



August 24, 2026

SUBMITTED VIA REGULATIONS.GOV

Equal Employment Opportunity Commission

Re: Removal of Reporting Requirements, Docket No. EEOC-2026-0034 (RIN 3046-AB37)

To Whom It May Concern:

The American Civil Liberties Union Foundation (“ACLU”) submits this comment in response to the above-docketed notice (“Proposed Rule”) regarding the removal of requirements to report certain data to the Equal Employment Opportunity Commission (“EEOC”). The ACLU strongly opposes the Proposed Rule and urges the EEOC to withdraw it in its entirety.

For over 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than seven million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all fifty states, Puerto Rico, and Washington, D.C., for the right of every individual to access opportunity free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, disability, national origin, citizenship status, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction.

The ACLU has long championed the rights of workers, including the right to be free from discrimination and stereotyping that diminishes workplace opportunity for individuals simply because of who they are. Through our Women’s Rights Project, Racial Justice Program, Disability Rights Program, and LGBTQ & HIV Project, we have litigated some of the nation’s most significant cases establishing the contours of on-the-job rights, including *Frontiero v. Richardson*,¹ the first Supreme Court decision to apply heightened scrutiny to constitutional claims alleging sex-based distinctions, and *Bostock v. Clayton County*,² the landmark ruling confirming that discrimination on the basis of sexual orientation or gender identity is discrimination “because of” sex under Title VII. We have advocated, in coalition with other civil rights organizations, to enact broader statutory protections for workers since Title VII’s enactment, including the Pregnancy Discrimination Act, the 1991 Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Pregnant Workers Fairness Act. We also routinely engage in *amicus* and agency advocacy opposing policies that perpetuate historical workplace disparities, stereotypes that dictate the jobs for which people are deemed “naturally” suited, and legal frameworks that take insufficient account of the myriad ways bias infects the workplace. We also are at the forefront of litigation and policy advocacy

¹ 411 U.S. 677 (1973).

² 590 U.S. 644 (2020).

addressing modern forms of discrimination, such as biased targeting of online job advertisements and AI-driven selection tools.

The Proposed Rule aims to entirely rescind the requirements for employers to file EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports as well as the recordkeeping and record preservation requirements related to those reports.³ The vast quantities of data these reports collect—reflecting workforce demographics at the nation’s largest employers, its government contractors, joint apprenticeship programs, labor unions, state and local government bodies, and public elementary and secondary education entities—is integral to the EEOC’s law enforcement mandate under Title VII. That the entity charged by Congress with rooting out workplace discrimination is seeking to know less, not more, about systemic disparities facing U.S. workers constitutes nothing less than an abdication of duty. Eliminating or weakening the reporting requirements will severely curtail an important tool for preventing and investigating employment discrimination and reflects this administration’s abandonment of evidence-based frameworks for assessing the nature and extent of discrimination under Title VII.

Accordingly, the ACLU strongly opposes the Proposed Rule⁴ for several reasons. The Proposed Rule ignores the reports’ proven utility in protecting workers from discrimination over decades, relies on unfounded allegations of misuse of the data, misinterprets equal protection law, fails to consider regulatory alternatives, and leaves employers confused as to what data collection obligations remain if the rule were to take effect. For these reasons and more, the Proposed Rule must be withdrawn.

I. The Proposed Rule Ignores that the Reported Data is Critical to Protecting Workers from Discrimination.

Congress recognized that collection of workforce data is part and parcel of the mission to identify and remedy employment discrimination. In Section 709(c) of Title VII, it codified the obligation of employers and other entities bound by the statute to maintain such data and empowered the EEOC to collect reports from that data. 42 U.S.C. § 2000e-8(c). In furtherance of this mission, in 1966—during its first year of operation—the EEOC adopted the EEO-1 report,⁵ a foundational tool in assuring compliance with Title VII. The report requires employers of 100 or more employees to annually report data on the job categories, race/ethnicity, and sex of their employees.⁶ In subsequent years, the EEOC extended the reach of its data collection, creating the EEO-2 (reporting requirements for joint labor-management apprenticeship programs), EEO-3 (reporting requirements for local referral unions), EEO-4 (reporting requirements for state and

³ Removal of Reporting Requirements, 91 Fed. Reg. 46332 (July 23, 2026) (hereinafter, “Proposed Rule”).

