judgment, and for ensuring that the burden actually shifts where the indicia of retaliation are present. Without such a method, the deference appropriate to genuine administration is too easily extended to its counterfeit, and the migration of the tactic across administrative forms—from clearance to contract to designation—outpaces case-by-case invalidation.

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[20] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977); Hartman v. Moore, 547 U.S. 250, 260 (2006).

[21] Backpage.com, LLC v. Dart, 807 F.3d 229, 230–31 (7th Cir. 2015).

[22] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001).

[23] *See, e.g., Perkins Coie*, 783 F. Supp. 3d at 161–65; *Jenner & Block,* 784 F. Supp. 3d at 106–07 (treating the breadth of the challenged orders as evidence of a punitive rather than managerial purpose); *see also* Brief, *supra* note 5, at 7–9.

[24] *See Vullo*, 602 U.S. at 190; *Backpage.com*, 807 F.3d at 230–31; *see also* Brief, *supra* note 5, at 6–8.

III. A THREE-TOOL FRAMEWORK

The framework proposed here is a method of construing authority and allocating proof, not a new tier of scrutiny. It draws on existing doctrine but recalibrates it for the mechanisms through which modern executive power operates. Its three tools are designed to work in sequence, each addressing one of the features that makes expressive governance hard to detect.

A. A Clear-Statement Requirement

Where executive action burdens expressive activity or the infrastructure through which speech is produced and disseminated,[25] courts should require clear congressional authorization for the discretionary category of action before permitting it to operate against protected speech.[26] Clear-statement principles are familiar in adjacent contexts. In the separation of powers setting, an agency asserting highly consequential authority "must point to clear congressional authorization for the power it claims."[27] In the federalism setting, courts decline to read a statute to reach

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[25] The category is functional, not industry-specific. At one end are entities whose business is the production or dissemination of expression—newspapers, broadcasters, publishers, and digital platforms—whose dependence on federal contracts, licenses, or approvals supplies an obvious lever; at the other are firms whose work bears no relation to expression, such as road-paving or waste-hauling contractors, as to which the clause has no purchase. The intermediate cases—a cloud-computing host, a telecommunications carrier—turn not on the actor's sector but on whether the discretionary instrument is brought to bear on its production, carriage, or dissemination of speech: within the clause when the leverage reaches the expressive traffic the actor carries, outside it when the dispute concerns an unrelated commercial term. *See* Balkin, *supra* note 9, at 7.

[26] The clarity demanded runs to the general category of discretionary power—whether Congress authorized deploying this instrument against a domestic actor at all—not to authority for viewpoint-based retaliation, which Congress could not validly confer and which no court should read a statute to supply. Pitching the requirement at the level of the category, rather than at the implausible level of express authority to retaliate, both answers the objection that no statute would ever authorize viewpoint discrimination and preserves deference where Congress has in fact granted the power: there the clear-statement tool is satisfied, and the analysis proceeds to the motive inquiry the remaining tools supply. *Cf.* Trump v. Hawaii, 585 U.S. 667, 704–06 (2018) (deferring substantially once the President's statutory authority over entry was established). *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022); Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991).

[27] *West Virginia v. EPA*, 597 U.S. at 723.

sensitive subjects absent an unmistakable statement.[28] The same interpretive discipline is warranted where ambiguous delegations are invoked to reach expressive activity: Absent a clear statement, a court should not read such a delegation to reach domestic expressive activity or its infrastructure at all. The clarity the canon demands runs to that question of reach, not to viewpoint discrimination, which Congress cannot authorize: No statement, however clear, can license the executive to penalize protected speech for the views it conveys, because that constraint is constitutional and lies beyond Congress's power to confer.

Applied to the paradigmatic case, the requirement asks a concrete question: What statute authorizes the use of a supply-chain risk designation—an instrument designed for foreign adversaries—against a domestic company for its policy views? If no statute clearly authorizes that application, the clear-statement tool resolves the matter without any need to probe motive, because the executive lacks the authority it claims. The tool thus performs a screening function, disposing of the most overt cases at the threshold and reserving the more searching inquiry for actions that clear it.

The requirement is appropriately cabined. It does not subject every exercise of administrative discretion to a clear-statement demand; it applies where the action reaches expressive activity or the infrastructure that carries it. So limited, the tool respects the ordinary operation of government while insisting that Congress, not the executive acting alone, decide whether a given discretionary power may be turned against protected speech. It also has the virtue of administrability: A court can ask whether a clear statutory directive exists without first resolving contested questions of motive.

