

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW	.	
CENTER, et al.,	.	
	.	CA No. 17-2458 (TSC)
Plaintiffs,	.	
	.	
v.	.	Washington, D.C.
	.	Thursday, April 25, 2019
OFFICE OF MANAGEMENT	.	11:04 a.m.
AND BUDGET, et al.,	.	
	.	
Defendants.	.	
.....	.	

TRANSCRIPT OF ORAL RULING HEARING  
BEFORE THE HONORABLE TANYA S. CHUTKAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	ROBIN F. THURSTON, ESQ. JEFFREY B. DUBNER, ESQ. SUNU P. CHANDY, ESQ. Democracy Forward Foundation P.O. Box 34553 Washington, DC 20043 (202) 448-9090
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For the Defendants:	TAMRA T. MOORE, ESQ. CARLOTTA WELLS, ESQ. U.S. Department of Justice Federal Programs Branch 1100 L Street, NW Washington, DC 20005 (202) 305-8628
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Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue NW Washington, DC 20001 (202) 354-3186
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Proceedings reported by stenotype shorthand.  
Transcript produced by computer-aided transcription.

## P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: Your Honor, we have Civil Action  
3 17-2458, National Women's Law Center, et al., versus the Office  
4 of Management and Budget, et al. We have Mr. Jeffrey Dubner,  
5 Ms. Robin Thurston, and Ms. Sunu Chandy representing the  
6 Plaintiffs. We have Ms. Tamra Moore and Ms. Carlotta Wells  
7 representing the Defendants.

8 THE COURT: Okay. Good morning, everyone.

9 Sorry to have to bring you all back here, but I thought  
10 it would be appropriate to place my reasons for my findings on  
11 the record, and it was just more efficient to do it this way.  
12 So I appreciate you all being here.

13 We're here for my decision on the appropriate relief after  
14 the April 16, 2019, hearing. I will give my reasoning on the  
15 record now. After the hearing, I'll issue a written order.

16 Now, as a preliminary matter, the Court wants to deal first  
17 with the declaration submitted by counsel for the Government and  
18 the issues that it touches upon.

19 Plaintiffs, at least since the beginning of December of  
20 2018, have been under the impression that if the Court ruled  
21 in their favor on the cross-motion for summary judgment, then  
22 the Government could begin the process of collecting Component 2  
23 data almost immediately. That understanding was based on  
24 communications between Plaintiffs and the Government on  
25 December 3, 2018.

1           During negotiations concerning a request by the Government  
2           for an extension of time, Government counsel represented in an  
3           e-mail that the Office of Management and Budget stated it would  
4           take, I quote, "1 day" to, I quote, "get Component 2 'live'  
5           should Plaintiffs prevail in this case."

6           The e-mail also stated that Government's counsel was  
7           waiting to hear back from the EEOC. The representation from  
8           OMB that Component 2 data could go live in one day was the basis  
9           for Plaintiffs agreeing to the Government's Consent Motion for  
10          an extension filed on December 4, 2018.

11          In other words, this Consent Motion reflected the  
12          understanding that, if the Court resolved the summary judgment  
13          motions with sufficient time before the March 31, 2019, data  
14          collection, that collection could include the stayed Component 2  
15          information if the Court ruled in Plaintiffs' favor.

16          Whether or not the Government's earlier communication had  
17          explicitly stated only that OMB could go live in a day -- and  
18          there perhaps remained some uncertainty about EEOC's turnaround  
19          time -- the Government certainly reinforced Plaintiffs'  
20          understanding that *both* agencies could go live virtually  
21          immediately when it included Plaintiffs' language about timing  
22          in its Consent Motion, and for months did not reveal the  
23          information it had from EEOC to Plaintiffs or to the Court.

