Do No Harm

August 21, 2026

Submitted via the Federal eRulemaking Portal (www.regulations.gov)

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131 M Street NE, Washington, DC 20507

Re: Comment in Support of the Proposed Rule, *Removal of Reporting Requirements*, 91 Fed. Reg. 46,332 (July 23, 2026); RIN 3046-AB37; Docket No. EEOC-2026-0034

Do No Harm is a nonprofit organization with over 50,000 members, including physicians, nurses, medical students, patients, and policymakers. Do No Harm is committed to ensuring that the practice of medicine is driven by scientific evidence and merit rather than ideology. We write in strong support of the Commission's proposal to rescind the EEO-1 through EEO-6 reports.[1]

For sixty years the federal government has required American employers to sort their workers by race and file the numbers. The practice is old enough to feel inevitable, but it is not. These reports exceed what Title VII authorizes, they cannot survive strict scrutiny, they cost more than a quarter of a billion dollars a year, and they corrode the merit principle on which American medicine and American business depend.

I. The reports are inconsistent with equal employment opportunity law.

Title VII does not command the EEO Reports; it permits the Commission to require reports that are "reasonable, necessary, or appropriate for the enforcement of" the Act.[2] That is a ceiling, not a floor, and the Commission rightly acknowledges that nothing obliges it to collect this data at all.[3] So the question is not whether the Commission may stop but whether it may lawfully continue.

Roughly 110,000 employers file EEO-1 reports every year, producing some 2.2 million filings.[4] The overwhelming majority of them face no charge of discrimination in any given year. For those employers,

[1] Removal of Reporting Requirements, 91 Fed. Reg. 46,332 (proposed July 23, 2026)(to be codified at 29 C.F.R. pt. 1602)[hereinafter NPRM].

[2] 42 U.S.C. § 2000e-8(c).

[3] NPRM, 91 Fed. Reg. at 46,334 ("The Commission is not required to impose these reporting requirements on regulated entities . . . .").

[4] *Id.* at 46,342 (estimating approximately 110,000 EEO-1 filers submitting 2,235,938 reports annually).

the annual racial tally is not enforcement but a census — and Congress never authorized the Commission to take a census of the American workforce by race.

There is a deeper problem. Title VII makes it unlawful for an employer to "classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race."[5] The Commission has long read that provision as the foundation of disparate-impact liability, reaching practices that are facially neutral and adopted with no intent to discriminate at all.[6] Yet the EEO Reports require every covered employer to put every employee in a racial box—if § 703(a)(2) forbids anything, it certainly forbids this. A regulation compelling what the statute prohibits cannot be "appropriate for the enforcement" of that statute. We urge the Commission to add this ground to the final rule: it would let a reviewing court sustain the rescission without reaching the Constitution.

The Commission's own practice makes the tension plain. It warns employers that asking an applicant's race is evidence of discriminatory intent — and in the same breath requires them to record the race of everyone they hire.

Two further features give the game away. First, the reports were built on the minority-versus-majority framework the Supreme Court rejected in *Ames v. Ohio Department of Youth Services*, which held that Title VII protects every individual without regard to membership in a minority or majority group.[7] Second, Title VII protects five characteristics; the reports capture two. They have never captured religion, and the Commission has never required reporting on disability, genetic information, or pregnancy despite holding the authority to do so.[8] If mass demographic reporting were genuinely necessary to enforce the antidiscrimination laws, that gap would be inexplicable.

Consider what the omission implies. If the Commission proposed tomorrow that every employer with 100 workers file an annual count of its Jewish, Muslim, and Catholic employees, broken out by job category, the proposal would be recognized at once as intolerable — not because the count would be useless, but because compiling it is itself the injury. It is not obvious why a federally compelled inventory of an employer's Black, Asian, and Hispanic employees stands on different ground. The Commission should say so.

II. The reports are probably unconstitutional.

Federal racial classifications receive strict scrutiny.[9] The government cannot escape this heavy standard of review by conscripting private parties to do the classification. As Justice Scalia observed in Ricci, a government forbidden to discriminate by race is surely also forbidden to enact laws mandating

[5] 42 U.S.C. § 2000e-2(a)(2).

