

August 24, 2026

Submitted via regulations.gov

Chair Andrea R. Lucas
Commissioner Kalpana Kotagal
Commissioner Brittany Bull Panuccio
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: EEOC Removal of Reporting Requirements, Docket No. 2026-14937, RIN 3046-AB37

Dear Chair Lucas, Commissioner Kotagal, and Commissioner Panuccio:

We are scholars at the Ethics and Public Policy Center (EPPC). Rachel Morrison is an EPPC Fellow, the director of EPPC's Administrative State Accountability Project, and a former attorney with the Equal Employment Opportunity Commission. Jamie Bryan Hall is the Director of Data Analysis and a Fellow in EPPC's Life and Family Initiative. He frequently works with federal government survey data for public policy analysis and has a strong interest in ensuring that the federal government lawfully collects appropriate data and publishes useful statistics.

We write in strong support of the Commission's proposal "Removal of Reporting Requirements."¹ This rule would rescind and remove the requirements for the EEO (1-6) reports, which require certain employers (and others) to report race and sex demographic data of employees (and others).² The rule would rescind the recordkeeping and record preservation requirements related to these reports, while retaining other EEOC recordkeeping requirements.³ The rule would also incorporate the Pregnant Workers Fairness Act (PWFA) where appropriate since these regulations have not been updated since that law was passed.⁴

The proposed rule explains that the EEO data collections are "inconsistent with equal employment opportunity law," "potentially unconstitutional," "unnecessary to enforce anti-discrimination laws," and impose "substantial burdens" on both employers and the EEOC that are not outweighed by "any marginal benefits."⁵ We agree.

¹ 91 Fed. Reg. 46332 (July 23, 2026), <https://www.federalregister.gov/d/2026-14937>.

² *Id.* at 46322. The

³ *Id.* at 46334 n.5, 46340.

⁴ *Id.* at 46332-33.

⁵ *Id.* at 46332.

One of the authors of this comment, Rachel Morrison, provided oral testimony before the EEOC on August 11, 2026. A written copy of her remarks is linked below,⁶ as well as attached to this comment for your reference. We reiterate the points raised in her testimony—(1) “collecting EEO data is unnecessary for the EEOC to fulfill its mission” and (2) “the EEO reports undermine EEOC’s mission.”⁷ Below, we also provide additional reasons why the Commission should finalize its proposal to rescind the EEO reporting requirements.

I. Title VII does not require EEOC to collect EEO data.

The EEOC has required and collected EEO data reports in some form since 1966. Despite what one commenter claimed at the EEOC’s August 11 hearing, these EEO reports are not mandated by law. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an employee or applicant because of the individual’s race, color, religion, sex, or national origin.⁸ Congress gave the EEOC power to enforce Title VII (and other workplace nondiscrimination laws). However, as the Supreme Court has cautioned, “the EEOC was not given rulemaking authority to interpret the substantive provisions of Title VII.”⁹ Rather, Congress merely gave the Commission the “authority from time to time to issue suitable *procedural* regulations to carry out the provisions of Title VII.”¹⁰

At best, the EEO reports fall under EEOC’s discretionary authority. Section 709(c) of Title VII, requires employers, labor organizations, and employment agencies to:

(1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as **reasonable, necessary, or appropriate** for the enforcement of [Title VII] or the regulations or orders thereunder.¹¹

Thus, the Commission has authority to prescribe reports “as reasonable, necessary, or appropriate” for its enforcement efforts, but such reports are not required by law.

Assuming the EEO reports are reasonable, necessary, or appropriate (more on this below), they fall within EEOC’s permissive authority and are not mandated by Congress. As

⁶ Testimony of Rachel N. Morrison Before the Equal Employment Opportunity Commission Regarding Notice of Proposed Rulemaking to Rescind EEO Data Reporting Requirements (Aug. 11, 2026) (“Morrison Testimony”), <https://media.eppc.org/2026/08/Rachel-N-Morrison-Testimony-Before-EEOC-08.11.2026.pdf>.

⁷ *Id.*

⁸ 42 U.S.C. § 2000e-2(a).

⁹ *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002).

¹⁰ *Id.* (emphasis added) (citing 42 U.S.C. § 2000e-12(a)). In contrast, Congress granted the Commission substantive rulemaking authority under the Pregnant Workers Fairness Act, mandating that the Commission “issue regulations ... to carry out this Act.” 42 U.S.C. § 2000gg-3.

¹¹ 42 U.S.C. § 2000e-8(c).

such, the EEOC can exercise that discretion to rescind the EEO reporting requirements. And as explained below, the EEOC has many good reasons to exercise its discretion to that end.

II. Collecting EEO data is unnecessary for EEOC to fulfill its mission.

EEOC's mission is to "prevent and remedy unlawful employment discrimination and advance equal opportunity for all."¹² Some commenters at the August 11 hearing contend that collecting EEO data on race and sex is vital to the Commission's work. That contention is false.

As Chair Lucas explained in her statement on the proposed rule, "the vast majority of the EEO data reports are filed and sit gathering dust, disconnected to any charges currently before the agency and the agency's core law enforcement work. Even where an employer or other covered entity has received a charge of discrimination, an employer's EEO data report is neither necessary nor sufficient by itself for the agency to find reasonable cause to believe unlawful discrimination has occurred."¹³ Morrison, a former EEOC attorney, agreed in her August 11 testimony: "From my experience and that of others at the EEOC, the EEO data collected in the reports is frankly not used for EEOC enforcement actions."¹⁴

What *is* necessary and useful for EEOC enforcement is tailored demographic information requested and disclosed during a specific investigation. As Lucas clarified: "Without fail, it is vastly more valuable for the agency's law enforcement work for the agency during its investigation to issue requests for information tailored to the specific charge and allegations at issue."¹⁵ Lucas reiterated that finalizing this rule "would not change or otherwise affect the Commission's ongoing, statutory right to request specific, tailored records relevant to charge investigations."¹⁶ We applaud this approach and agree that requests for demographic data can be appropriate when related to a specific charge of discrimination.