⁴ While this comment primarily focuses on concerns regarding the proposed rescission of the EEO-1 reporting and record keeping requirements, we also oppose the proposed rescission of the requirements regarding the EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports.

⁵ Employer Reporting and Record-keeping Requirements, 31 Fed. Reg. 2832 (Feb. 17, 1966).

⁶ See 29 C.F.R. 1602.7. The seven race and ethnicity categories are Hispanic or Latino; White; Black or African American; Native Hawaiian or Other Pacific Islander; Asian; American Indian or Alaska Native; and Two or More Races. The ten job categories 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.

local governments), EEO-5 (reporting requirements for elementary and secondary schools), and EEO-6 (reporting requirements for higher education institutions).

Despite Title VII’s 62-year history and subsequent enactment of additional statutory anti-discrimination protections, it is undeniable that significant disparities remain in the U.S. workforce. Among them, statistics confirm that across virtually every work setting, Black and brown workers and women remain disproportionately segregated in lower-level, lower-paid job categories, while white men disproportionately hold higher-paid, higher-status roles.⁷ To name just one recent study, Black workers with a college degree, regardless of gender, were found more likely than white comparators to be employed in “middle wage” jobs, like human resources, accountant, and customer service representative.⁸ Although women—of all races—outpace men in college graduation,⁹ they consistently lose ground upon entering the workforce. Research published in the Harvard Business Review found, for instance, that while women represent 48 percent of workers at the entry-level of the corporate workforce, beginning with the first promotion opportunity to a managerial level, they disproportionately fail to advance—the “broken rung” syndrome—and lose representation at each successive rung of the ladder: at senior manager/director level (37 percent), then vice president (34 percent), and senior vice president and above (29 percent).¹⁰ For women of color, the lost ground after college graduation is even starker; collectively, they comprise just 7 percent of top executives.¹¹ Workforce segregation also is sector-specific and reflects patterns entrenched by decades of facial discrimination. For example, women, unsurprisingly, are grossly underrepresented in STEM fields, including in high-paying jobs that do not require a college degree, such as manufacturing and construction jobs—statistics that are even grimmer for Black women and Latinas.¹²

Moreover, research consistently finds that discrimination remains a key driver of these inequities—both at the “macro” level of company-wide policies relating to employee selection, performance evaluations, opportunities for advancement, and promotion, and the “micro” level of individual decision-making.¹³ And indeed, the EEOC’s own statistics of charge filings, litigation, and recovery for workers confirm that systemic discrimination unfortunately remains widespread among employers in every sector. For instance, the agency saw a nearly 10 percent increase in new charges in FY24 over the prior year; of the total charges for the year, those

⁷ See, e.g., Marina Zhavoronkova, Rose Khattar, and Mathew Brady, *Occupational Segregation in America*, Center for American Progress (Mar. 29, 2022), figs. 1 & 2, <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

⁸ Ashley Jardina, Peter Q. Blair, Justin Heck, and Papia Debroy, *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers*, National Bureau of Economic Research Working Paper Series, Working Paper 31641 (Aug. 2023), <https://perma.cc/CD68-JD4F>.

⁹ Kiley Hurst, *U.S. Women are outpacing men in college completion, including in every major racial and ethnic group*, Pew Research Center (Nov. 18, 2024), <https://perma.cc/32R5-W5TM>.

¹⁰ Kweilin Ellingrud, Lareina Yee, and Maria del Mar Martínez, *How Women Can Win in the Workplace*, Harvard Bus. Rev. (Mar.-Apr. 2025), <https://perma.cc/3UGU-RBHS>.

¹¹ *Id.*

¹² Rose Khattar, *Expanding Women’s Access to Male-Dominated Jobs*, Center for American Progress (Mar. 14, 2024), <https://www.americanprogress.org/article/playbook-for-the-advancement-of-women-in-the-economy/expanding-womens-access-to-male-dominated-jobs/>.