It bears emphasis what does and what does not set this first tool in motion, because the trigger is easily mistaken—and a mistaken view of it would make the tool intolerably broad. The clear-statement requirement is not activated by a plaintiff's allegation that the executive harbored a speech-suppressive motive. Its trigger is objective and antecedent to any inquiry into purpose: It asks whether the challenged action operates against expressive activity or the infrastructure that carries it, and, if so, whether Congress has clearly authorized applying the instrument to that target at all. The viewpoint problem is the *reason* for invoking the canon, not the proposition the plaintiff must first prove. So framed, the tool poses a question

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[28] *Gregory,* 501 U.S. at 460–61.

of statutory *reach* rather than of intent. In the paradigmatic case, the question is not whether officials acted out of disagreement with the company's views, but rather whether any statute clearly authorizes deploying a supply-chain designation built for foreign adversaries against a domestic firm in the first place. That question can be answered from the face of the authorizing law, without discovery into motive—which is precisely why the tool screens efficiently and why it cannot be activated by bare assertion.[29]

B. A Burden-Shifting Rule

The second tool addresses the motive problem directly by allocating proof. Once a claimant demonstrates two things—first, a viewpoint-linked pattern, evidenced by such indicia as timing, named targeting, official statements, disparate treatment, or predictable chilling effects; and second, a dependency relationship the government can exploit, such as employment, contracting, funding, access, or regulatory leverage[30]—the burden should shift to the government. The government must then establish, on the record, that it would have taken the same action for legitimate, viewpoint-neutral reasons. Where the action restricts speech[31], the inquiry should also ask whether a materially less speech-restrictive alternative was reasonably available; an analogous less-intrusive-measures requirement already

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[29] The clear-statement requirement is triggered by the viewpoint-linked character of the challenged action, but the clarity it demands runs to statutory *reach*—whether Congress authorized applying the designation to a domestic American company at all—not to authorization for viewpoint discrimination, which Congress could not validly confer. *See West Virginia v. EPA*, 597 U.S. at 723; *Gregory,* 501 U.S. at 467; *see also* Brief, *supra* note 5, at 11–12.

[30] The dependency that matters is a continuing or structural reliance the government can leverage—an ongoing contracting, funding, licensing, employment, or regulatory relationship—not the bare fact that a party sought and was denied a one-off benefit. A disappointed bidder's interest in a single contract it never held is not the exploitable dependency the trigger requires; what distinguishes expressive governance is the government's ability to use a standing relationship as recurring leverage against the actor's protected expression.

[31] Not every challenged action directly restricts speech; some withdraw only a discretionary benefit. The less-restrictive-alternative sub-inquiry is reserved for the subset in which the instrument operates directly on expression or its dissemination—for example, a designation that forecloses a publisher's access to federal distribution—where an obvious narrower course is probative of pretext. Where the action withdraws only a benefit, the same-decision inquiry proceeds without it.

appears in governing law.[32] To avoid any suggestion that this imports strict scrutiny's least-restrictive-means test, the availability of an obvious narrower alternative is best understood as evidence of pretext rather than as a freestanding tailoring demand: Where the government chose the more speech-restrictive path despite a materially less restrictive one lying readily at hand, that choice is itself probative of the motive the inquiry seeks to surface.[33]

This allocation is not novel in kind. It mirrors the established retaliation burden-shift, under which a prima facie showing shifts to the government the obligation to prove it would have acted identically absent the impermissible motive.[34] It is reinforced by the unconstitutional-conditions line, which holds that the government may not deny a discretionary benefit on a basis that infringes protected expression, even where no one is entitled to the benefit.[35]

The contribution of the present tool is to specify the triggers with enough precision to be administrable in the expressive-governance setting, and to make clear that the discretionary or low-visibility character of the instrument is a reason to scrutinize the asserted justification more carefully, not less. These indicia will look familiar from equal-protection doctrine, which likewise treats sequence, departures from ordinary practice, and contemporaneous statements as evidence of purpose; the resemblance is instructive rather than redundant.[36] Three differences matter: The pattern indicia are here paired with a second, independent requirement of an

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[32] 10 U.S.C. § 3252(b)(2)(B).

[33] The least-restrictive-means inquiry functions here as evidence of pretext, not as a freestanding tailoring demand; it carries no tiered-scrutiny import. *See* Grossi, *supra* note 1.

