

September 29, 2026

Scott Kuper
Director
Office of Personnel Management
1900 E St NW
Washington, DC 20415

Via regulations.gov

RE: Removal of References to the Uniform Guidelines on Employee Selection
Procedures in Federal Personnel Regulations, RIN 3206-AP20

Dear Director Kuper,

The Legal Defense Fund and the undersigned civil rights organizations write to oppose the Office of Personnel Management's (OPM) interim final rule (IFR)¹ removing references to the Uniform Guidelines on Employee Selection Procedures (UGESP)² from federal civil service regulations. For decades, the UGESP have provided employers with critical guidance on how to ensure their policies and practices do not unfairly exclude qualified workers based on race, sex, and other protected characteristics, as required by Title VII of the Civil Rights Act of 1964. These guidelines have helped address unjustified barriers faced by Black workers, other workers of color, and women in the federal workforce and allowed workers of color to find a pathway to the middle class through public service. OPM now proposes to remove references to the UGESP from its regulations, relying on a poorly reasoned June 9, 2026 memo from the Department of Justice's Office of Legal Counsel (OLC Memo).³ The radical and inaccurate arguments advanced in the OLC Memo do not provide OPM with a reasoned basis for changing its regulations, which will impose significant costs on the federal government as well as job applicants. Nor does OPM have good cause to circumvent normal notice-and-comment procedures and require compliance with the IFR immediately upon publication. We urge to OPM withdraw the IFR and reinstate the prior regulations.

I. Federal Employment Has Been a Pathway to the Middle Class for Black People, Other People of Color, and Women for Decades.

The federal government is the United States' largest employer, employing over 2 million people in every state and territory to serve the American people.⁴ In January 2025, approximately 80% of all federal workers lived outside of the Washington, D.C. metropolitan area.⁵ Forty-nine percent of federal civilian workers live in the South, compared to 38% of all

¹ Removal of References to the Uniform Guidelines on Employee Selection Procedures in Federal Personnel Regulations, 91 Fed. Reg. 48234 (Jul. 31, 2026), <https://www.federalregister.gov/documents/2026/07/31/2026-15586/removal-of-references-to-the-uniform-guidelines-on-employee-selection-procedures-in-federal> (hereinafter "IFR").

² Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,296 (Aug. 25, 1978) (codified as amended at 29 C.F.R. part 1607)

³ U.S. Dep't of Justice Office of Legal Counsel, Constitutionality of Disparate-Impact Liability Under Title VII (Jun. 9, 2026), <https://www.justice.gov/olc/media/1444871/dl> (hereinafter "OLC Memo").

⁴ Drew Desilver, *What the Data Says About Federal Workers*, PEW RES. CTR. (Jan. 7, 2025), <https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/>.

⁵ Partnership for Public Service, A Profile of the 2023 Federal Workforce, <https://ourpublicservice.org/fed-figures/a-profile-of-the-2023-federal-workforce/#:~:text=Race%20%26%20Ethnicity,the%20U.S.%20labor%20force%2C%20respectively> (last viewed Jan. 14, 2025).

workers,⁶ and federal workers are especially likely to work in Alaska, Hawai'i, Montana, New Mexico, North Dakota, Oklahoma, West Virginia and Wyoming, in addition to the D.C. metropolitan area.⁷ Federal career employees range from health care providers at Department of Veterans' Affairs medical centers, to attorneys addressing discrimination in education and housing, to scientists helping to predict the weather, to experts working to ensure the safety of the food we eat, the water we drink, the medicines we take, and the air we breathe.⁸