¹³ See, e.g., Zhavoronkova, *et al.*, *Occupational Segregation in America*, *supra* n.7; Cailin S. Stamarski and Leanne S. Son Hing, *Gender inequalities in the workplace: the effects of organizational structures, processes, practices, and decision makers’ sexism*, *Frontiers in Psychology* (Sept. 16, 2015), <https://perma.cc/Y273-5CN4>.

alleging harassment comprised roughly 40 percent, race discrimination comprised roughly 34 percent, and those alleging sex discrimination comprised roughly 30 percent.¹⁴ It secured almost \$700 million in recovery—the highest amount in recent history—on behalf of more than 20,000 workers.¹⁵ Its new litigation filings for the year included 52 lawsuits alleging sex discrimination, 15 alleging race discrimination, and 6 alleging national origin discrimination.¹⁶

Plainly, discrimination and the inequities it causes in workers’ lives have not been eradicated, and the EEOC continues to see their effects. Thus, the EEOC’s role as chief law enforcement officer for workers has never been more vital. As discussed in further detail below, the data yielded by the EEO-1 and other reports is pivotal to the agency’s fulfillment of that role. It also is crucially important to employers themselves, state and local enforcement agencies, and the public to identify, study, and fight discrimination. The Proposed Rule is conspicuously silent about these myriad benefits.

A. The EEOC Uses the Reports to Investigate Discrimination, Issue Reports Identifying Barriers to Employment, and Efficiently Use its Limited Resources.

Most obviously, the reports allow the EEOC to investigate individual charges of discrimination, particularly those that allege systemic bias. But they also support issuance of Commissioner’s charges and directed investigations, which help protect workers who are unable or unwilling to report discrimination for any number of reasons, such as language barriers, lack of resources, or fear of retaliation. The data from the reports provide a vital window into an employer’s operations, from recruitment and hiring to training and promotion. The demographics of an employer’s workforce—which can reflect not only who is hired, but who decides to leave—also may reflect other terms and conditions of employment, such as whether the employer maintains a harassment-free environment and equitable compensation policies. In sum, data about who is and isn’t working for a given employer, and at what level in the employer’s hierarchy, can bring forward disparities that may be attributable to pattern-or-practice discrimination, disparate impact discrimination, or both. Such data can be especially valuable to identify discrimination that is less visible to workers themselves, like applicants who may chalk up a job rejection to better competition, rather than an employer’s reliance on biased artificial intelligence (“AI”) software or a policy barring new hires with low credit scores.

The data is also used to help identify barriers to equal employment opportunity that otherwise might go undocumented. For example, in 2024, the EEOC analyzed report data from 2014 to 2022 and issued a report highlighting disparities in the number of women, Black workers, Hispanic workers, and older workers working in the high tech sector.¹⁷ The report

¹⁴ *Enforcement and Litigation Statistics*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0> (last visited Aug. 24, 2026).

¹⁵ U.S. Equal Employment Opportunity Commission, *2024 Annual Performance Report* (Jan. 17, 2025), at 11, <https://perma.cc/73EB-H4PQ>.

¹⁶ *Id.* at 39.

¹⁷ U.S. Equal Employment Opportunity Commission, *High Tech, Low Inclusion: Diversity in the High Tech Workforce and Sector, 2014-2022*, <https://perma.cc/U6BK-28NV>.

concluded that “[t]he magnitude of the underrepresentation [for some demographic groups], particularly for female and Black workers, along with research and the EEOC’s experience enforcing anti-discrimination laws suggest that discrimination contributes to the relatively low employment of women, Black workers, Hispanic workers, and older workers.”¹⁸ It then recommended that high tech workers “take active steps to address the *barriers* that limit employment” for these groups.¹⁹

These reports provide the data that is a critical starting point to identifying and addressing barriers to equal employment opportunity. No one should be denied a job or a chance to advance in the workplace because of factors unrelated to merit or job performance. Rescinding these reporting requirements will only make it more difficult to identify such barriers, and in turn will make it easier for employers to engage in discriminatory practices.

The reports also help focus the EEOC’s limited resources. As the Proposed Rule points out, the EEOC “is a small agency with a small budget” and has “very tight margins,” particularly recently, given that Congress has not funded the EEOC to the levels requested in its budget requests.²⁰ Given that the workforce has grown over time, more charges of discrimination are filed, and there are new civil rights laws to enforce, the EEOC must be “incredibly strategic and fiscally prudent” when it comes to its activities.²¹ It goes without saying that the EEOC should thus prioritize actions that fulfill its mission of “[p]revent[ing] and remedy[ing] unlawful employment discrimination and advanc[ing] equal opportunity for all.”²² And the EEO reports do just that. By providing data that can show where discrimination might be occurring, the reports give the EEOC a more targeted starting point for investigation, rather than having to start from scratch with each new charge filing. This saves incalculable time and resources.