Further, any claim that collecting EEO data is necessary to enforce Title VII and fulfill EEOC's mission is belied by the fact that data is not collected for other bases. As Morrison pointed out in her August 11 testimony, the EEOC does not collect data on religion or pregnancy, which are also protected under Title VII. Similarly, the EEOC does not collect data on national origin—another protected basis under Title VII. While national origin has some overlap with race and ethnicity, it is not a one-to-one correlation. The same is true for other workplace nondiscrimination laws EEOC enforces. Even though Congress gave EEOC reporting powers under the Americans with Disabilities Act, Genetic Information Nondiscrimination Act, and Pregnant Workers Fairness Act, the EEOC has never required employers to submit annual reports with disability, genetic information, or pregnancy data. The Commission has never indicated that the absence of such data impedes its enforcement efforts under those laws. Indeed, we are

¹² Overview, EEOC, <https://www.eeoc.gov/overview> (last visited Aug. 24, 2026).

¹³ Statement of Chair Andrea Lucas Regarding Notice of Proposed Rulemaking to Rescind EEO Data Reporting Requirements (July 21, 2026) ("Chair Lucas Statement"), available at https://www.linkedin.com/posts/andrea-lucas-a5b27513_lucas-statement-activity-7485358734840401922-Yhs3/.

¹⁴ Morrison Testimony, at 1.

¹⁵ Chair Lucas Statement, *supra* note 13.

¹⁶ *Id.*

confident the Commission would vigorously reject any such charge. Nor have we seen anyone advocating for the EEO data collections claim that the EEO reports are underinclusive and should be expanded to include data on religion, pregnancy, national origin, disability, or genetic information.

III. The EEO reports are inconsistent with EEO law.

A. The EEO reports focus on equitable outcomes and disparities, not equal opportunity and discrimination as required by EEO law.

Equal employment opportunity is about merit and opportunity, not equitable outcomes. As Morrison told the Commission on August 11, “Collecting demographic data can give a snapshot of what is, but cannot explain the why. And Title VII’s prohibition against discrimination in the workplace—which EEOC enforces—focuses on the why: whether employment decisions were made ‘*because of* such individual’s race, color, religion, sex, or national origin.’”¹⁷

The EEO reports’ revelation of outcomes gives the false impression that disparities reveal discrimination. Since the EEOC has required employers to report on their employees’ race and sex for decades, employers and others will naturally assume that such information is important and relevant to discrimination under Title VII. Otherwise, why else would the EEOC spend millions annually to collect the reports?

But the reports’ focus on outcomes is based on an inaccurate assumption that disparities alone can reveal discrimination. The very existence of the reports, which one would presume has something to do with enforcing Title VII, encourages employers to think equal outcomes, not equal opportunity, is required. The reports encourage employers to assume that unbalanced numbers reveal discrimination, while balanced numbers mean no discrimination exists.

This focus on outcomes is closely tied to the notion of disparate impact liability and the idea that if something has a disparate impact, then it is discriminatory. But as former law professor and U.S. Commission on Civil Rights Commissioner Gail Heriot has been arguing for years, everything has a disparate impact. In a 2020 law article titled, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, she argues “[a]ll job qualifications have a disparate impact”:

South Asian Indian Americans are disproportionately likely to have experience in motel management than the rest of the population. African Americans are statistically over-represented in many professional athletics as well as in many areas of the entertainment industry. African American college students earn a disproportionate share of college degrees in public administration and social services. Asian Americans are less likely to have majored in Psychology.

¹⁷ Morrison Testimony, at 2 (quoting 42 U.S.C. § 2000e-2(a) (emphasis added)).

Unitarians are more likely to have college degrees than Baptists. And it doesn't stop.¹⁸

Heriot goes on to explain how disparate-impact liability is an “internally incoherent doctrine,” gives a federal agency “enormous discretionary authority,” and “makes almost everything presumptively illegal.”¹⁹

The EEOC's shift in focus away from disparate impact is warranted. In a recent Department of Justice Office of Legal Counsel (OLC) opinion, OLC explained that “[p]roperly understood,” Title VII “proscribes only those practices that reflect a significant likelihood of intentional discrimination.”²⁰ OLC further explained that the EEOC's Title VII disparate-impact guidelines violate the Constitution because “they contemplate liability based on disparate effects alone, without regard to an employer's likely intent, and pressure employers to engage in race-based decisionmaking.”²¹ Statistical disparities *alone* without evidence of actual intentional disparate treatment should not be used as a proxy for unlawful discrimination. But that is the effect of the EEO reports.

