The EEOC's Identity Crisis: Considering the Commission's Future in the Absence of Independence

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"We cannot allow important matters of national policy to be reduced to simple matters of political posturing. . . . Our personal views on the laws we enforce are, at most, inconsequential. We have sworn to uphold the law."

— Former EEOC Commission Chair,
Clarence Thomas[1]

INTRODUCTION

In 2022, Dylan Bringuel, a transgender person, took a job at a Holiday Inn Express in Jamestown, New York.[2] Despite assurances of support during their interview, a supervisor called them "it" and "a transformer" during their first days on the job.[3] When Bringuel reported the harassment, they were fired soon thereafter.[4] The Equal Employment Opportunity Commission (EEOC or Commission) investigated Bringuel's claim and, in 2024, sued Holiday Inn under Title VII of the Civil Rights Act of 1964.[5] After President Donald Trump returned to office in 2025, the Commission reversed course and moved to dismiss the case with prejudice, citing a new executive order that eliminated federal recognition of transgender and nonbinary identities under the banner of "defending women from gender ideology extremism."[6]

Bringuel was not alone. The EEOC moved to dismiss at least seven pending cases involving sexual orientation and gender identity discrimination,[7] despite the Supreme Court's holding in *Bostock v. Clayton County* that Title VII's ban on sex discrimination encompasses both.[8] Of the six additional cases, several alleged

1. Juan Williams, *EEOC Chief Faults Administration on Curbing Bias*, WASH. POST (Aug. 2, 1983), https://www.washingtonpost.com/archive/politics/1983/08/03/eeoc-chief-faults-administration-on-curbing-bias/278ef3b3-4bd7-4578-aca1-d742c193a688/.

2. *The EEOC's Identity Crisis*, REVEAL (May 31, 2025), https://revealnews.org/podcast/workplace-discrimination-anti-transgender-eeoc/ [https://perma.cc/3FFW-VFBJ]. This Essay was inspired by the reporting of Reveal, a "nonprofit, independent, investigative radio show and podcast." *About Us*, REVEAL, https://revealnews.org/about-us/ [https://perma.cc/95KQ-U2E5] (last visited May 17, 2026).

3. *The EEOC's Identity Crisis*, *supra* note 2.

4. *Id.*

5. Complaint at 1–2, EEOC v. Boxwood Hotels, LLC, No. 24-CV-00902 (W.D.N.Y. Sep. 25, 2024).

6. Unopposed Motion to Dismiss EEOC's Complaint at 1–2, EEOC v. Boxwood Hotels, LLC, No. 24-CV-00902 (W.D.N.Y. Feb 14, 2025), Dkt. No. 32 (alterations omitted); *see also* Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) ("*Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*"). The order also requires the Chair of the EEOC to prioritize investigations and litigation to ensure single-sex spaces. *Id.* at 8617.

7. Complaint for Declaratory and Injunctive Relief at 16–21, FreeState Just. v. EEOC, No. 25-CV-02482 (D. Md. July 29, 2025) (describing the details of the seven cases that the EEOC moved to dismiss).

8. 590 U.S. 644, 651–62 (2020). The extent to which *Bostock* makes harassment based on gender identity or sexual orientation unlawful under Title VII is a live issue. In May 2025, U.S. District Court

conduct that clearly violated Title VII, including groping, graphic sexual comments, and indecent exposure.[9] As one court observed, the "total abandonment" of cases in this manner "appear[ed] to be unprecedented."[10]

The reversals did not stop there. In response to an executive order aimed at "restoring merit-based opportunity" in the workplace,[11] the EEOC abandoned disparate impact theory—the very doctrine it helped pioneer to challenge facially neutral policies that disproportionately harm protected groups.[12] The Commission halted its investigations into worker claims relying on the theory,[13] then moved to dismiss the Commission's disparate impact cases.[14] With that dismissal, the EEOC prematurely ended a decade-long investigation into hiring practices that screened out applicants with criminal convictions.[15]

Judge Matthew J. Kacsmaryk invalidated the EEOC's 2024 enforcement guidance, which asserted that sexual harassment includes harassment based on gender identity and sexual harassment, claiming *Bostock* is limited to firing (and, presumably, hiring and promotion) decisions. Texas v. EEOC, 785 F. Supp. 3d 170, 190 (N.D. Tex. 2025). Notably, three of the seven cases the EEOC moved to dismiss with prejudice involved claims of unlawful firing based on gender identity. *See* Unopposed Motion to Dismiss EEOC's Complaint, *supra* note 6, at 1–2; Motion to Intervene at 6, EEOC v. Brik Enters., Inc., No. 24-CV-12817 (E.D. Mich. Feb. 27, 2025), Dkt. No. 27; Complaint at 1, EEOC v. Harmony Hosp., LLC, No. 24-CV-00357 (M.D. Ala. June 13, 2024); Joint Motion to Dismiss EEOC Litigation at 1, EEOC v. Harmony Hosp., LLC, No. 24-CV-00357 (M.D. Ala. Feb. 13, 2025), Dkt. No. 23.

9. Complaint for Declaratory and Injunctive Relief at 16–21, *supra* note 7.

10. EEOC v. Sis-Bro, Inc., 350 F.R.D. 40, 45, 47 & n.3 (S.D. Ill. 2025) (granting the EEOC's motion to dismiss and granting the motion to intervene of the person alleging discrimination based on gender identity).

11. Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (alterations omitted).

12. Claire Savage & Alexandra Olson, *Civil Rights Agency Drops a Key Tool Used to Investigate Workplace Discrimination*, ASSOCIATED PRESS (Sep. 30, 2025, at 18:56 ET), https://apnews.com/article/trump-discrimination-ai-eeoc-disparate-impact-a2e8aba11f3d3f095df95d488c6b3c40 [https://perma.cc/F9RW-MVS5]. *See infra* notes 133–138 and accompanying text (explaining the EEOC's influence on the development of disparate impact theory).

13. *See* Niko Gallogly, *Trump Administration Tells State Regulators It Won't Back Some Discrimination Claims*, N.Y. TIMES (May 27, 2025), https://www.nytimes.com/2025/05/27/business/eeoc-funding-states.html. The EEOC also announced it would stop reimbursing state and local civil rights agencies for disparate impact claims. *Id.*; *see also* Press Release, EEOC, Message from EEOC Acting Chair Lucas About Opening of 2024 EEO-1 Component 1 Data Collection (May 20, 2025), https://www.eeoc.gov/newsroom/message-eeoc-acting-chair-lucas-about-opening-2024-eeo-1-component-1-data-collection [https://perma.cc/8EBW-8KE4] (announcing that the EEOC will deprioritize disparate impact claims). These agencies are known as Fair Employment Practices Agencies (FEPAs), which enforce state and local laws that ban discrimination. *See* EEOC, *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing [https://perma.cc/GGA5-FEXC] (last visited May 17, 2026).

14. *See* Emily F. Keimig & Carissa J. Davis, *Another Blow to Disparate Impact—The EEOC's Action to Close Out Disparate Impact Charges*, VENABLE LLP (Oct. 16, 2025), https://www.venable.com/insights/publications/2025/10/another-blow-to-disparate-impact-the-eeocs-action [https://perma.cc/AZF6-RFS7] (explaining that the EEOC "has taken action to close out virtually all pending charges that were based exclusively on disparate impact discrimination").

15. *See Taking Action as EEOC Moves to Drop Civil Rights Lawsuit Against Sheetz*, PUB. INT. L. CTR., https://pubintlaw.org/cases-and-projects/taking-action-eeoc/ [https://perma.cc/R33Z-7E8U] (last visited May 17, 2026); Alexandra Olson & Claire Savage, *Sheetz Racial Discrimination Case is on the Chopping Block as Trump Rewrites Civil Rights*, ASSOCIATED PRESS (June 6, 2025, at 16:50 ET), https://apnews.com/article/discrimination-trump-civil-rights-eeoc-sheetz-disparate-impact-e1c5bc79f7cc08b561acc6bb568e1735 [https://perma.cc/YLF4-W42Q].

These extraordinary actions did not arise from judicial decisions or resource constraints. Rather, they followed presidential directives and depended on the Commission's leadership to carry them out. President Trump secured the latter by dismissing Democratic Commissioners Jocelyn Samuels and Charlotte Burrows after they criticized his order targeting transgender and nonbinary people.[16] Acting Chair Andrea Lucas then publicly announced that the EEOC is an "executive branch agency" that is compelled to follow presidential directives.[17] Her statement rejected the Commission's long-held self-understanding as an independent, bipartisan civil rights body.[18]

For over six decades, the EEOC functioned in practice as an independent commission, even though its commissioners were not explicitly given tenure protection under Title VII.[19] Presidents shaped the Commission's direction through appointments[20] and priority-setting, but they did not dictate its policies and actions. Political conventions did the real work. Commissioners' terms were respected. Bipartisan membership and staggered five-year appointments supported sound policy and continuity, and Congress, at key moments, defended the Commission's space to operate.[21] The resulting "operational independence" gave

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16. Andrea Hsu, *Trump Fired EEOC Commissioner Jocelyn Samuels. She Isn't Going Quietly*, NPR (Feb. 5, 2025, at 17:31 ET), https://www.npr.org/2025/02/05/nx-s1-5285697/trump-fired-eeoc-commissioner-jocelyn-samuels-she-isnt-going-quietly [https://perma.cc/HM55-K2KV] (detailing Samuels's background and termination); Image posted by Jocelyn Samuels (@JSamuelsEEOC), X, *Below is a statement that my fellow Democratic Commissioners, @BurrowsCA & @KotagalEEOC, and I issued today.* (Jan. 21, 2025, at 16:33 ET), https://x.com/jsamuelseeoc/status/1881817519188795700?s=46 [https://perma.cc/M3ZE-LS6R]. Prior to the firing of Samuels and Burrows, no EEOC Commissioner had ever been fired before the end of their term. Complaint for Declaratory and Injunctive Relief at 3, Samuels v. Trump, No. 25-CV-01069 (D.D.C. Apr. 9, 2025). The President's justifications for Samuels's termination included her desire "'to impose an expansive and improper DEI agenda on America's workplaces,' her involvement in 'enacting or enforcing the Biden Administration's radical Title VII guidance,' and her commitment to 'furthering a series of race-based initiatives that are themselves mired in racism.'" *Id.* at 10–11. The termination of Samuels and Burrows also converted the makeup of the Commission from a three-member Democratic majority to a Commission without a quorum. *See id.* at 2–3, 11.

17. Press Release, EEOC, *supra* note 13. At the confirmation hearing of Commissioner Brittany Panuccio, Panuccio also stated that the EEOC is an "executive branch agency" and must follow the directions of the President. *See Nominations of Crystal Carey to be General Counsel of the National Labor Relations Board, Brian Christine to be Assistant Secretary for Health, Department of Health and Human Services, and Brittany Panuccio to be a Member of the Equal Employment Opportunity Commission: Hearing Before the S. Comm. on Health, Educ., Lab. & Pensions*, 119th Cong. 22 (July 16, 2025) (statement of Brittany Panuccio, nominee for EEOC Comm'r).

18. *See What You Should Know: ABCs of the EEOC*, EEOC (Apr. 20, 2015), https://www.eeoc.gov/laws/guidance/what-you-should-know-abcs-eeoc [https://perma.cc/6VNU-QW5U] (describing itself as an "independent federal agency"); *see also infra* Section I.B (discussing the conventions of the EEOC's independence).

19. *See infra* Section I.B; 42 U.S.C. § 2000e-4(a).

20. EEOC leadership consists of five commissioners: one Chair, one Vice Chair, and three Commissioners. *EEOC Office Overviews*, EEOC, https://www.eeoc.gov/eeoc-office-overviews [https://perma.cc/FG8S-CTKQ] (last visited May 17, 2026). The five members of the bipartisan Commission are appointed by the President and then confirmed by the Senate. *Id.* ("The Chair, Vice Chair and one Commissioner are members of the majority party, while the other two Commissioners are members of the minority party.").

21. *See infra* Sections I.A and I.B.

the EEOC the credibility and ability to translate Title VII's broad statutory commands into stable guidance for employers and robust protections for workers.[22]

That arrangement is now in question, and the EEOC must confront two incompatible versions of itself. In one, it is a bipartisan commission charged with expertly interpreting and faithfully enforcing Title VII. In the other, it is an executive agency that must implement the President's agenda. Political convention and the Commission's structure suggest independence—bipartisan composition, staggered five-year terms,[23] Senate confirmation, independent litigation authority—but the Commission does not primarily perform the functions that justified removal limits in *Humphrey's Executor v. United States*[24] and *Wiener v. United States*.[25]

Yet the path forward for the EEOC is unclear. The Supreme Court has repeatedly narrowed Congress's ability to insulate agencies from presidential control and has signaled its willingness to overturn *Humphrey's Executor*.[26] Rebuilding the EEOC's independence by simply demanding stronger tenure protection is

22. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013); *see also infra* Part II (explaining the impact of the EEOC's independence).

23. The initial version of Title VII included language to stagger the term lengths of the original commissioners. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705(a), 78 Stat. 241, 258 (1964). Those provisions were removed in 1972. Equal Opportunity Employment Act of 1972, Pub. L. No. 92-261, § 8(d), 86 Stat. 103, 109 (1972). Traditional independent commissions would be the Federal Reserve's Board of Governors, the Federal Trade Commission (FTC), and the Securities and Exchange Commission (SEC). *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORN. L. REV. 769 (2013) (discussing what makes an agency "independent").

24. 295 U.S. 602 (1935). In *Humphrey's Executor*, the Supreme Court upheld a statutory for-cause removal restriction for FTC members because Congress had expressly insulated the FTC's "quasi-legislative and quasi-judicial" work from political control. *Id.* at 624, 626. The Court declared that Congress intended the FTC "to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625–26.

25. 357 U.S. 349 (1958). In *Wiener*, the Court found that Congress provided for-cause removal protections for commissioners of the War Claims Commission (WCC) because it performed quasi-judicial functions, even though the WCC's enabling statute had no such protections. *Id.* at 354–55. The Court declared that "[t]he Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court by mandamus or otherwise.'" *Id.*

26. Last year, the Court stayed an order from the U.S. District Court for the District of Columbia requiring reinstatement of members of the National Labor Relations Board and Merit Systems Protection Board who were fired by President Trump without cause. Trump v. Wilcox, 145 S. Ct. 1415, 1416–17 (2025). As of this writing, the Supreme Court is considering whether to overturn *Humphrey's Executor*. Trump v. Slaughter, 146 S. Ct. 18, 18 (2025). During oral arguments in *Slaughter* in December 2025, the Court's conservative majority seemed poised to either overturn or narrow the scope of *Humphrey's Executor*. John Kruzel & Andrew Chung, *Supreme Court Conservatives Poised to Back Trump in FTC Firing Case*, REUTERS (Dec. 9, 2025), https://www.reuters.com/legal/government/fight-over-trumps-power-fire-ftc-member-heads-us-supreme-court-2025-12-08/. In addition, if the Supreme Court were to extend its holding in *Seila Law LLC v. CFPB* to multimember commissions like the EEOC, agencies performing substantial executive functions could no longer be insulated by for-cause removal protections. *See* 591 U.S. 197, 220 (2020). In *Seila Law*, the Court held that a provision of the Dodd-Frank Act, which provided the Director of the Consumer Financial Protection Bureau (CFPB) with for-cause removal protections, was unconstitutional. *Id.* at 213, 229–30. For a summary of the

therefore politically fraught and constitutionally uncertain. Resolving the EEOC's crisis of identity will require a different type of cure—one that preserves expertise, continuity, and fidelity to Title VII while accounting for new political and constitutional realities. Without some level of structural and operational recalibration, the EEOC's identity may continue to drift from an expert enforcer to a presidential instrument, and equal employment opportunity may transform from a universal guarantee to a conditional privilege that shifts with every election cycle.

This Essay proceeds in four parts. Part I explains how, in practice, the EEOC functioned as an independent agency for decades. It does so by tracing the Commission's creation and examining the political conventions that sustained its operational independence in the absence of formal tenure protections. Part II demonstrates how operational independence permitted the Commission to cultivate expertise and strengthen Title VII's protections, and how presidential deference to the commissioners' staggered terms facilitated the production of sound, consistent guidance. Part III documents the unraveling of the EEOC's operational independence under the second Trump Administration and its consequences: delays for workers seeking relief, weakened enforcement of core statutory protections, politically motivated targeting of disfavored employers, and confusing guidance leaving employers uncertain of their obligations. Part IV responds by proposing structural and operational reforms designed to restore the EEOC's capacity to pursue Title VII's mission within the constraints of executive control and to provide greater access to relief for workers who have been subject to discrimination. These reforms aim to ensure that Title VII's promise of equal employment opportunity remains a stable guarantee rather than a privilege contingent on electoral outcomes.