B. Employers Use the Reports to Identify Barriers to Employment, Promote Transparency, and Ensure Compliance with Employment Laws.

In addition to the EEOC’s use of the EEO-1 and other reports, employers themselves find the reports useful,²³ which the Proposed Rule ignores. For example, just as demographic data can signal to the EEOC that a given entity is engaging in policies and practices that hinder equal opportunity, such statistics are similarly informative for employers in exposing patterns that they otherwise might overlook—which, among other harms, exposes them to potential liability. Collecting such data²⁴ is especially helpful in identifying the disparities imposed by putatively neutral policies. Over 50 years ago, in 1971, the Supreme Court recognized in *Griggs v. Duke Power Company* that Congress “directed the thrust of [Title VII] to the *consequences* of

¹⁸ *Id.* at 37.

¹⁹ *Id.* (emphasis added).

²⁰ 91 Fed. Reg. 46339.

²¹ *Id.*

²² *Overview*, U.S. Equal Employment Opportunity Commission, <https://perma.cc/G9JK-9Q9T> (last visited Aug. 20, 2026).

²³ Indeed, the Center for Workplace Compliance, which works with employers, spoke to these benefits while testifying in opposition to the Proposed Rule at the public hearing. See *CWC Urges EEOC To Preserve Employers’ Ability To Use Demographic Data For Compliance*, CWC (Aug. 12, 2026), <https://perma.cc/5V74-E5BZ>.

²⁴ It is unclear whether employers will still be required to collect the data if the reporting requirements are rescinded. See *infra* Section IV.

employment practices, not simply the motivation,” and held that Title VII protected against “employment procedures or testing mechanisms that operate as ‘built-in headwinds’” for protected groups when those procedures or mechanisms are “unrelated to measuring job capability.”²⁵ This type of discrimination has come to be known as “disparate impact liability.” Congress codified these federal protections into Title VII in 1991.²⁶

Employers are thus familiar with this aspect of Title VII and have been required to follow it for decades, including by taking proactive steps to protect against disparate impact liability. And disparate impact liability is an effective tool for rooting out discriminatory policies and practices that further entrench existing disparities in the workplace, such as arbitrary credit checks, or rigid schedule tracking and poor access to restroom facilities that can disadvantage pregnant women, women in historically male-dominated jobs like construction, and women driving delivery routes. The aggregate data provided by the EEO-1 and other reports can identify the discriminatory effects of these facially neutral policies and practices that can easily go undetected.

The current administration has wrongly argued that disparate impact liability under Title VII should not exist,²⁷ arguments which the Proposed Rule embraces.²⁸ But the EEOC cannot unilaterally overturn Title VII’s express terms, or decades of precedent establishing disparate impact liability. This would constitute an illegal attempt to impose the executive branch’s policy priorities over congressionally-established protections. Under the law as it stands, employers still must take steps to prevent disparate impact liability.²⁹ The data in the EEO-1 reports is often a critical starting point for assessing compliance, as it can reveal disparities that may or may not be legally justified. Without these reports, employers who do not voluntarily choose to collect the same data will be more vulnerable to potential legal action, as it will be more difficult for them to take preventative measures to avoid liability.

Further, some employers, including Google, Amazon, and Facebook, have previously disclosed the reports to the public themselves to promote transparency around hiring.³⁰ This accountability measure will be less likely to occur if the reporting requirements are rescinded, especially since the Proposed Rule wrongly suggests that the mere collection of this data risks stereotyping and discriminatory misuse, which may discourage employers from even voluntary collection of this data.

²⁵ 401 U.S. 424, 432 (1971) (emphasis added).

²⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3), 105 Stat. 1071 (1991).

²⁷ See *Constitutionality of Disparate-Impact Liability Under Title VII*, 50 Op. O.L.C. (June 9, 2026), <https://perma.cc/K8JZ-52H4>.

²⁸ 91 Fed. Reg. 46338.