For decades, federal jobs offered a path to the middle class for Black people and other people of color, women, and other workers who frequently face discrimination in the workplace.⁹ In September 2024, people of color made up 41% of the overall federal workforce, and women made up 46% of the workforce.¹⁰ In 2023, Black people comprised 18.9% of the federal workforce,¹¹ which is a larger share than their proportion of the private workforce (12.8%) and the population (13.7%).¹² While federal salaries may be lower than private sector salaries, federal employees receive more equitable pay than in the private sector: in September 2024, Black and Latino workers working full-time, year-round for the federal government were paid 87 cents for every dollar paid to white workers, compared to 75 cents paid to Black workers and 68 cents paid to Latino workers for every dollar paid to white workers in all industries.¹³ Women working full-time, year-round across all federal agencies were paid 95 cents for every dollar paid to men in comparison to 83 cents for every dollar paid to men paid to women in all industries.¹⁴ Federal workers are also more likely to be enrolled in benefits like retirement and health care, and to be eligible for family leave.¹⁵

II. Unjustified and Discriminatory Employee Selection Procedures Have Unfairly Excluded Black, Latino, and Women Workers, Including in Federal Employment.

While federal employment has offered opportunities for people of color and women, unjustified employment policies and practices have also unfairly screened out qualified individuals. Title VII of the Civil Rights Act of 1964 prohibits not only disparate treatment, but also policies and practices that disproportionately exclude people based on race, gender, and other characteristics and are either not justified by business necessity or a less discriminatory policy is available to serve that interest—what is known as disparate impact law.¹⁶ These

⁶ KATHERINE GALLAGHER ROBBINS & AREEBA HAIDER, NAT'L P'SHIP FOR WOMEN & FAMILIES, *TRUMP'S PLAN TO DECIMATE THE FEDERAL WORKFORCE WILL HARM DISABLED WORKERS, VETERANS, WOMEN OF COLOR & THE ECONOMY* (2025), <https://nationalpartnership.org/report/trump-decimate-federal-workforce-harm-disabled-workers-veterans-women-of-color-economy/>.

⁷ *Id.*

⁸ Partnership for Public Service, *Safeguarding the Civil Service: Who are Civil Servants?*, <https://ourpublicservice.org/protecting-democracy/#who-are-civil-servants> (last visited Jun. 4, 2025).

⁹ Gary Fields, *To these Black retirees, the federal civil service now under attack was a path to the middle class*, ASSOC. PRESS (Feb. 17, 2025), <https://apnews.com/article/trump-doge-civil-service-race-black-americans-64980891924f179c7395ed7443107ce5>; Curtis Bunn, *Much of the Black middle class was built by federal jobs. That may change*, NBC NEWS (Feb. 28, 2025), <https://www.nbcnews.com/news/nbcblk/black-federal-job-cuts-trump-musk-dei-middle-classrcna191704>.

¹⁰ SARAH JAVOID, NAT'L WOMEN'S LAW CENTER, *ATTACKS ON THE FEDERAL WORKFORCE TARGET WOMEN AND PEOPLE OF COLOR* (2025), <https://nwlc.org/wp-content/uploads/2025/05/Federal-Workforce-FS-5.5.25v2.pdf>

¹¹ Partnership for Public Service, *supra* note 8.

¹² Desilver, *supra* note 4; Quick Facts: United States, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/RHI225223>.

¹³ JAVOID, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 42 U.S.C. § 2000e-2(k). *See also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

protections were first recognized by a unanimous U.S. Supreme Court in 1971¹⁷ and were subsequently codified by Congress in the Civil Rights Act of 1991.¹⁸