I. THE EEOC'S OPERATIONAL INDEPENDENCE

The Equal Employment Opportunity Commission's (EEOC or Commission) independence has always been more operational than formal. Congress modeled the agency on traditional independent commissions but withheld key protections. Even so, shared understandings across Democratic and Republican administrations protected the EEOC's ability to interpret and enforce Title VII in ways that were relatively free from partisan interference. This Part examines the origins, conventions, and limits of that independence by tracing how political norms once sustained the Commission's autonomy. Section A examines how Congress created the EEOC and the efforts it took to make the Commission independent. Section B considers the conventions that undergirded the Commission's operational independence. Section C considers the limits of that independence.

A. THE CREATION OF AN INDEPENDENT EEOC

The EEOC that emerged from the Civil Rights Act of 1964 was the product of hard-fought political compromises between progressive Democrats and conservative

constitutional debate, see Aditya Bamzai & Peter M. Shane, *The Removal Question: A Timeline and Summary of the Legal Arguments*, 78 STAN. L. REV. ONLINE 64 (2025).

Republicans.[27] Civil rights organizations had long pressed for federal intervention against employment discrimination, but it was the states that first demonstrated what effective intervention might look like.[28] By the early 1960s, a patchwork of state fair employment agencies had emerged and gained broad acceptance.[29] State lawmakers endowed these agencies with enforcement powers similar to those of the National Labor Relations Board (NLRB), including the authority to investigate claims and issue remedial orders.[30] These state agencies used their enforcement authority sparingly, focusing instead on investigations, conciliation, and educating employers.[31] Their success generated momentum for a comparable federal body.[32] This momentum crested in 1963 amid the political upheaval following Martin Luther King Jr.'s arrest in Birmingham, Alabama.[33]

That year, progressive Democrats on the House Committee on Education and Labor proposed a federal "independent, bipartisan Commission" to prevent and eliminate unlawful employment practices.[34] The proposed agency had the authority to issue binding remedial orders modeled on the stronger state commissions.[35] Confidence in such powerful agencies reflected progressives' faith that expert, quasi-judicial bodies could enforce ambitious new laws more effectively than generalist courts.[36] Some Republicans in Congress were open to passing substantive workplace antidiscrimination laws, yet they resisted creating an agency that could impose onerous burdens on employers.[37] Through successive compromises

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27. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 444–45, 457 (1966). In the 1956 and 1960 presidential elections, neither the Republican nor Democratic parties were associated in the minds of voters with Black civil rights. *See* Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 STUD. AM. POL. DEV. 23, 29 (2009).

28. HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 19 (1990). President Franklin D. Roosevelt's Committee on Fair Employment Practice (FEPC) was also an initial model. *Id.* at 10. According to historian Hugh Davis Graham, President Roosevelt created the FEPC after pressure from A. Philip Randolph, a renowned leader in the civil rights and labor movements, and his collective action efforts. *Id.* The FEPC was charged with investigating violations of President Roosevelt's wartime executive order prohibiting race, color, creed, and national origin discrimination in federal employment and defense contracts. *Id.* at 10–13; Exec. Order No. 8802, 6 Fed. Reg. 3109, 3109 (June 25, 1941). Critics of the FEPC in Congress thought it infringed upon their legislative domain and impaired the free market through bureaucratic meddling. GRAHAM, *supra* note 28, at 12–13.

29. Many employers came to appreciate how state equal employment agencies expanded the workforce. GRAHAM, *supra* note 28, at 22.

30. *See* Arnold H. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965, 1036–42 (1965) (describing enforcement actions by early state FEPCs).

31. *See* GRAHAM, *supra* note 28, at 21–22.

32. *See* Farhang, *supra* note 27, at 31.

33. GRAHAM, *supra* note 28 at 131.

34. H.R. REP. NO. 88-570, at 1, 5 (1963); GRAHAM, *supra* note 28, at 131–32. The "independent, bipartisan" language would later resonate with internalized beliefs about the EEOC's independence.

35. H.R. REP. NO. 88-570, at 11; GRAHAM, *supra* note 28, at 21.

36. Farhang, *supra* note 27, at 31–32.

37. *Id.* at 32. Due to a deep divide between progressive and southern Democrats in Congress in the early 1960s, Republicans were essential to the passage of the Civil Rights Act of 1964. Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 L. & SOC. INQUIRY 657, 668 (2012). As a result, Republican lawmakers were in a powerful bargaining position. *Id.*

to get Title VII as a whole passed, Republicans forced the removal of the proposed EEOC's adjudicatory enforcement power.[38] They also curtailed the Commission's ability to issue substantive regulations and to litigate on behalf of victims in federal court.[39] The final statute limited the EEOC's powers to investigation and "informal methods of conference, conciliation, and persuasion," while leaving enforcement to private plaintiffs and, in cases involving systemic discrimination, to the Attorney General.[40]

The Republicans' refusal to grant the EEOC the authority to interpret and enforce Title VII stemmed from the same concern that had shaped the Commission's independent structure. Both aimed to prevent partisan capture of civil rights enforcement. With Democrats controlling the White House for all but eight years in the three decades before 1964, Republicans viewed a powerful EEOC as a vehicle for entrenching progressive labor policy.[41] This concern was sharpened by their experience with the NLRB.[42] Two Republican dissenters to the 1963 bill creating the EEOC warned in the House Report that "[i]t is a major mistake to model legislation in this field on the National Labor Relations Board, which has one of the sorriest records of all the Federal agencies for political involvement."[43] For Republicans like them, limiting the EEOC's powers and delegating the interpretation and adjudication of Title VII to courts served to temper partisan influence on Title VII's development.[44] The Commission's independent, bipartisan structure served the same end. A five-member commission with staggered five-year terms, and no more than three members from any single party,[45] also helped to insulate the agency from "executive politicization," allowing decisions to rest on expertise rather than politics.[46]

Yet Congress never granted the formal tenure protections that would have most effectively secured the Commission's independence. The 1964 Act was simply silent on the issue of removal.[47] It is unclear whether this omission reflected oversight, strategic ambiguity, or an assumption that political norms would suffice to safeguard the Commission's independence. Congress also narrowed the Commission's delegated authority in ways that made it unlike New

38. Farhang, *supra* note 37, at 668.

39. *Id.*; *see also* Anne Noel Occhialino and Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 671–73 (2005) (explaining that the Supreme Court has described the EEOC to be the "master of its own case," rather than "merely stand[ing] in the shoes of employees").

40. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 706(a)–(e), 707(a), 78 Stat. 241, 259–62 (1964).

41. *See* Farhang, *supra* note 27, at 32, 34–35.

42. *Id.* at 27, 32, 37; GRAHAM, *supra* note 28, at 129–32 (describing Republican concerns).

43. H.R. REP. NO. 88-570, at 19 (detailing "Minority Views" about the Act from Congressmen Dave Martin and Paul Findley); *see Former Neb. Congressman David T. Martin Dies at 89*, WASH. POST (May 16, 1997), https://www.washingtonpost.com/archive/local/1997/05/17/former-neb-congressman-david-t-martin-dies-at-89/6d5093b1-a074-4191-b8ef-adda8717b86f/(stating that Congressman Dave Martin was Republican); Katharine Q. Seelye, *Paul Findley, Congressman Behind War Powers Act, Dies at 98*, N.Y. TIMES (Aug. 13, 2019) (stating that Congressman Paul Findley was Republican), https://www.nytimes.com/2019/08/13/us/politics/paul-findley-dead.html.

44. *See* GRAHAM, *supra* note 28, at 129–30; Farhang, *supra* note 27, at 34 ("Politization of the agency by an ideologically distant executive branch was . . . a central concern.").

45. Civil Rights Act of 1964 § 705(a).

46. Farhang, *supra* note 27, at 32.

47. § 705, 78 Stat. at 258–59.

Deal agencies such as the Federal Trade Commission (FTC) or the NLRB.[48] The EEOC was neither empowered to adjudicate claims nor permitted to supply interpretations of Title VII through substantive regulations. The result was an institution that looked structurally independent but was functionally constrained. Historian Hugh Davis Graham described the resulting EEOC as "a kind of bastard compromise between a quasi-judicial regulatory commission, an administrative agency, and an educational and conciliation bureau."[49]

That hybrid design mattered in practice. It gave the Commission the freedom to set priorities, investigate workplace discrimination patterns, and press its view of Title VII through guidance but it also limited the Commission's ability to actually change employer behavior.[50] In the words of EEOC Chair Stephen Shulman in 1967, the Commission was "out to kill an elephant with a fly gun."[51] Overwhelmed by a backlog of discrimination charges,[52] the EEOC could not use conciliation to secure compliance across a broad cross-section of employers, and the statute's private right of action failed to offer a backstop.[53] In Title VII's first four years as law, only four plaintiffs were able to successfully sue their employers in contested cases without representation by the Attorney General.[54] After nearly a decade of debate, Congress concluded that an agency limited to investigation and persuasion could not effectively compel employer compliance.[55] Congress responded with the Equal Employment Opportunity Act of 1972.[56]

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48. Both the FTC and the NLRB have quasi-judicial functions. Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935) (noting that the FTC has "quasi-judicial and quasi-legislative" functions); *Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are [https://perma.cc/X74U-TSFE] (last visited May 17, 2026) (noting that the Board "primarily acts as a quasi-judicial body").

49. GRAHAM, *supra* note 28, at 266.

50. *See* Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOCIO. 709, 727 (2004) (describing the EEOC's important role in Title VII's development). Professors Pedriana and Stryker note that the EEOC in 1965 "was toothless, unorganized and broke." However, only a few years later, it "had expanded the legal definition of employment discrimination, outlawing some entrenched industrial practices and erecting a broader framework of procedural and substantive law to help protect minority groups from the harmful consequences of past and current disadvantage." *Id.* at 747–48; *see generally* Jennifer Woodward, *Borrowed Agency: The Institutional Capacity of the Early Equal Employment Opportunity Commission*, 35 J. POL'Y HIST. 195 (2023) (discussing the EEOC's achievements in its early years).

51. James P. Gannon, *Uphill Bias Fight: After Faltering Start, Agency Readies Attack on Job Discrimination*, WALL ST. J., Apr. 12, 1967, at 1.

52. *See* Occhialino & Vail, *supra* note 39, at 673–75.

53. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260 (1964).

54. GRAHAM, *supra* note 28, at 422. In the 1968 fiscal year, the Commission received 15,000 complaints yet resolved only 513. *Id.* Average processing times stretched to eighteen months and backlogs swelled to over 30,000 complaints. *Id.* Graham also notes that the DOJ had filed amicus briefs in three of the four private-plaintiff cases. *Id.*

55. *See generally* Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 51–81 (1977) (discussing the legislative history of the Equal Employment Opportunity Act of 1972).

56. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4–5, 86 Stat. 103, 104–07 (1972); EEOC, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS, 1965-2000, at 15 (2000).

The 1972 Act authorized the Commission to bring civil enforcement actions against private employers and, on a delayed timetable, to assume the Attorney General's power to litigate cases involving systemic discrimination.[57] Those choices strengthened public enforcement of Title VII and quietly ratified the EEOC's role as an advocate for victims' rights.[58] Congress paired that expansion with limits that kept the Commission from resembling other independent commissions. It again declined to authorize the EEOC to issue binding administrative orders or to engage in broad substantive rulemaking, reflecting a persistent fear that such concentrated authority would invite politicization.[59]

Consequently, by the mid-1970s, the EEOC possessed most of the structural features that scholars associate with agency independence, including multimember composition, staggered terms, partisan balance requirements, and litigation authority.[60] But commissioners still lacked formal tenure protections,[61] and the Commission was still prohibited from performing the key functions that often justify insulating a body from presidential control.[62] This combination left the EEOC's formal independence uncertain. As a result, when asked, the Office of Legal Counsel,[63] the American

57. §§ 4(a), 5, 86 Stat. at 105, 107; David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1149–50 (1989) (explaining the eventual transfer of pattern-or-practice cases to the EEOC). Title VII's coverage expanded to include state and local governments and educational institutions, which were previously exempt, and the minimum employer size was reduced to fifteen employees, reaching millions more workers. § 2, 86 Stat. at 103; Hill, *supra* note 55, at 52 (explaining that eliminating an exemption for state and local government employees "add[ed] an estimated ten million covered employes" under Title VII and reducing the employer size to fifteen employees "add[ed] an estimated six million private industry employees to EEOC's jurisdiction"); Richard R. Rivers, *In America, What You Do Is What You Are: The Equal Employment Opportunity Act of 1972*, 22 CATHOLIC U. L. REV. 455, 464 (1973) (noting that eliminating an exemption for employees at educational institutions added "an estimated 4.3 million employees of public and private educational institutions" to Title VII coverage).

58. The Act's House Report characterized the EEOC as an "independent agency" and "the expert . . . in the field of employment discrimination." H.R. REP. NO. 92-238, at 25 (1971); *see also* S. REP. NO. 92-415, at 5 (1971) (declaring that employment discrimination is a "complex and pervasive phenomenon" and poses a problem "whose resolution in many instances requires . . . expert assistance"). The Commission Chair at the time, William H. Brown, testified against giving the EEOC cease-and-desist authority, which reportedly "reflect[ed] a consensus within the [C]ommission that the EEOC was properly an advocate of the victims of discrimination, not a neutral judge of their claims." GRAHAM, *supra* note 28, at 429–30.

59. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); GRAHAM, *supra* note 28, at 429–30.

60. *See* Datla & Revesz, *supra* note 23, at 782 (noting another scholar's argument that "independent agencies almost uniformly display several characteristics: a multimember structure, a bipartisanship requirement, rulemaking authority, adjudication authority, enforcement authority, a narrow mandate, and removal protection").

61. *See id.* at 786 tbl. 1 (listing EEOC as an agency without statutory removal protection); *see also* Vermeule, *supra* note 22, at 1168 (observing that for-cause removal protection is the "sine qua non of agency independence").

62. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); Vermeule, *supra* note 22, at 1168, 1171–72.

63. *See* President's Auth. to Promulgate a Reorganization Plan Involving the EEOC, 1 Op. O.L.C. 248, 249 (1977).

Law Division,[64] and a federal court[65] all concluded that the EEOC is not the kind of quasi-legislative or quasi-judicial body that *Humphrey's Executor* and *Wiener* were meant to protect.[66] Indeed, the 1978 Reorganization Plan that consolidated employment discrimination enforcement in the EEOC expressly situated the Commission "in the Executive Branch and responsible to the President."[67]

How, then, did an agency without formal tenure protection maintain its autonomy for over half a century? The answer lies not in law but in convention.

B. THE CONVENTIONS OF EEOC INDEPENDENCE

Constitutional law scholar Adrian Vermeule observed that an agency's independence need not depend solely on formal legal protections.[68] It can persist instead through "operational independence," a state sustained by political conventions rather than statutory text.[69] These conventions emerge when political actors repeatedly conform to behavioral patterns out of a sense of obligation, whether from fear of political sanction or from an internalized belief that deviation would be wrong.[70] What may begin as strategic restraint can harden into an expectation about how officials ought to behave.[71]

Viewed through that lens, the EEOC's pre-2025 independence rested on two mutually reinforcing conventions. Presidents refrained from removing sitting

64. *See* Memorandum from the Am. L. Div. to H. House Gov't Operations Comm. & Manpower/Hous. Subcomm. (Feb. 27, 1985) (on file with the Cong. Rsch. Serv.).

65. Lewis v. Carter, 436 F. Supp. 958, 960–62 (D.D.C. 1977) (denying injunctive relief to an EEOC Commissioner fired by President Jimmy Carter after the expiration of his term). The Court found that *Humphrey's Executor* did not clearly apply to the Commissioner's case. *Id.*

66. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958); *see also supra* note 24–25 and accompanying text (discussing the holding in *Humphrey's Executor*, as well as the related holding in *Wiener*). The EEOC's only major quasi-judicial responsibilities involve appeals of federal employment discrimination claims, but these claims are all reviewable by courts. *See* 42 U.S.C. § 2000e-16(a)–(c); 29 C.F.R. § 1614.405; Chandler v. Roudebush, 425 U.S. 840, 863–64 (1976) (holding that federal employees are entitled to de novo judicial review of Title VII claims following administrative proceedings). *But see* Complaint for Declaratory and Injunctive Relief at 3, Samuels v. Trump, No. 25-CV-01069 (D.D.C. Apr. 9, 2025) (asserting that the EEOC does perform quasi-judicial and quasi-executive functions and thus commissioners should have for-cause removal protections).

67. Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1979), *reprinted as amended in* 5 U.S.C. app. at 1366 (2006), *and in* 92 Stat. 3781 (1978). Under the Plan's provisions, the EEOC assumed responsibility for the Equal Pay Act, Age Discrimination in Employment Act claims, the Rehabilitation Act of 1973, and for federal-sector EEO enforcement. *See id.* The Commission had to be considered an "executive agency" for President Carter to have the authority reorganize EEO enforcement. *See* President's Auth. to Promulgate a Reorganization Plan, *supra* note 63, at 248; *see also Reorganization Plan No. 1 of 1978 (Equal Employment Opportunity): Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 95th Cong. 41 (1978) (statement of Eleanor Holmes Norton, Chair, EEOC) (asserting that the EEOC is an "executive agency and not an independent agency").