²⁹ See Democracy Forward, *et al.*, The Office of Legal Counsel’s Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII”: What You Need to Know (July 28, 2026), <https://perma.cc/GT7S-SYVD>.

³⁰ Davey Alba, *Amazon Joins Google and Facebook in Exposing Tech’s Gender Gap*, Wired (Oct. 31, 2014), <https://perma.cc/C39S-227T>.

C. State and Local Agencies, the Public, and Individuals Use the Reports for Investigations and Accountability.

The reports are also valuable to state and local agencies and the public. Fair Employment Practice Agencies (“FEPAs”) are state and local agencies that enforce state and local anti-discrimination laws that may differ from federal law. FEPAs use the reports for their own enforcement efforts, but will now have to start from scratch in their investigations. This will make their enforcement less efficient and less effective, as they will have to rely on complaints, which workers are often hesitant to file for myriad reasons, and the report data that might validate those complaints will not be readily available from employers.

Further, the reports are an important source of public information. The aggregated data is published for the public, allowing journalists to hold industries accountable and researchers to use the data to identify and report on trends across industries.³¹ For example, Donald Tomaskovic-Devey, the Co-Director of the Center for Employment Equity at the University of Massachusetts Amherst, testified at the public hearing regarding this Proposed Rule about the importance of the reports to the Center’s work analyzing discrimination over time.³² The reports allowed the Center to identify that racial and gender segregation in lower-paying jobs is the primary source of pay inequality that remains today, among other trends.³³

The reports and data are particularly important now, given the proliferation of AI tools in the workplace. Employers are broadly using automated tools in virtually every stage of the employment process, from recruiting and hiring to managing and surveilling employees, including for key decisions such as setting hours, promotion, compensation, discipline, and termination. These tools carry a risk of amplifying existing discrimination in employment and are far less transparent than traditional employment processes, making it harder for workers to know when discrimination has occurred.

For example, many of these tools are trained on data that reflect existing institutional and systemic biases in the workplace, such as hiring tools trained on an employer’s existing staff. The correlations that AI tools rely on in decision-making are often proxies for race, gender, disabilities, and other protected characteristics and are not necessarily job-related.³⁴ Worse, workers may not even know that such tools are being used, much less *how* they work or that their decisions are discriminatory. Existing civil rights laws apply with equal force to the use of AI tools, but the black box nature and complexity of AI tools makes discrimination harder to detect. That makes the reports particularly critical.

³¹ EEO-1 (Employer Information Report) Statistics, <https://perma.cc/NTS7-SRAJ>.

³² See Donald Tomaskovic-Devey, *Testimony before the EEOC*, LINKEDIN (Aug. 14, 2026), <https://perma.cc/KCH4-KJQM>.

³³ *Id.*

³⁴ See Olga Akselrod, *How Artificial Intelligence Might Prevent You From Getting Hired*, ACLU (Aug. 23, 2023), <https://perma.cc/CJF5-UAQN>; Olga Akselrod, *How Artificial Intelligence Can Deepen Racial and Economic Inequities*, ACLU (July 13, 2021), <https://perma.cc/9577-B3EX>.

D. Labor Organizations and Public School Districts Show Equally Entrenched, Continued Disparities by Race, National Origin, and Sex.

The other current EEO reports that the NPRM proposes eliminating—the EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6—are equally invaluable in identifying the full range of discriminatory policies and practices causing workforce segregation in myriad sectors.³⁵ For instance, while labor unions in the skilled trades and the joint labor-management apprenticeship programs that supply them are well-worn routes to economic security—particularly for workers of color, who disproportionately populate the ranks of the low-wage sectors like retail, hospitality, and caregiving—it is well-established those benefits are not equally available to all, due at least in part to bias and harassment.³⁶ In public schools, where women constitute the vast majority of the teaching workforce, the demographics of that group skew exceptionally white.³⁷ Moreover, despite women’s overrepresentation among teachers, they are vastly underrepresented among leaders, like principals and school district superintendents.³⁸ And as is the case with respect to virtually all other workplace metrics, workers of color are excluded from those higher ranks—women of color to the greatest extent.³⁹

In sum, willfully ignoring the magnitude of persistent inequality facing U.S. workers is a wrongheaded approach for ending it. Demanding that all sectors regularly report demographic data to the EEOC is essential to identifying, and addressing, the causes of these disparities. The Proposed Rule entirely fails to account for the many uses and benefits of this reporting.