Despite these statutory prohibitions, the federal government has previously employed practices that disproportionately excluded people of color. For example, in 1979, a group of Black and Latino plaintiffs representing a nationwide class challenged OPM's use of a written exam to screen applicants for entry-level federal jobs.¹⁹ All applicants who took the exam were also required to have a four-year college degree, three years of professional experience, or the equivalent combination of experience and education.²⁰ Applicant who satisfied those minimum requirements and scored above the minimum cutoff score on the written exam were placed on a list of individuals eligible for consideration for designated entry-level jobs. The written exam, however, disproportionately screened out Black and Latino applicants: only 5% of Black applicants and 12.9% of Latino applicants scored above the minimum cutoff, compared to 42.1% of white applicants. Black and Latino workers sued, alleging the written test did not accurately assess applicants' ability to do the job and thus caused an unlawful disparate impact in violation of Title VII.²¹ After substantial discovery, OPM agreed to end its use of the written exam and to develop alternative examining procedures that would fairly and accurately test the relative capacity and fitness of applicants to perform on the job without causing the same unjustified adverse impact on Black and Latino applicants.²² State and local governments have also employed discriminatory written examinations and other practices that unfairly excluded qualified people of color.²³ Government actors have also employed selection procedures that disproportionately exclude qualified women, such as physical fitness tests that do not accurately measure whether applicants can do the job.²⁴

III. Federal Courts and Congress Have Approved of and Relied on the UGESP.

The UGESP has provided guidance to employers for more than 50 years. The EEOC first issued guidelines on employee selection procedures in 1966, just two years after the passage of Title VII, and elaborated on those initial guidelines the UGESP in 1970.²⁵ In *Griggs v. Duke Power Co.*, the Supreme Court recognized the UGESP were supported by "the [Civil Rights] Act and its legislative history."²⁶ The UGESP have remained largely unchanged since 1978.²⁷ Federal

¹⁷ *Id.* at 431.

¹⁸ Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).

¹⁹ *Luévano v. Campbell*, 93 F.R.D. 68 (1981).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* See also *Douglas v. Hampton*, 338 F.Supp. 18 (D.D.C. 1972); *Ellis v. Naval Air Rework Facility*, 404 F.Supp. 377 (N.D. Cal. 1975).

²³ *Lewis v. City of Chicago*, 643 F.3d 201 (7th Cir. 2011) (holding the city's use of a cutoff score from a written test to determine which applicants would be considered for jobs caused an unjustified disparate impact in violation of Title VII); *Gulino v. Board of Educ. Of City School Dist. Of City of New York*, 113 F.Supp.3d 663 (S.D.N.Y. 2015) (holding the New York City Board of Education's test for teachers violated Title VII because it disproportionately excluded Black and Latino applicants and was not job-related); *Bradley v. City of Lynn*, 443 F.Supp.2d 145 (D. Mass. 2006) (holding that the written component of the state civil service exam violated Title VII because it had a disproportionate adverse impact on Black and Hispanic applicants and was not properly validated).

²⁴ *Ernst v. City of Chicago*, 837 F.3d 788 (7th Cir. 2016) (striking down a physical fitness test used by the Chicago Fire Department because it disproportionately excluded women and was not properly validated to show job-relatedness consistent with UGESP).

²⁵ Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (Aug. 1, 1970).

²⁶ *Griggs*, 401 U.S. at 434.

²⁷ See, e.g., Amendment of Procedural and Administrative Regulations to Include the Genetic Information Nondiscrimination Act of 2008 (GINA), 74 Fed. Reg. 63983 (Dec. 7, 2009) (amending UGESP and other regulations to add a discussion of the Genetic Information Nondiscrimination Act of 2008),

courts, including the Supreme Court, have relied on the UGESP as a useful interpretive guide in applying the standards of Title VII.²⁸ As the Second Circuit explained in 2006, “following the Guidelines promotes consistency in the enforcement of anti-discrimination law” and “thirty-five years of using these Guidelines makes them the primary yardstick by which we measure defendants' attempt to validate” employment selection procedures.²⁹ Importantly, the UGESP had been in place for decades when Congress codified Title VII’s disparate impact standards in 1991. By codifying disparate impact law without overriding these standards, Congress indicated implicit approval of the UGESP.³⁰

IV. The IFR is Arbitrary and Capricious Because It Relies on Inaccurate Legal Reasoning and Ignores the Costs of the IFR.