68. Vermeule, *supra* note 22, at 1175.

69. *Id.* at 1166, 1181. Vermeule gives several examples, including how presidents have historically not removed U.S. Attorneys before the expiration of their term and how John McCain was mocked and criticized for proposing to fire the Chair of the SEC during his 2008 presidential campaign, even though as a matter of statute, the Chair can be demoted without cause. *Id.* at 1195–96, 1201–03.

70. *See id.* at 1182, 1186–91.

71. *See id.* at 1191, 1203.

commissioners mid-term and generally allowed the EEOC to fulfill its obligations under Title VII without substantial interference. These conventions did not eliminate conflict between the White House and the Commission. Rather, they structured conflict by making certain moves politically costly and therefore uncommon. In Vermeule's terms, the conventions formed a stable pattern of mutual expectations in which overt breach reliably invited backlash, so presidents usually pursued influence through subtler, institutionally mediated levers such as appointments, chair designations, and budgets while leaving intact a zone in which the Commission could operate as a multimember body exercising its own judgment.[72]

The clearest convention was presidential restraint on premature removal. Prior to 2025, no president had removed an EEOC Commissioner before the expiration of their term.[73] When presidents faced resistance from holdovers, they typically relied on measures that avoided a direct showdown over removal, including resignation requests and leadership reshuffles.[74] The Nixon Administration's early experience with the EEOC illustrates this dynamic. At the time, the EEOC lacked the authority to file its own enforcement suits,[75] so it relied heavily on investigations and widely publicized hearings to compel compliance. Under Chair Clifford L. Alexander, Jr., the Commission convened high-profile hearings on employment discrimination in motion pictures and television, provoking sharp criticism from conservative members of Congress.[76] President Richard Nixon asked Alexander, a Democratic holdover serving as Acting Chair, to resign.[77] Alexander refused publicly.[78] President Nixon responded not by removing him from the Commission but

72. *See id.* at 1193–94. Conventions often work through an administrative version of the "Victorian compromise," where norms channel aggressive moves into quieter, behind-the-scenes forms to avoid public sanction. *Id.* at 1199.

73. *Client Alert: What Employers Need to Know About the State of the EEOC*, KING & SPALDING LLP (Feb. 6, 2025), https://www.kslaw.com/news-and-insights/what-employers-need-to-know-about-the-state-of-the-eeoc [https://perma.cc/F8QG-3SLQ] (noting that "Commissioners Burrows and Samuels were the first commissioners in history to be removed before the expiration of their terms, which were set to expire in July 2028 and July 2026, respectively"). President Jimmy Carter did fire EEOC Commissioner Colston A. Lewis but only *after* his term had expired. *See* Lewis v. Carter, 436 F. Supp. 958, 960 (D.D.C. 1977).

74. For example, President Gerald Ford requested the resignation of Commissioner Chair John H. Powell, Jr. due to the EEOC's alleged mismanagement, and Powell resigned without issue. *At E.E.O.C., One Is Less Equal*, N.Y. TIMES, Mar. 23, 1975, at 184.

75. *See* Alexa Mills, *Clifford Alexander Jr., First Black Secretary of Army, Dies at 88*, WASH. POST (July 4, 2022), https://www.washingtonpost.com/obituaries/2022/07/04/clifford-alexander-army-secretary-dies/ (noting that "[t]he EEOC, created under the Civil Rights Act of 1964, [then] had no mandate for legal action but could make recommendations based on its investigations of employment discrimination").

76. *See* Kathleen A. Tarr, *Bias and the Business of Show Employment Discrimination in the "Entertainment" Industry*, 51 U.S.F. L. REV. F. 1, 8–9 (2016); Marjorie Hunter, *Dirksen Upbraids U.S. Rights Official; Dirksen Upbraids Rights Aide at Hearing*, N.Y. TIMES, Mar. 28, 1969, at 1 (describing a heated hearing where Republican Senator Everett M. Dirksen threatened to see to it that Alexander be terminated). *See also* DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 118 (2001) (describing President Nixon's troubles with Alexander).

77. *See* KOTLOWSKI, *supra* note 76, at 118.

78. GRAHAM, *supra* note 28, at 324.

by stripping him of his chairmanship.[79] Alexander remained in the EEOC after his demotion and continued to be a vocal critic of the Nixon Administration until his resignation months later.[80]

Conventions protecting the EEOC's independence extended beyond tenure and into the substance of the Commission's work. In day-to-day practice, presidents of both parties generally refrained from exercising direct authority over the Commission's actions. Consequently, the Commission could slow-walk, resist, or publicly diverge from executive preferences. The Reagan years provide particularly telling examples because Reagan's Administration was strongly opposed to affirmative action and associated with the unitary executive theory.[81] Even then, the EEOC was not a standard executive agency that could be compelled to fall in line. When the Department of Labor pursued regulatory changes that would have exempted most federal contractors from affirmative action reporting requirements,[82] Acting EEOC Chair J. Clay Smith refused to approve the proposal, and the EEOC's resistance helped stall the regulatory effort for more than two years.[83] Similarly, when Justice Clarence Thomas chaired the EEOC, he demanded that executive agencies continue to report workforce demographics and submit multiyear affirmative action plans with measurable benchmarks, as required by EEOC policy, despite multiple refusals by the Department of Justice (DOJ) and other agencies.[84] Thomas went so far as to support a law that withheld funds from federal agencies that refused to submit data and plans.[85]

The EEOC's operational independence also protected the Commission's ability to advocate for its expert interpretations of Title VII even when those interpretations openly conflicted with other executive branch actors.[86] The EEOC's

79. *See* Marjorie Hunter, *President to Replace Chairman of Job Opportunity Commission*, N.Y. TIMES, Mar. 29, 1969, at 23. The White House press secretary denied that criticism of Alexander by Senator Everett M. Dirksen was the reason for Alexander's demotion. *See id.*; *see also* KOTLOWSKI, *supra* note 76, at 118 (explaining that apparently, "the [P]resident had reached his decision much earlier" than Dirksen's criticism of Alexander).

80. *See* Roy Reed, *Job-Rights Chief Quits in Dispute on Nixon's Goals*, N.Y. TIMES, Apr. 9, 1969, at 1, 20 (describing that when Alexander resigned as Chair, he claimed that it was due to a "crippling lack of Administration support"); Paul Delaney, *President Seeks to Widen Program for Job Equality*, N.Y. TIMES, Aug. 8, 1969, at 1, 11 (discussing Alexander's disagreement with the Nixon Administration's proposals for the 1972 Act); Charles Tasnadi, *Blasts Nixon Administration* (Aug. 15, 1969), SMART MUSEUM OF ART, U. CHI., https://smartcollection.uchicago.edu/objects/37221/blasts-nixon-administration-clifford-l-alexander-gestures (last visited May 17, 2026) (establishing that Alexander resigned as an EEOC Commissioner in August 1969, almost five months after President Nixon announced he was replacing Alexander as Chair).

81. *See* John A. Dearborn, *Contesting the Reach of the Rights Revolution: The Reagan Administration and the Unitary Executive*, 39 STUD. AM. POL. DEV. 83, 83–84 (2025).

82. *See* Marjorie Hunter, *Plan to Ease Fight on Jobs Criticized*, N.Y. TIMES, Oct. 8, 1981, at A19.

83. *See* EMILY ZUCKERMAN, *EEOC Politics and Limits on Reagan's Civil Rights Legacy*, *in* FREEDOM RIGHTS NEW PERSPECTIVES ON THE CIVIL RIGHTS MOVEMENT 247, 260 (Danielle L. McGuire & John Dittmer eds., 2011).

84. *See id.* at 261–64.

85. *See 3 U.S. Agencies Facing Action Over Hiring Goals*, N.Y. TIMES, Aug. 22, 1984, at A14.

86. For example, the Carter Administration permitted the EEOC to file amicus briefs in opposition to the DOJ's position. *See* Dearborn, *supra* note 81, at 94 n.106.

formal litigation authority is limited and often intertwined with the DOJ and the Solicitor General,[87] yet the Commission has been permitted to shape Title VII through participation in private-sector litigation in lower courts. During the first Trump Administration, for example, a case before the U.S. Court of Appeals for the Second Circuit, *Zarda v. Altitude Express Inc.*, presented the question of whether Title VII's ban on sex discrimination applies to sexual orientation.[88] The EEOC filed an amicus brief urging the Second Circuit to recognize that coverage.[89] The DOJ filed a separate amicus brief urging the opposite view and insisting that "the EEOC is not speaking for the United States."[90] Yet the Commission did not withdraw or reframe its filing.[91] The EEOC also refused to join the DOJ's brief in *Bostock v. Clayton County* despite the Department's insistence.[92] These intra-executive conflicts were made legible to the courts and the public, and they persisted without any apparent presidential discipline.

The conventions of the EEOC's operational independence remained in place because political actors perceived excessive presidential interference as improper and responded through hearings, letters, and public condemnation. Importantly, the enforcement mechanism applied not only when the White House pressured the Commission but also when the Commission appeared to align too closely with presidential preferences at the expense of its own expert judgment. In 1992, the Commission under President George H.W. Bush adopted a narrow interpretation of the Civil Rights Act of 1991, refusing to apply the statute's new compensatory and punitive damages provisions retroactively.[93] Senator Ted Kennedy viewed this interpretation as reflective of political alignment with the Bush Administration's opposition to the 1991 Act rather than a faithful statutory interpretation by the EEOC. During a Senate committee hearing, Senator Kennedy condemned the EEOC's stance as "abdicating its statutory responsibility" and reminded the Commission that Congress created it "as an independent agency to

87. The Office of Legal Counsel insists that the Solicitor General speaks for the United States in the Supreme Court and in public-sector Title VII cases. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 282, 297 (1994). In 1974, the EEOC attempted to file an amicus brief in a Supreme Court case without seeking the DOJ's approval. *Id.* at 297. The EEOC asserted that "[i]ts independent character . . . gives it the same right as any other independent organization to ask the Court to consider its views," but the Supreme Court refused to consider the brief. *Id.* (quoting Memorandum of the EEOC in Response to the DOJ at 2, De Funis v. Odegaard, 416 U.S. 312 (1974) (No. 73-295)).

88. 883 F.3d 100, 111–12 (2d. Cir. 2018) (en banc).

89. En Banc Brief of Amicus Curae EEOC in Support of Plaintiffs/Appellants and in Favor of Reversal at 1, Zarda v. Altitude Express, Inc, No. 15-3775 (2d Cir. June 23, 2017).

90. Brief for the United States as Amicus Curiae at 1, Zarda v. Altitude Express, Inc., No. 15-3775 (2d Cir. July 26, 2017).

91. *See Zarda*, 883 F.3d at 105 (listing the EEOC as an amicus curiae in the case).

92. *See* Ben Penn, Chris Opfer & Paige Smith, *Justice Department Urges Civil Rights Agency to Flip LGBT Stance*, BLOOMBERG L. (Aug. 13, 2019, at 17:02 ET), https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance.

93. *See Oversight on Activities of the EEOC: Hearing Before the S. Subcomm. on Emp. & Productivity of the S. Comm. on Lab. and Hum. Res.*, 102d Cong. 251–52 (1992) (statement of Sen. Ted Kennedy).

avoid precisely this kind of situation."[94] The episode illustrates how conventions perpetuate themselves. When political actors perceive a breach of a convention, they invoke the norm and expect others to recognize its force.[95]

The strongest evidence of the conventions surrounding the EEOC's operational independence occurred when they were finally and unambiguously breached. When President Trump dismissed EEOC Commissioners Jocelyn Samuels and Charlotte Burrows in 2025, over 230 members of Congress denounced the "unprecedented dismissal[s]," which they claimed "undermine[d] the EEOC's historic independence," and they demanded the reinstatement of the commissioners.[96] Civil rights organizations likewise warned that political manipulation of the agency "could leave many workers open to discrimination, retaliation, and harassment."[97] Those reactions were not merely rhetoric. They reflected the sanction mechanism that Vermeule treats as central to operational independence. Political actors invoked the norm precisely because they expected it to resonate, and because they sought to impose a political penalty and to reaffirm the norm.[98]

These episodes depict an EEOC whose independence rested not on statute but on shared expectations, repeated practice, and mutual enforcement. For decades, this informal architecture proved remarkably durable. But durability through convention rather than statute carried an inherent vulnerability: the entire edifice could be dismantled without changing a single law. The conventions could simply be ignored, and beginning in 2025, they were.

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94. *Id.* at 252.

95. *See* Vermeule, *supra* note 22, at 1186.

96. Letter from 236 Members of Congress to President Donald J. Trump (Mar. 27, 2025), https://democrats-edworkforce.house.gov/imo/media/doc/letter_to_president_trump_re_dismissal_of_eeoc_commissioners.pdf [https://perma.cc/R27K-8Y2K].

97. Press Release, NAACP Legal Def. Fund, LDF Condemns President Trump's Decision to Dismiss EEOC Commissioners and Highlights Impact on Marginalized Communities (Feb. 11, 2025), https://www.naacpldf.org/wp-content/uploads/2025.02.03-EEOC-Firings-Statement.pdf [https://perma.cc/R3WG-Q89F]; *accord* Press Release, Laws.' Comm. for C.R. Under L., Lawyers' Committee Condemns Removal of EEOC Commissioners and General Counsel (Jan. 29, 2025), https://www.lawyerscommittee.org/lawyers-committee-condemns-removal-of-eeoc-commissioners-and-general-counsel/ [https://perma.cc/WR9S-MUU5]; Press Release, Nat'l P'ship for Women & Fams., National Partnership Condemns Targeted Attempts to Fire EEOC Commissioners (Jan. 29, 2025), https://nationalpartnership.org/news_post/national-partnership-condemns-targeted-attempts-to-fire-eeoc-commissioners/ [https://perma.cc/7JVJ-297S]; Press Release, Hum. Rts. Campaign, HRC Responds to Illegal Firing of EEOC Commissioners: "A Calculated Attack on Every American Worker's Fundamental Right to a Workplace Free from Discrimination" (Jan. 28, 2025), https://www.hrc.org/press-releases/hrc-responds-to-illegal-firing-of-eeoc-commissioners-a-calculated-attack-on-every-american-workers-fundamental-right-to-a-workplace-free-from-discrimination [https://perma.cc/HQ6E-Z2QK].

98. Notably, the belief had historically transcended party lines. In 2021, when President Joe Biden fired EEOC General Counsel Sharon Gustafson before her term expired, Republican Commissioner Andrea Lucas publicly declared the action against "our *independent agency* to be deeply troubling." Andrea Lucas (@andrealucasEEOC), X (Mar. 5, 2021, at 17:02 ET), https://x.com/andrealucasEEOC/status/1367958634672623619 [https://perma.cc/FGP8-VBEK] (emphasis added); *see* Eli Rosenberg, *White House Fires Trump EEOC Official After She Refuses to Step Down*, WASH. POST (Mar. 6, 2021), https://www.washingtonpost.com/business/2021/03/05/biden-eeoc-general-counsel-trump/. That officials from both parties invoked the agency's independence to criticize presidents of the opposing party suggests the convention was genuinely internalized, not merely a partisan talking point.

C. LIMITS OF THE EEOC'S OPERATIONAL INDEPENDENCE

The EEOC's independence, though sustained by convention, has always been conditional. From its inception, Congress and the President have retained structural tools capable of shaping—or constraining—the Commission's exercise of its authority. On the congressional side, the EEOC's budget, reporting obligations, and oversight hearings give lawmakers significant leverage over its priorities.[99] Committee report language and proposed bills have pressed the Commission to devote staff time to clearing individual complaints and to justify pattern-or-practice cases as an efficient use of limited funds.[100] Independence, thus, has operated within a framework of ongoing political supervision.

Presidential influence operates through appointments to the Commission and the DOJ, which, in turn, shares and, in some areas, controls litigation authority under Title VII.[101] These overlapping roles present the most significant structural limit on the EEOC's autonomy. The DOJ has ultimate control over appeals to the Supreme Court, including appeals in which the EEOC is a party.[102] This creates a mechanism by which presidential administrations may substitute their preferred legal position for the Commission's. The Solicitors General under both Presidents Reagan and Trump filed briefs in the Supreme Court on behalf of the EEOC that reversed the EEOC's positions.[103]

In Title VII suits involving state and local governmental employers, the DOJ holds core litigating authority. That tension surfaced starkly in 1983, when the Reagan Administration pressured the Commission to abstain from filing an amicus brief in *Williams v. City of New Orleans*, which involved race-conscious remedies for Black police officers.[104] The DOJ intervened in the case and, in the commissioners' words, "took a position . . . which represent[ed] a radical departure from prior Department of Justice and current Equal Employment Opportunity Commission policy."[105] The EEOC voted unanimously to file its own brief

99. Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1146 (2015); *Congressional Oversight*, EEOC, https://www.eeoc.gov/legislative-affairs/congressional-oversight [https://perma.cc/HTX8-RLN3] (last visited May 17, 2026); Civil Rights Act of 1964, Pub. L. No. 88-352, § 705(d), 78 Stat. 241, 258 (1964).