[6] *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Dan Morenoff, *Title VII's Classification Bar: Section 2(a)(2), Disparate Impact, and EEO-1s*, 3 J.L. & Civ. Governance (forthcoming 2026) (manuscript at https://jlcgtamu.com/wp-content/uploads/2026/07/morenoff-article_forthcoming-2026.pdf).

[7] *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 309-10 (2025); *see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

[8] 42 U.S.C. § 2000e-2(a); *see id.* § 12117(a) (ADA); *id.* § 2000ff-6(a)(1) (GINA); *id.* § 2000gg-2(a)(1) (PWFA); NPRM, 91 Fed. Reg. at 46,334.

[9] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206-07 (2023) [hereinafter SFFA]; Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (no exception for "benign" classifications).

that third parties do so.[10] These reports are imposed by federal regulation and backed by federal penalty. They are the government's discriminatory classifications, executed by conscripted private hands.

We urge the Commission to restructure Section II.A of the final rule as an express strict scrutiny analysis, sorting each stated reason under the prong it serves. The material is already there but this organization is still needed.

There is no compelling interest. Whatever justified these reports in 1966 cannot be assumed to justify them in 2026. *Shelby County* held that an extraordinary remedy premised on mid-1960s conditions could not rest on that premise forever: current burdens must be justified by current needs.[11] *SFFA* requires that any governmental use of race have a logical end point.[12] The EEO Reports have had none for sixty years. Nor will a generalized interest do: *Fulton* declined to credit an interest in nondiscrimination pitched at a high level of generality.[13] The question is not whether government has a compelling interest in ending employment discrimination — it obviously does — but whether it has one in compelling any employer, absent any charge, to classify *any* employee by race.

That question has an empirical answer, and we urge the Commission to develop the record on it. If the reports addressed a live problem grave enough to justify racially classifying tens of millions of workers, the Commission should be able to name the enforcement actions in which the data mattered, and it cannot.

No narrow tailoring. Two of the Commission's stated concerns are tailoring arguments, and the final rule should label them as such.

The first is overbreadth: the requirement sweeps in every covered employer annually, whether or not anyone has alleged anything — while the Commission already holds a precisely tailored instrument: during a charge investigation it may demand the relevant records and subpoena them.[14] A less restrictive alternative already exists and is already in use.

The second is misuse: an employer who files a racial headcount with the agency that would prosecute it has every incentive to make the headcount look right, and the Court has recognized that employers adopt preferences precisely to avoid ruinous litigation.[15] A classification scheme that manufactures the discrimination it was built to detect is not narrowly tailored to anything.

Arbitrary categories. "Spanish Americans" became "Spanish Surnamed Americans," then became "Hispanic." South Asians evolved from "White" to "Asian." "American Indian" turns on tribal affiliation. The

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[10] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (citing Buchanan v. Warley, 245 U.S. 60, 78-82 (1917)).

[11] Shelby Cnty. v. Holder, 570 U.S. 529, 536, 553 (2013).

[12] SFFA, 600 U.S. at 212; id. at 314 (Kavanaugh, J., concurring) (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

[13] Fulton v. City of Philadelphia, 593 U.S. 522, 541 (2021).

[14] 42 U.S.C. § 2000e-8(a); *id.* § 2000e-9; NPRM, 91 Fed. Reg. at 46,339; *see also SFFA*, 600 U.S. at 213-14 (availability of race-neutral alternatives).

[15] *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 993 (1988) (plurality opinion); *see also Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). We note that the NPRM's pincite to *Watson* appears as "933" at 91 Fed. Reg. 46,338, which we believe is a typographical error for 993.

Supreme Court has called such categories arbitrary, overbroad, and underinclusive.[16] We anticipate the objection that this reasoning sounds like rational basis review rather than strict scrutiny. But rational basis is the *more forgiving* standard; a scheme that cannot satisfy it cannot possibly satisfy strict scrutiny. The Commission should state that relationship rather than leave readers to infer it.