II. The EEOC’s Assertions about Potential Misuse of the Data are Unfounded.

The EEOC concludes that it must stop collecting demographic data because the data “may be subject to misuse” in the form of employers responding to disparities in the reports by illegally using race or sex as a factor in individual employment decisions.⁴⁰ But it offered no examples of any employers that had made illegal race- or sex-based hiring or promotion decisions based on the information gathered through these reporting requirements in the 60 years that they have been in place. Indeed, the EEOC has previously offered guidance on how employers can avoid such potential misuse of demographic data, such as by keeping it separate

³⁵ While the EEO-2 and EEO-6 reports have not been collected in recent years, the data would still be valuable in showing these disparities.

³⁶ See, e.g., Maegan Godoy, *The Importance of Youth Apprenticeships for Women of Color*, New America (Apr. 1, 2026), <https://perma.cc/G24E-92TM>; Paul Solman and Lee Koromvokis, *Black Americans and Women Continue to Face Discrimination in the Skilled Trades*, PBS Newshour (Mar. 12, 2021), <https://perma.cc/LC9S-2NM3>; Angela Hanks, Annie McGrew, and Daniella Zessoules, *The Apprenticeship Wage and Participation Gap*, Center for American Progress (July 11, 2018), <https://perma.cc/2P3X-RWCZ>.

³⁷ Katherine Schaeffer, *Key Facts About Public School Teachers in the U.S.*, Pew Research Center (Sept. 24, 2024), <https://perma.cc/9Z7V-5MGS>; Tom Glass, *Where Are All the Women Superintendents?*, School Administrator Magazine (June 17, 2010), <https://perma.cc/Q2CZ-97EE>.

³⁸ Vicki Phillips, *Women in School District Leadership: Rarer Than You Think*, Forbes (Mar. 17, 2023), <https://perma.cc/3DKS-2G44>.

³⁹ See, e.g., Jennifer Igbonoba, *Women, People of Color Still Underrepresented in Superintendent Ranks*, Education Week (July 15, 2025), <https://perma.cc/2MMG-M6V2>; Lauren P. Bailes and Sarah Guthery, *Analysis: New Study of the Principal Pipeline Shows Women, African Americans Wait Longer, Are Promoted Less Often Than White Men*, The 74 (June 23, 2020), <https://perma.cc/9C4T-CMHQ>.

⁴⁰ 91 Fed. Reg. 46338.

from job applications and personnel files and not sharing it with those making employment decisions, has been effective.⁴¹ In any event, the Proposed Rule does not even attempt to balance this speculative concern about data misuse against the various benefits of continued reporting to the EEOC's operations, to employers, to states and localities, and to the public as a whole.

Moreover, the EEOC's contention that simply collecting demographic data somehow perpetuates stereotypes seems to confuse cause and effect. If a workplace audit reveals that women are clustered in certain positions like those involving sales and customer service and underrepresented in other roles, like upper management or technician positions, these statistics are not causing or creating stereotypes. Rather, they may simply be reflecting the practical effects of decisionmakers' stereotyped assumptions about whether a particular male or female job applicant would be a "good fit" for a particular role. Of course, other causes could also contribute to the overrepresentation of women in some job categories and their underrepresentation in others, such as societal discrimination affecting what educational and training opportunities women pursue and what jobs they apply for. Still, a particularly stark pattern of job segregation in the EEO-1 data for one employer compared to the average in the same industry could prompt that employer to engage in further self-assessment of what internal policies or biases might be causing that effect. Thus, this data can serve as a useful tool for revealing the effects of stereotypes, but the statistics themselves do not stereotype.

III. The EEO Reports Do Not Raise Equal Protection Concerns.

In addition to the unfounded claims of data misuse, the Proposed Rule makes the unprecedented and alarming argument that data collection itself, in the absence of a charge of discrimination, violates the Equal Protection Clause.⁴² This is a fundamental misunderstanding of equal protection law that must be corrected.