100. Kim, *supra* note 99, at 1147–49.

101. *See* Litig. Auth. of the EEOC in Title VII Suits Against State and Loc. Governmental Entities, 7 Op. O.L.C. 57, 58–59 (1983).

102. *See* 42 U.S.C. § 2000e-4(b)(2).

103. *See* Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 440, 465 & n.38 (1986); Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Litigation Authority*, 61 L. & CONTEMP. PROBS. 205, 209 (1998). Notably, in *Sheet Metal Workers' International*, the Supreme Court embraced the arguments that the EEOC presented in the lower court. 478 U.S. at 428–29, 481–83. In one of the cases consolidated in *Bostock v. Clayton County*, 590 U.S. 644 (2020), the EEOC had litigated that Title VII barred discrimination against a transgender employee. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566–67 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644, 654, 683 (2020). At the Supreme Court, the Solicitor General advanced the opposite position for the United States. Sandra F. Sperino, Bostock *and the Forgotten EEOC*, 103 TEX. L. REV. 141, 151 (2024).

104. 729 F.2d 1554 (5th Cir. 1984); Dearborn, *supra* note 81, at 90–92 (describing the dispute).

105. Letter from Clarence Thomas, Cathie A. Shattuck, Armando M. Rodriguez, Tony E. Gallegos, and William A. Webb, Comm'rs., EEOC, to William French Smith, Att'y Gen., DOJ (Jan. 26, 1983) (on

opposing the DOJ's position, asserting that expressing its views would be of "considerable public benefit."[106]

Assistant Attorney General William Bradford Reynolds subsequently obtained an opinion from the Office of Legal Counsel (OLC) declaring that the EEOC lacked the authority to appear in public-sector Title VII litigation and warning that allowing it to contradict the DOJ would "raise serious constitutional issues concerning the unity and integrity of the Executive."[107] Under pressure, the commissioners reversed their votes and agreed not to submit the brief.[108] A member of Congress, a former chair of the EEOC, and a civil rights leader denounced the DOJ's interference.[109] Barbara Hutchinson of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) testified that "[n]o administration has ever before interfered with or attempted to direct the litigation policy of the EEOC" and urged Congress to "clarify and reaffirm the principle that the EEOC is an independent agency whose policy is not subject to change without the approval of Congress."[110] EEOC Chair Clarence Thomas acknowledged that the OLC opinion and the 1978 reorganization "muddied the waters" but stated, "I felt that when I took this job that [the] EEOC was independent, without, again, doing that research. I think that [the] EEOC has to be independent. We have operated in this administration independently."[111] The episode demonstrates how presidential control over the DOJ's litigation authority, combined with statutory ambiguity, can narrow the Commission's practical independence even in the absence of formal structural change.

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file with authors) (protesting the DOJ's actions in then-ongoing case, *Williams v. City of New Orleans* (5th Cir. No. 82-3435)).

106. Fred Barbash & Juan Williams, *Administration Prods EEOC on Quotas Brief*, WASH. POST (Apr. 7, 1983), https://www.washingtonpost.com/archive/politics/1983/04/07/administration-prods-eeoc-on-quotas-brief/cc9dd4be-ddee-466a-b371-90b0f6b88a15/.

107. Litig. Auth. of the EEOC in Title VII Suits Against State and Loc. Governmental Entities, *supra* note 101, at 66.

108. Dearborn, *supra* note 81, at 93 (explaining that four of the five Commissioners voted to not submit the brief). Interestingly, some Fifth Circuit judges on the court in *Williams* cited the EEOC's amicus brief because two legal foundations in Washington, D.C. attached it to their own amicus brief. 729 F.2d at 1571 n.1, 1572 n.5 (Wisdom, J., concurring in part and dissenting in part); Fred Barbash, *Private Groups Plead Case for Stifled EEOC*, WASH. POST (Apr. 27, 1983), https://www.washingtonpost.com/archive/politics/1983/04/28/private-groups-plead-case-for-stifled-eeoc/816de477-0a27-4c5d-b27e-785cdcfab5ed/.

109. Juan Williams, *Lawmaker Urges EEOC Not to Quit Rights Case*, WASH. POST (Apr. 10, 1983), https://www.washingtonpost.com/archive/politics/1983/04/10/lawmaker-urges-eeoc-not-to-quit-rights-case/e18ab0da-5163-4257-95c4-3e704dacc560/. A House Report also recommended that the EEOC challenge the DOJ in court over the EEOC's ability to independently participate in public-sector Title VII lawsuits. H.R. REP. NO. 98-796, at 6 (1984). The Report argued that "[a]s the lead Federal agency for enforcement of employment discrimination laws, [the] EEOC has an obligation to participate in court cases, particularly controversial or precedent setting cases, and to provide the courts with the benefit of the Commission's expertise in and advocacy of employment discrimination laws." *Id.* at 5.

110. *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity Laws: Hearings Before the H. Subcomm. on Emp. Opportunities of the H. Comm. on Edu. & Lab.*, 98th Cong. 35–37 (statement of Barbara Hutchinson, Dir., Women's Dep't, Am. Fed'n of Gov't Emps., and Vice President, AFL–CIO).

111. *Id.* at 201, 204.

Recent events illustrate additional limits on the EEOC's independence. In 2021, President Joe Biden removed Sharon Gustafson, the Trump-appointed general counsel of the Commission, after she refused to resign.[112] Reporting suggested that her firing stemmed from her work on religious discrimination, which could conflict with LGBTQ+ rights.[113] Gustafson responded to the resignation request by stating that workers have "the right to be free from discrimination based on" faith, sexual orientation, and gender identity, and "[o]n those exceptional occasions where workplace rights may be in tension with each other, the EEOC should lead the way in thinking through legally-appropriate resolutions."[114] Her removal underscored the President's capacity to reshape the EEOC's enforcement posture through personnel decisions, just as the Reagan Administration had asserted control through litigation channels decades earlier. Together, these episodes reveal that the conventions of independence restrain presidential influence only so long as administrations choose to honor them.[115]

II. THE IMPACT OF THE EEOC'S INDEPENDENCE

For the Equal Employment Opportunity Commission (EEOC or Commission), independence is best understood not as freedom from democratic accountability but as freedom from distorting pressures that would subvert Title VII's purpose. Congress originally created the EEOC to carry out a deliberately chosen policy to eliminate employment discrimination through expert education, investigation, conciliation, and litigation.[116] Like the New Deal-era commissions that inspired its structure, the EEOC reflected Congress's judgment that some public problems require institutions insulated enough to cultivate expertise, deliberate across party lines, and "give energy and effectiveness to the legislative programs for which they are responsible."[117] This Part demonstrates how the Commission's protection from partisan interference allowed it to strengthen Title VII's protections, extend its safeguards to more workers, and provide consistent guidance across administrations. Section A describes how the EEOC's independence provided it the space to apply its expertise to enact Title VII's purpose as a remedial statute. Section B describes how that expertise, which was insulated from the shifting policy preferences of successive presidential administrations, provided stability and predictability. While there may seem to be tension or even contradictions between claims that independence allowed an expansive interpretation of Title VII through creative application of

112. Rosenberg, *supra* note 98.

113. *Id.*

114. *Id.*

115. For a discussion of presidential influence on independent agencies, including the EEOC, see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993).

116. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 705(g), 706(a), 78 Stat. 241, 258–59 (1964).

117. *See* Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 891 (2007); Datla & Revesz, *supra* note 23, at 770–71, 777.

the Commission's expertise on the one hand and that it led to consistent guidance and predictability on the other, this Part demonstrates that no such tension or contradiction existed.

A. CREATIVITY AND EXPERTISE: HOW INDEPENDENCE HELPED STRENGTHEN TITLE VII AND ITS REACH

Title VII, as originally enacted, was an undetermined statute with limited enforcement mechanisms.[118] Its transformation into the foundation of modern employment discrimination law depended heavily on the EEOC's willingness to develop and press ambitious interpretations of the statute grounded in Title VII's purpose and the Commission's own data and expertise. The Commission's capacity to do so rested on its operational independence.

The Commission first demonstrated this capacity through the creation of the EEO-1 reporting system: a nationwide survey requiring major employers with 100 or more employees to report the racial and gender composition of their workforces.[119] No provision of Title VII contemplated such a survey,[120] but drawing on the statute's purpose, the EEOC was able to justify a "creative" reading of the statute.[121] A more cautious agency might have yielded to the Budget Bureau's resistance or sought permission from the Office of Legal Counsel (OLC).[122] Instead, by its second year of operation, the EEOC was collecting data from some 60,000 employers.[123] The "battle of the reports" gave the agency credibility and, more importantly, an empirical foundation that would prove doctrinally transformative.[124]

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118. *See* Civil Rights Act of 1964 §§ 701–716.

119. *See* 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.7; *EEO Data Collections*, EEOC, https://www.eeoc.gov/data/eeo-data-collections [https://perma.cc/JB8Q-SGAS] (last visited May 17, 2026).

120. *See* Civil Rights Act of 1964 §§ 701–716.

121. *See* Alfred W. Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 GEO. WASH. L. REV. 694, 703, 715–18 (1970); GRAHAM, *supra* note 28, at 193–196. Alfred W. Blumrosen, the EEOC's former Chief of Conciliation, admitted that the EEOC's reading was "creative" and "required a reading of the statute contrary to the 'plain meaning.'" Blumrosen, *supra*, at 703, 717–18. Title VII's main data provision allowed the EEOC only to collect data "reasonable, necessary, or appropriate for the enforcement" of Title VII from employers if that data was not already collected by state and local agencies. § 709(c)–(d), 78 Stat. at 263. However, the EEOC took Section 709(d) of the statute that read "the Commission may require such notations on records . . . as are necessary because of *differences* in coverage or methods of enforcement between the State or local law and the provisions of this title" and argued that the patchwork of state reporting systems left it unable to fulfill the statute's purpose. § 709(d) (emphasis added); *see* Blumrosen, *supra*, at 716–17. Consequently, the agency needed to create a national database. Blumrosen, *supra*, at 716–17.

122. *See* GRAHAM, *supra* note 28, at 156–57, 196, 266. The Budget Bureau, or the Bureau of the Budget, was the predecessor agency to the Office of Management and Budget, which is now housed within the Executive Office of the President. TAYLOR N. RICCARD, CLINTON T. BRASS & BARBARA L. SCHWEMLE, CONG. RSCH. SERV., RS21665, OFFICE OF MANAGEMENT AND BUDGET (OMB): AN OVERVIEW 1–2 (2023).

123. GRAHAM, *supra* note 28, at 196. Historian Hugh Davis Graham observed that it is "difficult to explain" why conservatives did not challenge this "creative" interpretation. *Id.* at 195.

124. *Id.* at 196. Graham notes that the EEOC claimed that the EEO-1 reporting system gave the agency its "calling card" that gave "credibility to an otherwise weak statute." *Id.* (quoting EEOC administrative history).

The EEO-1 data revealed racial disparities so pervasive that they could only be understood as systematic discrimination.[125] The Commission traced these patterns to employment tests and seniority systems.[126] Yet Title VII expressly permitted "professionally developed ability tests" in hiring and promotion decisions.[127] This posed a doctrinal problem. Drawing on its empirical findings and the statute's broad remedial purpose, the EEOC reasoned that discrimination could occur through practices with demonstrable adverse effects, regardless of intent.[128] It formalized this view in its 1966 Guidelines on Employee Selection Procedures,[129] advising that any test or selection device that disproportionately excluded members of protected groups must be job-related.[130] Relying on the EEOC's interpretation, the Supreme Court held in *Griggs v. Duke Power Company* that Title VII prohibits disparate impact discrimination even without proof of discriminatory intent.[131] The Court also confirmed the EEOC's position that Title VII is a remedial statute, and its purpose to "achieve equality of employment opportunities and remove barriers" should guide interpretation of its text.[132] Thus, the Supreme Court's recognition of disparate impact theory was grounded in statutory interpretation. Even so, it was the EEOC's independent initiative and expertise that developed both the theory and the evidentiary grounding for it, in the form of EEO-1 data.

With the Court's endorsement of disparate impact theory and Congress's grant of independent litigating authority, the EEOC started to magnify its impact to address discrimination on a wider scale in the 1970s.[133] Early in the decade, Commission Chair William H. Brown established a National Programs Division and allocated sixty percent of the agency's resources to investigate significant cases against national employers (called "Track 1" cases).[134] In 1973, the EEOC issued charges against General Motors (GM), General Electric (GE), and Ford despite President Nixon's Departments of Labor and Defense providing those companies with "clean bills of health" for their employment practices.[135] The EEOC then

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125. *Id.* at 244. For example, while Kansas City had a Black population of 11.2% in 1966, only 2.1% were in "white-collar" employment. *Id.* at 242; *see also* EEOC, *supra* note 56, at 10 (describing examples of widespread discrimination patterns identified by the EEO-1 reports).

126. *See* Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 59–60, 70 (1972); Blumrosen, *supra* note 121, at 743–44.

127. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (1964).

128. GRAHAM, *supra* note 28, at 249.

129. 29 C.F.R. §§ 1607.1–.14 (1972). Blumrosen notes that "[t]he original guidelines were issued in a printed pamphlet," and they were later published and "codified at 29 C.F.R. §§ 1607.1–.14 (1972)." Blumrosen, *supra* note 126, at 60 & n.5.

130. 29 C.F.R. §§ 1607.4.

131. 401 U.S. 424, 432–34, 436 (1971) ("From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent.").

132. *Id.* at 429–30.

133. EEOC, *supra* note 56, at 15.

134. ZUCKERMAN, *supra* note 83, at 248.

135. Philip Shabecoff, *Rulings on Industry Job Bias Vary Among Agencies*, N.Y. TIMES, Sep. 29, 1973, at 28. The EEOC also strove to assert its independence during the Nixon Administration. ZUCKERMAN, *supra* note 83, at 249.

pursued these major cases across administrations, recovering substantial monetary relief for workers.[136] Notably, settlements with GM were finalized during the Reagan Administration.[137] The Commission, then chaired by Clarence Thomas, voted unanimously to approve a settlement adopting numerical goals for women and minorities, notwithstanding the Reagan Administration's fervent opposition to the use of goals and timetables in civil rights enforcement.[138] Thomas described the resolution as a "significant achievement."[139] That the EEOC could initiate enforcement actions under one President and conclude them on its own terms under another illustrates how independence gave the Commission not just the authority to act boldly but also the institutional continuity to follow through.

The Commission applied that same combination of expertise and independence to extend Title VII's reach as the workplace evolved. Faced with an unexpectedly high number of sex discrimination claims, the EEOC developed guidance for employers and created precedents that shaped the statute's meaning.[140] In each instance, the Commission read Title VII's prohibition on discrimination "because of sex"[141] to encompass forms of workplace inequality that Congress had not specifically considered when it enacted the statute. For example, the Commission concluded that "state-protective laws" restricting women's ability to work violated Title VII, that employers could not discriminate based on marital or parental status, and that sexual harassment constitutes sex discrimination.[142] The EEOC later applied this same interpretative reasoning to sexual

136. EEOC, *supra* note 56, at 15 (describing the settlements, including the $29.4 million settlement with GE).

137. *See* ZUCKERMAN, *supra* note 83, at 265.

138. *Id.* at 260, 265; Dearborn, *supra* note 81, at 87–88 (discussing the Reagan Administration's views on civil rights). The Conciliation Agreement between the EEOC and GM included numerical hiring and selection goals, including targets that at least approximately 15.5% of skilled-trade apprenticeship selections should be minority candidates and at least 12% should be women. Plott v. Gen. Motors Corp., 71 F.3d 1190, 1192 (6th Cir. 1995). The goals were to be measured across facilities and over time, rather than as rigid plant-level requirements. *Id.* at 1195 (noting that the Conciliation Agreement stated that "[a]ttainment of these goals is predicated on the assumption that some facilities will meet the goals, some facilities will exceed the goals, and some facilities will not meet the goals"). The agreement expressly stated that these benchmarks were "not intended to operate as a quota or ceiling." *Id.* The Reagan Administration nonetheless opposed such goals and timetables on the ground that they resembled impermissible quotas and conflicted with its stated commitment to formal, race-neutral enforcement of Title VII. *See* Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1009 (describing the Reagan Administration's broad color-blind and sex-blind approach to civil rights enforcement, including Title VII).

139. ZUCKERMAN, *supra* note 83, at 265.

140. EEOC, *supra* note 56, at 7 ("[The] EEOC authored many sex discrimination precedents."); *see also* H.R. REP. No. 98-796, at 2, 7 (1984) (describing how "much of the progress in the area of sex-based wage discrimination has been made with the active participation of [the] EEOC," including in *County of Washington v. Gunther*, 452 U.S. 161, 168 (1981), which established that sex-based wage discrimination claims were not strictly limited to the Equal Pay Act's "equal work" requirement).

141. 42 U.S.C. § 2000e-2(a), § 2000(e)(k).