[34] *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (once a plaintiff shows protected conduct was a substantial or motivating factor, the burden shifts to the government to show it would have reached the same decision absent that conduct); Hartman v. Moore, 547 U.S. 250, 260 (2006) (describing the same burden-shifting framework in the retaliation context); *see also* Boquist v. Courtney, 32 F.4th 764, 778 (9th Cir. 2022) (applying *Mt. Healthy* burden-shift and quoting *Hartman*).

[35] Perry v. Sindermann, 408 U.S. 593, 597 (1972); Elrod v. Burns, 427 U.S. 347, 362–63 (1976).

[36] *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266–68 (1977) (treating the sequence of events, departures from ordinary practice, and contemporaneous history as evidence of discriminatory purpose). The present framework borrows that evidentiary insight but adds a second, independent triggering prong—an exploitable dependency—and attaches a determinate burden-allocation consequence, rather than launching the open-ended intent inquiry *Arlington Heights* initiates.

exploitable dependency, which narrows the universe of triggering cases; the showing is calibrated to the low-visibility administrative instruments through which expressive governance operates, not to the suspect classifications equal-protection law polices; and its consequence is a defined burden-shift to a same-decision defense rather than the open-ended inquiry into intent that the equal-protection cases initiate.

One might fairly worry that a burden-shifting rule of this kind is too easily triggered—that because a retaliatory motive can be alleged whenever speech is anywhere in the background, the rule would shift the burden in the ordinary run of discretionary decisions and thereby chill legitimate administration. The objection is serious, and the framework is built to meet it. The trigger is conjunctive and evidentiary, not notice-pleading by adjective. A claimant must establish both a *plausible viewpoint-linked pattern*—shown through objective indicia such as the timing of the action relative to the speech, the targeting of a named party, contemporaneous official statements, disparate treatment of similarly situated actors, or a predictable and substantial chilling effect—*and* an exploitable *dependency relationship*.

Neither prong is satisfied by the bare assertion that speech "might have been" a motivation. A plaintiff who can point only to the coincidence that it once expressed a view, without the timing, targeting, statements, or differential treatment that make viewpoint a plausible explanation, does not clear the threshold, and the burden never shifts. The dual requirement is designed precisely to screen out the case the objection fears: the ordinary contract or grant dispute in which a disappointed party can gesture at some prior expression but cannot show the objective pattern that distinguishes retaliation from routine administration.[37]

Two further features keep the rule from favoring plaintiffs unduly. First, even where the burden shifts, it shifts only to a burden the government can carry—and routinely will, where its reasons are genuine. The government prevails by proving, on the record, that it would have taken the same action for legitimate, viewpoint-neutral reasons; this is the familiar same-decision showing of *Mt. Healthy* and

[37] The trigger is conjunctive: A plaintiff must show both a plausible viewpoint-linked pattern—timing, named targeting, official statements, disparate treatment, or predictable chill—and an exploitable dependency relationship. *See* Grossi, *supra* note 1; Brief, *supra* note 5, at 12.

Hartman, not a novel or insurmountable hurdle.[38] A recent decision sustaining an executive order on exactly this basis confirms that the showing is real and attainable: The government carried it because the record—the order, its fact sheet, and implementing guidance—demonstrated a viewpoint-neutral national-security rationale the executive would have acted on regardless.[39]

Second, the proposition that discretion *heightens* rather than relaxes scrutiny is bounded by the same trigger: It operates only once the dual showing is made, and only as to the fit between the asserted justification and the record. It does not subject the unprovoked exercise of discretion to special suspicion. The framework therefore disciplines the abuse of discretion without disabling its legitimate exercise, and it asks of the government nothing more than that it state, and stand behind, the reasons it would have to be able to give if its actions were in fact what it claims them to be.

A word on why discretion cuts in favor of, not against, scrutiny. The intuition that a discretionary benefit may be withdrawn for any reason has obvious force in the ordinary case. But where the asserted basis for withdrawal coincides with the exercise of protected expression, the discretionary character of the benefit heightens the risk that the viewpoint has done the work the stated rationale claims to do. The low visibility of discretionary action compounds that risk, because there is often no contemporaneous record against which to test the asserted justification. The burden-shift answers the difficulty by requiring the government to make its actual reasons legible on the record, where they can be evaluated.