As Morrison told the Commission, “the reports’ focus on outcomes, and by implication disparities, at best shifts Title VII’s emphasis away from equal opportunity and at worst induces employers to eliminate the perception of discrimination by minimizing any disparities, which requires them to make employment decisions based on race and sex, otherwise known as unlawful discrimination.”²² Kenneth Marcus, the CEO of the Louis D. Brandeis Center for Human Rights Under Law, agreed. He writes for the *Wall Street Journal*, “Title VII ... is meant to guarantee equal treatment ..., not to push employers toward race- or sex-conscious decisions aimed at hitting the right aggregate numbers. An annual filing that tallies every large employer's workforce by race and sex nudges companies toward that kind of statistical management.”²³

Further, members of racial and ethnic minority groups have been shown to have lower response rates to official government surveys, even including the decennial census, to which response is legally mandatory.²⁴ Because of this, government surveys for which response is not mandatory typically give greater weight to each individual response from a member of an otherwise underrepresented group, in order to match each group's separately established share of

¹⁸ Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & Liberty 1, 34-35 (2020), <https://ssrn.com/abstract=3482015>.

¹⁹ *Id.* at 1, 3.

²⁰ Constitutionality of Disparate-Impact Liability Under Title VII, 50 Op. O.L.C. ___, at *1 (June 9, 2026), <https://www.justice.gov/olc/media/1444871/dl>.

²¹ *Id.*

²² Morrison Testimony, at 2.

²³ Kenneth L. Marcus, *Bean Counting, Antisemitism and the EEOC*, Wall St. J. (Aug. 17, 2026), <https://www.wsj.com/opinion/bean-counting-antisemitism-and-the-eec-3b1531d5>.

²⁴ Press Release, U.S. Census Bureau, *Census Bureau Releases Estimates of Undercount and Overcount in the 2020 Census* (Mar. 10, 2022), <https://www.census.gov/newsroom/press-releases/2022/2020-census-estimates-of-undercount-and-overcount.html>.

the general population.²⁵ No analogous process exists for EEO data, so these same groups are highly likely to be underrepresented, and the reported survey data is likely to be less accurate.

At bottom, any research that attempts to establish a claim of employment discrimination using EEO data must rely on a disparate impact argument and should be discredited. The report's numbers could "look good" but be the result of discrimination; conversely, the numbers could "look bad" but not be the result of discrimination. That's the point. The data is divorced from workplace discrimination, which is what the EEOC has been tasked by Congress to prevent and remedy.

B. The EEO reports contain arbitrary racial categories, focus on "minorities," and encourage racial stereotyping contrary to EEO law.

Citing *Students for Fair Admissions (SFFA)*, the proposed rule states: "Whatever the merits of the initial justifications for the EEO Reports, the Commission believes that the atextual approach that frames discrimination based on pre-determined racial and ethnic categories and the dichotomy between minority and majority groups is no longer sustainable."²⁶ We agree.

In May 2002 testimony before the U.S. Commission on Civil Rights on racial and ethnic data collection by government agencies, then-Vice President and General Counsel of the Center for Equal Opportunity Roger Clegg argued that there are two basic problem that result from such collection, arising from (i) the very process of collecting data, and (ii) the misuse of the data collected.²⁷ On the first problem he explained:

The process of collecting the data, in turn, also gives rise to different subproblems. People are encouraged to think of themselves as having a particular racial identity, and the government is encouraged to require that they have such an identity. It is difficult to solve these two problems when racial and ethnic data are being collected, and indeed it may be impossible to solve them simultaneously. Requiring the government to do the classifying rather than the individual is likely to lead to errors, and of course it would be offensive to train officials in how to identify people by racial or ethnic "characteristics." On the other hand, it is also intrusive for the government to demand that people identify themselves racially and, no matter how "voluntary" you make such identification, when the government is asking for it, pressure is being brought to bear.

The problems with requiring people to identify themselves racially and ethnically become more problematic in a multiracial, multiethnic society with much

²⁵ Deborah H. Griffin, U.S. Census Bureau, *Evaluating Response in the American Community Survey by Race and Ethnicity* (Nov. 29, 2012), https://www.census.gov/content/dam/Census/library/working-papers/2012/acs/2012_Griffin_04.pdf.

²⁶ 91 Fed. Reg. at 46336 (citing *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023)).

²⁷ Roger Clegg, Vice President & Gen. Counsel, Ctr. for Equal Opportunity, Statement Before the U.S. Commission on Civil Rights, Re: Racial and Ethnic Data Collection by Government Agencies (May 17, 2002), <https://ceousa.org/wp-content/uploads/2016/10/CleggStatementMay2002.pdf>.

intermarriage. If we lived in a world in which each person had to be either completely white or completely black, then you might say that the government's requirement that people check a box for one or the other really isn't forcing an identity on them that they don't already have. But of course that is not the case in America today. We have lots of groups within blacks and whites and besides blacks and whites, and we have more and more individuals who are racially and ethnically blended.

To compound the problem of racial identification, employers have historically been instructed to use visual observation to fill in missing data for those who prefer not to answer the EEO questions, but the "correct" answers are not always obvious.²⁸ For example, "Hispanic" is by definition a cultural category and theoretically could never be discerned by visual observation of a person, without engaging in stereotyping. (Is the employee who brought a burrito from home to eat for lunch Hispanic, but the one who ordered his burrito from Chipotle non-Hispanic white?) Furthermore, visual observation would lead to an undercount in the "two or more races" category, as it is unclear how an employer would ever know this. He would be expected to guess whichever category most looks like it applies to a given person. Not only is EEO data almost certainly biased and inaccurate, the data collection process *itself* forces employers to think about and categorize employees by characteristics that it would be illegal for them to consider in other contexts.