142. EEOC, *supra* note 56, at 7–8. In its 1968 Guidelines on Sex Discrimination, the EEOC declared that Title VII preempted state protective laws, and various appellate courts agreed. *Id.* The Supreme Court endorsed the EEOC's views on discrimination based on marital and parental status and sexual harassment. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–66 (1986).

orientation and gender identity (SOGI) discrimination.[143] In a 2012 federal-sector decision, the Commission held that gender identity discrimination is sex discrimination.[144] According to Professor Sandra Sperino, the decision "acted as a catalyst to push the law" forward.[145] Soon thereafter, the EEOC laid the groundwork for broader judicial recognition of SOGI discrimination by forming an LGBT working group, developing litigation strategies, and tracking sex-based claims.[146] The Commission maintained that position during the first Trump Administration even when the DOJ insisted that the EEOC should take the opposite view.[147]

By exercising independent judgment rooted in expertise and evidence, the EEOC translated Title VII's promise into enduring protections against workplace discrimination. From the EEO-1 reports that revealed systemic exclusion, to disparate impact theory that addressed it, to the sex discrimination and SOGI precedents that extend Title VII to new forms of inequality, the Commission recognized that discrimination evolves with the workplace and that the statute's vitality depends on addressing "reasonably comparable evils" beyond those that Congress first envisioned.[148]

B. STAGGERED AND STABLED: HOW INDEPENDENCE ENABLED PRACTICAL AND CONSISTENT GUIDANCE

Title VII is a notoriously ambiguous statute,[149] and the Supreme Court often takes years to resolve interpretation questions.[150] In that gap, the EEOC's guidance plays a critical role in protecting employers and workers alike.[151] Over time, the Commission's bipartisan and multimember structure has made it a credible interpreter of Title VII, despite its lack of substantive rulemaking authority.[152] The empirical evidence supports this claim. In her comprehensive analysis of every Supreme Court decision interpreting Title VII between 1965 and 2007, Professor Margaret Lemos found that the Court agreed with the EEOC's position

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143. Sperino, *supra* note 103, at 156–78 (describing the EEOC's role in developing sexual orientation and gender identity based discrimination law).

144. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *4 (Apr. 20, 2012).

145. Sperino, *supra* note 103, at 170.

146. *Id.* at 163; *Fact Sheet on Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, EEOC [https://perma.cc/N7YX-59F4] (last visited Aug. 24, 2024).

147. *See supra* notes 86–92 and accompanying text.

148. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (holding Title VII protects workers from same-sex sexual harassment).

149. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 52 (1995). Most notably, Title VII does not even define "discrimination." *See* 42 U.S.C. § 2000e.

150. *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 423–24 (2013) (showing that it took more than fifteen years for the Supreme Court to resolve the issue of supervisor liability for harassment).

151. For example, Title VII provides employers who have complied with EEOC guidance with immunity for violations. 42 U.S.C. § 2000e-12(b).

152. As then-Judge Brett Kavanaugh observed, multimember commissions "divide and disperse power across multiple commissioners . . . [which] thereby reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect individual liberty." PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

roughly two-thirds of the time in 102 cases involving 120 distinct issues.[153] In cases where the Court declined to follow the Commission's view, Congress often passed new legislation endorsing the EEOC's interpretation.[154]

The Commission's staggered, bipartisan leadership has also served as a guardrail against abrupt policy shifts. When President Reagan entered office in 1981, his administration sought to reverse or revise major EEOC positions on everything from affirmative action to employment testing.[155] Yet he inherited commissioners who did not share those goals.[156] Acting Chair J. Clay Smith defended the Commission's interpretations before Congress, arguing that the Reagan Administration's proposals "demonstrated ignorance of the law, disregarded Supreme Court decisions, and evidenced a desire to make the EEOC a political arm of the White House with no independent power to protect minorities."[157] When Clarence Thomas later assumed the chairmanship, he promised to bring EEOC policy in line with Reagan's agenda; however, he could not secure enough votes to repeal or replace any of the Commission's major guidance.[158] The result in the 1980s was that, even amid vigorous debate about civil rights policy, the Commission's principal guidance documents remained largely intact.[159]

More broadly, Lemos's study of the EEOC's positions from 1965 through 2007 shows that the Commission's interpretations "ha[ve] been quite stable."[160] When revisions occur, they typically follow new legislation or Supreme Court

153. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 388–89 (2010).

154. *Id.* at 420–21, 421 n.234 (listing five instances where Congress overturned Supreme Court decisions by adopting EEOC positions); *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, EEOC (Apr. 29, 2014), https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009 [https://perma.cc/GK9B-RK4Q] (discussing enactment of the Lilly Ledbetter Fair Pay Act of 2009, which overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), and how "[t]he Act states the EEOC's longstanding position" on fair pay).

155. *See* Dearborn, *supra* note 81, at 87–88 (discussing proposals for the EEOC by President Reagan's transition team); ZUCKERMAN, *supra* note 83, at 256 (discussing how the Reagan Administration tried to change the EEOC's "regulations on employee screening tests").

156. *See* ZUCKERMAN, *supra* note 83, at 259; Spencer Rich, *Reagan Panel*, *Citing 'New Racism,' Urges Easing of EEOC Rules*, WASH. POST (Jan. 29, 1981), https://www.washingtonpost.com/archive/politics/1981/01/30/reagan-panel-citing-new-racism-urges-easing-of-eeoc-rules/dfd79721-7bbc- 4ef0-91a3-ee5425904abe/.

157. ZUCKERMAN, *supra* note 83, at 259.

158. *See Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says,* DAILY LAB. REP. (Bureau Nat'l Affs., Washington, D.C.), Nov. 15, 1984, at A-6; Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 706–07, 707 nn.103–05 (1988). Former EEOC Chair Holmes Norton notes that the "Uniform Guidelines of Employee Selection, the Sex Discrimination Guidelines, the Pregnancy Discrimination Questions and Answers, the Affirmative Action Guidelines, the Guidelines of Religious Discrimination, and the Guidelines on National Origin . . . continue[d] to be sanctioned by the courts." *Id.* at 708.

159. *See* Holmes Norton, *supra* note 158, at 707–08.

160. Lemos, *supra* note 153, at 427. Professor Lemos also finds that "the EEOC's Guidelines do not reflect 'flexible' decisionmaking in the sense of switching from one interpretation to another as times—or administrations—change." *Id.* at 428.

decisions rather than shifts in political control.[161] That stability is not simply bureaucratic inertia but a reflection of an institution prioritizing legally sound interpretations grounded in the statute's purpose.[162]

As this Part shows, the EEOC's independence was real, functional, and consequential, even though it was never guaranteed in a formal sense. Over decades, presidents of both parties largely refrained from policy-based removals; commissioners exercised professional judgment rather than political loyalty; and courts and regulated parties treated the Commission's guidance as authoritative. This practice-based equilibrium enabled the EEOC to develop and sustain core elements of modern employment discrimination law, producing stability for employers and meaningful protection for workers. Nonetheless, that independence rested on convention, not command. Because it depended on presidential restraint or commissioners' resilience rather than legal insulation, it was always inherently vulnerable to reversal.

III. THE EEOC WITHOUT INDEPENDENCE

This Part examines how the Equal Employment Opportunity Commission's (EEOC or Commission) vulnerability to erosion of its operational independence through abandonment of the tradition of political restraint, as noted in the previous Part, was exposed and exploited through policy-driven commissioner removals, abrupt reversals of settled guidance, and the redirection of enforcement authority toward political ends during the second Trump Administration. The collapse of the EEOC's operational independence has produced not merely a shift in policy but also a set of interlocking institutional failures. First, as Section A examines, the erosion of the Commission's independence has led to the abdication of responsibility, as the Commission retreats from enforcing entire categories of claims, including those involving disparate impact and sexual orientation and gender identity (SOGI) discrimination, despite clear statutory and doctrinal foundations for their enforcement. Second, as Section B examines, political control over the Commission's leadership has translated into delay: charges languish, investigations stall, and relief is deferred through inaction rather than denial. Third, as Section C examines, the EEOC's guidance function has been impaired. Longstanding interpretations have been withdrawn, rewritten, or left to atrophy, depriving employers and workers alike of stable interpretive guidance. Finally, as Section D examines, the Commission's enforcement authority itself has been redirected toward advancing the Trump Administration's targeting of disfavored employers. Investigatory and compliance tools are being deployed selectively, rather than in service of Title VII's antidiscrimination mandate. Together, these failures illustrate how the loss of independence transforms a

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161. *Id.* at 427.

162. Note that Ganesh Sitaraman and Ariel Dobkin might argue that we are mistaking "inaction for stability." Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 730–31 (2019). However, if that were the case, why have Republican-led EEOCs not consistently revoked guidance passed under Democrat-led EEOCs? We argue that the EEOC's autonomy has allowed it to prioritize legally sound interpretations over politics.

civil rights agency from a source of legal stability into a vehicle for uncertainty, inequality, ambiguity, and political targeting.

A. ABDICATING RESPONSIBILITIES

Pulling a policy oar for the second Trump Administration, the EEOC has staked out positions and operational practices related to SOGI discrimination and disparate impact claims that betray its own established interpretations and fly in the face of settled law, respectively. This Section describes this abdication of responsibility by the EEOC, and the subsequent Sections describe the knock-on effects on claimants, guidance, and whole protected classes of people.

Consistent with its dismissal of its SOGI litigation docket, the EEOC at the beginning of Trump's second term instructed claims-processing staff to code all SOGI charges as "meritless," a step that effectively halted investigations for months.[163] When the EEOC later permitted SOGI claims to move forward, it barred investigations into matters involving only SOGI-based sexual harassment and required investigators to send any permitted SOGI-based charge that they believed supported a cause finding to the national office for additional review.[164] At the same time, the Commission announced to the state and local fair employment agencies that process discrimination claims through worksharing agreements that it would retroactively refuse to reimburse them for intakes or resolutions of SOGI claims.[165] It seemed that the agency whose mission is to "[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all"[166] was now drawing identity-based lines of its own.

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163. Julian Mark, *EEOC to Consider Some Transgender Discrimination Cases After Months-Long Pause*, WASH. POST (July 10, 2025), https://www.washingtonpost.com/business/2025/07/10/eeoc-transgender-discrimination/; *see also* Press Release, EEO Leadership Group Statement on EEOC's Processing of LGBTQ+ Charges as of July 1, 2025 (July 21, 2025), https://static1.squarespace.com/static/67f14b136c5a8838cca88ae0/t/687d867215f8a2128c6e9c2a/1753056882929/EEO+Leadership+Group+Statement+on+EEOC%27s+Processing+of+LGBTQ%2B+Charges+07.21.25.pdf [https://perma.cc/9H7K-T6KM] (outlining the timeline of recent changes to the EEOC's processing of SOGI claims) [hereinafter EEO Leadership Group Statement]. When now-Chair Andrea Lucas was asked at her Senate confirmation hearing about whether EEOC staff were instructed to code cases involving gender identity as "meritless" without investigation, she responded, "[U]nfortunately, I cannot answer [that] as it would require me to breach Title VII's confidentiality provisions and deliberative privilege and attorney client privilege." SENATE HELP COMMITTEE REPUBLICANS, *Senate HELP Hearing: Labor Nominees*, at 55:26 (YouTube, June 18, 2025), https://www.youtube.com/watch?v=R8hz2xWpO4A.

164. *See* EEO Leadership Group Statement, *supra* note 163; Mark, *supra* note 163; Complaint for Declaratory and Injunctive Relief at 15–16, 21–22, FreeState Just. v. EEOC, No. 25-CV-02482 (D. Md. July 29, 2025).

165. The EEOC's memo to Fair Employment Practices Agency (FEPA) Directors stated that the Commission would not reimburse claims that "implicate[]" President Trump's executive order on gender identity. Memorandum from Thomas Colclough, Dir., Off. of Field Programs, EEOC, to FEPA Dirs. (May 20, 2025), https://static1.squarespace.com/static/67f14b136c5a8838cca88ae0/t/68d4aec896ed442d4ea2d800/1758768840708/memo-to-fepas-executive-orders-regarding-gender-identity-and-disparate-impact.pdf [https://perma.cc/578A-XUD7]; *see also Fair Employment Practices Agencies (FEPAs) and Dual Filing*, EEOC, https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing [https://perma.cc/GH89-ENCS] (last visited May 17, 2026) (providing background on FEPAs).

166. *Overview*, EEOC, https://www.eeoc.gov/overview [https://perma.cc/PU9G-QPYS] (last visited May 17, 2026).

In addition, in September 2025, the EEOC issued an internal memorandum halting all investigations into disparate impact claims.[167] The directive interpreted Executive Order 14281[168] as giving the EEOC the authority to instruct federal agencies "'to eliminate the use of disparate-impact [theory] . . . to the maximum degree possible.'"[169] Unlike the EEOC's refusal to investigate SOGI-based harassment claims, which the Commission argues fall outside Title VII's scope,[170] here, the EEOC has no legal cover. The Civil Rights Act of 1991 explicitly amended Title VII to prohibit facially neutral employment practices that produce discriminatory effects without business necessity.[171] The EEOC's blanket nonenforcement policy thus represents an abdication of one of its core statutory responsibilities to "make an investigation" when a charge is filed.[172]

This withdrawal forces systemic discrimination enforcement onto private litigants who are less well-equipped for the task. Private plaintiffs lack the EEOC's broad subpoena power, which provides pre-litigation access to "virtually any material that might cast light" on discrimination allegations against employers.[173] This subpoena authority allows the Commission to compel the production of comprehensive employment data, which is often essential to satisfy initial pleading requirements.[174] The EEOC can also litigate on behalf of worker groups without meeting the class-certification requirements of Federal Rule of Civil Procedure 23.[175] Private class actions, by contrast, must satisfy the Supreme

167. Savage & Olson, *supra* note 12. The memo stated that "every pending charge of discrimination premised solely on disparate impact liability shall be **administratively closed** by issuing a Notice of Right to Sue and identifying 'other' as the reason for the closure." Complaint for Declaratory and Injunctive Relief at 13, Cross v. EEOC, No. 25-CV-03702 (D.D.C. Oct. 20, 2025) (quoting the memo).

168. Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 28, 2025).

169. Complaint for Declaratory and Injunctive Relief at 12, *supra* note 167 (quoting the EEOC internal memo).

170. *See* Press Release, EEOC, Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace (Jan. 28, 2025), https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace [https://perma.cc/6WA4-X6VL] [hereinafter EEOC Press Release on Removing Gender Ideology] ("'The Commission's harassment guidance was fundamentally flawed,' said [then-Acting Chair] Lucas. 'It ignored biological reality, effectively eliminated single-sex workplace facilities, and impinged on all employees' rights to freedom of speech and belief. In unlawfully expanding past *Bostock's* dictates, the EEOC exceeded its authority.'").

171. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i)). For an account of congressional override of the Supreme Court's weakening of disparate impact theory, see Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217 (2007).

172. 42 U.S.C. § 2000e-5(b) (stating that the Commission "*shall* make an investigation") (emphasis added). The EEOC is currently being sued by a plaintiff who claims the EEOC unlawfully stopped investigating her disparate impact claim, arguing various violations of the Administrative Procedure Act. Complaint for Declaratory and Injunctive Relief at 3–4, *supra* note 171.

173. EEOC v. Shell Oil Co., 466 U.S. 54, 68–69 (1984). Specifically, the Supreme Court noted that courts had long construed a Title VII as granting the EEOC broad subpoena powers. *Id.*; *see* 42 U.S.C. § 2000(e)-8(a) (stating that the Commission "shall at all reasonable times have access to . . . any evidence . . . relevant to the charge under investigation").

174. *See* Mandala v. NTT Data, Inc., 975 F.3d 202, 212 (2d Cir. 2020) (acknowledging the "informational disadvantage" that plaintiffs face before discovery in disparate impact claims).

175. *See* FED. R. CIV. P. 23(a); Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 333–34 (1980) (holding that, under Title VII, the EEOC may seek class-wide relief without Rule 23 certification).

Court's demanding commonality requirement with "significant proof" of a company-wide discriminatory policy.[176] With the EEOC retreating and private class mechanisms constrained, unlawful practices operating across facilities, job categories, or entire companies will inevitably go under-enforced.

These consequences are especially concerning given the rise of algorithmic decisionmaking. Automated screening systems, predictive analytics, and artificial intelligence increasingly drive hiring, promotion, and termination decisions.[177] Though ostensibly objective, these technologies can embed and amplify discriminatory patterns, producing disparate impacts more pervasive and elusive than traditional biased practices.[178] Challenging algorithmic discrimination requires access to detailed information about these systems, which can be obtained more easily through the EEOC's investigative powers.[179] The Commission's withdrawal from disparate impact enforcement thus potentially leaves unchecked the form of systemic discrimination most likely to shape the future of work.

B. DISCRIMINATING DELAYS

The second Trump Administration's enforcement directives have transformed the EEOC from a resource to a roadblock for some workers. As described in the previous Section, the Commission halted investigations into SOGI harassment claims and now subjects SOGI-related hiring and termination claims to a heightened standard of review.[180] Whether these actions are lawful remains the subject of ongoing litigation,[181] but their immediate effect is unnecessary delay for many victims of discrimination who must come to the EEOC for relief.

