Letter of Comment of the Institute for Workplace Equality
Removal of EEOC Reporting Requirements

Submitted to:

U.S. Equal Employment Opportunity Commission

Prepared by:

The Institute for Workplace Equality

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Executive Summary

The Institute for Workplace Equality ("The Institute") submits this letter of comment in vigorous opposition to the U.S. Equal Employment Opportunity Commission's ("EEOC" or the "Commission") proposed rescission of the EEO-1 and related EEO reporting and recordkeeping requirements. As we demonstrate, the proposal is unsupported by evidence, in violation of Title VII's statutory mandates, contradicted by the federal government's continued reliance on comparable demographic reporting, and likely to increase rather than reduce employer burden. The Institute urges the Commission to withdraw the proposed rule and pursue modernization of the EEO-1 framework instead of repeal.

Key Points:

- **No evidentiary basis for rescission:** Neither the EEOC nor decades of employer experience can identify any meaningful evidence that EEO-1 reports have caused employers to use racial quotas or unlawful preferences. Notable judicial decisions validate and support this conclusion.
- **Title VII requires reporting:** Section 709(c) of Title VII uses mandatory language requiring employers to keep relevant records and submit reports as prescribed by the Commission. The EEOC has discretion over the reporting form but has no discretion to eliminate reporting altogether.
- **Data collection is not discrimination:** As repeatedly concluded by courts over the years, demographic data collection is distinct from race- or sex-based employment decision-making. The comment emphasizes that EEO-1 reporting is an aggregate workforce census used for enforcement, monitoring, benchmarking, and compliance—not a mandate to take preferential action.
- **The administration's position is internally inconsistent:** The comment contrasts the proposed elimination of EEO-1 reporting with expanded federal race- and sex-disaggregated reporting in higher education through the Admissions and Consumer Transparency Supplement ("ACTS")/Integrated Postsecondary Education Data System ("IPEDS"), arguing that both programs rely on the same sort of demographic data to identify potential civil-rights compliance risks. The EEOC refuses either to acknowledge or explain this glaring contradiction, which is a fatal omission in the proposed rescission.
- **Elimination would harm enforcement and employers:** The Institute explains that EEO-1 data helps agencies identify potential discrimination, conserve investigative resources, and protect employers from unsupported broad investigations. It also supports employer self-audits and lawful barrier analyses. In addition, a rescission would also violate Section 709(d) of Title VII by ending the Congressionally mandated exchange of information between EEOC and State FEPs and, thus, undermine State enforcement efforts.
- **The burden rationale is overstated:** The letter challenges the Notice of Proposed Rulemaking's ("NPRM") cost justification, noting that modern Human Resources Information Systems make EEO-1 filing largely automated for many employers and that rescission may create greater costs through ad hoc agency subpoenas and a fragmented patchwork of state reporting obligations.
- **The NPRM is arbitrary and capricious:** The Institute establishes that the proposal fails under the Administrative Procedure Act because it lacks factual support, ignores reliance interests, contradicts current agency practice and other federal initiatives, fails to consider less restrictive alternatives, and provides an incomplete cost-benefit analysis.
- **Conclusion:** The Institute urges the Commission to withdraw the proposed rule and pursue modernization of the EEO-1 framework instead of repeal. The Institute presents a number of suggestions to achieve this goal.

August 24, 2026

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

Mr. Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: Removal of EEOC Reporting Requirements

Dear Mr. Windmiller:

The Institute for Workplace Equality ("The Institute") submits the following comments in response to the invitation of the U.S. Equal Employment Opportunity Commission on the proposed rescission and removal of the requirements for filing of the EEO-1, EEO-2, EEO-3, EEO-4, EEO-5 and EEO-6 reports and the recordkeeping and record preservation requirements related to these reports, under 29 CFR part 1602, published in the *Federal Register* on July 23, 2026.[1]

BACKGROUND ON THE INSTITUTE FOR WORKPLACE EQUALITY

The Institute is a national, non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors regarding their equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions who represent many of the nation's largest and most sophisticated federal contractors. The Institute's faculty members are recognized as leading practitioners in the field.[2]

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[1] *See,* Equal Employment Opportunity Commission, Removal of Reporting Requirements, 91 *Fed. Reg.* 46332 (July 23, 2026); available at https://www.govinfo.gov/content/pkg/FR-2026-07-23/pdf/2026-14937.pdf.
[2] The Institute faculty members include the leading subject matter experts on federal contractors' equal employment opportunity responsibilities.

I. INTRODUCTION

The Institute submits these formal public comments in strong opposition to the U.S. Equal Employment Opportunity Commission's ("EEOC" or the "Commission") Notice of Proposed Rulemaking ("NPRM") proposing to eliminate all EEO reporting requirements, including the EEO-1, EEO-3, EEO-4, EEO-5, and EEO-6 reports and their accompanying recordkeeping obligations.[3] Our members have collectively filed tens of thousands of EEO-1 reports over the course of six decades. They are the employers the NPRM most directly affects, and they are in the best position to evaluate the EEOC's claims and consequences from the ground up.

In our view, the NPRM is a striking example of a solution in search of a problem. It is based on conjecture, unsupported by evidence, contrary to law, and contradicted by the government's own current data collection practices.

First, the NPRM's central factual premise is unsupported. The Commission proposes to eliminate a 60-year-old statutory program on the unsubstantiated belief that EEO-1 reporting causes or encourages employers to engage in racial quotas and preferences. The Institute and its members have *never* observed this phenomenon across thousands of employer engagements spanning 25 years of practice.

Second, the NPRM cannot override an existing statute. Section 709(c) of Title VII of the Civil Rights Act of 1964 ("Title VII") is fully applicable here. Its language is not permissive. The statute clearly states that employers "shall" make and keep records relevant to determining whether unlawful employment practices are occurring, and they "shall" make reports as the Commission prescribes. Congress chose mandatory language deliberately, reflecting its judgment in 1964 — and reaffirmed in 1991 when it amended Title VII — that demographic data collection is the foundational mechanism of civil rights enforcement. The Commission has discretion over the form of data collection. It does not have discretion to collect nothing.

Third, the NPRM's legal argument that the data collection cannot withstand strict scrutiny and is therefore unconstitutional, is untenable. The NPRM conflates the mere measuring of racial and sex-based disparities with acting on the basis of race or sex in employment decisions — two fundamentally different acts. Collecting a workforce census is not a racial classification for decision-making purposes, and in six decades of litigation, no court has held otherwise. Moreover, the legal theory the NPRM advances, such as it is, is directly contradicted by the administration's simultaneous mandate under the Admissions and Consumer Transparency Supplement ("ACTS")/ Integrated Postsecondary Education Data System ("IPEDS") requiring universities to submit six years of race- and sex-disaggregated admissions and personnel data — justified with the identical enforcement rationale the Commission now repudiates in the employment context.

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[3] 91 Fed. Reg. 46332.

Fourth, the NPRM fails to address decades of reliance interests and the permanent, irreversible destruction of 60 years of longitudinal workforce data. Employers, state civil rights agencies, researchers, and policymakers have built compliance systems, enforcement programs, and data infrastructure around the EEO-1 framework. Multiple states have enacted independent reporting requirements that expressly incorporate or reference the federal EEO-1. In addition, a rescission would also violate Section 709(d) of Title VII by ending the Congressionally mandated exchange of information between EEOC and State FEPs and, thus, undermine State enforcement efforts. And unlike most regulatory rescissions, the harm here is permanent: once annual collection ends, the 60-year longitudinal dataset cannot be reconstructed by any future administration or any combination of state laws.

Fifth, the NPRM's burden justification does not withstand scrutiny. The EEO-1 is not the costly compliance burden the NPRM portrays. For most covered employers, filing is a largely automated exercise embedded in standard Human Resources Information System ("HRIS") platforms. The Commission's own estimate amounts to approximately $122 per establishment report. The genuine burden employers face is not the annual federal filing — it is the patchwork of state and local reporting obligations that will proliferate as states fill the void the federal rescission creates.

For all of these reasons and because there is a less restrictive alternative, the Institute urges the Commission to withdraw the NPRM. In the alternative, the Institute recommends, as set forth in greater detail below, that the Commission retain the EEO-1 requirement and convene a stakeholder task force — including employers, industrial-organizational psychologists, labor economists, state civil rights agencies, and practitioners — to modernize and streamline the Report for the 21st century. Reform, not repeal, is the appropriate response to the legitimate concerns the NPRM raises about the Report's age and design.

II. History and Purpose of EEO-1 Report

A. Origin Under Title VII (1966) and the EEOC/OFCCP Joint Reporting Structure

Section 709(c) of Title VII requires employers to make and keep records relevant to the determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce reports as the Commission prescribes by regulation or order.[4] Pursuant to this statutory authority, in 1966, the EEOC issued a regulation requiring certain employers to file executed copies of the Employer Information Report ("EEO-1") and instructed employers to report employee data by job category and by sex and race or ethnicity.[5] Pursuant to

[4] 42 U.S.C. 2000e-8(c).

[5] The EEOC's EEO-1 regulation is at 29 CFR Part 1602 Subpart B. § 1602.7 requires eligible employers to file "...in conformity with the directions set forth in the form and accompanying instructions."

Executive Order 11246,[6] the Office of Federal Contract Compliance Programs ("OFCCP"), U.S. Department of Labor, in 1978 issued its regulation describing the EEO-1 as a report "promulgated jointly with the Equal Employment Opportunity Commission" and requiring certain contractors to submit "complete and accurate reports" annually. Private employers with 100 or more employees and federal contractors that have 50 or more employees and meet certain criteria are required to report annually the number of individuals they employ by job category and by sex and race or ethnicity.[7]

B. What the Report Collects – Race/Ethnicity, Sex, and Job Category Data by Establishment

The EEO-1 currently uses federal race and ethnicity categories, which were adopted by the Commission in 2005 and implemented in 2007.[8] The seven race/ethnicity categories are: Hispanic or Latino; or White (Not Hispanic or Latino); Black or African American (Not Hispanic or Latino); Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino); Asian (Not Hispanic or Latino); American Indian or Alaska Native (Not Hispanic or Latino) and Two or More Races (Not Hispanic or Latino).[9] The Report collects employee race/ethnicity and sex data by 10 job categories which are Executive/Senior Level Officials and Managers; First/Mid-Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; and Service Workers.[10]

The data is collected by establishment which is generally a single physical location where business is conducted or where services or industrial operations are performed (*e.g.,* factory, mill, store, hotel, movie theater, mine, farm, airline terminal, sales office, warehouse, or central administrative office). Establishments at different physical locations must be reported as separate establishments even if conducting the same business or performing the same services or industrial operations. In addition, employers should only include establishments located in the 50 United States and the District of Columbia.[11]

C. Dual Regulatory Use – EEOC Enforcement/Investigative Screening Function and OFCCP Compliance Evaluation Function for Federal Contractors

[6] E. O. 11246, 30 *Fed. Reg.* 12319 (Sept. 24, 1965).
[7] EO 11246 was rescinded by Executive Order 14173, eliminating both the Executive Order with its regulatory requirement for federal contractors with 50 or more employees to file EEO-1 being rescinded effective October 26, 2026. The Executive Order does not invalidate the statutory requirements of Section 709(c).
[8] Supporting Statement A, Recordkeeping and Reporting Requirements for EEO-1 Component 1, Fn.7, May 3, 2023; available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202504-3046-001.
[9] *See,* Appendix B, 2024 EEO-1 Component 1 Data Collection Instruction Booklet, Expiration Date 11/30/2026; available at https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=202504-3046-001&icID=240069.
[10] *See,* Appendix C, 2024 EEO-1 Component 1 Data Collection Instruction Booklet.
[11] 2024 EEO-1 Component 1 Data Collection Instruction Booklet, p.11-12. The Instruction Booklet provides details as to the types of required reports on pages 11-14.