Not only can it be difficult to know or categorize an individual's race, but the race categories used by the EEO reports are problematic and not grounded in EEO law. In *SFFA*, the Supreme Court described racial and ethnic categories as often "arbitrary," "imprecise," and "opaque."²⁹ The Court explained:

Some of [the categories] are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," [respondent's] counsel responded, "[I] do not know the answer to that question."³⁰

In his concurrence, Justice Gorsuch elaborated on how racial and ethnic classifications "rest on incoherent stereotypes."

Take the "Asian" category. It sweeps into one pile East Asians (*e.g.*, Chinese, Korean, Japanese) and South Asians (*e.g.*, Indian, Pakistani, Bangladeshi), even

²⁸ Letter from Peggy R. Mastroianni, Assoc. Legal Counsel, EEOC (Sept. 7, 2005), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-134>.

²⁹ *Students for Fair Admissions*, 600 U.S. at 216-17.

³⁰ *Id.* at 224-25 (internal citations omitted) (alterations in original except first and second to last alterations added).

though together they constitute about 60% of the world's population. This agglomeration of so many peoples paves over countless differences in "language," "culture," and historical experience. It does so even though few would suggest that all such persons share "similar backgrounds and similar ideas and experiences." Consider, as well, the development of a separate category for "Native Hawaiian or Other Pacific Islander." It seems federal officials disaggregated these groups from the "Asian" category only in the 1990s and only "in response to political lobbying." And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as "Asian" rather than "Other Pacific Islander."

The remaining classifications depend just as much on irrational stereotypes. The "Hispanic" category covers those whose ancestral language is Spanish, Basque, or Catalan—but it also covers individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. The "White" category sweeps in anyone from "Europe, Asia west of India, and North Africa." That includes those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family. Meanwhile, "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb.

If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group.³¹

The same is true for the EEO reports. As the proposed rule explains, changes to EEO categories over the years "reflect that the categories are largely arbitrary and not based on the EEOC's enforcement needs."³² While some, even at the August 11 hearing, have called on the EEOC to expand or revise the list of racial classifications in the EEO reports, expansion or revision will not remedy the underlying issue of arbitrary racial classifications and racial stereotyping.

Further, even changing the racial classifications will not eliminate what the proposed rule describes as an impermissible focus on "minorities" and women.³³ As the Supreme Court made clear in *Ames v. Ohio Department of Youth Services*, Title VII protects all employees, even those

³¹ *Students for Fair Admissions*, 600 U.S. at 291-93 (Gorsuch, J., concurring) (cleaned up) (citing David E. Bernstein, *The Modern American Law of Race*, 94 S. Cal. L. Rev. 171, 196-202 (2021), *inter alia*).

³² 91 Fed. Reg. at 46337 (providing examples of arbitrary racial categories).

³³ *Id.* at 46335-36.

who are part of “majority” groups.³⁴ *Ames* affirmed that under Title VII, the focus is on the individual not his or her membership in a majority or minority group. Citing *Ames*, the Commission made a similar point in its recent rescission of its Guidelines on Affirmative Action Appropriate Under Title VII:

Because the Guidelines provide a defense for affirmative action efforts on behalf of only women and minorities, they result in different standards for “majority-group” individuals to prove Title VII discrimination where an employer asserts this defense. In June 2025, the Supreme Court unanimously held that the evidentiary standard for proving disparate treatment under Title VII does not depend on whether a plaintiff is a member of a “minority group” or “majority group.” Rather, Title VII provides the “same protections for every ‘individual.’” Because the Guidelines are limited to affirmative action plans to improve opportunities for minorities and women, they provide less protection to majority-group employees, which may be contrary to *Ames* and the text of Title VII.³⁵

Discussing the Jewish experience, Marcus cautions that “[t]he rise of antisemitism in the past several years has shown how sorting people into racial categories can go wrong.”³⁶ At the end of the day, “Neither disappearing in aggregate data nor being singled out by the numbers has protected Jewish people from discrimination. Only actual enforcement, responding to actual complaints, has done that.”³⁷

Indeed, the EEOC exists to protect people when their rights have been violated, but such violations are not revealed in the EEO reports. As Marcus aptly explains, “The quality of civil rights enforcement isn’t measured by how much data the government collects but whether people are protected from discrimination when and where it happens.”³⁸ Unfortunately, “[i]n most cases, demographic reports have become substitutes for the harder work of investigating actual complaints.”³⁹ But “[i]ndividualized investigation, rather than annual paperwork, is what uncovers discrimination.”⁴⁰ Marcus concludes, “If the commission is going to do its job well, it must invest in individualized enforcement. Ending the annual reports and reallocating resources to investigating claims is an excellent place to start.”⁴¹ We agree.

³⁴ *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 267, 274-75 (2025).

³⁵ EEOC, Rescission of Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended, 91 Fed. Reg. 40879 (July 6, 2026), <https://www.federalregister.gov/d/2026-13637> (internal citations omitted) (quoting *Ames*, 605 U.S. at 310).

³⁶ Cf. Marcus, *supra* note 23 (“Governments have long used population records to identify Jewish communities for persecution, from Nazi Germany’s use of existing census and registry data to round up Jewish residents, to centuries of official lists that enabled discriminatory taxation and expulsion. That history is one reason Jewish groups are often wary of demographic cataloging by any government office.”).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

IV. The EEO reports are likely unlawful.

A. The EEO reports are not “reasonable, necessary, or appropriate” to enforce Title VII.

Title VII gives the Commission authority to prescribe reports that are “reasonable, necessary, or appropriate” for its enforcement efforts. While collecting employee demographic data on race and sex is definitely relevant, relevance is not the bar. There is good reason to find that today, whatever their merit in the past, the EEO reports are not actually “reasonable, necessary, or appropriate” to enforce Title VII. If the reports are not reasonable, necessary, or appropriate, then the Commission does not have discretion to mandate the reports.