In order for an agency action to be valid under the Administrative Procedure Act (APA), it must be the product of “reasoned decisionmaking.”³¹ Agency actions, including regulations, are arbitrary and capricious in violation of the APA when, among other things, the agency has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”³² These same requirements apply when an agency revises its regulations.³³ Indeed, when an agency substantially alters an existing regulation, it must provide a “more detailed justification” for a change in policy when the “new policy rests upon factual findings that contradict those which underlay its prior policy” or where the previous policy has “engendered serious reliance interests that must be taken into account.”³⁴

The IFR fails to meet this standard. To justify removing references to the UGESP from its regulations, OPM relies on the OLC Memo. However, because the OLC Memo itself is poorly reasoned and inaccurate, it does not provide OPM with a reasoned basis to remove references to the UGESP from its regulations. While the OLC Memo frames disparate impact law as “controversial,” Title VII has protected applicants and employees from unjustified disparate impacts for sixty years.³⁵ Moreover, OPM ignores the costs federal agencies will likely incur in trying to comply with the law without this essential guidance, as well as in responding to the lawsuits likely to result if federal agencies follow the OLC Memo’s flawed analysis.

<https://www.federalregister.gov/documents/2009/12/07/E9-29012/amendment-of-procedural-and-administrative-regulations-to-include-the-genetic-information#page-63983>.

²⁸ *E.g. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973); *Gulino v. New York State Educ. Dep’t*, 460 F.3d 361, 383 (2d Cir. 2006).

²⁹ *Gulino* 460 F.3d at 383.

³⁰ *Cf. Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmtis. Project, Inc.*, 576 U.S. 519, 521 (2015) (“The 1988 amendments [to the Fair Housing Act of 1968 (FHA)] signal that Congress ratified [disparate impact] liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.”).

³¹ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 53 (1983).

³² *Id.* at 43.

³³ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (explaining while “agencies are free to change their existing policies,” they must “provide a reasoned explanation for the change”).

³⁴ *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009).

³⁵ OLC Memo at 5, 11, 12.

A. *The OLC Memo Does Not Provide OPM with a Reasoned Basis for the Rule.*

While OPM is correct that “[e]xecutive branch legal interpretations issued by the President or the Attorney General are controlling on executive-branch employees,”³⁶ courts will exercise independent legal judgment when evaluating whether that legal analysis can justify a regulatory change. Moreover, as the Supreme Court recently made clear, “Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”³⁷ The OLC Memo makes several legal errors contrary to Title VII and the caselaw interpreting it and cannot justify the IFR.

The OLC Memo starts from a flawed foundation, relying primarily on concurrences and dissents³⁸ to argue that Title VII only permits disparate impact analysis to demonstrate discriminatory intent.³⁹ The OLC Memo rewrites *Griggs*, claiming the case involved “a serious risk of intentional discrimination” and thus should not be read to prohibit unjustified impacts in the absence of discriminatory intent.⁴⁰ The OLC Memo ignores the plain language of the Supreme Court’s unanimous opinion in that case, which makes clear Title VII prohibits “practices, procedures, or tests neutral on their face, and *even neutral in terms of intent* . . . if they operate to ‘freeze’ the status quo of prior discriminatory employment practices” (emphasis added).⁴¹ The OLC Memo also underplays the language of Title VII itself, which lays out a standard for proving disparate impact violations that does not apply in cases of intentional discrimination.⁴² The OLC Memo claims that this reinterpretation of federal law is necessary to avoid constitutional concerns, while ignoring cases where a majority of the Supreme Court has resolved issues contrary to OLC’s views.⁴³

The OLC Memo also substantially alters the disparate impact standards codified in Title VII and approved by the Supreme Court. Title VII requires the respondent to show that employment practices that cause a disparate impact on a protected class are “job related for the position in question and consistent with business necessity.”⁴⁴ The Supreme Court has similarly defined job-relatedness as defined as a “manifest relationship”⁴⁵ with the position in question and as “business necessity.”⁴⁶ As the Court has explained, “discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are

³⁶ IFR at 48234.