1. EEOC/OFCCP Use of EEO-1 Report Data

In its most recent Supporting Statement[12] for its renewal of the EEO-1 Report, the EEOC outlined in detail how EEO-1 Report data is used.[13] In that document, EEOC stated that it used the EEO-1 data for the following purposes:[14]

- To investigate charges of employment discrimination against employers in private industry and to evaluate the employment status of women and racial and ethnic groups;
- To aid State and Local Fair Employment Practices Agencies (FEPAs) their investigations of workplace discrimination;
- To respond to Congressional inquiries;
- To provide aggregate EEO-1 Component 1 data used by numerous external stakeholders including employers, researchers, advocacy groups, and the media;
- For statistical purposes and for developing evidence; and
- To help focus its outreach, education, technical assistance, and training to the public.

The value of these uses has not changed despite the policy goals of this administration.

2. EEOC Continues to Use EEO-1 Report Data

In the public hearing held by EEOC on July 21, 2026, at which the Commission voted to propose the elimination of the EEO-1, EEOC Commissioner Kalpana Kotagal, in her Statement on the Proposal,[15] stated that she voted against the proposal because as recently as this year EEOC had demonstrated the value of the EEO-1 Report by using EEO-1 Report data in its investigations into race and sex discrimination. Specifically, Commissioner Kotagal cited the $5.5M settlement EEOC made with Central Transport for hiring less qualified male truck drivers rather than qualified female drivers for at least 20 years.[16]

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[12] Supporting Statement A, US Equal Employment Opportunity Commission, May 2, 2023, p.2-4.
[13] Prior to the rescission of EO 11246 and its implementing regulations, EEO-1 Report was also used to determine which employers were federal contractors.
[14] *Id.*
[15] Commissioner Kotagal's Statement on Proposal to Rescind EEO Report, July 21, 2026, available at https://www.linkedin.com/feed/update/urn:li:activity:7485365910212591616/.
[16] EEOC Reaches Early $5.5 Million Resolution With Central Transport Over Nationwide Sex Discrimination in Hiring, *EEOC Press Release*, May 15, 2026; available at https://www.eeoc.gov/newsroom/eeoc-reaches-early-55-million-resolution-central-transport-over-nationwide-sex.

D. The Race, Burden, and Sex Categories to Be Used by Federal Government are Not Arbitrary or Capricious but are Established by the OMB

The White House Office of Management and Budget ("OMB") developed Statistical Policy Directive ("SPD") 15 in 1977 in coordination with other Federal agencies to provide consistent data on race and ethnicity throughout the Federal Government.[17] Initial development of these data standards stemmed in large part from new Federal responsibility to enforce civil rights laws.[18] SPD 15 has only been revised one time in 1997.[19] On March 29, 2024, the Biden Administration proposed revisions to the SPD 15 to be used for data collection across the federal government.[20] However, OMB has pushed the implementation timeline from September 25, 2025 to September 28, 2029.[21]

E. Federal Government and OPM Continue to Collect Race/Ethnicity and Sex Data

Despite the push by the Administration to end employers' obligations to collect and submit race/ethnicity and sex data by eliminating the EEO-1 Report, the federal government and Office of Personnel Management ("OPM") is continuing to collect race/ethnicity and sex on its employees, implicitly validating such collection, despite its statements to the contrary.[22]

[17] Revisions to OMB's Statistical Policy Directive SPD 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 89 *Fed. Reg.* 22182, 22183 (March 29, 2024; available at https://www.govinfo.gov/content/pkg/FR-2024-03-29/pdf/2024-06469.pdf; U.S. Dep't of Comm., *Statistical Policy Handbook 37-38* (May 1978); available at https://www2.census.gov/about/ombraceethnicityitwg/1978-statistical-policy-handbook.pdf.

[18] 89 *Fed. Reg.* 22182, 22183; 62 FR 58782 (Oct. 20, 1997), available at https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf. The changes would combine race and ethnicity into a single question allowing respondents to select multiple categories with which they identity and add "Middle Eastern or North African" (MENA) as a reporting category, separate and distinct from "White."

[19] *Id.*

[20] *Id.*

[21] OMB Announcing Additional Timeline Extension for SPD 15 Implementation, *OMB News*, March 27, 2026; available at https://spd15revision.gov/content/spd15revision/en/news/2026-03-27-bulletin.html.

[22] On June 4, 2026, EEOC issued revised instructions for federal agency data collection and analyses, stating "[f]or the current reporting year, agencies in their MD-715 responses are not required to address "diversity and inclusion" principles, "barrier analysis," "triggers," "gender identity," or any other element in conflict with Executive Orders 14151, 14168, and 14281. Agencies are not required to provide Workforce Data Table A. The new instructions are available at https://www.eeoc.gov/sites/default/files/2026-06/MD-715_2026_instructions-signed.pdf.

III. Correcting the Record: EEO-1 Data Is Not a Vehicle for Quotas or Preferences

A. No Evidence of Employers' Misuse

As stated above, our first objection to the EEOC's NPRM is that the NPRM's central factual premise is unsupported by decades of experience. The Institute and its members have *never* used EEO-1 data to make race- or sex-based employment decisions. Collectively, Institute members and faculty represent thousands of U.S. employers and hundreds of years of experience complying with Title VII and other federal nondiscrimination laws and regulations. Across that depth and breadth of experience, the Institute is not aware of *any* cases where an employer has used information from its EEO-1 reports to engage in unlawful employment practices in violation of Title VII. It is also significant that in the NPRM, the EEOC did not cite a single actual case of employers making unlawful employment decisions or otherwise violating Title VII based on their EEO-1 reports over the last 60 years.

Institute members have a clear understanding that the plain text of Title VII – in particular, 42 U.S.C. § 2000e-2(j) – expressly prohibits quotas and preferential treatment based on race, color, religion, sex, or national origin:

> (j) Preferential treatment not to be granted on account of existing number or percentage imbalance
>
> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[23]

Additionally, most Institute members are federal contractors who have complied with Executive Order ("EO") 11246 requirements for decades. As an example, the EO 11246 regulations[24] clearly stated that "quotas are expressly forbidden," and that "In all employment

[23] 42 U.S.C. § 2000e-2(j).
[24] 41 CFR 60-2.16.

decisions, the contractor must make selections in a nondiscriminatory manner." In their EO 11246 affirmative action programs, these employers annually confirmed that they would not "create set-asides for specific groups"[25] and would not use their programs "to achieve proportional representation or equal results"[26] in their workforce demographics and employment decisions.

Prior to the revocation of EO 11246, OFCCP conducted compliance reviews of thousands of contractor establishments each year, including establishments of many of the Institute's members, and did not find examples of employers using data from their EEO-1 reports to make employment decisions to achieve "equitable outcomes." Also, prior to the revocation of EO 11246, these contractors made an annual certification to OFCCP through the agency's Contractor Portal that they had complied with all regulatory requirements. These federal contractors now have an obligation to comply with EO 14398[27] and FAR 52.222-90,[28] which require certification that they "will not engage in any racially discriminatory DEI activities." "Racially discriminatory DEI activities" are defined as "disparate treatment based on race or ethnicity in the recruitment, employment (*e.g.,* hiring, promotions), contracting (*e.g.,* vendor agreements), program participation, or allocation or deployment of an entity's resources."[29]

B. EEOC's Conjectures About Possible Discrimination Provide No Basis for Rescinding the EEO-1

In the NPRM, the EEOC argued that the EEO-1 reports should be rescinded based on a hypothetical premise that "regulated entities ***may*** mistakenly believe that the EEOC will target them for enforcement actions based on statistical imbalances and therefore take discriminatory actions to correct those imbalances in violation of EEO law" (emphasis added).[30] As stated above, we, the members of The Institute, are those postulated "regulated entities" and our decades of experience demonstrates that the EEOC's conjectures are false. The cases cited in support of the NPRM's point—*Watson v. Fort Worth Bank & Trust*[31] and *Texas v. EEOC*[32] – *also* do not demonstrate that this premise has been observed in practice. To the contrary and as noted in *Watson:* "Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result [quotas], 42 U.S.C. § 2000e-2(j), . . . the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized…. In sum, the high standards of proof in disparate impact cases are sufficient, in our view, to avoid giving

[25] 41 CFR 60-2.16(e)((3).
[26] *Id.*
[27] Addressing DEI Discrimination by Federal Contractors, 91 Fed. Reg. 16147 (March 26, 2026); available at https://www.govinfo.gov/content/pkg/FR-2026-03-31/pdf/2026-06286.pdf.
[28] 91 *Fed. Reg*. 38439 (June 25, 2026); available at https://www.govinfo.gov/content/pkg/FR-2026-06-25/pdf/2026-12834.pdf.
[29] 91 *Fed. Reg*. 38439, 38440.
[30] 91 *Fed. Reg.* 46332, 46338.
[31] 487 U.S. 977 (1988).
[32] 933 F.3d 433 (5th Cir. 2019).

employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."[33]

Based on the extensive record described above demonstrating comprehension of, and compliance with, federal nondiscrimination requirements, there is no reason to conclude that the submission of EEO-1 reports on an annual basis has ever encouraged employers "to engage in discrimination to avoid potential EEOC enforcement actions or to address perceived inequitable outcomes,"[34] as the EEOC alleges in the NPRM. Likewise, there is no reason to believe that continuing to collect EEO-1 reports would ever encourage employers in the future to engage in such discrimination.

IV. Collecting Race and Sex Data Does Not Violate the Law

Our second objection is that the NPRM's legal argument is untenable. The equal-protection argument advanced in the proposed rule conflates measuring racial disparities with acting on race, which are fundamentally different. As explained below, the EEO-1's collection of demographic data is a census of an existing workforce, not a racial classification for decision-making purposes. As such, it does not trigger the constitutional review the Commission's proposed rule assumes. And most importantly, data collection is mandated by law.

A. Congress Expressly Authorized This Data Collection

The NPRM's most fundamental legal defect is one it does not acknowledge: the data collection it proposes to eliminate is not a discretionary choice by the EEOC. It is a direct implementation of a congressional mandate.

Section 709(c) of Title VII provides:

> Every employer, employment agency, and labor organization subject to this subchapter shall (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 this subchapter or the regulations or orders thereunder.[35]

Congress framed this obligation in mandatory terms. Employers shall make and keep records relevant to determining whether unlawful employment practices have occurred and shall

[33] 487 U.S. 977, 993.
[34] 91 Fed. Reg. 46332, 46335.
[35] 42 U.S.C. § 2000e-8(c).

make such reports as the Commission prescribes. The Commission may determine the form that reporting takes; the statute directs that reports be made "as the Commission shall prescribe by regulation or order."[36] But that delegation is bounded by the purpose Congress attached to it. The Commission may prescribe only what is "reasonable, necessary, or appropriate for the enforcement of this subchapter."[37] Discretion over the form of collection is not discretion to collect nothing. Congress chose mandatory language deliberately, reflecting its judgment—made at the same time it enacted the substantive anti-discrimination provisions of Title VII—that demographic data collection is the mechanism by which civil rights enforcement is made possible. The EEO-1 report is the direct regulatory expression of this congressional command.