C. A Presumption of Systemic Distortion for Expressive Intermediaries

The third tool applies once the burden has shifted, and it operates with greatest force where the target is an *expressive intermediary*[40]—an entity that aggregates,

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[38] This burden-shift overlaps with the same-decision framework of *Mt. Healthy,* 429 U.S. at 287, and *Hartman*, 547 U.S. at 260. The contribution here lies not in the burden itself but in specifying the trigger and adding the dependency prong that adapts the framework to expressive governance.

[39] That the government can prevail where its proof is genuine is illustrated by *American Federation of Government Employees v. Trump*, 167 F.4th 1247, 1256–58 (9th Cir. 2026).

[40] Like the infrastructure of expression, the category is functional. Its paradigm cases are entities that aggregate, curate, generate, or transmit others' speech—news organizations, publishers,

filters, or generates speech and thereby shapes how others receive and understand information. In such cases, the government should be required to come forward with viewpoint-neutral criteria stated in advance, individualized reasons supported by record evidence, procedural safeguards against pretext, and a showing that its objectives could not be achieved through narrower means. Generalized invocations of "national security" or "supply-chain risk," unaccompanied by such a showing, should not suffice to carry the government's burden.

The heightened review the framework produces here is the *effect* of the burden allocation just described—a demand that the government justify itself with evidence rather than rhetorical labels—and not the *assignment* of a place in the rational-basis, intermediate, or strict-scrutiny hierarchy.[41] The distinction is not merely terminological. Rarely is the government's asserted interest, stated in the abstract, too weak; national security is a weighty interest. The problem in these cases is that the asserted and actual interests diverge, and the discretionary, low-visibility character of the instruments deployed makes that divergence systematically difficult to detect. A burden-allocation mechanism addresses that problem directly, where a tiered-scrutiny inquiry into the abstract weight of the interest would not.

Large language models illustrate why the intermediary category matters. Such systems increasingly mediate how individuals and institutions find, analyze, and communicate information; a provider's publicly articulated safety commitments are themselves speech on a matter of public significance. When the executive deploys regulatory instruments to punish that speech, the presumption is triggered,

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broadcasters, social and search platforms, universities, and, increasingly, providers of general-purpose artificial-intelligence systems—entities that neither shape nor carry third-party expression fall outside it. The intermediate cases turn on whether the actor, in the respect the government's action reaches, stands between speakers and audiences such that distortion of the actor distorts the broader flow of information. The presumption's force tracks that mediating role and is greatest where the actor's curation or carriage materially shapes what the public can find and say. It follows that an individual employee or applicant who makes controversial statements in her personal life is not, for that reason, an intermediary: She generates expression of her own, but she does not stand between speakers and audiences. The reference to entities that "generate" speech denotes those whose generative output mediates others' access to information, not any person who generates expression of her own; the discussion of employment in Part IV develops the point.

[41] On the distinction between heightened review as an *effect* of burden allocation and the *assignment* of a scrutiny tier, *see* Grossi, *supra* note 1.

and the government must satisfy the showing described above or fail to carry its burden.

The procedural safeguards the presumption demands—notice, an opportunity to respond, and meaningful review—are not foreign impositions but the ordinary attributes of fair process, conspicuously absent where damaging designations issue without any adjudicative analogue. Their absence is itself probative. A government acting on genuine, articulable criteria has little reason to avoid the modest process that would document those criteria; the choice to proceed without it invites the inference that the operative reasons would not survive being stated.

The demand is narrower than it may appear, and it is not imposed ex ante on the run of administration. It arises only after a claimant has made the dual prima facie showing and the burden has shifted; it is heightened, in the form the presumption supplies, where the target is an expressive intermediary, but it does not depend on that status. So bounded, it reaches only a small fraction of the many thousands of routine procurement and funding decisions made each year—none of which draws the burden-shift, much less the presumption, unless its threshold is crossed.[42] What the government must then produce, moreover, is not a new adjudicative apparatus but the contemporaneous criteria and reasons a genuine decision would already have generated.