³⁷ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).

³⁸ OLC Memo at 7, 8, 9, 11, 13, 15, 18, 23.

³⁹ *Id.* at 11-13.

⁴⁰ *Id.* at 12.

⁴¹ *Griggs*, 401 U.S. at 430. *See also id.* at 432 (The “absence of discriminatory intent does not redeem employment procedures that operate as ‘built-in headwinds,’” because “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”).

⁴² 42 U.S.C. § 2000e-2(k)(2) (“A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.”)

⁴³ *Inclusive Cmities.*, 579 U.S. at 540 (“[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.”); *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009) (“Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of ‘practices that are fair in form, but discriminatory in operation.’”).

⁴⁴ 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See also* 42 U.S.C. § 2000e-2(k)(2) (“A demonstration that an employment practice is *required* by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.” (emphasis added)).

⁴⁵ *Griggs*, 401 U.S. at 432. The Supreme Court has imposed similar requirements when interpreting other disparate impact laws, such as the Fair Housing Act. *E.g. Inclusive Cmities.*, 576 U.S. at 541 (explaining a policy that causes a disparate impact on a protected class must be “necessary to achieve a valid interest”).

⁴⁶ *Id.* at 431.

relevant to the job or jobs for which candidates are being evaluated.”⁴⁷ The OLC Memo announces a substantially weaker standard, categorically asserting employment selection procedures are “presumptively job-related” and only practices with “no plausible job-relatedness” can create disparate-impact liability.⁴⁸ The OLC Memo also claims plaintiffs must not only show there is a less discriminatory “alternative employment practice,” but bears the burden to “rul[e] out the competing explanation” for why the respondent has not adopted the practice the challenged business practice by showing the decision “cannot be explained” apart from intentional discrimination.⁴⁹ These new standards are untethered from and conflict with binding caselaw.

OLC asserts the UGESP “embrace[s] an unconstitutional reading of Title VII”⁵⁰ and new limitations on the longstanding protections of Title VII are necessary to avoid “pressuring employers to take race-based actions in the name of proactively addressing potential statistical disparities.”⁵¹ However, disparate impact law does not require employers to allocate benefits or burdens or otherwise make unlawful employment decisions based on race.⁵² Removing policies that disproportionately bar qualified candidates of color or women without a legitimate reason does not require the hiring or promotion of those candidates;⁵³ it gives everyone who was unfairly barred, regardless of race or gender, a fair chance to compete for the positions they are qualified for. Nor does it disturb “an employee’s legitimate expectation not to be judged on the basis of race,”⁵⁴ as each candidate would still be judged based on job-related qualifications. While identifying and addressing unjustified disparate impacts requires understanding how policies and practices affect groups differently, awareness of racial demographics is not enough to trigger strict scrutiny; there must be evidence the government took action with the intent to materially impact particular racial groups.⁵⁵ The Supreme Court in *Alexander v. South Carolina State Conference of the NAACP*, for example, held that a state legislature’s awareness of race during the redistricting process did not trigger strict scrutiny in the absence of evidence the district lines were motivated by race.⁵⁶

⁴⁷ *Albemarle Paper*, 422 U.S. at 431 (internal quotation marks omitted).

⁴⁸ OLC Memo at 2, 15. *See also* OLC memo at 2 (“[T]he business-necessity defense is not a high bar; it requires employers to demonstrate only that the challenged practice is rational, convenient, or helpful for serving a valid business purpose.”).

⁴⁹ IFR at 17-18.

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 9.

⁵² *Griggs*, 401 U.S. at 436 (“Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.”).

⁵³ *Id.* at 430-1 (Title VII “does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”).