24          Consent Motion stated, ECF No. 24: "Pursuant to Local  
25          Rule 7(m), counsel for Defendants conferred via e-mail with

1 Plaintiffs' counsel regarding Defendants' request.

2 In response to Defendants' request, Plaintiffs stated the  
3 following: 'Plaintiffs consent to an extension until December  
4 20, 2018 and the additional proposed briefing deadlines, so long  
5 as the extension gives the Court sufficient time to resolve the  
6 pending motions in advance of the scheduled March 31, 2019 data  
7 collection, so that the 2019 data collection could include the  
8 stayed pay data collection (if the Court resolves the litigation  
9 in Plaintiffs' favor.)'" That's from ECF No. 24.

10 Counsel for the Government included this language in the  
11 Consent Motion, which was filed on December 4, 2018, even though  
12 she had already received information to the contrary from the  
13 EEOC. Earlier on December 4, 2018, EEOC notified Government  
14 counsel by e-mail that it would take -- its estimate was that it  
15 would take until January 2021 to begin national implementation  
16 of pay data collection.

17 Even though the Government had information in early  
18 December 2018 indicating that EEOC would not even begin  
19 collecting Component 2 pay data until nearly two years after  
20 Plaintiffs and the Court thought it would be completed, the  
21 Government allowed Plaintiffs and the Court to continue under  
22 the misimpression about how quickly collection could proceed.

23 For example, on February 5, 2019, Plaintiffs stated in a  
24 pleading to the Court: "a ruling on the merits by the end of  
25 February should allow EEOC to incorporate the improperly stayed

1 component of the data collection without further disruption to  
2 the EEO-1 schedule." And I'm quoting from ECF No. 38. The  
3 Government did not correct this representation from Plaintiffs  
4 to the Court.

5 This background is very important because, at the time of  
6 the Court's summary judgment decision on March 4, both the Court  
7 and the Plaintiffs believed that the removal of the stay would  
8 allow for an efficacious and prompt collection of the Component  
9 2 pay data for both 2017 and 2018 as part of the timeline for  
10 the Component 1 2018 pay data.

11 However, since the summary judgment decision was issued,  
12 the Government has represented that EEOC could not begin  
13 collecting the 2018 Component 2 data until September 30, 2019  
14 and that it will not be collecting the 2017 data.

15 Moreover, the Government's failure to disclose its actual  
16 position with regards to timing is affecting Plaintiffs'  
17 litigation decisions now. If the Government had revealed to the  
18 Court and Plaintiffs in December 2018 that EEOC was representing  
19 that it could not begin collecting Component 2 pay data until  
20 2021, the Court would have provided Plaintiffs the opportunity  
21 to conduct discovery and contest this factual representation.

22 Now the Court and Plaintiffs know that the 2021  
23 representation was incorrect because EEOC currently states it  
24 can complete the collection by September 30, 2019. But, even  
25 worse for Plaintiffs, although they know that a prior EEOC

1 factual estimation was incorrect, they are effectively being  
2 forced to accept Dr. Haffer's factual assertion about EEOC's  
3 timeline as true because discovery now would consume too much  
4 time.

5 In its latest filing, the Government provides various  
6 reasons why it did not disclose the information that it had  
7 from the EEOC earlier to the Court and to the Plaintiffs.  
8 The Court finds these reasons to be unpersuasive.

9 First, the Government states that it did not provide the  
10 information from EEOC to Plaintiffs because it believed that  
11 information would be, in quotes, "unsatisfactory" to Plaintiffs.  
12 That is certainly not a reason to fail to turn over vital  
13 information. This information was critical to both Plaintiffs  
14 and the Court for understanding when the Court needed to act.

15 Second, the Government also states that it did not turn  
16 over the information because it would have been a diversion of  
17 time and a collateral issue. It was -- and continues to be --  
18 not at all collateral, because it goes to the heart of the  
19 effectiveness of any relief Plaintiffs secured.