We point the Commission to legal scholar Dan Morenoff’s forthcoming article, *Title VII’s Classification Bar: § 2(A)(2), Disparate Impact, and EEO-1s*, which argues that “it remains very hard to imagine how it could be ‘reasonable, necessary, or appropriate for the enforcement of’ Title VII for the EEOC to compel the keeping of these records.”⁴² Indeed, it “*cannot be* ‘reasonable, necessary, or appropriate for the enforcement of’ Title VII for the EEOC to compel violations of Title VII,” namely “classifying employees by race, national origin, and sex.”⁴³ How can the EEOC caution employers against asking applicants about their race⁴⁴ while at the same time compelling them to track race data for employees? In addition to Morenoff’s excellent analysis, we provide a few additional thoughts.

EEO reports are unreasonable. Mass data collection from America’s employers on their employee’s race and sex is not reasonable. It is expensive for both the EEOC and employers: the Commission estimates that its current collection requirement “imposes costs of almost \$275 million on employers every year, as well as almost \$4 million of costs on the EEOC to administer this data collection.”⁴⁵ This is an extraordinary burden given that the data the program produces is not tied to any specific charge of discrimination.

EEO reports are unnecessary. As Morrison testified before the Commission on August 11, mass collection of EEO data is “not actually necessary for EEOC to enforce Title VII or fulfill its mission.”⁴⁶ This is especially apparent considering EEOC only collects data on race and sex, and not religion, pregnancy, or national origin, which are also protected under Title VII. On the one hand, those supporting the EEO reports claim the data is necessary to enforce Title VII and root out race and sex discrimination. But on the other, there is no effort to claim data on religion, pregnancy, or national origin is necessary to enforce Title VII or root out religion, pregnancy, and national origin discrimination. So, which is it? Is it necessary or is it not? Those

⁴² Dan Morenoff, *Title VII’s Classification Bar: § 2(a)(2), Disparate Impact, and EEO-1s* (forthcoming 2026) (manuscript at 47), https://jlcgtamu.com/wp-content/uploads/2026/07/morenoff-article_forthcoming-2026.pdf.

⁴³ *Id.* at 47-48.

⁴⁴ See *Pre-Employment Inquiries and Race*, EEOC, <https://www.eeoc.gov/pre-employment-inquiries-and-race> (last visited Aug. 24, 2026).

⁴⁵ Press Release, EEOC, *EEOC Proposes Rescission of Annual Race and Sex Reporting Requirements* (July 21, 2026), <https://www.eeoc.gov/newsroom/eeoc-proposes-rescission-annual-race-and-sex-reporting-requirements>.

⁴⁶ Morrison Testimony, at 2.

claiming race and sex data is necessary have the burden to explain why that is the case for race and sex but *not* for religion, pregnancy, or national origin (and other protected bases).

EEO reports are inappropriate. The reports are inappropriate for several reasons. First, as explained above, the reports require American employers to sort their employees into arbitrary and predetermined racial boxes. Second, the reports focus on outcomes and disparities, instead of unlawful discrimination and equal employment opportunity. As Morrison explained in her August 11 testimony:

EEOC’s mission focuses on unlawful discrimination and equal employment opportunity. The EEO reports focus on neither.

The reports are broad brush data collection divorced from any actual charge of discrimination—and the data focuses solely on outcomes, not equal opportunity.

Setting aside the many problems with trying to classify employees based on race, collecting demographic data can give a snapshot of what is, but cannot explain the *why*. And Title VII’s prohibition against discrimination in the workplace—which EEOC enforces—focuses on the *why*: whether employment decisions were made “*because of* such individual’s race, color, religion, sex, or national origin.”⁴⁷

Finally, we urge the Commission to consider clarifying for employers whether they are compelled to preserve existing EEO data records, allowed to make and keep EEO data records, or are prohibited from making records and must destroy existing records. Section 709(c), requires employers to “make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed” and “preserve such records for such periods.” Should employers be required to keep records that only existed because of the rescinded and potentially unlawful regulations? Or should employers be required or encouraged to destroy such records?

B. The EEO reports potentially violate equal protection.

As the proposed rule explains, any collection of race data is subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest to satisfy the Equal Protection Clause.⁴⁸

Compelling interest. We do not question whether EEOC and the federal government more generally has a compelling interest in enforcing Title VII and preventing and remedying unlawful race and sex discrimination. But the Supreme Court has repeatedly held that strict scrutiny requires more than such general or “broadly formulated” nondiscrimination goals. For example, in *Fulton v. City of Philadelphia*, the Court reaffirmed that a compelling interest must be

⁴⁷ *Id.* at 2 (quoting 42 U.S.C. § 2000e-2(a) (emphasis added)).