⁵⁴ *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

⁵⁵ Strict scrutiny only applies “when the government distributes burdens or benefits on the basis of individual racial classifications.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (citing *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (explaining); *see also, e.g., Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011) (“A racial classification occurs only when an action distributes burdens or benefits on the basis of race.” (internal citations and quotations omitted); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 77 (1st Cir. 2004) (“The term racial classification ‘normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits.’”); *see also Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin*, 142 F.4th 819 (5th Cir. 2025) (“[A]ll parties agree that it is lawful for the institution to collect that data for the lawful purposes of reporting to government agencies and recruiting students to enroll . . .”).

⁵⁶ 602 U.S. 1 (2024); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“Redistricting legislatures will . . . almost always be aware of racial demographics.”).

Nor do recent Supreme Court cases support the OLC Memo's claims. In support of its arguments, the OLC Memo points to three recent cases: *Students for Fair Admissions v. Presidents and Fellows of Harvard College* and *University of North Carolina, et al. (SFFA)*,⁵⁷ which held that Harvard and the University of North Carolina impermissibly used race as an explicit factor in their admissions practices; *Louisiana v. Callais*, which held Congress did not have the authority under the Fifteenth Amendment to require race-based remedies under the Voting Rights Act of 1965 except to remedy intentional discrimination;⁵⁸ and *Allen v. Milligan*, which reversed a preliminary injunction requiring Alabama to maintain a second majority-Black Congressional district, finding the district court did not have sufficient evidence of intentional discrimination to justify a race-based remedy.⁵⁹ None of these cases overrule *Griggs*, change the clear legal standards outlined in Title VII, or make any statement regarding Title VII's legality under the U.S. Constitution.⁶⁰

Given the numerous flaws in the OLC Memo's reasoning, it cannot provide OPM with a sufficient basis for the IFR. As such, OPM should withdraw the rule.

B. The IFR Underestimates the Cost and Overestimates the Benefits of Removing References to the UGESP.

The IFR does not adequately assess the costs and benefits of the rule. OPM claims the only cost of the rule will be triggered by the "need to review internal policy documents, delegated examining materials, category-rating procedures, or training materials to remove outdated references to UGESP," while the rule may "rule may reduce administrative burden by clarifying that agencies need not conduct UGESP validation studies or adverse-impact analyses as a matter of OPM regulation."⁶¹ Even if OPM removes the references to the UGESP, however, the statutes governing federal hiring remain unchanged. Federal agencies must still comply with Title VII's prohibition on unjustified disparate impacts, regardless of intent, and cannot avoid the steps necessary to comply without placing themselves at legal risk.

Moreover, finalizing the OPM rule and following the misguided standards outlined in the OLC Memo could place federal agencies at risk of employment discrimination claims. By removing references to the UGESP and implying the OLC Memo controls, the IFR could mistakenly lead federal agencies to assume they do not have to avoid unintended disparate impacts and apply the wrong standard when assessing whether they have a sufficient justification for their policies and practices. Indeed, OPM has already implemented a battery of new employment tests for prospective federal workers.⁶² It is unclear whether these tests would survive scrutiny under the Title VII standards courts have applied for decades. Removing these protections may also prevent the federal government from identifying qualified employees, limiting its access to talent, and undermine faith in the federal government as a fair employer.

The IFR also fails to account for the harm it will cause to workers, particularly workers of color and women. If the federal government follows the OLC Memo rather than the law, it is likely to add new barriers for workers of color, women, and other historically excluded groups,

⁵⁷ 600 U.S. 181 (2023).

⁵⁸ 608 U.S. 85, 146 S.Ct. 1131, 1152-54 (2026).

⁵⁹ 608 U.S. 511 (2026).

⁶⁰ Indeed, in *SFFA*, the Court reaffirmed the general principle that entities can consider race in order to remedy specific instances of past discrimination. *SFFA*, 600 U.S. at 207.

⁶¹ IFR at 48235.