1. The Agency Cannot Use Regulatory Authority to Negate the Statutory Purpose for Which It Was Granted

Section 709(c)[38] grants the EEOC authority to prescribe reporting requirements that are "reasonable, necessary, or appropriate for the enforcement of this subchapter." The NPRM proposes to eliminate those requirements on the theory that they are no longer necessary or appropriate. But the agency's authority to make that determination is limited by the statutory purpose Congress identified: enforcement of Title VII. The EEOC cannot invoke its Section 709(c) authority to eliminate the very reporting infrastructure Congress established to make Title VII enforcement possible. Clause (1) of Section 709(c) obligates employers to make and keep records relevant to determining whether unlawful employment practices have occurred; clause (3) directs that reports be made from those records.[39] An agency that eliminates the reporting channel while the underlying recordkeeping obligation remains in force has not exercised the delegation Congress gave it—it has severed Title VII's enforcement mechanism from the records Congress still requires employers to keep. That is not an exercise of regulatory discretion; it is an abandonment of the statutory scheme.

The Supreme Court's post-*Chevron* framework under L*oper Bright Enterprises v. Raimondo*[40] reinforces this conclusion. Courts must now exercise independent judgment about what a statute means, without deferring to an agency's self-serving interpretation. Where the statutory text is unambiguous, an agency's contrary reading carries no special weight. Section 709(c)'s text is unambiguous: it mandates recordkeeping and reporting for the purpose of determining whether unlawful employment practices are occurring. An agency rule that eliminates that reporting cannot be squared with that mandate, regardless of the policy preferences of the current administration.

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] 603 U.S. 369 (2024).

Nor can the NPRM reframe the issue as a cost-benefit exercise that happens to come out against the reporting requirement. Section 709(c) already reflects Congress's cost-benefit judgment: it determined that demographic recordkeeping and reporting is reasonable, necessary, and appropriate for Title VII enforcement. An agency cannot substitute its own contrary judgment for Congress's without statutory authorization to do so—and the NPRM identifies none.

2. Congress Already Weighed the Concerns the NPRM Raises

The NPRM's central justification is that EEO-1 reporting may cause employers to engage in race-conscious employment decisions. But Congress enacted Section 709(c) in 1964 with full awareness that demographic data collection involves race and sex classifications. Congress nonetheless directed that such collection occurs, because it recognized—correctly—that you cannot enforce anti-discrimination law without data about the characteristics that anti-discrimination law protects. The EEOC's implicit claim that demographic data collection is inherently problematic contradicts a congressional judgment that is more than 60 years old and even after Congress overhauled Title VII in 1991, they left 709(c)'s mandate purposefully intact.

The NPRM does not cite any provision of Title VII, any subsequent congressional action, or any judicial decision holding that Section 709(c)'s data collection mandate is unconstitutional or otherwise invalid. The cases the NPRM relies upon—*Watson v. Fort Worth Bank & Trust*[41] and *Texas v. EEOC*[42]*,* as discussed above, do not address Section 709(c) at all, let alone hold that it authorizes rescission of EEO-1 reporting. The administration's argument is, at bottom, a policy disagreement with Congress. That is not a legally cognizable basis for eliminating a program that directly implements a statutory mandate. If the administration believes Section 709(c) should be amended or repealed, the remedy is legislation—not a rulemaking that purports to exercise the very authority it is simultaneously arguing should not be used.

3. Six Decades of Unbroken Practice and No Contrary Judicial Authority Validate the EEO—1 Report

The EEO-1 has been in place since 1966. In nearly six decades of litigation and administration, no court has held it unconstitutional, and the Commission's own operative practice, including its 2024 enforcement litigation described below, has consistently treated the reporting requirement as a valid and useful tool rather than a constitutionally suspect one. The Commission's newly stated constitutional concern is not compelled by any intervening decision that addresses data collection, aggregate reporting, or the EEO-1 specifically. The Commission may reassess reporting policy, but the record does not support transforming a longstanding aggregate reporting requirement into a constitutional violation absent any decision treating such reporting as an individualized racial classification.

[41] 487 U.S. 977 (1988).
[42] 933 F.3d 433 (5th Cir. 2019).

That practice has never belonged to one party. Across four different presidential administrations, under General Counsels who were Senate-confirmed political appointees and under Acting General Counsels drawn from career staff alike, the Commission read Section 709(c) the same way every time: as authority worth enforcing in federal court, not as a provision of doubtful constitutionality. The Commission's newly discovered concern is a break from that consistent, bipartisan understanding, not a response to any intervening legal development.

B. Data Collection Is Not a Racial Classification for Decision-Making Purposes

The Fourteenth Amendment's equal protection guarantee, and its Fifth Amendment analog applicable to federal action, is triggered by government action that burdens or benefits individuals based on race.[43] It is not triggered by the mere act of counting. The EEO-1 does not tell any employer whom to hire, promote, transfer, or pay. It is a census of an existing workforce, compiled after the fact and reported in anonymous aggregate. The Supreme Court has consistently distinguished between race-conscious remedies, which allocate a benefit or burden to a person because of race and race-conscious monitoring, which does neither. Collecting data to detect the possibility of discrimination is categorically different from using race as a criterion in an actual employment decision. *Further, and critically, the Commission's proposed rule does not identify a single instance in which EEO-1 data determined any individual's employment outcome.* The absence of any decision invalidating EEO-1-style demographic reporting over six decades is significant because the requirement has operated openly under Title VII since 1966, has repeatedly been renewed through the Paperwork Reduction Act ("PRA") process, and has never been treated by courts or the Commission as an individualized racial classification. This comment addresses the question at two levels, explaining first why no meaningful level of scrutiny applies to data collection as such, and, in Part E below, why the EEO-1 would independently survive such scrutiny even if some court concluded otherwise.

C. The NPRM's Cited Authority Undercuts the EEOC's Position

The Commission's own cited authority undercuts its position here. In *Morales v. Daley*, the court rejected a constitutional challenge to the Census Bureau's collection of race data, expressly distinguishing between "collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and governmental use of suspect classifications without a compelling interest."[44] The court treated that distinction as dispositive. The Commission's attempt to distinguish *Morales* rests on the assertion that EEO-1 categories function as "an incoherent system of choosing 'winners and losers'"[45] but that criticism describes how the categories have been labeled and revised over decades, not how the resulting

[43] See, e.g., *Myles Salt Company v. Board of Commissioners*, 239 U.S. 478, 481-85, 36 S.Ct. 204, 60 L.Ed. 392 (1916); *Thomas v. Kansas City Southern Railway Co.*, 261 U.S. 481, 485, 43 S.Ct. 440, 67 L.Ed. 758 (1923).
[44] 116 F. Supp. 2d 801, 815 (S.D. Tex. 2000).
[45] 91 Fed. Reg. 46332, 46336.

data is used. A survey's taxonomy can be imprecise without the survey itself becoming an act of allocation.[46]

History confirms the point. As recently as May 2024, the Commission filed suit against fifteen employers under 29 C.F.R. § 1602.9, the very provision the current proposed rule would eliminate, to compel filing of overdue EEO-1 reports. In announcing those suits, then-Chair Charlotte Burrows explained that "the data helps the agency focus its resources, identify potential discrimination, and refine its investigations," and General Counsel Karla Gilbride emphasized that Congress had authorized both the collection and the Commission's authority to seek judicial enforcement of it.[47] Nothing in that contemporaneous description, offered by the agency itself less than two years before this rulemaking, characterizes EEO-1 data as a tool that assigns any individual a benefit or burden because of race. The Commission cannot simultaneously have litigated to compel this reporting on the grounds that it serves resource allocation and investigative triage and now claim that the same reporting is constitutionally suspect because it is "unconnected to any specific allegation of discrimination."[48] That disconnection is precisely what makes it monitoring rather than classification and makes it precisely what the Commission itself relied upon to justify enforcing the requirement.

D. EEOC's Legal Arguments Are Fatally Flawed

Insofar as the Commission's legal argument is based on *Ricci v. DeStefano,* it is misplaced.[49] The *Buchanan v. Warley* passage the Commission borrows from that ruling - that government may not compel third parties to discriminate on the basis of race—comes from Justice Scalia's solo concurrence, joined by no other Justice, not from the majority opinion.[50] The *Ricci* majority resolved the case entirely on Title VII statutory grounds and expressly declined to reach the constitutional question the concurrence raised.[51] Justice Scalia himself acknowledged as much. The concurrence identified an unresolved constitutional question; it did not resolve that question.

Buchanan itself does not fit the present context regardless. *Buchanan* struck down a municipal ordinance that forbade Black and White residents from purchasing property on blocks where the other race predominated, a law that directly barred individuals from specific transactions because of their race.[52] Justice Scalia's broader point, that government may not compel third

[46] *See also, OMB's imprimatur of the categories, above at II, D.*
[47] EEOC Sues 15 Employers for Failing to File Required Workforce Demographic Reports, *EEOC Press Release,* May 29, 2026; available at https://www.eeoc.gov/newsroom/eeoc-sues-15-employers-failing-file-required-workforce-demographic-reports.
[48] 91 Fed. Reg. 46332, 46334.
[49] 557 U.S. 557, 129 S.CT. 2658, 174 L.Ed.2d 490 (2009).
[50] *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (citing *Buchanan v. Warley*, 245 U.S. 60, 78-82, 38 S.Ct. 16, 62 L.Ed. 149 (1917).
[51] *Id*. at 593.
[52] *Buchanan*, 245 U.S. at 82.

parties to do what it cannot do itself, presupposes a government mandate that the third party discriminate against someone. But the EEO-1 requirement mandates no such thing. It does not require any employer to hire, fire, promote, or exclude anyone because of race; it requires only that the employer report, in aggregate, the demographic composition of decisions the employer has already made for its own reasons. An employer that files a complete and accurate EEO-1 has thereby not discriminated against or in favor of anyone, in the way that a property owner following the *Buchanan* ordinance would have been forced to do.

Ricci's actual holding provides an independent reason to reject the Commission's reliance on the case. The Court held that before an employer may take race-conscious action to avoid disparate-impact liability, it must have a "strong basis in evidence" that it would otherwise face such liability, and that a bare statistical disparity, without more, does not suffice.[53] That standard cannot be applied by anyone -- an employer deciding whether to act, a court reviewing whether it should have, or the Commission investigating whether it did -- without reliable data on the racial and demographic composition of the relevant applicant pool and workforce. *Ricci* did not treat that data as constitutionally problematic; it made the data indispensable to distinguishing lawful caution from unlawful race-consciousness. The very case the Commission cites to raise concerns about data misuse depends on the data's availability to police the line the Commission says it wants policed.

The point cuts still further against the Commission's position once its own constitutional theory is taken on its own terms. Under *City of Richmond v. J.A. Croson Co.*, a race-conscious remedial program is unconstitutional unless the government can point to "identified discrimination," typically shown through a statistical disparity between the racial composition of the qualified labor pool and actual outcomes; absent such a showing, a race-based program is exposed as having "more of a political than a remedial basis."[54] That is precisely the test the Commission says it wants applied rigorously to root out improper race-conscious employer conduct. But a court, an employer, or the Commission itself cannot conduct a *Croson* analysis, cannot tell whether a race-conscious program rests on identified discrimination or on the "political" preference *Croson* condemns, without reliable data on the workforce's actual racial composition. Eliminating the EEO-1 does not advance the colorblind enforcement regime the proposed rule invokes; it removes the evidentiary foundation that regime requires to distinguish a lawful remedial measure from an unlawful racial preference in the first place.