⁴⁸ 91 Fed. Reg. at 46335 (citing *Louisiana v. Callais*, 146 S. Ct. 1131, 1161 (2026); *Students for Fair Admissions*, 600 U.S. at 206-07).

described in relation to the specific party subject to the policy.⁴⁹ As Justice Gorsuch explained in another case, “*Fulton* explains [that] “strict scrutiny demands ‘a more precise analysis’”: a government’s “*general* interest” in its regulations are not compelling “without reference to the *specific* application of those rules to [the *specific* party].”⁵⁰ Further, as the Court reiterated this year in *Louisiana v. Callais*, “The States and Federal Government have no compelling interest in generally remediating ‘past discrimination in a particular industry or region’ or ‘the effects of societal discrimination.’”⁵¹ The question is whether the challenged policy is “sufficiently congruent with and proportional to” an ongoing set of violations sufficiently serious and common to justify the policy.⁵²

Here, even assuming the EEO reports had achieved that compelling interest decades ago, there is no compelling interest *today* to justify mass data collection divorced from actual changes of discrimination.⁵³ This distinction also separates EEOC’s enforcement efforts, which remain unaffected by this rule, to obtain similar information related to specific charges of discrimination. In general, collecting relevant demographic data in such cases can achieve a compelling interest, be narrowly tailored, and thus satisfy strict scrutiny.

Further, the arbitrary nature of the racial and ethnic categories used in EEO reports typically lacks a meaningful connection to a compelling interest. The imprecise data is neither necessary nor sufficient for addressing employment discrimination and may even lack a rational basis to the government’s interest. And if the mass data collection does not satisfy rational basis, it certainly fails strict scrutiny.

Narrowly tailored. The EEO reports are not narrowly tailored in at least two specific ways. First, they are overbroad by requiring mass data collection by America’s employers divorced from any allegation or history of unlawful discrimination. We agree with the proposed rule that “requiring all employers with 100 or more employees to indiscriminately submit racial and sex demographic data to the federal agency responsible for enforcing anti-discrimination laws, absent any underlying charge or allegation of unlawful discrimination, is not narrowly tailored.”⁵⁴ To the extent such information is useful for remedying unlawful discrimination, the relevant information can be obtained from the specific employer subject to a particular charge of discrimination. The proposed rule contemplates that such information can be “narrowly tailored to specific alleged violations of federal employment anti-discrimination laws arising from a particular charge of discrimination.”⁵⁵

⁴⁹ *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) (explaining that the question “is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [plaintiffs]”).

⁵⁰ *Mast v. Fillmore County, Minn.*, 141 S. Ct. 2430, 2432 (2021) (Gorsuch, J., concurring in the decision to grant, vacate, and remand).

⁵¹ *Callais*, 146 S. Ct. at 1153.

⁵² *Id.* at 1155.

⁵³ *Cf. Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (explaining that the passage of time changed the calculus).

⁵⁴ *Id.* at 46335.

⁵⁵ *Id.*

Second, the reports are not narrowly tailored because of the potential for misuse of the data collected. We agree with the proposed rule that “the Commission’s EEO reporting requirement may have the unintended effect of promoting, rather than reducing, discrimination because of the mistaken view that it is permissible to take race and sex-based actions to correct statistical imbalances.”⁵⁶ Even though “a statistical imbalance may have an innocuous explanation and not be probative of discrimination, standing alone,”⁵⁷ the function of the reports is to disclose the statistics and reveal any imbalances. With this in mind, it is common sense that the EEO reports will encourage employers—either consciencely or subconsciously—to adopt quotas to “correct” any imbalances and avoid being flagged for closer review. Such quotas and race-conscience “corrections” are unlawful discrimination, undermining the purported purpose of collecting the data in the first place and the argument that the EEO reports are narrowly tailored.

The twin commands. In *SFFA*, the Supreme Court established the “the twin commands” of equal protection: “race may never be used as a ‘negative[,]’ and . . . it may not operate as a stereotype.”⁵⁸ Full stop. No balancing or compelling interest required. Indeed, the *SFFA* Court did not mention the terms “strict scrutiny,” “tailoring,” or “interest” in the section analyzing the twin commands.⁵⁹ As legal scholars Daniel Lennington and Skylar Croy wrote in the law article *The Twin Commands: Streamlining Equality Litigation Based on Students for Fair Admissions*, “The twin commands are absolute or at least near absolute: the Court said they can ‘never’ be violated, not that they may be violated if the government has a compelling interest.”⁶⁰ Thus, to the extent that racial data in the EEO reports is being used as a negative or operating as a stereotype (as discussed above), the data collection fails the Equal Protection Clause regardless of whether the EEOC establishes a compelling interest.

As a final note, at the Commission’s August 11 hearing, some claimed that the EEOC’s proposal and rationale to eliminate the EEO report is inconsistent with the Trump Administration’s collection of race and sex data in other contexts, pointing specifically to the Department of Education’s requirement that certain universities and graduate schools report applicants’ aggregated race and sex information as part of their annual Integrated Postsecondary Education Data System (IPEDS) reporting.⁶¹ Putting the merits of the IPEDS reporting to the

⁵⁶ *Id.* at 46338.

⁵⁷ *Id.*

⁵⁸ *Students for Fair Admissions*, 600 U.S. at 218; see Daniel P. Lennington & Skylar Croy, *The Twin Commands: Streamlining Equality Litigation Based on Students for Fair Admissions*, 25 *Federalist Soc’y Rev.* 349, 357-59 (2024), available at <https://fedsoc.org/fedsoc-review/the-twin-commands-streamlining-equality-litigation-based-on-students-for-fair-admissions> (arguing that the twin commands test is a separate analysis from strict scrutiny).

⁵⁹ *Student for Fair Admissions*, 600 U.S. at 218-21 (Section IV.B).