To make this argument, the EEOC, relying primarily on Justice Thomas's concurrence in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 257 (2023) ("*SFFA*"), argues that the data collection requires the adoption of race-based classifications, which would trigger strict scrutiny.⁴³ But racial classifications only trigger strict scrutiny "when the government distributes burdens or benefits on the basis of individual racial classifications,"⁴⁴ not any time the government simply *acknowledges* someone's race. It is only "*preference[s]* based on racial or ethnic criteria" that receive strict scrutiny.⁴⁵ For example, in *SFFA*, it was the use of race as a factor in deciding whether to admit students that triggered strict scrutiny,⁴⁶ not the fact that the schools collected data about race at all. Here, the collection of data in the EEO reports neither distributes burdens or benefits nor imposes preferences based on race. It does not, as the EEOC baldly asserts, choose "winners and losers."⁴⁷ It simply captures

⁴¹ EEOC Informal Discussion Letter, Oct. 15, 2008, <https://perma.cc/QQ9V-49DX>.

⁴² 91 Fed. Reg. 46334–39.

⁴³ 91 Fed. Reg. 46335.

⁴⁴ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

⁴⁵ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (quoting *Fullilove v. Kluznick*, 448 U.S. 448, 491 (1980)) (emphasis added).

⁴⁶ *SFFA*, 600 U.S. at 208.

⁴⁷ 91 Fed. Reg. 46339 n.14.

data about employers' workforces at a particular time to facilitate investigation and enforcement of anti-discrimination laws. It is thus exactly like the collection of Census data, which has been upheld as constitutional.⁴⁸ EEO report data, like Census data, is merely "demographic data . . . [that the government needs] in order to govern."⁴⁹ Thus, the reports do not trigger strict scrutiny and need not be justified by a compelling interest and narrow tailoring.⁵⁰

The EEOC also asserts that "the bulk of the EEO Reports' data is not relevant to determining whether unlawful employment practices have occurred" in the absence of a charge of discrimination.⁵¹ This is simply wrong. Title VII permits the collection of reports that are "*relevant* to the determinations of whether unlawful employment practices have been or are being committed."⁵² The reports are *always* relevant to that determination because they either help confirm that no unlawful employment practices are taking place or provide evidence that unlawful employment practices might be occurring. It simply cannot be the case that the data are only relevant when unlawful practices are occurring, as the Proposed Rule suggests. This would be like saying that evidence in a criminal case is only relevant if it proves the prosecution's case. This incoherent and dangerous reading of the statute must be corrected.

Further, the Proposed Rule's approach of eliminating reporting because of alleged inconsistencies with equal protection doctrine is itself inconsistent with this administration's approach to data collection across other agencies. For example, just last year, the Department of Education announced proposed changes to *expand* the collection of race and sex data regarding selective student admissions from institutes of higher education.⁵³ There, the Department of Education attempted to justify that expansion of data collection by pointing to *SFFA*, the Equal Protection Clause, and Title VI.⁵⁴ How can it be that *SFFA* and the Equal Protection Clause both support expanded data collection for the Department of Education and make the EEOC's data reporting requirements unconstitutional? The administration cannot have it both ways, and indeed, the reasoning that both agencies assert to justify their opposing positions is flawed.⁵⁵ Regardless, the administration's inconsistent approach is concerning.

Lastly, the Proposed Rule wrongly suggests that the reports "potentially conflict with" the Supreme Court's decision in *Ames v. Ohio Department of Youth Services* because they "focus[] attention on 'minority' employees."⁵⁶ This too is a severe misinterpretation that must be corrected. The Supreme Court in *Ames* narrowly held that individuals of a "majority-group" need not satisfy any *heightened* standard to establish a *prima facie* case of discrimination under Title

⁴⁸ See *Morales v. Daley*, 116 F. Supp. 2d 801, 815 (S.D. Tex. 2000).

⁴⁹ *Id.* at 814.

⁵⁰ In a footnote, the EEOC attempts to extend these arguments to the collection of sex data, arguing that such collection triggers and fails intermediate scrutiny. 91 Fed. Reg. 46335 n.9. Because the collection of sex data similarly does not involve classifications distributing burdens, benefits, or constitute preferences, intermediate scrutiny would not be triggered, and the data collection does not violate the Equal Protection Clause.

⁵¹ 91 Fed. Reg. 46339.

⁵² 42 U.S.C. 2000e-8(c) (emphasis added).

⁵³ Department of Education, Agency Information Collection Activities; Comment Request; Integrated Postsecondary Education Data System (IPEDS) 2024–25 Through 2026–27, 90 Fed. Reg. 39384.