E. Raw Statistical Imbalance Does Not Require or Justify Preferential Treatment

The preceding Part addressed whether collecting EEO-1 data is itself a racial classification; it is not. This Part addresses a related but distinct concern the proposed rule also raises, that even lawful collection creates a risk that employers or the Commission will misuse the resulting data to

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[53] *Ricci*, 557 U.S. at 587.
[54] 488 U.S. 469, 485, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

justify improper race-conscious action. That is a question about the consequences the law attaches to a statistical disparity, not about whether compiling the disparity in the first place is constitutionally suspect. Congress, in Title VII, has answered the misuse question directly, and its answer confirms that the proposed rescission is not necessary to prevent the harm the Commission fears. To make such a profound change in invaluable data collection procedures on a mere potentiality misuses and demeans the agency's authority.

A related concern, that employers might misuse EEO-1 data by mistakenly believing statistical imbalances alone justify corrective action, describes a risk of downstream third-party conduct, not a constitutional defect in the collection itself. An employer that reacts to aggregate data by making race-conscious decisions violates Title VII and, if the employer is a government entity, potentially the Constitution as well. But that violation would be committed by the employer's own decision, subject to the ordinary tools that already police it, not by the Commission's act of gathering a workforce census. The First Circuit addressed this issue head on in *U.S. v. New Hampshire*[55], where the State argued that the EEO-4 reporting requirement could not be constitutionally sustained because "the information gleaned from the EEO-4 reports might be misused in a relief program improperly relying on quotas or in a program violative of § 793(j) of Title VII, 42 U.S.C. § 2000e-2(j). . ." The First Circuit quickly disposed of this argument: "The short answer is . . . that possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather neutral entity which only becomes meaningful when interpreted. And any positive steps which the United States might subsequently take as a result of its interpretation of the data in question remain subject to the law and judicial scrutiny."[56]

Congress's own contemporaneous design of Title VII answers this misuse concern more directly than any judicial gloss could. In the same Act that created the reporting authority the Commission now proposes to rescind, Congress enacted 42 U.S.C. § 2000e-2(j), which provides that nothing in Title VII requires an employer to grant preferential treatment to any individual or group because of a racial, sex, or other protected-class "imbalance" that may exist "in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force" in that area.

Congress thus anticipated, in 1964, precisely the scenario the Commission now treats as a reason to eliminate EEO-1 reporting: that an employer's workforce composition might be compared against the composition of the relevant community or labor force and found imbalanced.

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[55] 539 F.2d 277, 280 (1st Cir. 1976).
[56] *New Hampshire*, 539 F.2d at 280; *see also Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000) (rejecting arguments that census data collection is unconstitutional in noting "Plaintiffs' position is based upon a misunderstanding of the distinction between **collecting demographic data** so that the government may have the information it believes at a given time it needs in order to govern, and governmental **use of suspect classifications** without a compelling interest.") (emphasis added).

Congress's answer was not to forbid the comparison or the data that makes it possible; it was to make clear, in the statute's own text, that no such imbalance obligates an employer to grant preferential treatment to anyone. Section 2000e-2(j) is the legislative ancestor of *Ricci*'s "strong basis in evidence" requirement and *Croson*'s demand for "identified discrimination," both discussed above: all three make clear that a raw disparity, however documented, does not by itself justify or require race-conscious action. The Commission's misuse concern is not a gap in the statutory scheme that only rescission of EEO-1 can fill; it is a problem Congress already solved, in the same subchapter that authorizes the data's collection, sixty years ago.

Congress reaffirmed the same principle in 1991, from a different direction. When Congress legislatively overrode much of *Wards Cove Packing Co. v. Atonio*,[57] through the Civil Rights Act of 1991, restoring the employer's burden on the business-necessity defense and the pre-*Wards Cove* meaning of that defense, it deliberately left undisturbed one specific piece of that decision's holding: that "the mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."[58] Whatever one's views on the continued vitality of disparate-impact liability generally, Congress's specific 1991 judgment on this narrower evidentiary question is a fourth data point, after § 2000e-2(j) in 1964, *Croson* in 1989, and *Ricci* in 2009, confirming from yet another direction that a bare workforce statistic does no legal work by itself. Congress had every opportunity in 1991 to treat statistical imbalances as legally consequential on their own; it declined to do so then, just as it declined to do so in 1964. The Commission's proposed rule treats the mere existence of EEO-1 data as dangerous precisely because it could reveal such an imbalance, a concern Congress itself considered and rejected across nearly six decades and two separate enactments.

1. *Students for Fair Admissions* Does Not Apply to Workforce Data Collection

Students for Fair Admissions v. Harvard ("*SFFA*") held that race-conscious admissions programs violated equal protection because they used race as a factor in individualized, outcome-determinative decisions about specific applicants.[59] The Court's holding, and the remedy it ordered, addressed the mechanism by which Harvard and the University of North Carolina sorted individual people into different outcomes based partly on race. The EEO-1 involves no such mechanism. No individual is admitted, hired, promoted, or denied anything based on EEO-1 data. The proposed rule's reliance on *SFFA* to invalidate a workforce census, rather than an individualized admissions sorting mechanism, stretches the decision well beyond what it held. The Institute is not aware of any court that has extended *SFFA* into the data collection context, and the Commission's proposed rule cites none.

[57] 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989),
[58] *Wards Cove*, 490 U.S. at 650–653; *see* 42 U.S.C. § 2000e-2(k).
[59] 600 U.S. 181, 230, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023).

The Commission does not rely on *SFFA* solely for its individualized-decision holding, however; it also invokes the concurring opinions' criticism of racial categories as historically "arbitrary," "overbroad," and "incoherent," citing Justice Gorsuch's discussion of shifting Hispanic-origin and American Indian classifications.[60] That criticism, read in context, was addressed to the use of those categories to sort individual applicants into different admissions outcomes, the same individualized-decision problem the majority opinion addressed. Justice Gorsuch's concurrence catalogued how arbitrary category lines produced arbitrary individual results in college admissions, where an applicant's classification could determine whether they were admitted. It was not a freestanding holding that the categories themselves are unconstitutional wherever collected, independent of any use. A taxonomy can be imperfect, or even administratively inconsistent over time, without that imperfection converting every use of the taxonomy into a constitutional violation. The relevant question under *SFFA* and its concurrences alike is what the classification does to a person, not merely whether the label applied to that person has changed over the decades. Because EEO-1 categories are never applied to sort any individual into a different employment outcome, the arbitrariness criticism the Commission borrows from *SFFA*'s concurring opinions has no purchase here.

The Commission's own instructions confirm as much. The 2024 EEO-1 Component 1 Data Collection Instruction Booklet advises filers that the reporting "designations do not control who is protected by Title VII's prohibitions against employment discrimination based on race or national origin." [61] That is an admission, from the agency's own operative guidance, that the categories used for EEO-1 reporting were never intended to function as the kind of individually consequential classification *SFFA* addressed. A reporting category the Commission itself disclaims as non-controlling for an individual's legal protections is not the kind of individualized racial sorting mechanism that triggered strict scrutiny in *SFFA*.

The source of the very categories Justice Gorsuch criticized confirms the point further. The check-box categories used across federal civil rights and administrative reporting, including the EEO-1, originate in OMB's SPD No. 15, first issued in 1977, as discussed earlier. That directive states that its racial and ethnic categories "should not be interpreted as being scientific or anthropological in nature," and, critically, are "not to be viewed as determinants of eligibility for participation in any Federal program." The categories Justice Gorsuch found "incoherent" were never designed to allocate anything to anyone; their own governing directive says so, in terms nearly identical to the distinction this comment draws throughout. When the proposed rule borrows Justice Gorsuch's criticism of category design to argue that EEO-1 reporting works an unconstitutional classification, it asks the categories to do something their originating authority has expressly disclaimed for nearly five decades. A category can be imprecise as a matter of statistical taxonomy while remaining, by its own governing standard, unavailable as a tool for deciding who receives a benefit or burden. That is the collection/classification line this comment

[60] See *SFFA*, 600 U.S. at 291–92 (Gorsuch, J., concurring).
[61] 2024 EEO-1 Component 1 Data Collection Instruction Booklet, Expiration Date 11/30/2026, p. p.15, fn. 41.

has drawn throughout, and it is the same line OMB drew when it created the categories the proposed rule now says cannot be collected at all.

Even the dissenting Justices, who would have upheld the admissions programs at issue, treated the categories themselves as serving a legitimate function separate from individual admissions decisions. Justice Sotomayor, joined by Justice Kagan and, as to the University of North Carolina, by Justice Jackson, observed that the racial categories the majority found troubling "resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U.S. Census Bureau."[62] She added that "not all" of the government activity that flows from such data collection is "constitutionally suspect."[63]

The Commission's invocation of *SFFA*'s requirement that race-conscious measures have a "logical end point" runs into the same problem. That requirement, drawn from *Grutter v. Bollinger*'s condition that race-based admissions programs include reasonable durational limits and eventually terminate was designed for a specific problem: a remedial or diversity-based program that uses race as an admissions factor could, absent a sunset requirement, entrench racial preferences indefinitely as a permanent feature of who gets in and who does not.[64] The end-point requirement disciplines programs that allocate a benefit based on race by forcing them to justify why the allocation is still needed and to describe what would allow it to stop.

A demographic census has no comparable structure to discipline. The EEO-1 does not allocate anything to anyone; there is no preference, benefit, or negative factor for a sunset provision to bound. The end-point doctrine asks when a race-conscious benefit can be said to have accomplished its remedial purpose and therefore end. That question has content only where race is being used to produce an outcome. Where no outcome depends on race at all, as with a reporting requirement that assigns no one anything based on the data reported, there is no allocation whose duration needs to be bounded, and the end-point requirement simply does not attach. The Commission's invocation of this doctrine imports a limiting principle from remedial admissions programs into a context that lacks the very feature, an allocated racial benefit, that made the principle necessary in the first place.

Finally, the proposed rule invokes the broader anti-classification language in *SFFA* and *Parents Involved*, that "[e]liminating racial discrimination means eliminating all of it"[65] and that

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[62] *SFFA*, 600 U.S. at 367 (2023) (Sotomayor, J., dissenting) (citing 62 Fed. Reg. 58,786–90 (1997), the very OMB directive revision underlying the categories discussed above).
[63] *Id.* (quoting Department of Commerce v. New York, 588 U.S. 752, 760, 139 S.Ct. 2551, 204 L.Ed.2d 978 (2019)).
[64] 539 U.S. 306, 342, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *SFFA*, 600 U.S. at 212, 314 (Kavanaugh, J., concurring).
[65] *SFFA,* 600 U. S. at 206.

"the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[66] Both statements describe what a government or institution must do when it is engaged in discrimination through allocating a benefit or burden to individuals because of race. Neither statement is a general injunction against the government's acquiring information about race in any form, for any purpose. Taken at the level of generality the proposed rule applies it, this rhetoric would prohibit not only the EEO-1 but the Census, vital statistics reporting, public health surveillance, university admissions decisions, and virtually every other government function that tracks outcomes by race to determine whether discrimination exists. Neither *SFFA* nor *Parents Involved* purported to reach that far, and both decisions addressed institutions that were, in fact, sorting individuals by race to produce a result. Stopping discrimination on the basis of race requires knowing, in the first place, whether it is occurring. A rule that forbids measurement in the name of eliminating discrimination does not eliminate discrimination; it removes the tool by which its presence or absence can be shown at all.