⁶⁰ Lennington & Croy, *The Twin Commands*, *supra* note 58, at 357; see also *id.* at 360 (pointing out that “one judge on the Wisconsin Court of Appeals recently signaled support for reading *SFFA* to require separate analysis of the twin commands, albeit at an oral argument (an opinion has yet to be issued): ‘University programs must (1) comply with strict scrutiny; (2) they may never use race as a stereotype or negative; and (3) at some point, they must end. That looks to me like all three need to be satisfied. Not just strict scrutiny’” (quoting Oral Argument at 0:55:38, *Rabiebna v. Higher Ed. Aids Bd.*, No. 2022AP002026 (Wis. Ct. App. July 11, 2024), available at https://www.wicourts.gov/CaAudioSearch?docket_number=2022AP002026&begin_date=07-11-2024&end_date=07-11-2024&Submit=Search)).

⁶¹ See Lynn A. Clements, *The EEOC’s August 11 Hearing on the Future of the EEO-1 Report*, *Berkshire Assocs.* (Aug. 17, 2026, updated Aug. 18, 2026), <https://www.berkshireassociates.com/blog/the-eeocs-august-11-hearing-on->

side, comparing it to the EEO reports is comparing apples to oranges. The EEO reports are general mass collection of employees' race and sex data divorced from charges or allegations of discrimination or from the collection of any additional data, such as education or experience levels, that might enable an investigator to address the merits of such a claim. In contrast, there have been recent and widespread allegations and findings of racial balancing and discrimination in higher education student admissions, and the Trump Administration expanded the IPEDS data collection to include information, such as GPA and test scores, that aid comparisons and could provide evidence that an institution engages in unlawful discrimination on the basis of sex and/or racial/ethnic group.⁶² Further, employers are subject to Title VII under Congress' Commerce Clause Power while institutions of higher education are subject to nondiscrimination requirements through receipt of federal financial assistance under Congress' Spending Clause Power. Regardless, the Commission is not responsible for the Department of Education's actions and there are sufficient reasons to justify the EEOC's decision to remove the EEO reporting requirements.

V. Collecting EEO data is burdensome on the EEOC and employers, and cost savings of the rule will be substantial.

We agree with the proposed rule that EEO data collection is overly burdensome on the EEOC and employers, and that its burdens do not outweigh any marginal benefit. The rule estimates that rescinding the reporting requirements would generate annual cost savings to private employers, state and local governments, local unions, public elementary and secondary school systems and districts, and the Commission of approximately \$278,389,162.58.⁶³

For the EEOC, as the rule explains, administering the EEO reporting comprises a "meaningful portion of [EEOC's] budget."⁶⁴ Over the last five years, the EEOC spent over \$18 million in federal contractor costs collecting EEO-1 data, which doesn't account for the additional millions spent in federal staffing costs.⁶⁵ The over \$4 million dollars a year spent on those reports, not to mention the approximately \$1.2 million spent on the EEO-3, EEO-4, and EEO-5 data collections,⁶⁶ could be reallocated to investigating actual charges of discrimination.

Considering that (a) the EEO reports are not relevant to the vast majority of EEOC's investigations and enforcement actions, (b) that the data in the reports is not sufficient to determine unlawful discrimination, and (c) the reports are not necessary for the EEOC's investigations and enforcement actions, eliminating the reports will not stop those enforcement efforts or the ability of EEOC to fulfill its mission. In fact, as Chair Lucas emphasized in her statement on the proposed rule, eliminating the EEO reports does not change those tailored

[the-future-of-the-eeo-1-report](#) (summarizing "consistent themes raised by witnesses who opposed the EEOC proposal").

⁶² See, e.g., *Students for Fair Admissions*, 600 U.S. at 181.

⁶³ 91 Fed. Reg. at 46345.

⁶⁴ *Id.* at 46339.

⁶⁵ *Id.*

⁶⁶ *Id.*

enforcement efforts.⁶⁷ Further, eliminating the reports will allow the EEOC to reallocate the millions of dollars spent each year on collecting data to remedying unlawful employment discrimination for more employees.

For employers, reporting data costs approximately \$275 million annually.⁶⁸ These costs apply regardless of whether an employer has discriminated in violation of Title VII. In addition, we believe the savings from eliminating the EEO filing requirement are likely somewhat greater than estimated. Most employers will likely stop collecting the data in the first place, not merely stop reporting the data. Employees will no longer have to repeatedly answer these same questions on EEO surveys. Employers will no longer be burdened by having to impute answers on behalf of employees who prefer not to respond to these questions. Even if these savings amounted to only \$1 per employee, they would be of a similar magnitude to the other savings that were counted in the EEOC's cost analysis.

In sum, the benefits of eliminating EEO data collection far outweigh the costs. Any marginal benefits of the EEO reports are outweighed by the substantial burdens imposed on both Commission and employers, who must submit these reports regardless of any specific allegation or indication of a potential violation of the statutes the EEOC enforces.

VI. Arguments in favor of the EEO reports are unconvincing.

At the Commission's August 11 hearing, some argued that eliminating the EEO data reports doesn't actually reduce the burden for the EEOC or employers, who would be required to reconstruct data not compiled in regular reporting.⁶⁹ While this claim may possibly be true for an employer subject to an EEOC investigation or enforcement action alleging race or sex discrimination, it does not hold water for the millions of employers not subject to charges of discrimination. Further, as explained above, the EEO reports are not relied on by the Commission, so employers subject to an enforcement action will still have to produce additional race or sex data. And even if an employer has to reproduce data it would have had in an EEO report, that data is still likely more limited in scope than the EEO report.