IV. A THREE-TOOL FRAMEWORK

Two applications show that the framework distinguishes rather than predetermines. In the paradigmatic case (the supply-chain-risk designation of the artificial intelligence company introduced at the outset), each tool points in the same direction. No statute clearly authorizes a foreign-adversary supply-chain designation against a domestic company for its views—the operative question being whether any statute authorizes turning a foreign-adversary instrument against a domestic firm at all, not whether one authorizes viewpoint retaliation, which none could, so the clear-statement tool is not satisfied. Both burden-shifting triggers are present:

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[42] The showing is a consequence of the burden shift, not a mandate imposed ex ante on the run of administration. It applies only to the subset of decisions that both target an expressive intermediary and have already drawn a prima facie showing of viewpoint-linked pattern and exploitable dependency—a small fraction of the many thousands of routine procurement and funding decisions made each year, none of which the framework touches unless that threshold is crossed. And what the government must then produce is not a new adjudicative apparatus but the contemporaneous criteria and reasons a genuine decision would already have generated.

The designation followed immediately upon the company's refusal of the government's terms (a viewpoint-linked pattern),[43] and the company stood in a contracting relationship which the government then sought to leverage across the broader federal ecosystem (a dependency relationship). On that dual showing, the burden shifts, and it would shift on the same showing whether or not the company were an expressive intermediary. And because the target is an expressive intermediary, the presumption of systemic distortion applies as well, heightening what the government must produce; the government offered no ex ante viewpoint-neutral criteria, no individualized record evidence, no procedural safeguards, and no demonstration that a narrower alternative—such as transitioning to another provider—was inadequate. The chilling effect, moreover, was already manifest in the reticence of industry actors to be associated with the targeted company.[44]

Because the framework's value lies in its method rather than in any single application, it is worth tracing how it operates across the recurring fact patterns in which expressive governance has appeared—other patterns in which the protected expression is unmistakable and the use-limitation objection considered below has no purchase.

Consider first the executive orders directed at named law firms for their representation and advocacy. There the viewpoint-linked pattern is overt: The orders identified the firms by name, recited the President's disapproval of the clients they represented and the causes they championed, and followed closely upon that representation. The dependency—security clearances, building access, and federal contracting—was both obvious and the very lever pulled. The dual trigger is satisfied on the face of the orders, the burden shifts, and the courts that have examined these actions have found the asserted justifications belied by the government's own

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[43] The protected expression is not the refusal of the government's terms as such; a bare contractual "no" is not a viewpoint, and nothing here suggests that every contractor who declines the government's terms states a retaliation claim. The refusal matters only as evidence of sequence and timing. The viewpoint to which the pattern links is the company's publicly articulated position on the uses to which its models may responsibly be put, as the discussion of the use-limitation objection below explains; it is the targeting of that expression, not the declined deal, that supplies the pattern.

[44] Am. Ass'n of Univ. Professors v. Trump, 815 F. Supp. 3d 907, 947–48 (N.D. Cal. 2025), *appeal dismissed*.

statements of animus.[45] The work here is done principally by the burden-shifting rule, with the presumption for expressive intermediaries reinforcing it, since a firm that litigates contested public questions is itself an intermediary in public discourse.

Consider next the suspension and rescission of appropriated funding for public broadcasting on the asserted ground of editorial "bias." Here the clear-statement tool carries the analysis: Public-broadcasting funds are committed by statute to an institutional mission of editorial independence, and an ambiguous spending authority should not be construed to authorize the executive to condition those funds on the content of coverage.[46] The funding relationship supplies the dependency; the targeting of disfavored editorial viewpoints supplies the pattern; and the statutory design supplies the reason to demand a clear congressional authorization that does not exist.

Consider finally the revocation or denial of press credentials to journalists whose coverage an administration dislikes. Access to government spaces is conventionally treated as discretionary, which is exactly the instinct the framework corrects: Journalists are paradigmatic expressive intermediaries, and once viewpoint-linked targeting is plausibly shown, the presumption of systemic distortion requires the government to justify exclusion by viewpoint-neutral criteria stated in advance and supported by evidence of genuine institutional necessity, not by the circular invocation of discretion.[47] Where exclusion correlates with critical coverage rather than with any disruption of function, the absence of such evidence is dispositive. In each pattern a different tool predominates, but the method is the same, and in none does the framework strain to find viewpoint discrimination where only ordinary administration is present.

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[45] *See* Perkins Coie LLP v. U.S. Dep't of Just., 783 F. Supp. 3d 105, 161–65 (D.D.C. 2025); Jenner & Block LLP v. U.S. Dep't of Just., 784 F. Supp. 3d 76, 106–07 (D.D.C. 2025); Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of President, 784 F. Supp. 3d 127, 155–57 (D.D.C. 2025); Susman Godfrey LLP v. Exec. Off. of President, 789 F. Supp. 3d 15, 46–47 (D.D.C. 2025); *see also* Brief, *supra* note 5, at 7–9.