V. The Administration’s Position is Internally Contradictory: The ACTS/IPEDS Double Standard

The administration’s proposal to eliminate the EEO-1 report is facially contrary to its simultaneous, substantial expansion of required race- and sex reporting in higher education. While the two programs arise under different statutory schemes and regulate different entities, fundamentally, both use demographic data for the same reason – to identify patterns that may warrant civil-rights enforcement scrutiny. The EEOC must therefore explain why the administration’s constitutional, tailoring, and enforcement arguments in favor of ACTS/IPEDS reporting do not apply with equal force to analogous EEO-1 reporting

A. The ACTS/IPEDS Initiative: Analyzing Race & Sex Data Trends to Identify Potential Discrimination

On August 7, 2025, President Trump signed a Presidential Memorandum[67] directing the Secretary of Education to dramatically expand race- and sex data collection from postsecondary institutions. Secretary Linda McMahon immediately issued a directive implementing the President's instruction.[68] The result was the *Admissions and Consumer Transparency Supplement*, a new mandatory component of the *Integrated Postsecondary Education Data System*.[69]

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[66] *Parents Involved in Cmty. Schs. V. Seatle Sch. Dist. No. 1,* 551 U. S. at 748.
[67] Ensuring Transparency in Higher Education Admissions, *Presidential Memorandum,* Aug. 7, 2025; available at https://www.whitehouse.gov/presidential-actions/2025/08/ensuring-transparency-in-higher-education-admissions/.
[68] Ensuring Transparency in Higher Education Admissions, *The Secretary of Education*, Aug. 7, 2025; available at https://www.ed.gov/media/document/secretary-directive-ensuring-transparency-higher-education-admissions-august-7-2025-110497.pdf.
[69] Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Integrated Postsecondary Education Data System (IPEDS) 2025–26 Through 2026–

ACTS/IPEDS is a significant expansion of federally mandated reporting in higher education. It requires covered institutions to submit detailed admissions data disaggregated by race and sex, together with wide-ranging academic and socioeconomic variables that can help identify patterns of potential bias warranting further government investigation.[70] Four-year institutions with competitive admissions processes that receive federal financial assistance under Title IV of the *Higher Education Act* must submit up to six years of retrospective admissions data by race and sex. Covered institutions must report detailed applicant, admitted, and enrolled student data broken out by race/sex pairings (*e.g.,* White males, Black females, *etc.*), further cross-tabulated against GPA quintiles, standardized test score quintiles, family income ranges, Pell Grant eligibility, parental education level, and application round (early action, early decision, regular). Graduate and professional programs must submit parallel data disaggregated by field of study (CIP code), race, and sex.[71]

Revealingly, the Federal Register notice describes *ACTS/IPEDS* as a tool for identifying possible illegal race-based preferences in admissions. Thus, the administration itself acknowledges that race-disaggregated data is useful, indeed often critical, to identify patterns that may warrant further civil-rights enforcement scrutiny.[72] By way of recent examples, the U.S. Department of Justice (DOJ) made discrimination findings against the University of California, Davis School of Medicine,[73] Yale University School of Medicine,[74] and the University of California San Diego School of Medicine.[75] In each of these investigations and adverse findings, DOJ analyzed demographic data and relied in part on adverse patterns against White and Asian applicants for admission to conclude there was bias in the medical schools' admissions processes.[76]

The *ACTS/IPEDS* notice explains that demographic data is not itself proof of discrimination, but may be used to identify patterns, assess risk, and determine whether further

27, *Dept. of Education,* Nov. 13, 2025;90 *Fed. Reg.* 50940; available at https://www.govinfo.gov/content/pkg/FR-2025-11-13/pdf/2025-19874.pdf.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Justice Department Finds University of California Davis Medical School Discriminates Based on Race in Admissions, *DOJ Press Release,* June 10, 2026; available at https://www.justice.gov/opa/pr/justice-department-finds-uc-davis-medical-school-discriminates-based-race-admissions.

[74] Justice Department Investigation Determines Yale's Medical School Discriminated Based on Race in Admissions, *DOJ Press Release,* May 14, 2026; available at https://www.justice.gov/opa/pr/justice-department-investigation-determines-yales-medical-school-discriminated-based-race.

[75] Justice Department Joins Lawsuit Against Racial Discrimination in Admissions at UCLA's Medical School, *DOJ Press Release,* Jan. 29, 2026; available at https://www.justice.gov/opa/pr/justice-department-joins-lawsuit-against-racial-discrimination-admissions-uclas-medical.

[76] On August 6, 2026, DOJ announced its finding that Duke University School of Law discriminated based on race in admission. Justice Department Finds Duke Law School Discriminates Based on Race in Admissions, *DOJ press release,* Aug. 6, 2026; available at https://www.justice.gov/opa/pr/justice-department-finds-duke-law-school-discriminates-based-race-admissions.

investigation is warranted. That rationale closely resembles the traditional justification for EEO-1 reporting: aggregate data can inform agency investigation priorities without determining liability in any individual case. [77]

B. The Administration Cannot Explain Its Contradictory Treatment of Mandated Employee and Student Demographic Reporting

The administration's constitutional concerns about compelled demographic reporting warrant careful comparison across the two programs. We note that the Constitution's Equal Protection Clause applies directly to governmental action, while private employers and private universities are regulated through distinct statutory regimes. However, in examining the differences between employee and student admissions race and sex reporting requirements, the relevant question is not whether the same constitutional rule mechanically governs both contexts, but whether the administration can explain why the asserted risks of demographic reporting differ between them, and in fact lead to opposite results.

The administration has not explained why its various objections to EEO-1 reporting do not apply to *ACTS/IPEDS* , nor can it. Both are data reporting requirements rather than directives governing individual employment or admissions decisions, and both may be used to identify potential adverse demographic patterns that may warrant further government enforcement scrutiny. The relevant question is not whether the programs are identical, but why their differences justify clearly contradictory regulatory treatment.

Confusingly, the two initiatives point enforcement resources in opposite directions: *ACTS/IPEDS* is designed to identify possible unlawful race-based preferences in university admissions, while rescinding EEO-1 reporting would eliminate the longstanding resource of workforce demographic data that has been used to identify exactly the type of adverse data trends DOJ is relying on to conduct discrimination investigations and make findings against universities.

That contrast does not itself establish unlawful motive, but it heightens the need for a clear explanation as to why comparable data serves legitimate agency enforcement purposes in one context yet is considered unnecessary, and even legally and constitutionally problematic, in the other.

C. The Two Programs Use Similar Enforcement Tools

In examining differences between the two demographic reporting schemes, we note they arise under distinct statutory frameworks. Section 709(c)[78] of Title VII authorizes the EEOC to

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[77] 90 *Fed. Reg.* 50940*,* 50942.
[78] 42 U.S.C. 2000e-8(c).

require covered employers to maintain and submit records relevant to enforcement of federal employment-discrimination law. *ACTS/IPEDS* operates through federal higher-education reporting requirements and supports enforcement of laws prohibiting discrimination by recipients of federal financial assistance. However, while the programs are not legally identical, they rely on analogous demographic reporting as an important investigation and enforcement tool.

The EEOC's proposal argues that demographic reporting may encourage race-conscious decision-making, impose data collection and reporting burdens, and provide insufficient enforcement value. However, *ACTS/IPEDS* requires detailed demographic reporting *exactly because* the government considers such data useful for identifying possible noncompliance. This contradiction compels a clear explanation of why the asserted risks and benefits are assessed so differently in the two contexts.

D. The ACTS/IPEDS Rationale Parallels the Traditional Justification for EEO-1 Reporting

The Federal Register notice[79] supporting *ACTS/IPEDS* states that the initiative will "track racial changes in admissions practices" and establish "a baseline of admissions practices from before the Supreme Court decision in *SFFA v. Harvard*." It further explains that the data may identify institutions with "an elevated risk of noncompliance with civil rights laws" and support "risk-based enforcement practices." These statements frame demographic data as a screening tool rather than proof of liability, which is the feature most relevant to the comparison with EEO-1 reporting.

The same enforcement logic – and legal rationale -- applies in the employment context: demographic data can help EEOC identify employers with an elevated risk of noncompliance and support risk-based enforcement. Because that rationale substantially parallels the stated purpose of EEO-1 reporting, the EEOC should explain why it now views the employment data as unnecessary, insufficiently tailored, or legally and constitutionally problematic.

The Institute maintains that until the EEOC can explain this interagency contradiction explicitly, there should be no final rulemaking. Failure to address that material inconsistency fatally undermines the Commission's reasoned explanation under the Administrative Procedure Act ("APA") and the principles articulated in *Motor Vehicle Manufacturers Ass'n v. State Farm*.[80]

[79] 90 *Fed. Reg.* 50940.
[80] 463 U.S. 29.

VI. Why the Data Still Matters: Legitimate Benchmarking, Not Preference-Making

Beyond the lack of evidence that EEO-1 reporting in any way encourages discrimination, eliminating EEO-1 reports would also deprive employers, federal agencies, and the EEOC itself of information that serves several legitimate and valuable purposes, including benchmarking.

An important clarification when it comes to benchmarking information is that contrary to the NPRM's characterization, Title VII of the Civil Rights Act does not require employers to be "colorblind" in their approach. Instead, Title VII requires that employers not discriminate based on protected characteristics in employment actions and decisions.[81] Adopting a "colorblind" approach ignores the realities of modern society: differences in race, ethnicity, and sex exist in the real world and understanding the actual employment landscape is what allows employers and regulators to detect and correct unlawful barriers. The data itself helps ensure that meritocracy is operating in the workplace, and it serves as an anti-discrimination tool.

By surfacing artificial barriers to employment, the data protects merit-based systems, helping identify and remove unintended obstacles. This is precisely what benchmarking allows employers and regulators to do. Comparing EEO-1 trends for employers over time has become a useful tool – both internally in their own organizations as well as externally to others in their industry. The purpose of this benchmarking is to compare an employer's internal workforce composition against the EEOC's published industry trends[82] and broader labor-market availability, to ensure there are no artificial and potentially discriminatory barriers to employment. Employers also look inward, tracking their own aggregate EEO-1 data over time to detect patterns or anomalies that may signal emerging risk. This same benchmarking can also work in the other direction: employers can use their own multi-year data to demonstrate that their workforce composition is, in fact, consistent with the qualified labor pool, industry norms, or their own historical trends, helping them push back against inaccurate claims or complaints with evidence rather than mere denial. Multi-year trend data by employer, industry, or geography is a useful tool for both employers and regulators, as this can serve as an early warning system for both populations to discover potential barriers to employment not rooted in merit-based decision-making.

A. Illustrative Example

For illustration, let's suppose a technology company that has lawfully been filing EEO-1 reports since it met coverage thresholds, uses the data to annually report to its leadership on risk

[81] See 42 U.S.C. § 2000e-2(a) (making it an unlawful employment practice for an employer to fail or refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin).
[82] https://www.eeoc.gov/data/eeo-1-employer-information-report-statistics.

mitigation. They look at both their own historical year-over-year trends and compare themselves to their industry counterparts.

The company's overall workforce representation of women is declining (from 29.6% in 2022 to 25.9% in 2024), but the erosion is concentrated in, and driven by, Professionals, the company's largest job category by headcount. Measured against the 31% industry benchmark, the gap widened from 11.0 percentage points in 2022 to 17.0 percentage points in 2024, a double-digit shortfall in every year reviewed, and one that is getting worse rather than better.

The combination of category growth (more professional roles overall) alongside a shrinking number of women in the category indicates that new hiring into Professionals is skewing increasingly male, and/or that women are leaving the category faster than men. Both are questions that a barrier analysis of hiring and attrition flow could answer.