⁶² Noah Peters, U.S. Office of Personnel Management, Restoring Merit With the Right Civil Service Exam, <https://www.opm.gov/news/secrets-of-opm/restoring-merit-with-the-right-civil-service-exam/> (last visited Sept. 17, 2026).

unfairly limiting their job opportunities. The IFR will thus exacerbate the harms caused by the Trump administration's attacks on federal workers, which shrank the federal workforce by 12 percent between September 2024 and January 2026.⁶³ Black women accounted for roughly a third of the total contraction.⁶⁴ As a result of the decline in public sector jobs,⁶⁵ the unemployment rate for Black women rose from 5.4 percent at the start of 2025 to 7.3 percent by December 2025,⁶⁶ despite the Trump administration's purported interest in addressing unemployment.⁶⁷ The IFR could further reduce access to federal jobs for qualified workers of color and women.

In doing so, the IFR will hurt the U.S. economy. According to a 2020 study by Citi, the United States' aggregate economic output would have been \$16 trillion higher since 2000 if we had closed racial gaps in wages, access to higher education, lending, and mortgage access.⁶⁸ By contrast, maintaining the current regulations could foster economic growth: Recent research by economists Chang-Tai Hsieh, Erik Hurst, Charles I. Jones, and Peter J. Klenow shows that up to 40 percent of growth in the U.S. GDP per capita between 1960 and 2010 can be attributed to increases in the shares of women and Black men working in highly skilled occupations.⁶⁹ Yet OPM fails to account for the costs of changing the rule.

V. OPM Does Not Have Good Cause to Require Compliance with the IFR Before Reviewing and Responding to Comments.

The APA establishes the norm that agencies engaged in "formulating, amending, or repealing" ⁷⁰ a substantive rule must provide notice of the rulemaking⁷¹ and the opportunity to comment⁷² before they finalize the rule. The APA also requires agencies to publish final rules 30 days before they become effective.⁷³ Agencies can avoid these requirements only when a substantive rule falls under limited exceptions,⁷⁴ including if the agency has "good cause" to believe the notice and comment process is "impracticable, unnecessary, or contrary to the public interest."⁷⁵ To qualify for the "good cause" exception, the APA requires an agency to state in its Federal Register notice why it has determined there is good cause to bypass the typical notice-and-comment rulemaking process.⁷⁶ Courts have emphasized the good cause exception should

⁶³ Bryce Covert, *Federal Job Cuts Hit Black Women Hard—a Year Later, Unemployment Is Up*, AM. PROSPECT (Apr. 24, 2026), <https://prospect.org/2026/04/24/federal-job-cuts-hit-black-women-hard-unemployment-is-up/>.

⁶⁴ *Id.*

⁶⁵ Valerie Wilson, *Black women suffered large employment losses in 2025—particularly among college graduates and public-sector workers*, ECON. POL'Y INST. (Feb. 10, 2026), <https://www.epi.org/blog/black-women-suffered-large-employment-losses-in-2025-particularly-among-college-graduates-and-public-sector-workers/>.

⁶⁶ Chabelli Carranza, *Black women's unemployment has skyrocketed. Here's what happened*, THE 19TH (Jan. 26, 2026), <https://19thnews.org/2026/01/black-women-unemployment-rate-skyrocketed-2025/>.

⁶⁷ Erica L. Green, *After Courting Black Voters, Trump Downplays Black Unemployment*, N.Y. TIMES (Jul. 7, 2026), <https://www.nytimes.com/2026/07/07/us/politics/trump-black-voters-unemployment.html>.

⁶⁸ DANA M. PETERSON & CATHERINE L. MANN, CITI GPS, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 7 (2020), <https://www.citigroup.com/global/insights/citigps/closing-the-racial-inequality-gaps-20200922>.

⁶⁹ Chang-Tai Hsieh, et al., *The Allocation of Talent and U.S. Growth*, 87 ECONOMETRICA 1439 (2019).

⁷⁰ 5 U.S.C. § 551(5).

⁷¹ *Id.* § 553(b)(1)-(3).