[46] *Cf.* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (concluding that the government may decline to fund a program but may not condition funding on the exclusion of disfavored ideas); *see also* Grossi, *supra* note 1 (discussing public-broadcasting funding suspensions).

[47] *Cf.* Backpage.com, LLC v. Dart, 807 F.3d 229, 230–31 (7th Cir. 2015); *see also* Grossi, *supra* note 1 (discussing press-credentialing and access decisions as expressive governance).

The employment relationship deserves separate attention, both because the second tool lists employment among the dependencies it recognizes and because the chilling concern extends fully to it. Where the target is a current public employee, the framework operates within, not in place of, the doctrine that already governs that relationship. The threshold questions remain those of *Garcetti*[48] and *Connick*[49]—whether the employee spoke as a citizen rather than pursuant to official duties, and on a matter of public concern—and the substantive accommodation remains *Pickering*'s,[50] under which the government commands a latitude as employer, grounded in its managerial interest in the functioning of the workplace, that it does not command as sovereign or as patron.[51]

What the framework supplies is the proof structure for the motive question that arises once the speech is protected: The employment relationship furnishes the continuing dependency. A viewpoint-linked pattern—discipline or dismissal on the heels of controversial citizen speech, coupled with the indicia already described—shifts the burden. And the government answers with the same-decision showing it already owes under *Mt. Healthy*. In that setting the framework's contribution is clarifying rather than transformative, and the reason is instructive: Public employment is the rare domain in which the doctrine is complete—a protection threshold, a calibrated balance, and an allocation of proof—while expressive governance operates precisely where the latter two are missing.

The hiring stage is the harder case and the more illuminating one, because it marks a boundary. Suppose an administration publicly identifies itself with an ideological program—condemning in general terms those it deems racist, homophobic, or transphobic, or, with the valence reversed, those it deems purveyors of a disfavored orthodoxy—and an applicant for a public position, whether a university professorship, a place on a police force, or a civil-engineering post, is passed over after having publicly expressed views of the condemned kind, though never condemned by name.

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[48] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[49] Connick v. Myers, 461 U.S. 138, 146–47 (1983).

[50] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[51] *Id.* at 568. *Cf.* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 673–75 (1996) (extending the *Pickering* balance to independent contractors).

The clear-statement tool does little work here: Hiring is among the most clearly conferred of discretionary authorities, so the question of statutory reach is settled at the threshold. The burden-shifting rule can engage, but its dual trigger disciplines the inquiry. The pattern prong is not satisfied by the bare conjunction of prior controversial speech and an adverse outcome; the applicant must point to objective indicia—comparably credentialed applicants without the disfavored speech advancing, contemporaneous references to the applicant's expression, evidence of a screening practice—that make viewpoint a plausible rather than merely conceivable explanation. And the dependency prong will ordinarily be absent, for the reason already given: A first-time applicant, like a disappointed bidder, stands in no continuing relationship that the government can exploit as recurring leverage.[52]

It follows that the framework's distinctive machinery is generally not engaged at hiring: The burden-shift this essay specifies does not trigger, no presumption of systemic distortion attaches, no ex ante procedural safeguards are demanded, and no less-restrictive-alternative inquiry arises—the last for the additional reason that a denial of employment withdraws a benefit rather than operating directly on expression.

That answer marks a boundary, not a gap, and it leaves the applicant far from unprotected. General First Amendment employment doctrine already reaches hiring: *Rutan* holds that the government may no more base hiring on protected affiliation and expression than promotion, transfer, or post-layoff recall, and that the ordinary retaliation framework, with its own motive inquiry, remains available to the rejected applicant who can prove her case.[53] The framework proposed here supplements that general law where the general law is weakest—where low-visibility administrative instruments are brought to bear on standing dependencies—and it deliberately declines to convert every individual personnel dispute into an occasion for burden-shifting.

One refinement matters, and it clarifies the intermediary category itself. The individual applicant cannot claim the presumption of systemic distortion, because

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[52] *See supra* note 30 (distinguishing a continuing, exploitable reliance from the denial of a one-off benefit).