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176. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–53 (2011) (heightening the "commonality" requirement and emphasizing the need for "glue" across decisions). In addition, individualized backpay claims generally cannot proceed under Rule 23(b)(2). *Id.* at 365–67.

177. *See* Keith Ferrazzi, *The AI Recruitment Takeover: Redefining Hiring in the Digital Age*, FORBES (Mar. 27, 2025, at 17:33 ET), https://www.forbes.com/sites/keithferrazzi/2025/03/27/the-ai-recruitment-takeover-redefining-hiring-in-the-digital-age/ [https://perma.cc/6A5Z-GJ69]; Megan Cerullo, *AI Could Determine Whether You Get Hired or Fired as More Managers Rely on the Technology at Work*, CBS NEWS (July 8, 2025, at 14:04 ET), https://www.cbsnews.com/news/ai-hired-fired-promotion-managers/ [https://perma.cc/GF29-HWGP].

178. Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS (Oct. 10, 2018, at 13:47 ET), https://www.reuters.com/article/world/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08J/(describing Amazon's AI tool that demonstrated a gender bias); Guy Brenner, Jonathan Slowik & Dixie Morrison, *AI Bias Lawsuit Against Workday Reaches Next Stage as Court Grants Conditional Certification of ADEA Claim,* PROSKAUER ROSE LLP (June 11, 2025), https://www.lawandtheworkplace.com/2025/06/ai-bias-lawsuit-against-workday-reaches-next-stage-as-court-grants-conditional-certification-of-adea-claim/ [https://perma.cc/J8SS-CJRG] (discussing *Mobley v. Workday, Inc.*, an ongoing class action suit in California federal district court involving an AI-based applicant recommendation system that "the plaintiff alleges . . . had a disparate impact on job applicants based on race, age, and disability").

179. *See Resetting Antidiscrimination Law in the Age of AI*, *in* DEVELOPMENTS IN THE LAW — ARTIFICIAL INTELLIGENCE, 138 HARV. L. REV. 1554, 1562–64 (2025) (arguing that existing antidiscrimination doctrine may be inadequate to address the novel challenges of AI decisionmaking).

180. *See supra* notes 163–165 and accompanying text.

181. An advocacy group based in Baltimore, Maryland sued the EEOC based on *ultra vires* and Fifth Amendment violations. Complaint for Declaratory and Injunctive Relief at 32–33, FreeState Just. v. EEOC, No. 25-cv-02482 (D. Md. July 29, 2025); FREESTATE JUST., https://www.freestate-justice.org

Before these changes, EEOC investigations averaged roughly eleven months from charge filing to resolution.[182] The additional layers of review for approved SOGI claims will inevitably lengthen that timeline.[183] For workers whose claims the Commission declines to investigate, which includes not only SOGI-based harassment but also all disparate impact claims,[184] delay takes another form. The EEOC will still provide "right to sue" (RTS) letters in such cases,[185] but because letters are issued without a substantive investigation, claimants may need to wait 180 days from the charge filing date before proceeding to court.[186] Prior to the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[187] several federal appellate courts deferred to the EEOC's interpretation permitting premature RTS letters.[188] After *Loper Bright* eliminated *Chevron* deference,[189] however, more district courts have rejected early notices and insisted on the full statutory waiting period.[190] These procedural delays are not mere inconveniences. Each month of inaction increases the likelihood that witnesses leave, documents disappear, and memories fade, thereby diminishing the quality of evidence and the likelihood of relief for victims of discrimination.

[https://perma.cc/7AYH-324J] (last visited May 17, 2026). The EEOC moved to dismiss on standing and other grounds. Memorandum in Support of Defendants' Motion to Dismiss at 1, FreeState Just. v. EEOC at 1, No. 25-cv-02482 (D. Md. Oct. 15, 2025), Dkt. No. 24-1. As of the printing of this Essay, the court has yet to release a decision. *Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SECURITY, https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/M8TF-G235] (last visited May 17, 2026).

182. *What You Can Expect After You File a Charge*, *supra* note 180.

183. *See* EEO Leadership Group Statement, *supra* note 163 (detailing how SOGI claims will be delayed).

184. Savage & Olson, *supra* note 12.

185. *Id.* ("Workers who submitted complaints solely on these grounds will receive a notice from the [EEOC] saying they can pursue the case in court on their own if they wish.")

186. 42 U.S.C. § 2000e-5(f)(1) ("If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . .").

187. 603 U.S. 369 (2024).

188. *See* Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1277 (10th Cir. 2001); Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1063 (11th Cir. 1994); Saulsbury v. Wismer & Becker, Inc., 644 F.2d 1251, 1257 (9th Cir. 1980). However, other circuits did not apply *Chevron* deference. *See* Prichard v. Long Island Univ., No. 23-CV-09269, 2025 WL 2163390, at *2 (E.D.N.Y. July 30, 2025) (discussing the circuit split).

189. *Loper Bright*, 603 U.S. at 412–13; *see also* Craig E. Leen & Michael A. Pavlick, Loper Bright*'s Potential Effect on Federal Labor and Employment Law: Possible Consequences for Agencies and Practitioners*, K&L GATES (Oct. 1, 2024), https://www.klgates.com/Loper-Brights-Potential-Effect-on-Federal-Labor-and-Employment-Law-Possible-Consequences-for-Agencies-and-Practitioners-10-1-2024 [https://perma.cc/4KQ2-S42P] (explaining the potential impacts of the end of *Chevron* deference on federal labor and employment law).

190. *Prichard*, 2025 WL 2163390, at *3; *see also* Gibb v. Tapestry, Inc., No. 18-CV-6888, 2018 WL 6329403, at *6 (S.D.N.Y. Dec. 3, 2018) (holding that Title VII prohibits premature RTS letters).

C. GUIDANCE IMPAIRED

The EEOC's compromised independence manifests not only in what it investigates but also in how the Commission speaks. When courts move slowly and Congress stays silent, employers look to the EEOC for clarity. In response to a series of executive orders by President Trump, however, the Commission sowed confusion by removing employer resources and casting doubt on the legality of its positions.

The EEOC Chair's substantial power over public communications makes this possible. Except for "[s]ignificant guidance," which requires Commission deliberation and approval,[191] the Chair can unilaterally create and remove any informational material on the EEOC's website.[192] This matters because Title VII immunizes employers for employment actions made "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission."[193] As a result, the Chair can almost single-handedly reshape the EEOC's interpretation of the law, removing prior longstanding guidance and replacing it with the interpretation du jour of the sitting administration.[194] In doing so, the Chair provides an argument for legal cover to employers who rely on those controversial opinions.[195]

EEOC Chair Andrea Lucas has exercised this authority aggressively, first in her appointment as Acting Chair by President Trump and then as the formally designated Chair after the Senate confirmed her for a second term on the Commission in mid-2025.[196] Following President Trump's executive order, "Removing Barriers to American Leadership in Artificial Intelligence,"[197] then-Acting Chair Lucas removed the Commission's 2023 technical assistance document on algorithmic decisionmaking in employment.[198] The document had clarified responsibilities and explained how employers could assess whether AI hiring tools produce disparate impacts.[199] Similarly, after President Trump ordered the

191. *See* 29 C.F.R. § 1695.1(b) (defining "significant guidance document"); 29 C.F.R. § 1695.2(d) (describing approval for significant guidance).

192. *See* 29 C.F.R. § 1695.2(d); Nonnie L. Shivers & Zachary V. Zagger, *EEOC Acting Chair Rolls Back Guidance Related to Unlawful Discrimination and Harassment Based on Gender Identity*, OGLETREE DEAKINS (Jan. 30, 2025), https://ogletree.com/insights-resources/blog-posts/eeoc-acting-chair-rolls-back-guidance-related-to-unlawful-discrimination-and-harassment-based-on-gender- identity/ [https://perma.cc/DKV9-7GEA].

193. 42 U.S.C. § 2000e-12(b).

194. *See id.*

195. *See id.*

196. Press Release, EEOC, Andrea R. Lucas Designated Chair of the U.S. Equal Employment Opportunity Commission (Nov. 6, 2025), https://www.eeoc.gov/newsroom/andrea-r-lucas-designated-chair-us-equal-employment-opportunity-commission [https://perma.cc/8J3W-GXYM].

197. Exec. Order No. 14179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

198. Erinn L. Rigney, Ninamarie C. Moore & Isabella F. Sparhawk, *The Changing Landscape of AI: Federal Guidance for Employers Reverses Course with New Administration*, K&L GATES (Jan. 31, 2025), https://www.klgates.com/The-Changing-Landscape-of-AI-Federal-Guidance-for-Employers-Reverses-Course-with-New-Administration-1-31-2025 [https://perma.cc/SC98-V962].

199. *See Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, EEOC (May 18, 2023),

federal government, including explicitly naming the EEOC, to defend against "gender ideology extremism" and "restore biological truth,"[200] Lucas deleted materials on the EEOC's website about *Bostock*'s implications for LGBTQ+ workers and the Commission's 2015 fact sheet on bathroom access for transgender employees.[201]

Lucas did not limit herself to removing resources for employers. She also created material to discredit the agency's 2024 significant guidance on LGBTQ+ harassment, declaring that "[s]ex is binary (male and female) and is immutable."[202] As such, she stated that "[i]t is not harassment to acknowledge these truths—or to use language like pronouns that flow from these realities, even repeatedly."[203] She further insisted that maintaining sex-segregated facilities based on biological sex does not constitute harassment or discrimination.[204] Employers who are uncertain about their obligations may treat her pronouncements as permission to engage in such conduct.[205]

Lucas also created guidance to advance executive priorities. In response to President Trump's order encouraging the private sector to end "illegal DEI discrimination,"[206] she issued an explainer on the EEOC's website entitled: "What You Should Know About DEI-Related Discrimination at Work."[207] The posting,

https://web.archive.org/web/20250119202620/https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial [https://perma.cc/8WBS-YX8B] (explaining that algorithmic hiring and evaluation tools count as "selection procedures," so employers must monitor them for adverse impact will remain liable even when vendors build or run the tools, and employers must either prove resulting disparities are job-related and consistent with business necessity or adopt less-discriminatory alternatives); *see also* Anne Cullen, *AI Guidance About-Face Shouldn't Alter Employers' Approach*, LAW360: EMP. AUTH. (Jan. 28, 2025, at 15:09 ET), https://www.law360.com/employment-authority/articles/2288280/ai-guidance-about-face-shouldn-t-alter-employers-approach (explaining how the EEOC and the Department of Labor "scuttled online resources advising employers on how to curb the risk of workplace discrimination when they use artificial intelligence tools, but experts said that doesn't mean companies should change their game plans").

200. Exec. Order No. 14168, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025) (alterations omitted).

201. Rachel V. See & Andrew L. Scroggins, *Trump Fires EEOC Commissioners, Testing Constitutional Limits on Presidential Power Over Independent Agencies*, SEYFARTH: WORKPLACE CLASS ACTION BLOG (Jan. 29, 2025), https://www.workplaceclassaction.com/2025/01/trump-fires-eeoc-commissioners-testing-constitutional-limits-on-presidential-power-over-independent-agencies/ [https://perma.cc/QJM4-7VAX]; *see also Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC (Jun. 15, 2021), https://web.archive.org/web/20250119220225/https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/MLJ7-68GP].

202. *Commissioner Andrea R. Lucas's Statement on EEOC Enforcement Guidance on Harassment in the Workplace*, EEOC, https://www.eeoc.gov/commissioner-andrea-r-lucass-statement-eeoc-enforcement-guidance-harassment-workplace [https://perma.cc/PVZ5-GP9P] (last visited May 17, 2026).

203. *Id.*

204. *Id.*

205. *See id.* It should be noted that EEOC "[g]uidance" does not include EEOC "statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including . . . press materials." 29 C.F.R. § 1695.1(a)(8). Therefore, Lucas's statements here may not qualify as a "written interpretation or opinion" under 42 U.S.C. § 2000e-12(b)'s immunity provision. *See* 42 U.S.C. § 2000e-12(b); 29 C.F.R. § 1695.1(a)(8).

206. Exec. Order No. 14173, 90 Fed. Reg. 8633, 8635 (Jan. 21, 2025).

207. *What You Should Know About DEI-Related Discrimination at Work*, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work [https://perma.cc/5PS9-CGEM] (last visited May 14, 2026) [hereinafter *DEI-Related Discrimination Factsheet*].

likely issued without a Commission vote, portrays diversity, equity, and inclusion (DEI) practices as legally suspect, suggesting that expressing interest in workforce diversity could signal illegal race- or sex-based preferences.[208]

Ten former EEOC officials condemned Lucas's characterizations as misleading.[209] They also noted that Lucas overstated the hostile work environment liability risks associated with "DEI-related training" while omitting critical context, such as the fact that discomfort alone does not establish harassment.[210]

Lucas's anti-DEI message amplified confusion already created by the Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard* (*SFFA*), which struck down race-conscious college admissions programs and limited the circumstances under which race may be considered to promote diversity.[211] Although *SFFA* addressed higher education and not employment, its reasoning cast doubt on the use of race and gender in decisionmaking.[212] Employers now face genuine uncertainty about how to reconcile diversity initiatives with Title VII's constraints.[213] Ironically, at precisely the moment employers need clarity, the EEOC is offering ambiguity and alarm.

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208. *See* Statement of Former Equal Employment Opportunity Commission (EEOC) Officials on Employer Diversity, Equity, and Inclusion Efforts (Apr. 3, 2025), https://static1.squarespace.com/static/67f14b136c5a8838cca88ae0/t/67f6caf2fc4ea152ce203d06/1744227059055/1+Statement-of-Former-EEOC-Officials-on-DEI-04.03.25-1.pdf [https://perma.cc/5S39-AXR9] [hereinafter April 2025 Statement of Former EEOC Officials] (listing the authors of the statement as: Charlotte A. Burrows, EEOC Commissioner from 2015 to 2025 and Chair from 2021 to 2025; Chai R. Feldblum, EEOC Commissioner from 2010 to 2019; Karla Gilbride, EEOC General Counsel from 2023 to 2025; Christine Griffin, EEOC Commissioner from 2006 to 2009 and Vice Chair during 2009; Stuart J. Ishimaru, EEOC Commissioner from 2003 to 2012 and Acting Chair from 2009 to 2010; P. David Lopez, EEOC General Counsel from 2010 to 2016; Peggy R. Mastroianni, EEOC Legal Counsel from 2011 to 2017; Jocelyn Samuels, EEOC Commissioner from 2020 to 2025 and Vice Chair from 2021 to 2025; Ellen Vargyas, EEOC Legal Counsel from 1994 to 2000; and Jenny R. Yang, EEOC Commissioner from 2013 to 2018, Vice Chair during 2014, and Chair from 2014 to 2017); *see also DEI-Related Discrimination Factsheet*, *supra* note 207. In response to the question, "Can an employer justify taking an employment action based on race, sex, or another protected characteristic because the employer has a business necessity or interest in 'diversity,' including preferences or requests by the employer's clients or customers?", the EEOC answers on its website, "No. Employers violate Title VII if they take an employment action motivated—in whole or in part—by race, sex, or another protected characteristic. Title VII explicitly provides that a 'demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination.' . . . Title VII does not provide any 'diversity interest' exception to these rules." *Id.* (footnotes omitted).

209. April 2025 Statement of Former EEOC Officials, *supra* note 208.

210. *Id.* Specifically, they argued that Lucas's explainer failed to emphasize that cases finding liability (or even allowing claims to proceed) are rare and fact-specific. *Id.*; *see also DEI-Related Discrimination Factsheet*, *supra* note 207 ("'In discrimination cases involving anti-discrimination trainings, courts have ruled in favor of plaintiffs who present this type of evidence' of 'how the training could be discriminatory – for example, in design or execution,' 'or, at the motion-to-dismiss stage, who make plausible allegations that explain how the training was discriminatory.'") (quoting Brief of the EEOC As Amicus Curiae in Support of Neither Party at 21, Vavra v. Honeywell Int'l, Inc., No. 23-2823 (7th Cir. Feb. 6, 2024), Dkt. No. 19-2).

211. 600 U.S. 181, 230 (2023).

212. *See id.*; *see also DEI-Related Discrimination Factsheet*, *supra* note 207 (demonstrating similar reasoning regarding the use of race and gender in decisionmaking as seen in *SFFA*).

213. Letter from C.R. Orgs. to Sen. Bill Cassidy and Sen. Bernie Sanders in Opposition to the Confirmation of Andrea Lucas to the EEOC (June 25, 2025), https://nwlc.org/wp-content/uploads/2025/06/Andrea-Lucas-opposition-letter-6.25.25-FINAL.pdf [https://perma.cc/G885-HF7G] (asserting that,

D. POLITICAL TARGETING

In addition to recasting DEI-related activity as legally perilous through an interpretive retreat from prior guidance, the EEOC has sought to reinforce that message through enforcement itself. As the previous Section illustrates, the withdrawal and revision of longstanding guidance signals to employers the EEOC's shifting position that DEI initiatives rest on unstable legal ground. This Section shows how that signal is operationalized. Rather than applying Title VII evenhandedly, the Commission has pursued investigations and has demanded information from employers and institutions singled out by the White House for their DEI practices. Thus, the EEOC's investigatory authority is being used to advance the same substantive objectives reflected in its guidance reversals. In this way, impaired guidance and political targeting function together: the former destabilizes the legal baseline, while the latter selectively enforces that instability against politically disfavored actors.