Some at the hearing also claimed that erasing data does not erase discrimination and that eliminating the EEO reports won't reduce instances of discrimination but instead might hide or make it hard to detect broader patterns across employers or industries.⁷⁰ We agree that eliminating the reports does not eliminate discrimination because the data in the reports do not reveal whether or not a discriminatory action was taken. Further, it is irrelevant what other employers in the industry do; what matters is whether a specific employer discriminates based on race or sex.

Next, some claimed that the demographic data can be useful to identify broad trends and create "a consistent national dataset that can be used to compare industries, occupations,

⁶⁷ Chair Lucas Statement, *supra* note 13, at 2.

⁶⁸ *Id.* at 1.

⁶⁹ See Clements, *supra* note 61.

⁷⁰ See *id.*

employers, and demographic groups over time.”⁷¹ Others have claimed the data can inform how the Commission allocates its enforcement resources. Still others have claimed that the data can put claims in context and facilitate civil rights litigation.⁷² While employment trends can be interesting, creating such statistics is the statutory responsibility of the Bureau of Labor Statistics and the Census Bureau; the EEOC is not supposed to be in the businesses of creating statistics—its mission is to prevent and remedy employment discrimination and “no spreadsheet can prove or disprove discrimination.”⁷³ Further, each EEO Public Use Data File contains only, for each geographic area and industry, the number of employer establishments and their reported number of employees in each racial/ethnic and sex category by job type.⁷⁴ Similar data on general workforce trends are already available from both the Bureau of Labor Statistics and the Census Bureau, so the few legitimate uses of this EEO data can be achieved using data from agencies whose mission is to collect and report such data, rendering the EEO data largely duplicative and wasteful. As Clegg told the U.S. Commission on Civil Rights in his May 2002 testimony: “[W]hile the collection of racial and ethnic data may facilitate some civil-rights lawsuits, they do so at the expense of encouraging civil-rights violations. On balance, it is not clear to me that civil-rights enforcement through litigation is furthered by data collection.”⁷⁵ We agree.

Others at the hearing claimed that the EEOC has not identified specific examples of employers using EEO data to engage in unlawful discrimination,⁷⁶ but the burden is on those seeking to keep the reports to prove that they are beneficial for *the EEOC* to enforce Title VII and fulfill its mission. Claims that *some employers* find the data useful as a compliance tool is not sufficient to overcome that burden. Further, assuming demographic data collection by employers is actually lawful, removing the EEOC’s reporting requirements does not prohibit an employer from collecting such data for lawful uses.

VII. Eliminating EEOC data collection aligns with the Trump Administration’s priorities.

EEOC’s proposal to eliminate the reporting requirements aligns with the following Trump administration priorities and executive orders:

- E.O. 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” seeks to end illegal preferences and discrimination, including under “the guise of so-called ‘diversity, equity, and inclusion’ (DEI).”⁷⁷ Eliminating the EEO reports allows EEOC to focus its resources on ending illegal discrimination and ensuring equal employment opportunity.

⁷¹ *Id.*

⁷² *See id.*

⁷³ Marcus, *supra* note 23.

⁷⁴ EEOC, *Public Use Data File: User Guide* (prepared by National Opinion Research Center at the Univ. of Chicago, Nov. 2020), https://www.eeoc.gov/sites/default/files/2020-11/PUF_Data_Download_User_Guide.pdf.

⁷⁵ Clegg, *supra* note 27.

⁷⁶ *See* Clements, *supra* note 61.

⁷⁷ 90 Fed. Reg. 8633 (Jan. 21, 2025), <https://www.federalregister.gov/d/2025-02097>.

- E.O. 14281, “Restoring Equality of Opportunity and Meritocracy,” seeks to ensure that “all citizens are treated equally under the law” by guaranteeing “equality of opportunity, not equal outcomes”; promising “that people are treated as individuals, not components of a particular race or group”; and encouraging “meritocracy and a colorblind society, not race- or sex-based favoritism.”⁷⁸ Rescinding the EEO reporting requirements shifts the focus from outcomes and membership in race- and sex-based groups to merit and equal opportunity.
- E.O. 14219, “Ensuring Lawful Governance and Implementing the President’s ‘DOGE’ Deregulatory Initiative,” directs agencies to rescind regulations including those that “impose significant costs upon private parties that are not outweighed by public benefits,” and “impose undue burdens on small business and impede private enterprise and entrepreneurship.”⁷⁹ Requiring millions of American employers to classify and report their employees’ race and sex demographics every year is an unnecessary regulatory burden.

Finally, we note that EEOC’s Uniform Guidelines on Employee Selection Procedures, which applies to tests and other selection procedures used to make employment decisions, requires employers to validate a test or procedure and to retain the validation documentation when the test or other selection procedure is determined to have an adverse impact. Using this information, the employer evaluates the selection procedures for adverse impact. We are pleased to see that according to the Unified Agenda, EEOC is planning to rescind the interpretive rulemaking portions of the Uniform Guidelines.⁸⁰

Conclusion

EEOC should finalize the proposed rule.

Sincerely,

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⁷⁸ 90 Fed. Reg. 17537 (Apr. 23, 2025), <https://www.federalregister.gov/d/2025-07378>.

⁷⁹ 90 Fed. Reg. 10583 (Feb. 19, 2025), <https://www.federalregister.gov/d/2025-03138>.

⁸⁰ Rescission of Uniform Guidelines on Employee Selection Procedures – Recordkeeping, RIN 3046-AB45, Unified Agenda of Regulatory and Deregulatory Actions (Fall 2026), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202510&RIN=3046-AB45>.