In this example, the company conducts a barrier analysis of their Professional job category by reviewing applicant flow, hire rates, promotion rates, and voluntary/involuntary attrition by sex for their Professional level jobs. Additionally, they compare their hiring rates for women Professionals against the published EEO-1 data by industry. Given the multi-year downward trend, the leadership team prioritizes this category for immediate ongoing quarterly reviews rather than just the routine annual EEO-1 reports.

A barrier analysis identifies the cause. In 2023, the company implemented a new AI-assisted resume screening tool in its Professionals hiring process. Applicant flow data shows that women and men applied for Professional roles at comparable rates, but that women advanced past the tool's initial screen at a substantially lower rate than men. On review, the company determines that the tool was weighing factors that were *not* job related and did not predict job performance. The company discontinues use of the tool, creates a job-related screening criterion that has been validated, and monitors applicant flow and hiring quarterly. Absent the multi-year EEO-1 trend that prompted the barrier analysis, the company would have had no signal that its new screening tool was screening out qualified women on a basis unrelated to the job.

The steps taken in the example above illustrate the distinction between using EEO-1 data for risk identification and "illegal DEI" purposes. It is important to note that a diagnostic signal, such as multiyear trending, or comparing one's workforce to aggregate industry data, is very different from taking race/ethnicity or sex-based actions in employment decisions. The latter remains unlawful, regardless of what the data shows. Equally important, the corrective response a diagnostic signal invites are to examine and, where warranted, remove barriers in recruiting, advancement, or retention, if any. This type of action is itself lawful and race- and sex-neutral; the signal prompts a review of practices, not a preference in outcomes.

B. The Data is Useful for Federal Enforcement

Moreover, the utility of this kind of information has been of critical importance to the EEOC itself, even as recently as FY2026. Information in EEO-1 reporting has been used as a trigger to investigate employers for discriminatory practices, such as discriminatory hiring cases. As noted by EEOC Commissioner Kotagal during the July 21, 2026 public meeting,[83] EEO-1 data showed that "nearly 100 percent of its employees were Hispanic," in reference to the EEOC's investigation of Vallarta Food Enterprises. Those Commissioner-initiated charges, issued in September 2024, allege that Vallarta, a chain of approximately 80 stores in Central and Southern California, failed or refused to recruit, hire, or promote non-Hispanic individuals because of their race (white, Black, and/or Asian) and national origin. The EEO-1 data served as a helpful initial tool to help substantiate the charge.

EEO-1 data has proven equally valuable once litigation is underway: in *EEOC v. Central Transport, LLC*,[84]. the agency compared the company's own EEO-1 reports against its actual hiring records to identify a statistically significant, nationwide disparity between male and female hires for truck driver positions, evidence that helped corroborate two individual charges of discrimination and create a $5.5 million nationwide settlement With limited staff, the EEOC cannot interview every applicant or audit every one of a company's facilities individually; in the case of *Central Transport*, mandatory EEO-1 reporting gave the agency a nationwide dataset that both flagged the disparity and, separately, revealed that the paper records the company produced didn't match the hiring numbers in its own EEO-1 filings.

Importantly, this value runs in both directions. Just as EEO-1 data can serve as a trigger to investigate, it also helps the Commission efficiently target its limited enforcement resources and decline to pursue matters that the aggregate data does not support. In this sense, the reporting is not solely an enforcement mechanism against employers; it is also an objective screening tool that can protect employers from unwarranted or unnecessarily prolonged investigations.

Taken together, these cases show EEO-1 reporting operating at both ends of the enforcement process: flagging where an investigation is warranted and avoiding an investigation when the data does not suggest a pattern exists. resources and decline to pursue matters that the aggregate data does not support. In this sense, the reporting is not solely an enforcement mechanism against employers; it is also an objective screening tool that can protect employers from unwarranted or unnecessarily prolonged investigations. Rescinding it would deprive the agency of both functions.

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[83] https://www.eeoc.gov/meetings/meeting-july-21-2026.

[84] *EEOC v. Central Transport, LLC*, Complaint (Document 1), Case No. 2:26-cv-02201-JJT (D. Ariz.), filed March 31, 2026, via CourtListener/RECAP: https://storage.courtlistener.com/recap/gov.uscourts.azd.1486019/gov.uscourts.azd.1486019.1.0.pdf.

For all these reasons, EEO-1 reporting continues to serve legitimate benchmarking, diagnostic, and enforcement functions that benefit employers, the EEOC, and other federal agencies alike. Against these substantial and ongoing benefits, the NPRM offers principally a single countervailing rationale for rescission – that the reports are too costly to justify. As explained below, that burden argument does not withstand scrutiny and cannot support eliminating the EEO-1 requirement.

C. Demographic Data Remains Relevant Even Though the Government has Deprioritized Disparate-Impact Liability

The deprioritizing of disparate-impact liability does not reduce the evidentiary relevance of demographic data to claims of intentional discrimination. Federal courts have often held, and DOJ recently agreed, that agencies and private litigants may use statistical disparities, together with other evidence, to prove discriminatory intent. As a result, the EEOC's proposed elimination of EEO-1 reporting would remove a resource important to both enforcement agencies and private litigants as they seek to ensure compliance with federal discrimination law.

VII. The Burden Argument Does Not Support Rescission

The NPRM also stated that the EEO reports impose a costly burden on the Commission and the entities required to file them. Using its most recent PRA notice for the EEO-1 data collection, the Commission estimated that its cost to administer the EEO-1 would be almost $3.89 million per year[85], and the cost to private employers would be over $273 million per year.[86]

The Institute respectfully questions the framing of $3.89 million as burdensome to the EEOC, given the resources these reports save the agency, enabling it to identify discrimination, corroborate complaints, and fill gaps where employer records are missing or incomplete. Based on the EEOC's FY 2027 Congressional Budget Justification, the estimated administrative costs of the EEO-1 reporting would represent less than 1% of the total budget. Rescinding the EEO-1 would not eliminate the Commission's need for this data; it would only change how, and at what cost, the agency obtains it. If the Commission eliminates the annual report but still seeks the same demographic information during a charge investigation, it will have to gather that data employer-by-employer, case-by-case – most likely through the subpoena process, with its attendant administrative and legal costs.

The NPRM does not appear to estimate what that *ad hoc* collection would cost the Commission, nor what it would cost employers to respond to it, but both are likely to run well

[85] Notice of Proposed Rulemaking, https://www.federalregister.gov/documents/2026/07/23/2026-14937/removal-of-reporting-requirements, page 46340, Section B.
[86] *Id.*

above the cost of the current system: responding to a targeted demand after the fact, without the benefit of a standardized, largely automated annual filing, imposes a far greater per-instance cost on an employer than generating the routine EEO-1 report. Proactive annual collection is therefore materially cheaper, for the agency and for employers alike, than reactive, one-by-one collection after a charge has been filed. Any honest accounting of burden must weigh the cost the report avoids, not merely the cost it imposes. *EEOC v. Central Transport*[87] illustrates the point concretely: EEO-1 data allowed the agency to convert two individual charges into a nationwide disparity finding, resulting in the $5.5 million settlement. Without the EEO-1 reports already on file, building that same case file would have required EEOC to subpoena and reconstruct hiring records terminal-by-terminal across more than 200 locations, at a cost in time and resources the agency could not easily absorb. **A single case of this scale suggests the EEO-1 program can more than justify the cost.**

The cost savings run in the other direction as well. Consider a hypothetical: the EEOC receives a charge from a Black applicant alleging that an employer discriminated against him in hiring for Laborers and Helpers positions. Before issuing any request for information, the commissioner or investigator reviews the employer's EEO-1 filings already on file and observes that Black representation in that job category has increased steadily over the preceding several years and sits above the industry average for the same category. That data does not resolve the individual allegation, but it tells the agency that the charge does not signal a broader pattern or practice, and the Commission resolves the matter without expanding the inquiry, issuing a document demand, or subpoenaing records. Neither the agency nor the employer spends anything on data collection to reach that conclusion. Rescind the EEO-1, and the same screening decision becomes impossible without an information request: the agency must open a document demand, and the employer must compile applicant and hire data by race and job category from scratch, often with counsel involved. The cost of a single such exchange can readily exceed what that employer spends on its annual EEO-1 filing, and a handful of them can exceed what the Commission spends administering the entire program. Conversely, a commissioner's charge or a prolonged investigation initiated without aggregate data to support it imposes costs on both the agency and the employer that could dwarf the $3.89 million annual administration figure.

The Institute also questions the $273 million burden estimate to employers given our current technology-driven environment. Most HRIS platforms now have EEO-1 reporting built in. For most covered employers, generating the report is a low-cost, largely automated exercise. The Commission's own figures reinforce the point. In the May 2023 Paperwork Reduction Act notice from which the $273.1 million estimate derives, the EEOC put the number of annual EEO-1 Component 1 filers at approximately 110,000, submitting roughly 2,235,938 establishment-level

[87] *See fn. 14.*

reports each year.[88] Measured against that volume, the $273.1 million estimate amounts to an average of only about $122 per report, and the Commission further estimated that the more than 40% of filers who are single-establishment employers need just 45 minutes per year to complete the report. Interestingly, large employers have the benefit of the processing power of HRIS systems and automation, and thus an economy of scale factor should be accounted for in those cases. An employer filing 500 reports is unlikely to spend 45 minutes on each; in the Institute's experience, filing these reports, the realistic figure for multi-establishment is a few hours of total processing time, regardless of company size. Figures drawn from the agency's own analysis are difficult to reconcile with a characterization of the EEO-1 as a substantial burden to employers. Additionally, smaller employers that lack a large, automated HRIS system may not have to file at all: because the EEO-1 filing threshold is 100 employees, many are not subject to the requirement in the first place.

The genuine burden employers face is not the annual EEO-1 filing – now a largely automated exercise – but instead, the uncertainty and unpredictable costs created by the gap that rescinding a federal EEO-1 standard would leave. EEO-1 data derives much of its value not just from what it contains, but from being collected the same way, year after year, across every employer. Because it is a mandatory ***census*** of covered employers rather than a sample survey, EEO-1 provides complete, employer-specific counts rather than statistical estimates. This allows for precise drill-down to the level of an individual company, or even a specific establishment within that company, in a way no survey-based dataset can support. This has been collected in a consistent format for nearly sixty years, which makes it possible to track trends reliably over time, both within a single employer and across an entire industry or region. State-level reporting requirements now emerging in response to the proposed rescission cannot fully substitute for this: they vary in scope, thresholds, and definitions from state to state, they cover only employers operating within their borders, and they lack the decades of comparable historical data that make EEO-1 trend analysis meaningful in the first place. Compounding this, EEO-1's definitions and structures, such as what constitutes an "establishment," or how job categories are defined, have become deeply embedded reference points for other federal and state data collection efforts over the decades. Eliminating EEO-1 does not just end one report; it introduces significant uncertainty into any adjacent reporting regime that has long assumed those definitions and structures as a stable foundation.

With the patchwork of state requirements, and not having a federal requirement to point to as a means to ease burden and provide a unified report to state agencies, multi-state employers are left with the compliance burden and increased costs in trying to determine which states they must

[88] Agency Information Collection Activities: Existing Collection, 88 Fed. Reg. 27,504 (May 2, 2023) (OMB Control No. 3046-0049); see also EEOC, Supporting Statement A, OMB No. 3046-0049 (May 2, 2023), https://www.reginfo.gov/public/do/DownloadDocument?objectID=131631701.

comply with, how the reports differ across states, and thus constructing different scenarios for each state they operate in.[89]

Employers would overwhelmingly prefer a single national standard for EEO demographic reporting over 50 – or even 10 – divergent State ones. Evaluated honestly, rescinding the federal EEO-1 standard would not reduce the burden on employers; it would increase it, replacing one streamlined federal report with a fragmented and duplicative patchwork of state obligations, and thus increasing the burden for employers.