III. The reports are expensive, and the money buys nothing.

By the Commission's own accounting, rescission would save roughly $278 million a year. Private employers alone bear more than 5.2 million compliance hours, and the Commission has spent over $18 million in contractor costs in five years — real money at an agency where fixed costs consume 80 percent of the budget.[17]

Healthcare bears this unusually hard. A single health system may run a flagship hospital plus dozens of clinics, urgent care sites, and physician practices, each generating its own establishment-level report at an estimated 150 minutes apiece.[18] Rural and safety-net hospitals operating under financial constraints and staff shortages must divert capacity from credentialing and retention to sorting technicians into federal racial categories. None of that work treats any patients.

We recommend one refinement: the Commission concludes that rescission would not affect values such as equity, human dignity, and fairness.[19] That is too modest. Being counted by race as a condition of employment is itself a dignitary cost, borne by every worker at every covered employer in the country. Ending it therefore boosts these values, and the Commission should say so.

IV. The reports are antithetical to merit in American healthcare and business.

Federal data collection is never passive; what the government counts, institutions manage. Aggregate EEO data have been benchmarked against population shares for decades and converted into "representation gaps" — which then provide the justification for the very preferences Title VII forbids. Executive Order 14173 names the medical industry among the institutions that adopted race- and sex-based preferences under the banner of diversity, equity, and inclusion.[20] That did not happen despite federal demographic reporting but because of it.

Do No Harm has documented how this machinery works in medicine. The claim that patients fare better with physicians of their own race has been the primary justification for racial preferences in medical education and hiring, and the studies most often cited for it do not survive examination. Accreditors then wrote diversity requirements into the standards governing medical education, handing

[16]*SFFA*, 600 U.S. at 216; *id.* at 291-92 (Gorsuch, J., concurring); *see* NPRM, 91 Fed. Reg. at 46,336-37 (tracing the categories' revisions).
[17]NPRM, 91 Fed. Reg. at 46,345, 46,343, 46,339.
[18]*Id.* at 46,342-43 (estimating 150 minutes per establishment-level report and 2,060,195 such reports annually).
[19]Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011); *see* NPRM, 91 Fed. Reg. at 46,345.
[20]Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8633 (Jan. 21, 2025).

institutions a compliance rationale for otherwise indefensible programs.[21] The pattern does not vary: an institution measures itself against a demographic benchmark, finds itself short, and adjusts the people rather than the process.

Medicine is where that substitution is most unbearable. A patient on an operating table has no interest in the demographic composition of the surgical team, but she has a critical interest in the team's competence. And because virtually every employment practice produces some sort of disparate impact on some group — as Professor Gail Heriot has shown and the Office of Legal Counsel now accepts — an employer holding its own racial headcount can never be confident it is safe, and therefore can always be pressured toward the one response the law forbids.[22] Rescinding the reports removes the pressure and the pretext alike.

Conclusion

For sixty years the government has told American employers to line their workers up by race and count. The practice was never clearly authorized, never given an end point, and never shown to catch discrimination — all while costing a quarter of a billion dollars a year and pressuring employers toward discriminatory conduct the law forbids. This must end. Do No Harm urges the Commission to finalize this rule.

Respectfully,

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BOARD CHAIRMAN

Do No Harm

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[21]*See* Do No Harm, *Major DEI Studies, Major Flaws* (Sept. 2024), https://donoharmmedicine.org/research/2024/major-dei-studies-flaws/; Do No Harm, *Unethical Expectations: How Accreditors Inject Identity Politics into Medical and Healthcare Education* (Mar. 18, 2025).

[22]Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & Liberty 1 (2020); Constitutionality of Disparate-Impact Liability Under Title VII, 50 Op. O.L.C. __ (June 9, 2026) (slip op. at 20 n.13); *see also* Exec. Order No. 14,281, 90 Fed. Reg. 17,537 (Apr. 23, 2025).