[53] Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990) (extending First Amendment protection against politically based personnel decisions to promotion, transfer, recall, and hiring); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

a would-be employee who makes controversial statements in her personal life speaks for herself: She generates expression of her own, but she does not stand between speakers and audiences, and the systemic rationale—the government's distortion of the informational ecosystem through leverage over its conduits—is not implicated by a single personnel file. Aggregation, however, can change the analysis. An administration that systematically screened an entire faculty, police force, or civil service for ideological conformity would present not an individual hiring dispute but a practice, and the practice itself would then supply the strongest form of the viewpoint-linked showing the second tool demands—while the institution so screened, a university above all, may be an intermediary target in its own right.

Nothing in this method, finally, is calibrated to the politics of the administration that wields the tools, and the point deserves to be made express, because expressive governance is a standing temptation of power rather than the property of a party. The leading modern precedent arose from the left. In *Vullo*, a New York regulator leveraged her supervisory authority over insurers to press them to sever ties with the National Rifle Association because of its gun-rights advocacy: a viewpoint-linked pattern supplied by contemporaneous statements tying the pressure to the advocacy, a dependency supplied by comprehensive regulatory leverage over licensed entities, and a target—an advocacy organization that aggregates and amplifies its members' expression—well within the intermediary category.[54]

The alleged jawboning of social media platforms to suppress disfavored pandemic-era and election-related content, pressed by a Democratic administration and resolved by the Court only on standing grounds, presents the same form: informal pressure on paradigmatic expressive intermediaries through regulatory and rhetorical leverage, which is precisely what the framework is built to test rather than assume.[55] The prospective hypotheticals write themselves in either direction: A state administration that conditioned procurement on a contractor's abandonment of its publicly stated opposition to the state's climate or firearms policies, or that denied a routine license to a religious broadcaster because of its stance on marriage, would trigger the same tools by the same steps as the federal designation with which this essay began.

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[54] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 180–83, 189–90 (2024).

[55] Murthy v. Missouri, 603 U.S. 43 (2024) (resolving on standing grounds, without reaching the merits, a challenge to federal officials' communications with platforms concerning the moderation of pandemic-era and election-related content).

The hiring hypothetical above, in which the condemned viewpoints are those conventionally associated with the right, makes the same point in the employment register, and the reversed diversity program variation discussed below completes the set. The symmetry is a structural feature, not just a rhetorical concession: A method that operates on burden allocation and record evidence has no political valence to lend.

The framework's discipline is confirmed by a case coming out the other way. In a recent decision sustaining a challenged executive order, *American Federation of Government Employees v. Trump*, the order survived precisely because the executive carried the burden this framework would assign: The order contained no retaliatory language on its face, it rested on articulated national-security concerns, and the record—including the order itself, an accompanying fact sheet, and implementing guidance—demonstrated that the executive would have acted as it did regardless of any asserted retaliatory motive.[56] That the government can and sometimes does prevail under these conditions is a feature, not a defect. A method that distinguishes legitimate, discretionary administration from viewpoint retaliation must be capable of vindicating the former, and this one is.

A distinct objection goes not to the framework's breadth but to its leading example, and it deserves a candid answer. One might contend that the artificial-intelligence dispute is a poor vehicle because the government's grievance was not the company's *viewpoint* at all but its *conduct*: The company attached conditions to the use of its product—declining to permit deployment for autonomous lethal weapons—and the government merely pressed it to drop those conditions. On this view the refusal to build a weapon is not speech (a weapon system is not expression), and an effort to dislodge a contractual use-restriction is not viewpoint discrimination but hard procurement bargaining.

The point can be sharpened with a hypothetical that reverses the political valence. Suppose an administration concluded that a competing model was technically superior, and that the competitor's terms of service forbade its use for the very diversity-and-inclusion programs the administration wished to pursue—would la-

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[56] Am. Fed'n of Gov't Emps. v. Trump, 167 F.4th 1247, 1256–58 (9th Cir. 2026).

beling that competitor a supply-chain risk unless it lifted the restriction be viewpoint-based? The objection is a real one, and a framework worth adopting must be able to absorb it rather than assume it away.[57]

Two responses meet the objection, and together they show why the example is in fact well chosen. The first locates the protected expression precisely. The framework does not rest on the proposition that declining to build a weapon is speech; it rests on the company's *publicly articulated position*—its stated principles about the uses to which its models may responsibly be put—which is speech on a matter of public concern in the most conventional sense.[58] The contract terms and the public advocacy are intertwined but distinct, and it is the latter, not the former, that the First Amendment protects.