VIII. The Proposed Rescission Is Arbitrary And Capricious Under the APA

A. The Governing Standard

The Administrative Procedure Act directs reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[90] Under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co*.[91]— the governing standard for every APA challenge that follows — agency action is arbitrary and capricious if the agency:

- relied on factors which Congress has not intended it to consider;
- entirely failed to consider an important aspect of the problem;
- offered an explanation for its decision that runs counter to the evidence before the agency; or
- offered an explanation so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm's requirement of a "rational connection between the facts found and the choice made" applies with heightened force when an agency reverses a longstanding regulatory position. *FCC v. Fox Television Stations, Inc*.[92] held that while agencies need not demonstrate that the

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[89] It appears that the Administration is aware of the state patchwork conundrum. If we were to borrow from Executive Order 14365, "Ensuring a National Policy Framework for Artificial Intelligence," the President indicates, "First, State-by-State regulation by definition creates a patchwork of 50 different regulatory regimes that makes compliance more challenging, particularly for start-ups." A similar sentiment exists for employers with regards to federally de-regulated EEO reporting. Additionally, the President goes on to state, "My Administration must act with the Congress to ensure that there is a minimally burdensome national standard – not 50 discordant State ones."

[90] 5 U.S.C. § 706(2)(A).

[91] 463 U.S. 29, 43 (1983).

[92] 556 U.S. 502, 515 (2009).

reasons for a new policy are better than those for the prior one, they must at minimum "acknowledge that [they are] changing position" and provide "good reasons" for doing so — with "more than a mere reasoned explanation" required "when the prior policy has engendered serious reliance interests." The NPRM satisfies none of these requirements. It fails on at least five independent grounds, each of which is separately sufficient to require vacatur.

B. The Five Independent Grounds for Vacatur

1. The NPRM's Central Factual Premise Is Unsupported by Any Evidence in the Record

a. The NPRM Concedes It Has No Factual Foundation

The NPRM's central claim is that EEO-1 reporting "may" cause employers to engage in discriminatory conduct to achieve statistical balance.[93] As discussed fully herein, the word "may" is not incidental. It is an admission. An agency that cannot say employers "have" misused data, or "will" misuse data, or "did" misuse data in any documented case, has not found the facts that *State Farm* requires it to find before rescinding a regulatory program of this magnitude. The Institute and its members represent some of the nation's largest and most sophisticated employers. Collectively, we have filed tens of thousands of EEO-1 reports over six decades of compliance practice. We have never — not once — observed an employer using its EEO-1 report as the basis for a racial quota or hiring preference. The NPRM, which bears the burden of justification, cites no such case either. The administrative record is empty of the predicate fact on which the entire proposed rule rests.[94]

2. The NPRM Entirely Failed to Consider an Important Aspect of the Problem: Reliance Interests

a. The NPRM Is Silent on Six Decades of Reliance

[93] 91 Fed. Reg. 46332, 46338 (July 23, 2026).

[94] Prior to the revocation of Executive Order 11246, the Office of Federal Contract Compliance Programs conducted over 4,000 compliance evaluations of federal contractors annually — reviewing EEO-1 reports, applicant flow data, workforce composition analyses, and employment practices in exacting detail. Those reviews collectively covered hundreds of millions of employment decisions across the nation's largest employers. In over 4,000 such reviews conducted under the first Trump administration alone, OFCCP did not find a single contractor that had used its EEO-1 data to engage in preferential or quota-based employment practices. Not one. The agency charged with detecting that precise problem, under this administration's predecessor, looked for it systematically and could not find it. The NPRM does not acknowledge this record. Under *State Farm*, an agency that ignores the most directly relevant evidence in existence has not engaged in reasoned decision-making.

FCC v. Fox Television Stations, Inc.[95], established that when an agency reverses a longstanding policy that has engendered serious reliance interests, it must supply more than a standard reasoned explanation — it must specifically acknowledge and address those reliance interests. The NPRM does neither. In 37 pages of Federal Register text, the Commission does not use the words "reliance," "relied upon," or "dependency" in connection with any of the interests that six decades of mandatory reporting have created. That silence is not an oversight. Under *Fox Television,* it is a fatal legal defect.

The reliance interests at stake here are among the most substantial in modern administrative law. Employers have built human resources information systems, legal compliance programs, audit defense strategies, pay equity monitoring frameworks, and litigation response infrastructure around the EEO-1 framework for 60 years. Law firms have developed EEO-1-based litigation methodologies. State civil rights agencies have built enforcement programs around the assumption that EEO-1 data will be available. Ninety Fair Employment Practices Agencies (FEPA) receive EEO-1 data from the EEOC pursuant to Section 709(d) of Title VII, which makes that sharing mandatory upon their request.

b. The Data Destruction Is Permanent and Irreversible

The reliance interest argument has a dimension here that is unique among APA cases: the harm from the rescission is not merely difficult to reverse — it is impossible to reverse. The EEO-1's value as a longitudinal enforcement and research tool derives precisely from the fact that it has been collected consistently, with standardized definitions, from every covered employer, annually, for nearly 60 years. It is not a sample survey — it is a mandatory census. Once the September 30, 2026 filing deadline passes without a collection, the 2025 reporting year data is permanently lost. No injunction issued after that date can reconstruct it. No future administration can recover it. No combination of state laws can replicate the national, standardized, longitudinal dataset that would be destroyed.

c. The Rescission Violates a Congressional Mandate and Undermines States' Reliance on Federal Assistance to Enforce the Law.

Section 709(d)[96] of Title VII **requires** the EEOC to share information gathered during its investigations with state or local fair employment practice agencies (FEPA). States[97] have relied on this requirement to enable their own enforcement efforts while preventing duplicate

[95] 556 U.S. 502, 515 (2009).
[96] 42 U.S.C. § 2000e-8(d).
[97] Minnesota and New York City have stopped the dual filing of charges with the EEOC, foregoing any investigative help or federal funding from EEOC in processing charges according to *Bloomberg Law News*, August 24, 2026. (Subscription needed.).

investigations. The proposed rescission, thus, undermines a Congressionally mandated state enforcement procedure. By eliminating the data collection process, there is no way to insure that federal and state anti-discrimination agencies can coordinate efficiently.

3. The NPRM's Explanation Runs Counter to the Evidence Now Before the Agency

a. The EEOC Is Using EEO-1 Data in Live Proceedings While Arguing It Is Unnecessary

As discussed above, at the EEOC's public meeting on July 21, 2026 — the same meeting at which the Commission voted to propose this rescission — Commissioner Kotagal stated on the record that EEO-1 data showing a workforce that was nearly 100 percent Hispanic provided the evidentiary basis for the EEOC's investigation of *Vallarta Food Enterprises*[98] for race discrimination. She further noted that in *EEOC v. Central Transport, LLC*,[99] EEO-1 data enabled the agency to convert two individual sex discrimination charges into a nationwide pattern-of-practice finding, resulting in a $5.5 million settlement. Both cases are active. The EEO-1 data at issue in both cases was collected under the very regulatory provisions this NPRM proposes to eliminate.

b. The ACTS/IPEDS Contradiction Is an Unexplained Inconsistency the APA Requires the Agency to Address

The Federal Register notice for ACTS states explicitly that demographic data "may be used to identify institutions with an elevated risk of noncompliance with civil rights laws" and to support "risk-based enforcement practices."[100] That is a verbatim statement of the rationale for EEO-1 reporting. As discussed at greater length in Section V, above, the EEOC is simultaneously offering two contradictory rationales: (1) mandating collection of race- and sex-disaggregated workforce and admissions data from universities — including faculty and staff data — under Title VI, and (2) eliminating collection of race- and sex-disaggregated workforce data from private employers under Title VII, on the theory that such data is constitutionally suspect and enforcement-unnecessary. The NPRM neither acknowledges nor explains this contradiction. Under *State Farm* and the principle articulated in *Encino Motorcars, LLC v. Navarro*,[101]— that agencies must "give adequate reasons for their decisions" including when departing from established positions — an

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[98] EEOC Files Subpoena Enforcement Action Against Vallarta Food Enterprises, *EEOC Press Release,* July 7, 2025; available at https://www.eeoc.gov/newsroom/eeoc-files-subpoena-enforcement-action-against-vallarta-food-enterprises.
[99] EEOC Reaches Early $5.5 Million Resolution With Central Transport Over Nationwide Sex Discrimination in Hiring. *EEOC Press Release,* May 15, 2026; available at https://www.eeoc.gov/newsroom/eeoc-reaches-early-55-million-resolution-central-transport-over-nationwide-sex.
[100] 90 Fed. Reg. 50940, 50942 (Nov. 13, 2025).
[101] 579 U.S. 211, 222 (2016).

unexplained inconsistency of this magnitude between two simultaneous administration actions is itself a basis for finding the proposed rule arbitrary and capricious.

4. The NPRM Failed to Consider Obvious Alternatives to Wholesale Rescission

As our concluding Recommendations will discuss more fully, the legal requirements state that an agency must consider the important aspects of the problem, including obvious alternatives to the action proposed. The NPRM proposes only one option: complete elimination of all EEO reporting. In fact, the agency that considers only one option — the most drastic available — without analyzing less restrictive alternatives has not engaged in reasoned decision-making.

Under strict scrutiny's narrow-tailoring requirement and under *State Farm's* reasoned-decision-making standard alike, an agency that skips directly to the most restrictive available option without explaining why less restrictive alternatives are inadequate has not justified its choice. The NPRM's failure to engage with any alternative to complete rescission is an independent basis for vacatur.

5. The NPRM's Cost-Benefit Analysis Is Fatally Incomplete

As has been argued at length in Section VII above, the EEOC's Cost-Benefit Analysis fails at every point. Any one of these five grounds, each of which has been discussed in this Comment, would be sufficient under *State Farm* and its progeny to require a reviewing court to vacate the final rule. Together they present a rulemaking record that is, in the Institute's assessment, among the weakest evidentiary foundations for a significant regulatory rescission in the modern history of APA litigation. The Commission should withdraw the NPRM. If it does not, a reviewing court applying the arbitrary-and-capricious standard independently — as *Loper Bright*, 603 U.S. 369 (2024), now requires for questions of statutory interpretation — will almost certainly do so.

IX. The "After Public Hearing" Requirement Is an Independent Procedural Constraint

Section 709(c)[102] specifies that the Commission's regulations and orders under this section must be prescribed "after public hearing." This language is significant. Congress did not merely require the notice-and-comment rulemaking process that the APA provides as a default. It required a hearing in addition to, and separate from, notice and comment. The Institute respectfully submits that an action of this magnitude—rescinding a 60-year-old data collection program that implements a direct statutory mandate, affecting approximately 110,000 employers and 56 million workers—does not satisfy the "after public hearing" requirement that Congress wrote into Section 709(c) as a precondition for action.

[102] 42 U.S.C. § 2000e-8(c).

This interpretation is reinforced by Executive Order 12866, which requires a 60-day comment period for significant regulatory actions—defined to include any rulemaking with an annual economic effect exceeding $100 million. The NPRM's own PRA analysis estimates employer compliance costs at over $273 million annually, well above that threshold. The Commission's decision to allow only 30 days on a rulemaking of this economic magnitude is a marked departure from the Executive Branch's own standard for public participation. The Institute notes that these comments were prepared under significant time constraints and may not fully reflect all concerns that a proper public hearing process would have allowed affected parties to develop and present.