After an executive order singled out Perkins Coie LLP and directed reviews of "large, influential, or industry leading law firms,"[214] then-Acting Chair Lucas sent "letters of inquiry" to Perkins Coie and nineteen additional law firms demanding detailed information about their DEI practices.[215] Within a month of the public announcement, nine firms pledged nearly $1 billion in pro bono services for the Administration's priorities, and President Trump announced that the EEOC had withdrawn its letters and would "not pursue any claims related to those

as then-Acting Chair of the EEOC, Andrea Lucas "used the EEOC to intimidate businesses and sow confusion around the legality of diversity, equity, inclusion, and accessibility practices that help create equal opportunity for workers"); Gene Marks, *New DEI Rules Are Creating Confusion. Here's What to Do.*, PHILA. INQUIRER (Apr. 22, 2025, at 05:00 ET), https://www.inquirer.com/business/small-business/dei-diversity-workplace-small-business-employment-law-20250422.html (noting that, "[f]or many employers who were previously implementing DEI policies, the new rules [from the EEOC] are creating confusion and concern"); *see also* Ishan K. Bhabha, Erica Turret & Peggy Xu, *One Year Later: Implications of SFFA for Corporate America*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 6, 2024), https://corpgov.law.harvard.edu/2024/08/06/one-year-later-the-implications-of-sffa-for-corporate-america/ [https://perma.cc/MBX7-7Q5U] (describing how the *SFFA* decision "has led to an increase in both challenges to DEI programs and fear amongst employers over the continued permissibility of those programs").

214. Exec. Order No. 14230, 90 Fed. Reg. 11781, 11782 (Mar. 11, 2025).

215. Letter from Rep. Jamie Raskin, Sen. Richard Blumenthal & Rep. Robert C. "Bobby" Scott to Andrea R. Lucas (July 9, 2025), https://democrats-judiciary.house.gov/sites/evo-subsites/democrats-judiciary.house.gov/files/evo-media-document/2025-07-09-raskin-blumenthal-scott-to-lucas-eeoc%29-law-firms.pdf [https://perma.cc/TB9J-DTEA] [hereinafter Letter from Members of Congress to Andrea Lucas]. The list of law firms to which Acting Chair Lucas sent letters included: A&O Shearman; Debevoise & Plimpton LLP; Cooley LLP; Freshfields LLP; Goodwin Procter LLP; Hogan Lovells; Kirkland & Ellis LLP; Latham & Watkins LLP; McDermott Will & Emery; Milbank LLP; Morgan, Lewis & Bockius LLP; Morrison & Foerster LLP; Perkins Coie LLP; Reed Smith LLP; Ropes & Gray LLP; Sidley Austin LLP; Simpson Thacher & Bartlett LLP; Skadden, Arps, Slate, Meagher & Flom LLP; White & Case LLP; and WilmerHale. Press Release, EEOC Acting Chair Andrea Lucas Sends Letters to 20 Law Firms Requesting Information About DEI-Related Employment Practices (Mar. 17, 2025), https://www.eeoc.gov/newsroom/eeoc-acting-chair-andrea-lucas-sends-letters-20-law-firms-requesting-information-about-dei [https://perma.cc/VQC7-UQ5M] (listing the twenty firms to whom letters were sent).

issues" against the capitulating firms.[216] Whatever one thinks of the settlements on the merits, the episode demonstrates how the EEOC's investigative powers can be used by a President to discipline disfavored private actors.

The targeting did not escape scrutiny. Congressional Democrats accused the Acting Chair of "extort[ing] law firms into providing free legal services to the President's allies" and questioned whether publicly announcing investigative demands violated Title VII's confidentiality provisions.[217] They claimed that Lucas's actions were potentially "a perversion of the EEOC's mission and [made] a mockery of due process guaranteed under the Constitution."[218] Former EEOC officials also condemned Lucas's actions as a misuse of her authority, asserting that she cannot unilaterally change Commission-approved positions.[219] Taken together, the concerns expressed were not merely procedural but went to the heart of the Commission's credibility.[220]

Universities experienced similar EEOC scrutiny. In March 2025, the EEOC announced an initiative to investigate universities for antisemitic conduct in the workplace.[221] Four months later, it secured a $21 million settlement with Columbia University.[222] Addressing antisemitism in employment plainly falls within the Commission's remit. Yet these actions were synchronized with administration-wide messaging and parallel efforts by other agencies, giving the EEOC's actions the

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216. Letter from Members of Congress to Andrea Lucas, *supra* note 215; Donald Trump (@realDonaldTrump), TRUTH SOCIAL (Apr. 11, 2025, at 12:21 ET), https://truthsocial.com/@realDonaldTrump/posts/114320245355397433 [https://perma.cc/XKL9-Y3RB]; Sam Levine, *Trump Says Five More Law Firms Agree to Pro Bono Work to Avoid Punitive Executive Orders*, GUARDIAN (Apr. 11, 2025, at 14:08 ET), https://www.theguardian.com/us-news/2025/apr/11/trump-law-firms-pro-bono-deal [https://perma.cc/3PL8-HL8K]; *see also In EEOC Settlement, Four 'BigLaw' Firms Disavow DEI and Affirm Their Commitment to Merit-Based Employment Practices*, EEOC (Apr. 11, 2025), https://www.eeoc.gov/newsroom/eeoc-settlement-four-biglaw-firms-disavow-dei-and-affirm-their-commitment-merit-based [https://perma.cc/L5S3-GRLN].

217. Letter from Members of Congress to Andrea Lucas, *supra* note 215.

218. *Id.*

219. Letter from Charlotte A. Burrows, Jenny R. Yang, Jocelyn Samuels, Chai R. Feldblum, Karla Gilbride, P. David Lopez and Peggy R. Mastroianni to Andrea Lucas, Acting Chair, EEOC (Mar. 18, 2025), https://www.chaifeldblum.com/wp-content/uploads/2025/03/Letter-to-Acting-Chair-Lucas-March-18-2025.pdf [https://perma.cc/Y53L-WGME] (listing several Commission-approved documents that state that the EEOC supports DEI practices); *see also* EEOC, EEOC STRATEGIC ENFORCEMENT PLAN, 2024-2028, at 18 (2023), https://www.eeoc.gov/sites/default/files/2024-03/23-161_EEOC_SEP_030124_508.pdf [https://perma.cc/E2B2-8M2W] (stating that "the EEOC will support employer efforts to implement lawful and appropriate diversity, equity, inclusion, and accessibility (DEIA) practices that proactively identify and address barriers to equal employment opportunity, help employers cultivate a diverse pool of qualified workers, and foster inclusive workplaces").

220. *See* Letter from Members of Congress to Andrea Lucas, *supra* note 215.

221. Press Release, EEOC, EEOC Acting Chair Promises to Hold Accountable Universities and Colleges for Antisemitism on Campus Workplaces (Mar. 5, 2025), https://www.eeoc.gov/newsroom/eeoc-acting-chair-promises-hold-accountable-universities-and-colleges-antisemitism-campus [https://perma.cc/7VXF-Z864].

222. Press Release, EEOC, In Largest EEOC Public Settlement in Almost 20 Years, Columbia University Agrees to Pay $21 Million to Resolve EEOC Antisemitism Charges (July 25, 2025), https://www.eeoc.gov/newsroom/largest-eeoc-public-settlement-almost-20-years-columbia-university-agrees-pay-21-million [https://perma.cc/9KLU-KE5D].

appearance of partisanship.[223] If the EEOC is perceived as a mere weapon in a presidential administration's political arsenal, the Commission's credibility as an impartial conciliator will erode, and its ability to eliminate discrimination in the workplace will be compromised. The risks are grave, not only to the EEOC as an institution but also to equal employment law and civil rights enforcement in the United States.

IV. RECOMMENDATIONS

In an environment where even formally independent agencies have lost, and are at risk of losing even more of, their hallmarks of independence, we recognize that recommending that Congress formally provide Equal Employment Opportunity Commission (EEOC or Commission) Commissioners with tenure is a policy nonstarter.[224] Nonetheless, as we demonstrated in Part II of this Essay, the EEOC's longstanding operational independence has allowed it to be remarkably consistent in developing policy and guidance over time, even as enforcement and litigation priorities have shifted with the politics of presidential administrations. Operational independence has also created a surprisingly stable and influential agency that has implemented the intent and text of Title VII, even in the face of restrictive judicial interpretations, which have, with some regularity, been met with congressional override consistent with the EEOC's interpretation. Thus, we offer recommendations to increase accountability and ensure decisionmaking is based on expertise. With these recommended reforms (some ambitious, some modest), we argue that the EEOC can better maintain fidelity to Title VII's statutory intent, purpose, and language, even as political winds shift from one presidential administration to another.

This Part outlines a set of complementary reforms aimed at restoring meaningful independence to the EEOC without reviving a New Deal-style independent commission. These proposals operate at both the structural and operational levels and are designed to work together, not as substitutes. In Section A, we propose structural reforms to consolidate authority in a single, Senate-confirmed administrator and pairing that office with a statutorily grounded advisory board capable of generating durable, expert counsel to the agency. In Section B, we recommend operational reforms that reduce the Commission's gatekeeping role and limit opportunities for politically motivated delay and targeting, including opt-out mechanisms for charging parties, expanded confidentiality protections, and clearer procedural constraints on investigatory authority. Taken together, these

223. *See* Stuart D. Tochner & Jack S. Sholkoff, *Federal Agencies Target Universities Amid Antisemitism Allegations*, OGLETREE DEAKINS (Mar. 19, 2025), https://ogletree.com/insights-resources/blog-posts/federal-agencies-target-universities-amid-antisemitism-allegations/ [https://perma.cc/Q6R5-KT4X].

224. For a list of firings of political appointees by President Trump during his second term, see Gabriella Cantor & Hannah Sobran, *Tracking Trump's Unprecedented–Often Illegal–Firings of Political Appointees and Watchdogs*, CITIZENS FOR RESP. & ETHICS IN WASH. (Nov. 26, 2025), https://www.citizensforethics.org/reports-investigations/crew-reports/tracking-trumps-unprecedented-o ften-illegal-firings-of-political-appointees-and-watchdogs/ [https://perma.cc/4UHB-WPQV].

reforms offer a unified approach to rebuilding independence by channeling presidential control through transparent accountability while insulating civil rights enforcement from partisan volatility.

A. STRUCTURAL REFORMS

If EEOC Commissioners cannot enjoy meaningful tenure protection, Congress should reconsider the EEOC's basic architecture. To enhance coordination and accountability, the five-member Commission should be replaced with a single administrator and an independent advisory board should be created.

1. Consolidation of Leadership

Consolidating EEOC leadership into a single administrator, who is appointed by the President with Senate approval and removable at will, would address several pathologies emerging with the current Commission. Most immediately, it would eliminate the quorum problems associated with the aggressive use of at-will removal.[225] It took approximately nine months for President Trump to restore the EEOC's quorum, leaving the Commission unable to amend or issue new significant guidance or pursue certain types of cases,[226] including those involving systemic discrimination or major expenditures of the Commission's resources.[227] Furthermore, when vacancies arise, the Federal Vacancies Reform Act could provide a ready default to ensure continuity of operations.[228] This statutory backstop, unavailable to multimember commissions, ensures that someone will always head the EEOC.

Beyond operational continuity, a single-administrator structure would clarify responsibility and enhance accountability. When agency action or inaction produces controversy, dispersed authority across five commissioners obscures attribution of responsibility. A single administrator, by contrast, provides a clear focal point for praise, blame, and questioning.[229] This visibility gives Congress a single point of contact for oversight.

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225. Delays in achieving quorums were already problematic even before the second Trump Administration. *See* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORN. L. REV. 1305, 1360 (2023) (finding that "[f]rom 2000 to 2022, at least ten different commissions have lost a quorum for a period of at least thirty days, leaving them unable to perform key adjudicatory and regulatory functions").

226. Sarah Goodman, *EEOC Regains Quorum and Signals Major Policy Shifts Ahead*, OFFIT KURMAN (Oct. 15, 2025), https://offit.gjassets.com/content/uploads/pdf/eeoc-quorum-restoration-employment-policy-updates.pdf [https://perma.cc/CM48-T2HG].

227. *See* 29 C.F.R. § 1695.1(b); *see also* EEOC, RESOLUTION CONCERNING THE COMMISSION'S AUTHORITY TO COMMENCE OR INTERVENE IN LITIGATION AND THE COMMISSION'S INTEREST IN INFORMATION CONCERNING APPEALS (Jan. 13, 2021), https://www.eeoc.gov/resolution-concerning-commissions-authority-commence-or-intervene-litigation-and-commissions-0 [https://perma.cc/BJR2-2AHW] (listing litigation activities that must be approved by the Commission).

228. 5 U.S.C. §§ 3345–3349d (providing the procedures for selection and limitations on interim administrators).

229. Sitaraman & Dobkin, *supra* note 162, at 726. To be sure, single-head structures raise concerns about politicization. But once for-cause tenure falls away, those concerns attach to any structure. The comparative question is whether a single head is more reviewable and more legible to Congress, the courts, and the public. It is. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through*

The accountability advantages extend to the Senate confirmation process itself. Multimember commissions require the Senate to vet and approve each nominee, consuming substantial legislative time and attention that might be better deployed on substantive oversight.[230] During periods of divided government or severe party polarization, these multiple confirmations invite holdups and strategic delays as individual nominations become hostages of unrelated political disputes.[231] Consolidating executive authority in a single official would streamline confirmations, reducing transaction costs and freeing Senate committees to focus on monitoring agency performance rather than perpetually staffing leadership positions.

While eliminating the deliberative safeguards and ideological diversity that multimember bodies can provide, a single-director model provides better accountability, efficiency, and reviewability, given new constitutional realities. To be sure, consolidating authority in a single administrator risks heightened politicization, but that risk already characterizes the commission model in practice. Consolidation would at least render political control transparent and accountable, rather than diffused through internal vetoes and delay.[232] Moreover, as discussed below, procedural buffers and advisory mechanisms can mitigate risks of political influence.

2. Establishing an Advisory Board for Guidance

To ensure the consistency and legitimacy of Commission guidance within a single-administrator structure, Congress should establish a statutory Advisory Board for Guidance Review, which would be responsible for evaluating guidance documents (as defined in the Code of Federal Regulations)[233] before they become public. The Board's review would extend not only to sub-regulatory guidance but also to significant substantive interpretations of Title VII, including those the

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Institutional Design, 89 TEX. L. REV. 15, 79 (2010) (finding that "buffers can be put in place to reduce unwarranted political pressure that can harm the public interest").

230. *See* Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717, 1722 (2015) (noting that "the [Senate] confirmation process is more difficult . . . because of the bitter partisanship that has infected the U.S. political system"); Paul Hitlin, *Senate Confirmations Slow to A Crawl*, CTR. FOR PRESIDENTIAL TRANSITION (Nov. 21, 2024), https://presidentialtransition.org/senate-confirmations-slow-to-a-crawl/ [https://perma.cc/2H7D-UUM4] (finding that the Senate confirmation process "takes almost three times as long now as it did during President Ronald Reagan's administration").

231. *See* Neal Devins & David E. Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 474–75, 486–87 (2008); *see also* MICHAEL GREENE, CONG. RSCH. SERV., R46664, RETURN OF NOMINATIONS TO THE PRESIDENT UNDER SENATE RULE XXXI1–2, 2 n.6 (2023) (discussing a Senate rule where presidential nominations are automatically returned to the President if senators do not act on them).

232. *See* Sitaraman & Dobkin, *supra* note 162, at 726 ("[S]ingle [agency] directors offer benefits in terms of accountability—they are both empowered to act and transparently responsible for their actions. This enhances the ability of members of Congress and the general public to know who to praise or blame for agency actions.")

233. 29 C.F.R. § 1695.1(a) ("*Guidance document* means any statement of Commission policy or interpretation concerning a statute, regulation, or technical matter within its jurisdiction that is intended to have general applicability and future effect . . . . The term is not confined to formal written documents, and may include letters, memoranda, circulars, bulletins, and advisories that set forth for the first time a new regulatory policy.").

Administrator proposes to formalize through notice-and-comment rulemaking. The EEOC Administrator would retain full decisional authority, but the Board would provide structured expert review and examine proposed guidance and proposed regulations for legal soundness, workability, and consistency with Title VII's text and purpose.

Board members should be appointed by the EEOC Administrator and serve staggered multiyear terms *with* for-cause removal protection to ensure candor and continuity across administrations.[234] The Board could adopt the structure of the CFPB Advisory Board, which Congress expressly designed to provide expert and diverse perspectives.[235] Under that model, there could be balanced representation between employers and worker groups (e.g., union representatives, worker advocacy organizations, human resources professionals), legal practitioners, and civil rights organizations representing communities disproportionately impacted by workplace discrimination.[236] Experts in employment law, economics, and human resources technology could also be included to round out the membership, providing technical expertise alongside stakeholder perspectives. Such a board would help ensure accuracy, flag controversy, and deter opportunistic uses of the EEOC's platform to advance politically motivated agendas, particularly where guidance or regulations could reshape the practical meaning of Title VII.