The second response is the more important, because it concedes the objection's premise and turns it to advantage. The framework does not *assume* that the designation was viewpoint-based; it *tests* whether it was. That is the entire function of the burden-shifting rule. If the government's true objection were the use-restriction rather than the expression—if it genuinely needed a vendor without those guardrails or had found a superior product—it could carry its burden: It could articulate that viewpoint-neutral procurement ground and show on the record that it would have acted identically regardless of anything the company said in public. The designation would then survive, exactly as the executive order survived in the decision discussed above. What the government may not do is invoke a procurement rationale as a label while the record shows the action tracking the company's expression—through the timing on the heels of the company's public refusal, the foreign-adversary designation reserved for hostile powers, the sector-wide overbreadth of the response, and the contemporaneous official statements.

The reversed hypothetical confirms the point rather than undermining it. Run through the framework, the diversity-program variation comes out the same way

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[57] This is the objection that the trigger was a use-limitation on software rather than expression. *Cf.* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 65–66 (2006) (distinguishing regulable conduct from protected expression). The reversed-valence hypothetical—an administration pressuring a vendor to lift a use-restriction the administration disfavors—shows why the framework must *test* rather than assume the viewpoint basis of the government's action.

[58] The protected speech is the company's publicly articulated safety position, a matter of public concern, not its refusal to build, which is conduct. *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011); Brief, *supra* note 5, at 4–5, 13–14.

and by the same steps: The court would ask whether there is a plausible viewpoint-linked pattern and a dependency, and if so would shift the burden to the government to prove a genuine, viewpoint-neutral ground—technical superiority, programmatic need—that it would have acted on regardless of the vendor's stated views. If such a ground is proven, the government prevails; if the record instead shows the designation tracking the vendor's expressed position, it does not. The framework is symmetric: It does not depend on whose ox is gored, and it supplies the government a real path to prevail wherever its objection is to use or performance rather than to speech. That symmetry is the answer to the worry that the test is rigged for plaintiffs. A method that lets the government win by proving that what it says is true is not a thumb on the scale; it is a demand for candor, applied without regard to the viewpoint at stake.[59]

The framework's limiting principles deserve emphasis, because a method that swept too broadly would be as unsound as one that swept too narrowly. The clear-statement tool reaches only discretion brought to bear on expressive activity or the infrastructure that carries it, not administration generally, and even there it asks a question of statutory reach—whether Congress authorized the application at all—rather than policing motive. The burden-shift is triggered only on a dual showing of viewpoint-linked pattern and exploitable dependency,[60] screening out the ordinary contract dispute in which neither is present. And the presumption of systemic distortion attaches with greatest force only to expressive intermediaries, where the public interest in an undistorted flow of information is at its height. Within those limits, the executive retains ample room to manage procurement, set enforcement priorities, and decline relationships on legitimate grounds. The framework disciplines the abuse of discretion; it does not abolish discretion.

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[59] Because the framework tests rather than presumes the viewpoint basis, its symmetry answers the concern that it is too plaintiff-friendly: A government with genuine viewpoint-neutral grounds carries its burden, as in *American Federation of Government Employees v. Trump*, 167 F.4th 1247, 1256–58 (9th Cir. 2026).

[60] As explained above, the dependency must be a continuing reliance the government can leverage, not the denial of a one-off benefit. The prong therefore does double duty as a limiting principle: A party that does not depend on government contracts, funding, or approvals is, by the same token, largely beyond the government's power to chill through them, so that both the trigger and the underlying injury are absent in the ordinary contract dispute.

CONCLUSION

Expressive governance presents a genuine doctrinal challenge: It achieves the suppressive effect of censorship while presenting to a reviewing court as ordinary administration, and it migrates across administrative forms faster than one-off adjudication can reach it. The principles needed to address it are already in the United States Reports; what has been missing is a method that operationalizes those principles for the discretion-cloaked form the problem now takes. The three tools proposed here—clear statement, burden-shifting, and a presumption of systemic distortion for expressive intermediaries—supply that method without inventing a new tier of scrutiny and without disabling the executive from the legitimate exercise of its authority. The government remains free to disagree with a speaker, to decline its terms, and to take its business elsewhere. What it may not do is convert the instruments of administration into instruments of punishment for protected expression—and a court equipped with the right method is positioned to tell the difference.