X. The Patchwork Problem: Federal Rescission Will Not Reduce Reporting, It Will Multiply It

The proposed rule frames rescission as regulatory relief, a reduction in the reporting burden the Commission imposes on employers. In practice, for the great majority of covered employers, rescission will not reduce that burden at all. It will convert one uniform federal reporting obligation into an uncoordinated set of state, local, and internal ones, each with different categories, formats, and deadlines.[103] For multi-state employers, the population EEO-1 has always covered, that is not deregulation. It is fragmentation.

A. States and Localities Already Require Substantially Similar Reporting, and More Will Follow

Several jurisdictions have not waited for the Commission to act. California, Illinois, Massachusetts, Colorado, and New York City, are among those that have established their own, different, employee reporting requirements, demonstrating the value these jurisdictions place on the collection of employee data. But existing state reporting does not make federal data collection redundant.

The Commission may respond that if California, Colorado, Illinois, Massachusetts, and New York City already collect or soon will collect this data, federal collection adds nothing, and eliminating it costs nothing net. That response does not withstand examination. None of these regimes share the others' categories, formats, or schedules, and most states contribute nothing at all. A multi-state employer cannot assemble a single national picture of its own workforce from several incompatible regional datasets and a great deal of silence. The redundancy argument would have force only if the state regimes actually replicated what the EEO-1 provides. They do

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[103] This even extends to private parties under collective bargaining agreements. *Shell Pipeline, Co., LP*, JD(SF)-15-26 (16-CA-32028 August 17, 2026) ("In situations like this one, where parties have negotiated an anti-discrimination provision into their CBA, the union has a duty to police that provision—which may require it to request information on the ethnic demographics of unit employees. Such data is presumptively relevant and employers violate the Act by refusing to furnish it, absent a valid defense.")

not, and the Commission's own proposed rule does not identify any state or combination of states that does.

Nor is the answer to this problem federal preemption of the state regimes rather than retention of the federal floor. This rulemaking is not a vehicle for preempting state or local reporting statutes, and the Commission has identified no authority, and this comment is aware of none, that would permit the EEOC to do so by rule. Indeed, the EEOC's statutory mandate is to "consult with other interested State and Federal agencies and [to] endeavor to coordinate its requirements with those adopted by such agencies."[104] The only tool actually available in this proceeding is the federal reporting requirement itself, and that requirement is the one mechanism that currently gives multi-state employers a common baseline that every one of their establishments, in every state, can be measured against in the same way. Rescinding it does not simplify the regulatory picture down to a single, preempted standard; it removes the one standard that was ever common to all fifty states, leaving the inconsistent patchwork described above with nothing to anchor it.

B. Absent a Federal Standard, Employers Will Build Their Own, and Inconsistently

The Commission's proposed rule does not eliminate the reasons employers collect workforce demographic data in the first place. Title VII's disparate-treatment and disparate-impact prohibitions, and the recordkeeping requirements at 29 C.F.R. §§ 1602.14, 1602.31, and 1602.40, none of which the proposed rule touches, will continue to require employers to track race, ethnicity, and sex data for self-audits, litigation defense, and ordinary compliance monitoring. What the EEO-1 currently provides is not the underlying need for that data; it is a common, stable definition of the categories used to organize it, the same definitions California, Colorado, Illinois, Massachusetts, and New York City have each borrowed or referenced rather than reinvent.

Remove that common definition, and employers will not stop collecting the data; they will collect it according to their own internally developed categories, each solving the same classification problem independently and at a scale, with far less drafting capacity, than any state legislature. That produces exactly the inconsistency, and the resulting difficulty of comparing any employer's data to an external benchmark, that a single federal standard was designed to prevent.

C. A Single Federal Standard Is the Lower-Burden Outcome for the Employers the Rule Claims to Protect

The proposed rule's cost-benefit analysis measures the burden of the EEO-1 in isolation, as though eliminating it is the end of the inquiry. That measure of burden may work for a single state, single establishment employer with no other reporting obligations. But the siloed assumption

[104] Section 709(d).

falls apart for the multi-state employers who make up the bulk of the EEO-1 filers, for whom the federal form has also been the one common framework around which state, local, and internal reporting has developed. Retaining a uniform national standard, even an imperfect one, minimizes compliance burden and cross-jurisdictional inconsistency for the regulated community the Commission's cost analysis is meant to protect. The patchwork described throughout this Section is not speculative: it is already forming obligations enacted around the very federal form the Commission now proposes to eliminate. The Institute respectfully submits that the Commission should weigh that reality before finalizing a rule premised on the assumption that recission simply makes the reporting obligation disappear. Retaining a uniform national standard, even an imperfect one, is the position that minimizes compliance burden and cross-jurisdictional inconsistency for the regulated community the Commission's cost analysis is meant to protect.

The Commission should not mistake the elimination of its own reporting form for the elimination of the reporting obligation; it would eliminate the only version of that obligation that was ever uniform. The state, local, and internal reporting patchwork described throughout this Part is not a speculative side effect of rescission. It is already forming, in statutes already enacted and reporting structures already built around the very federal form the Commission now proposes to eliminate. The Institute respectfully submits that the Commission should weigh that reality before finalizing a rule premised on the assumption that rescission simply makes a reporting obligation disappear.

XI. The Report is Dated but Fixable – Reform, Not Repeal

The Institute believes that while the current EEO-1 Report which was developed in 1966 may be dated, it should be revised not eliminated. Instead of eliminating the Report based on allegations that it *might* lead employers to violate Title VII, The Institute recommends that the EEOC retain the Report as is and create a task force of professionals and stakeholders to determine how to modernize the Report and eliminate unnecessary burdens.

The Institute recognizes that the Report could be simplified to reduce the burden on employers – especially small and medium-size employers. Currently the report requires establishment reports for all the establishments of an employer.[105] Similar to the framework used by OFCCP to create affirmative action plans, the requirement reflects a different era in American industry. Allowing all covered employers to submit one consolidated report covering all their employees regardless of where they are situated will eliminate unnecessary burden without reducing the usefulness of the data.

If EEOC creates a task force to provide recommendations to modernize the Report, the task force can review the current EEO-1 Job Categories and determine how to update the categories to

[105] 2024 EEO-1 Component 1 Data Collection Instruction Booklet, p. 12-14.

better fit into modern occupational structures using input from industry leaders, labor economists, I-O psychologists and other professionals. The continuing use of the current EEO-1 Report will bridge the gap until the task force can provide EEOC with recommendations as to how to keep what is useful about the Report while updating it reflect the current operations.

XII. Recommendations

Based on the foregoing analysis, the Institute submits the following recommendations to the Commission:

1. Withdraw the NPRM. The Commission should withdraw the NPRM in its entirety. The NPRM lacks the factual foundation, constitutional justification, and reasoned analysis the APA requires. It is premised on a hypothesis that has not materialized in 60 years of practice, advances a constitutional theory contradicted by the administration's own simultaneous actions, and fails to address the reliance interests, data destruction consequences, and state-law disruptions that rescission would cause.

2. Retain the EEO-1 Report in its current form pending modernization. The Commission should continue administering the EEO-1 report as currently structured while a modernization process is undertaken. The September 30 annual filing deadline should be maintained. The current form is imperfect but functional; eliminating it before any replacement is in place would irreversibly disrupt employer compliance systems, state enforcement programs, and the longitudinal data record.

3. Convene a stakeholder task force to modernize the EEO-1 Report. The Commission should establish a formal task force of employers, industrial-organizational psychologists, state civil rights agencies, labor economists, and civil rights practitioners to develop recommendations for modernizing the EEO-1 Report. The task force should address: (a) streamlining the establishment-level reporting structure to reduce burden on multi-location employers; (b) updating the 10 job categories to better reflect contemporary occupational structures; (c) evaluating the appropriate frequency of reporting; (d) aligning EEO-1 categories with updated OMB Statistical Policy Directive 15 standards; and (e) exploring optional expanded data elements, such as pay band or full-time/part-time status, that would increase the Report's utility for both employers and enforcement agencies.

4. Extend the comment period to 60 days. If the Commission proceeds with any rulemaking to modify or rescind the EEO-1 reporting requirements, it should provide a minimum 60-day comment period consistent with Executive Order 12866's requirements for significant regulatory actions — defined to include any rulemaking with an annual economic effect exceeding $100 million, a threshold the NPRM's own cost estimate of $273 million clearly satisfies. The Institute further submits that the "after public hearing" language in Section 709(c) of Title VII requires more than a notice-and-comment period alone, and that a public hearing — with an opportunity for oral testimony from employers, state agencies, practitioners, and affected workers — is a statutory precondition to any action under this provision.

5. Issue guidance clarifying the permissible uses of EEO-1 data. If the Commission is concerned that some employers may misunderstand the legal limitations on using EEO-1 data in employment decision-making, the appropriate response is guidance — not rescission. The Commission should issue clear guidance reminding employers that: (a) Section 2000e-2(j) of Title VII expressly prohibits granting preferential treatment based on statistical imbalances; (b) EEO-1data is a diagnostic tool, not a mandate for any specific employment action; and (c) using EEO-1 data as the basis for race- or sex-conscious employment decisions would itself violate Title VII.

6. Coordinate with states to ensure data continuity. Given the multiple state laws that incorporate, reference, or depend upon the continued existence of the federal EEO-1, the Commission should engage in meaningful consultation with state civil rights agencies and legislatures before taking any action that would disrupt those frameworks. Section 709(d) of Title VII requires the Commission to share EEO data with state fair employment practices agencies upon request; the Commission cannot fulfill that statutory obligation if there is no data to share.

XIII. CONCLUSION

The EEO-1 report is not an instrument of discrimination. It is an instrument of anti-discrimination. For nearly 60 years, it has given employers, enforcement agencies, state civil rights authorities, and courts the factual foundation necessary to identify, investigate, and remediate unlawful employment practices — practices that harm workers regardless of their race, sex, or national origin. The NPRM proposes to eliminate this foundation on a premise that has never been documented in six decades of practice: that employers use EEO-1 data to establish racial quotas and preferences. This is not a finding. It is a hypothesis. And it is a hypothesis that the Commission's own enforcement record — as well as the OFCCP's thousands of contractor compliance reviews before it — comprehensively refutes.

The administration cannot credibly advance this theory while simultaneously mandating expanded race- and sex-disaggregated data collection from universities through ACTS/IPEDS, justified with the identical enforcement rationale the NPRM now disavows. The Constitution does not permit asymmetric civil rights enforcement based on political convenience, and a reviewing court under State Farm will demand an explanation this NPRM does not provide.

Section 709(c) of Title VII reflects a deliberate congressional judgment that demographic recordkeeping and reporting is the foundation of Title VII enforcement. That judgment belongs to Congress, not to the agency. Unless and until Congress amends Section 709(c), the

Commission's obligation is to administer the reporting requirement Congress directed — not to dismantle it.

The Institute urges the Commission to withdraw this NPRM, retain the EEO-1 Report, and convene a stakeholder task force to modernize it. Reform is warranted. Repeal is not.

The data is not the problem. Eliminating it does not eliminate discrimination. It eliminates our ability to see it.

Thank you in advance for your consideration of the comments by The Institute. We are happy to provide any additional information you may need or to answer any questions you may have.

Respectfully,

Barbara L. Moskowitz
Director
The Institute for Workplace Equality