Operating under the Federal Advisory Committee Act's transparency requirements,[237] the Board would establish a public record of its deliberations and recommendations, which could prove useful for congressional oversight. If the EEOC Administrator consistently disregards unanimous or near-unanimous Board advice, that divergence could signal to oversight committees that agency guidance or rulemaking initiatives should be reviewed. The Board's written recommendations and the Administrator's responses would also provide Congress with an expert-generated benchmark for evaluating agency performance, thereby

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234. Since the Board would be purely advisory, such for-cause protections would be consistent with Article II. To ensure constitutionality, however, Congress should designate members as inferior officers. *See generally* Kennedy v. Braidwood Mgmt., Inc., 606 U.S. 748, 760–61 (2025) (holding that the Secretary of Health and Human Services, as a "principal officer," could appoint "inferior officers" without violating the Appointments Clause of the Constitution).

235. *See* 12 U.S.C. § 5494 (establishing the CFPB's Consumer Advisory Board to advise and consult with the CFPB Director on the exercise of the Bureau's functions under federal consumer financial law, requiring balanced representation from consumer groups, industry, and the public); *see also Consumer Advisory Board*, CFPB, https://www.consumerfinance.gov/rules-policy/advisory-committees/consumer-advisory-board/ [https://perma.cc/YW5Q-PYV6] (last visited May 17, 2026) (describing the CFPB Advisory Board's composition, advisory role, and function in identifying emerging practices and trends to inform CFPB policy and analysis).

236. The CFPB's Membership Balance Plan for the Consumer Advisory Board offers a template for an EEOC Advisory Board for Guidance Review. *See* CFPB, MEMBERSHIP BALANCE PLAN OF THE CONSUMER ADVISORY BOARD (2025), https://files.consumerfinance.gov/f/documents/cfpb_cab_membership-balance-plan_2025-03.pdf [https://perma.cc/2B25-G5NA].

237. The Federal Advisory Committee Act has various transparency requirements for advisory committees, including requirements for committees to publish "timely notice[s] of each . . . meeting . . . in the Federal Register" and to keep "[d]etailed minutes of each meeting." Federal Advisory Committee Act, Pub. L. No. 92-463, § 10, 86 Stat. 770, 774 (1972).

enhancing oversight without requiring additional committee staff or hearing time. Moreover, because Board members would serve staggered terms extending beyond any single administration, they could offer Congress a source of institutional memory and continuity that transcends political transitions, enabling committees to track whether policy shifts reflect evolving legal understandings or partisan preferences.

B. OPERATIONAL REFORMS

The problems of an EEOC without independence canvassed in Part III are not inevitable features of each change of presidential administration.[238] They are design failures that operational reforms can mitigate. Accordingly, this Section identifies a set of targeted operational reforms—including expanded rulemaking authority, clearer procedural constraints on investigations, and mechanisms to limit delays and guidance volatility—designed to ensure that presidential administration of the agency operates through transparent and predictable processes, rather than ad hoc control.

1. Substantive Rulemaking Authority for Title VII

Congress should grant the EEOC substantive rulemaking authority for Title VII and require the agency to promulgate interpretative regulations through the notice-and-comment process of the Administrative Procedure Act (APA).[239] While the Commission has voluntarily followed the APA procedures since 1975 when issuing significant guidance,[240] codifying this requirement would guarantee that the public has the opportunity to share its opinion and would give EEOC interpretive rules the force and effect of law.[241]

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238. The term "presidential administration" is used here in the sense developed by then-Professor Elena Kagan to describe the modern practice of centralized presidential control over administrative agencies, rather than simply to denote changes in presidential leadership. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2248–49 (2001). As Kagan emphasized, such control need not entail arbitrariness, delay, or instability. *See id.* at 2248–49. Thus, the institutional failures described in Part III reflect contingent design and governance choices, not necessary features of presidential administration itself.

239. The APA notice-and-comment process requires an agency to publish a proposed rule in the Federal Register, solicit public comments, and consider those comments before issuing a final rule accompanied by a statement of basis and purpose explaining the agency's reasoning and responding to significant comments. *See* 5 U.S.C. § 553(b)–(c); *see also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON & ORG. 243, 244 (1987) (discussing how Congress can influence agency behavior through procedural nudges).

240. *See* 29 C.F.R. § 1695.1(b) (defining "[s]ignificant guidance document").

241. The Commission started following the APA procedures in 1975 after the Supreme Court suggested it would have given the EEOC's guidance more deference if it "been subjected to the test of adversary comment." Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975); *see* Alfred W. Blumrosen, *The Binding Effect of Affirmative Action Guidelines*, 1 LAB. LAW. 261, 263 (1985); *see also* 29 C.F.R. §§ 1601.1–14 (explaining the EEOC's procedures for rulemaking). Codification is arguably even more important in the post-*Chevron* landscape. To the extent the EEOC's historical adherence to APA notice-and-comment procedures was motivated by a desire to secure judicial deference to its interpretations, that strategy has become increasingly uncertain. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024). In the absence of a robust deference doctrine, procedurally regular

This reform would place Title VII on equal footing with other civil rights statutes, where Congress has already delegated substantive rulemaking power to the EEOC, including the Age Discrimination in Employment Act (ADEA)[242] and the Americans with Disabilities Act (ADA).[243] It would also allow EEOC interpretations to play a larger role in arbitration.[244] Arbitrators could use the EEOC's Title VII regulations as a source of law, and awards inconsistent with those regulations could be set aside.[245] In a post-*Epic Systems* world where mandatory arbitration clauses are enforceable for employment discrimination claims,[246] ensuring that arbitrators apply consistent, agency-approved interpretations becomes critical to maintaining the uniform enforcement of Title VII.

Formal rulemaking would no doubt expose the EEOC to judicial skepticism and procedural burden, but sub-regulatory guidance is even more vulnerable to opportunistic revision and legal challenge,[247] making APA-constrained rules the more durable vehicle for interpretive stability.

2. Opting Out of Investigations

Congress should amend Title VII to permit charging parties to opt out of the EEOC investigation process and proceed directly to court upon filing their charge of discrimination with the Commission. The case for this reform rests on a basic dysfunction: the Commission's mandatory processing of individual charges fails to serve its intended purpose and diverts resources from systemic enforcement work that the EEOC is best positioned to perform.[248]

Empirical evidence demonstrates that the current investigation process does not function as an effective screening mechanism. Sociologist Laura Beth Nielsen and her colleagues' comprehensive study of over 1,600 employment discrimination cases found no correlation between the Commission's merit determinations and subsequent litigation outcomes.[249] Yet investigating individual charges consumes substantial staff

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rulemaking serves a different, and arguably more critical, function; namely, it anchors agency interpretations in statutory text, reasoned explanation, and public participation, thereby enhancing their persuasive authority.

242. *See* 29 U.S.C. § 628.

243. *See* 42 U.S.C. § 12116.

244. White, *supra* note 150, at 101 ("The increased use of arbitration makes the EEOC's role in statutory interpretation more important.").

245. *Id.* at 101–02.

246. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 525 (2018) (holding that the Federal Arbitration Act allows employers to compel arbitration for employment-related claims).

247. *See supra* notes 191–195 and accompanying text.

248. *See* Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1240–41 (2010) (discussing how "[o]ver the decades since the establishment of the EEOC," its private-sector employee backlog "ebbed and flowed, but has never been eliminated[,]" keeping the agency "treading water—managing [a] huge number of claims without substantively investigating them").

249. Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 181, 191 (2010) (examining 1,672 suits between 1988 and 2003 and finding that the EEOC's priority codes and merit determinations did not correspond with litigation outcomes).

time,[250] including intake review, fact-gathering, interviews, and conciliation efforts,[251] even in cases that ultimately lack systemic significance.[252]

Those resources could be far better spent on systemic enforcement.[253] Pattern-or-practice litigation requires concentrated investigative and legal resources capable of developing statistical proof, coordinating across multiple claimants, and sustaining complex federal litigation.[254] As discussed in Section III.A, demanding pleading and class-certification requirements substantially limit private enforcement of systemic discrimination claims, making the EEOC's subpoena power and independent litigation authority the primary mechanisms for addressing widespread discriminatory practices.[255] Commissioner's charges, in particular, allow the agency to initiate investigations independent of individual complainants and to target emerging patterns that private plaintiffs are unlikely to detect or plead successfully.[256] Yet the Commission cannot effectively exercise this authority when it (or its state and local partners) must investigate every claim.

Under this proposed reform, charging parties would still face the current 180-day deadline for filing charges[257] but could simultaneously request a right to sue (RTS) letter. To ensure timely resolution, claimants would need to file their lawsuit within 270 days from the date of discrimination. The EEOC would continue to receive all charges, preserving its systemic monitoring function and its ability to identify patterns across complaints. This reform would also preserve the Commission's discretionary authority to investigate any charge that warrants further review. What this reform eliminates is the statutory requirement that every claimant wait for the EEOC to process their charge before accessing judicial relief.[258]

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250. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106245, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: OVERSIGHT OF THE LENGTH OF THE CHARGE INTAKE PROCESS IS NEEDED 5 fig. 1, 10 (2022) (reporting that some EEOC staff "are not necessarily resolving all charges in the manner they would like—meaning they are not able to fully investigate every charge because of EEOC's limited resources").

251. *See* 42 U.S.C. § 2000e-5(b).

252. *See* Modesitt, *supra* note 248, at 1244 ("Even as the EEOC devotes huge resources toward its intake role, the value of this service has been questionable.").

253. David Freeman Engstrom makes a similar proposal. David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 619–20 (2013). Professor Engstrom, however, goes even further and considers abolishing the EEOC's individual claims processing function, and granting the EEOC "gatekeep[ing] powers over all class action and 'systemic' job discrimination suits." *Id.* at 700–01.

254. *See* 42 U.S.C. § 2000e-6 (describing procedural requirements for pattern-or-practice litigation); *see also* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1640, 1684 (2017) (explaining that class action proceedings involving employment discrimination claims require "substantial time and resources").

255. *See supra* note 176 and accompanying text; Mandala v. NTT Data, Inc., 975 F.3d 202, 212 (2d Cir. 2020).

256. *See* 42 U.S.C. § 2000e-5(b) (authorizing charges filed by a member of the Commission); *id.* at § 2000e-6(e) (authorizing pattern-or-practice actions); 29 C.F.R. § 1601.11 (implementing Commissioner charge authority).

257. *See* 42 U.S.C. § 2000e-5(e)(1).

258. *See* 42 U.S.C. § 2000e-5(f)(1).

Opt-out authority may appear to weaken systemic enforcement by reducing the Commission's intake of fully investigated charges. But delay and inaction already nullify collective remedies under the current system, and reallocating resources toward pattern-or-practice actions and Commissioner's charges would strengthen, not diminish, the EEOC's systemic enforcement capacity. Equally important, opt-out authority ensures that individual workers' access to judicial relief does not rise or fall with the political priorities of whoever controls the Commission at any given moment.

3. Expanded Confidentiality Protections

Congress should update Title VII's confidentiality rules to match modern agency practice. Title VII forbids public disclosure of charges and information gathered during investigations;[259] however, pre-charge letters of inquiry and Commission press releases effectively identify targets of investigation before the confidentiality provisions apply. Congress should clarify that the statutory bar extends to pre-charge outreach, letters of inquiry or demand, and online postings that reveal the existence of an inquiry against an employer. This would prohibit "naming and shaming"[260] of private entities absent a filed complaint in court, as the EEOC did with twenty large law firms in March 2025.[261]

Congress crafted Title VII's confidentiality provisions to prevent reputational harm and to promote voluntary conciliation.[262] Strengthening the statute to cover pre-charge publicity would reaffirm those original aims, and it would have the added benefit of providing guardrails against the use of investigative publicity to advance political agendas. By clarifying that confidentiality protections apply

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259. 42 U.S.C. § 2000e-5(b) ("Nothing said or done during and as a part of [informal methods of conference, conciliation, and persuasion] may be made public by the Commission . . . without written consent of the persons concerned."); 42 U.S.C. § 2000e-8(e) ("It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section [to investigate charges] prior to the institution of any proceeding . . . involving such information."); *see generally* Jamie Darin Prenkert, Julie Manning Magid & Allison Fetter-Harrott, *Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action*, 91 N.C. L. REV. 889 (2013) (discussing EEOC's confidentiality provisions and their implications).

260. Naming and shaming in the regulatory context "refers to the publication by administrative agencies of negative information about regulated private bodies, mostly corporations, in order to further public-interest goals." *See* Sharon Yadin, *Should Regulators Shame Companies into Compliance?*, REG. REV. (Sep. 18, 2019), https://www.theregreview.org/2019/09/18/yadin-should-regulators-shame-companies-into-compliance/ [https://perma.cc/CL3M-GL7P] ("Examples [of regulatory shaming] include: publishing a consumer complaint database on the agency website; producing rankings of companies based on their performance—via stars or scores—disseminated through social media, websites, or press releases; and many other data-sharing techniques.").

261. *See supra* notes 214–215 and accompanying text.

262. In 1964, then-Senator Hubert Humphrey explained that the confidentiality provisions are a "ban on publicizing" and are intended to avoid "the making available to the general public of unproven charges." 88 CONG. REC. 12723 (1964). Senator Everett Dirksen declared that "[t]he maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy." 88 CONG. REC. 8193 (1964). In *Mach Mining, LLC v. EEOC*, the Supreme Court stated that "confidentiality promotes candor in discussions and thereby enhances the prospects for agreement." 575 U.S. 480, 493 (2015).

from the moment that the EEOC begins scrutinizing an employer, Congress would reinforce Title VII's commitment to fair process and voluntary resolution.

Expanded confidentiality necessarily trades some transparency for restraint, but in an environment where investigatory tools are used to signal political disapproval, confidentiality functions as a safeguard against enforcement becoming punishment in itself.

CONCLUSION

For decades, the EEOC operated as an independent agency even though it lacked formal structural independence. Presidents, regardless of party, either did not try or did not succeed with politically motivated removals of commissioners. In turn, commissioners more or less enjoyed the freedom to exercise genuine independent judgment, even if they often aligned with the presidential administration's general policy preferences. Congress, courts, employers, and workers treated the EEOC's interpretations as authoritative, challenging them only through traditional avenues. In other words, the EEOC enjoyed operational independence. That operational independence had a profound effect on the development of law and process under Title VII, including the advent of the EEO-1 reporting system, the articulation and ultimate legislative adoption of disparate impact theory, formal recognition of sexual harassment as sex discrimination, and an enduring interpretation of "sex" consistent with *Bostock*. The Commission's operational independence resulted in stable and expert guidance, which provided employers with a relatively clear picture of their obligations and workers more than just paper rights.

That stability is unraveling. Under the second Trump Administration, the EEOC's independence has either been minimized or treated as an error. President Trump removed sitting commissioners for policy reasons. EEOC Chair Andrea Lucas has abandoned the narrative of independence, referring to the EEOC as simply an executive agency subject to presidential instructions. The Commission's wholesale retreat from sexual orientation and gender identity (SOGI) discrimination and disparate impact enforcement makes Title VII's guarantees seem like little more than contingent promises. Thus, Dylan Bringuel's case is not an aberration but rather a symptom. When interpretations of the law and enforcement priorities are based on hostility to particular groups, not on statutory text and evidence, workers are inappropriately sorted into favored and disfavored classes. Entire doctrinal fields—from disparate impact to protections against algorithmic bias—can be abandoned seemingly on a whim. Individual claimants face delay or denial of relief, and the EEOC as an institution is weakened. Operational independence diminishes, systemic enforcement is undermined, clear guidance is lost, and the EEOC's investigative tools are weaponized.

Rebuilding independence for the EEOC requires moving beyond fragile conventions and uncertain constitutional doctrines. Rather, it requires institutional redesign with elements that can withstand executive overreach. Our recommendations—including consolidating leadership in a single, accountable administrator; creating a statutorily grounded advisory board with protected tenure to cabin opportunistic swings in guidance; granting the EEOC substantive rulemaking authority under the Administrative Procedure Act; allowing charging parties to opt out of the investigative bottleneck; and extending confidentiality protections to pre-charge activity—stop short of recreating the EEOC in the image of a New Deal-style independent commission. They do, however, increase the likelihood that the Commission's enforcement priorities will track with statutory purpose, rather than shift with the policy preferences and grudges of the presidential administration; that guidance will be generated through transparent and expert processes rather than quick edits to websites; and that workers' access to remedies will not depend on whether the administration disfavors a particular theory of discrimination. In that sense, independence rebuilt is independence for civil rights enforcement. It is a set of structural and operational commitments that keep Title VII's promise of equal employment opportunity from rising and falling with each administration's view of which identities, and which rights, count.