⁵⁴ 90 Fed. Reg. 39385.

⁵⁵ See, e.g., ACLU Comment, <https://perma.cc/L8PV-75GA> (opposing Department of Education's proposal to expand data collection); ACLU Second Comment, <https://perma.cc/UA3D-UY4Z> (same).

⁵⁶ 91 Fed. Reg. 46336.

VII.⁵⁷ Rather, all plaintiffs are subject to the same standard, as has been the EEOC’s practice. But no heightened standards come into play in the EEO reports—the EEO reports treat all data about race identically—so *Ames* is simply inapposite. The reports collect data on white employees and other groups alike and nowhere refer to minority or majority-groups. The Proposed Rule’s thin arguments here do not support the proposed rescission.

In all, the EEOC’s deeply flawed reasoning here, if finalized, certainly falls short of the reasoned decisionmaking required by the Administrative Procedure Act (“APA”).

IV. The Proposed Rule Improperly Forgoes Consideration of Regulatory Alternatives.

Under the APA, agencies are required to consider “reasonable alternatives” as part of the requirement to engage in “reasoned decisionmaking.”⁵⁸ The EEOC has not done so here.

Throughout the Proposed Rule, the EEOC points to the fact that the categories for race and ethnicity and procedures for collecting that data have changed over time to argue that the categories are arbitrary, justifying this rescission.⁵⁹ What the EEOC misses here is that these modifications were implemented to *improve* data collection by better reflecting the complex nature of our multiracial society, such as by increasing the number of racial categories from four to seven and creating a category of “more than one race” to capture employees that identify with multiple racial categories.

The EEOC now proposes to *abandon* data reporting because the categories are not perfect. Instead, the EEOC should work with other stakeholders inside and outside of government to continue refining the categories to better reflect the realities of modern workplaces. But the Proposed Rule does not consider this option. This failure to consider regulatory alternatives flouts the APA’s requirements.

V. The Proposed Rule Creates Confusion for Employers.

The Proposed Rule also creates an uncertain regulatory landscape by removing much of the regulatory framework that Congress instructed the EEOC to create when it mandated employer recordkeeping in 42 U.S.C. § 2000e-8(c). That statutory provision, which remains in effect, requires employers to “make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed,” but the definition of which records are considered relevant to that question is not set forth in the statute itself.⁶⁰ Rather, Congress deferred that question to be answered by the EEOC “by regulation or order,

⁵⁷ *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 305–06 (2025).

⁵⁸ *See Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010); *see also Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agency to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (internal quotation omitted).

⁵⁹ *See, e.g.*, 91 Fed. Reg. 46336–38.

⁶⁰ 42 U.S.C. § 2000e-8(c).

after public hearing,” based on what the EEOC considered “as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.”⁶¹

By proposing to remove most recordkeeping, preservation, and reporting requirements from the regulations at 29 C.F.R. Part 1602 without replacing them with anything, the EEOC has left employers without any guidance about what relevant records they should be keeping or for how long. If the EEOC seeks particular demographic data in investigating a charge, or if a plaintiff seeks demographic data in subsequent litigation, it will then be for a court to determine whether the data at issue is relevant and must be produced in resolving a subpoena enforcement or discovery dispute. If the court requires production of the contested records, the employer may have to retroactively reconstruct the records if it has not been keeping them as a matter of course. And there will no longer be a standard way to collect, maintain, and produce that data, making it harder for the EEOC and litigants to analyze it and decreasing its utility.

Thus, while the Proposed Rule touts cost savings to employers, the chaos that will result from removing the standardized data collection and reporting regime that Congress created in 42 U.S.C. 2000e-8, and that has been implemented for 60 years through the EEO reporting requirements and related regulations, may prove quite costly indeed for employers. The failure to consider these costs is arbitrary and capricious under the APA.

VI. Conclusion

For these reasons, the ACLU opposes the Proposed Rule and urges the EEOC to withdraw it in its entirety. If you have any questions regarding this comment, please contact Alexis Alvarez, Staff Attorney with the ACLU’s Racial Justice Program, at AlexisA@aclu.org.

Sincerely,

The American Civil Liberties Union Foundation

⁶¹ *Id.*