⁷² *Id.* § 553(c).

⁷³ *Id.* § 553(d).

⁷⁴ *E.g., Id.* § 553(c) (exempting rules regarding (1) "a military or foreign affairs function of the United States," (2) "a matter relating to agency management or personnel," or (3) a matter relating to "public property, loans, grants, benefits, or contracts" from notice and comment).

⁷⁵ *Id.* § 553(b)(4)(B) (stating that an agency may forgo notice and comment if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

⁷⁶ *Id.* at § 553(b).

be “narrowly construed and only reluctantly countenanced.”⁷⁷ It is generally reserved for “emergency situations” where “delay could result in serious harm.”⁷⁸ Importantly, “an agency’s desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause.”⁷⁹

The IFR went into effect immediately upon publication on July 31, 2026, inappropriately requiring compliance with the rule before the agency had provided notice to the public and an opportunity to comment. In doing so, the IFR violated the procedural requirements of the APA.⁸⁰ While OPM claims it has “good cause” to forgo notice and comment because it “would be impracticable and contrary to the public interest,” it does not explain why that is the case.⁸¹ Even if OPM has a good faith belief that the UGESP is unconstitutional based on the OPM Memo, that belief does not constitute “good cause” to issue a final rule without prior notice and comment under the APA. The mere fact that an agency deems an existing rule unlawful does not make it so or obviate the need for the agency to hear public input on that finding. Moreover, even if the agency is correct that its existing rule is unlawful, it must still consider reliance interests and alternatives short of full repeal as part of the rulemaking process.⁸² OPM has failed to do so here and should withdraw the IFR.

VI. Conclusion

Title VII forbids employers from using policies and practices that exclude workers on the basis of race and other characteristics unless they are necessary and job-related—regardless of whether employers intend to discriminate. The UGESP has helped employers, including the federal government, put this fundamental antidiscrimination principle into practice for decades. By removing references to these guidelines, the IFR would make it more likely that Black people, other people of color, and women will experience unjustified barriers in federal employment, exacerbating the harms caused by the Trump administration’s attacks on federal workers. The IFR fails to account for these harms, instead relying on a deeply flawed OLC Memo to justify the

⁷⁷ *State of N.J., Dep’t of Env’t Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); accord *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012); *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1180 (D.C. Cir. 2004).

⁷⁸ *Jifry*, 370 F.3d at 1179.

⁷⁹ *California v. Azar*, 911 F.3d 558, 576 (9th Cir. 2018).

⁸⁰ OPM may contend the IFR itself provides the public with sufficient notice and opportunity to comment, citing *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657 (2020). However, the U.S. Supreme Court in that case assumed the relevant federal agency had complied with the APA because the final rule in that case became effective more than 30 days after being published, without recognizing the agency required compliance with the IFR that preceded the final rule upon publication. *Id.* at 686. Permitting agencies to require immediate compliance with IFRs upon publication, without prior notice or the opportunity to comment, provided they “cure” this violation with a later final rule, would effectively read the procedural requirements of the APA out of the statute.

⁸¹ IFR at 48235.

⁸² See, e.g., *California v. Block*, 690 F.2d 753, 772 (9th Cir. 1982) (highlighting the importance of public comment in the agency’s assessment of regulatory alternatives).

change in policy. Because the IFR was issued based on inadequate and inaccurate reasoning using improper procedures, it should be withdrawn.

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel, the Legal Defense Fund (asmirniotopoulos@naacpldf.org).

Sincerely,

The Legal Defense Fund
American Association of University Women (AAUW)
Equal Rights Advocates
Institute for Women's Policy Research
Joint Center for Political and Economic Studies
National Action Network
National Center for Law and Economic Justice
National Center for Youth Law
National Institute for Workers' Rights
National Organization for Women
National Partnership for Women & Families
National Urban League
National Women's Law Center
Poverty & Race Research Action Council
Women Employed