20 Third, and most revealing, EEOC's own attorney says she was  
21 not convinced that EEOC could not begin collecting information  
22 until 2021. This is troubling, because it shows that even  
23 EEOC's lawyers believed that EEOC was not credible in the  
24 information it was providing to Plaintiffs and to the Court  
25 and what impediments, if any, stood in the way of an efficient

1 collection. Needless to say, this misrepresentation casts  
2 a shadow over the Government's current representations that  
3 it cannot promptly and efficiently collect the Component 2  
4 information with Component 1 information.

5 Turning to the issue of the Government's pleadings  
6 since the Court's summary judgment decision and Dr. Haffer's  
7 Declaration and testimony, the Court finds that some of the  
8 Government's purported reasons for not collecting Component 2  
9 information during the reporting period for Component 1  
10 information lack merit.

11 First, EEOC's alleged privacy and data security concerns  
12 are not adequate reasons for its lack of prompt compliance.  
13 During questioning from the Court, Dr. Haffer conceded that his  
14 goal was to exceed federal standards. He did not contend that  
15 the approved data collection would not meet current federal  
16 standards. Likewise, Dr. Haffer also testified that he knew of  
17 no data breaches at EEOC and that storing aggregate pay data  
18 does not make EEOC security measures less effective.

19 Dr. Haffer's concern about inadvertently releasing  
20 information that could be reverse engineered to identify an  
21 individual person is misplaced. By policy, the EEOC excludes  
22 information aggregated from a small number of employees,  
23 eliminating the concern that this aggregated information could  
24 be used to identify particular employees or employers based on  
25 unusual combinations of demographic information, job category,

1 and pay band.

2 Second, the utility of the Component 2 data should  
3 be irrelevant to EEOC's ability to comply promptly with  
4 the collection of the Component 2 data. Specifically,  
5 while the Government questions the adequacy of the prior  
6 pilot study and the decision to use pay bands, these issues  
7 were previously considered and dealt with during the Paperwork  
8 Reduction Act approval process.

9 I want to speak for a moment about the Government's  
10 actions since the stay. The Government's actions during  
11 the time between OMB's stay and the Court's summary judgment  
12 order, and between the Court's summary judgment order and  
13 today, indicate that the Government is not committed to a  
14 prompt collection of Component 2 information.

15 Starting with the time period between OMB's stay and the  
16 Court's summary judgment decision, the Court finds that no  
17 meaningful review of Component 2 pay data was conducted during  
18 the stay, which was ostensibly the reason for the stay in the  
19 first place. It also appears that EEOC did not take any action  
20 in response to the Rao Memorandum's directive that it prepare a  
21 new information collection package for OMB to review.

22 Additionally, the EEOC failed to prepare -- or even  
23 consider preparing -- a contingency plan for the Component 2  
24 data collection in the event Plaintiffs prevailed in this  
25 lawsuit.



1           In response to questioning from the Court about what steps,  
2 if any, EEOC took to prepare for the collection of Component 2  
3 information between the time of the stay and the summary  
4 judgment decision, Dr. Haffer testified about "four major  
5 activities."

6           He testified that EEOC conducted an assessment of the  
7 entire data collection activity, hired staff with expertise in  
8 survey research and in data science and statistics, started the  
9 EEOC data and analytics modernization program, and began to  
10 carry out the evaluation to understand what EEOC can do better.

11           However, Dr. Haffer conceded that these four general  
12 activities were not done with an eye towards collecting  
13 Component 2 information, but rather with an eye to improving  
14 overall data collection activities. And later, during  
15 questioning from Plaintiffs' counsel, Dr. Haffer testified  
16 that he was not aware of any contingency plan for implementing  
17 Component 2 information.

18           Furthermore, while EEOC purports to be concerned with  
19 the prior pilot study, it did not, either before the stay or  
20 during the stay, conduct a subsequent pilot study. Dr. Haffer  
21 testified that this was because EEOC was focused on the  
22 Component 1 information.

23           Finally, Dr. Haffer neither knew about nor reviewed the  
24 internal work that EEOC had previously done on employer guidance  
25 for Component 2 information, even though 11 months had passed

1 between OMB's approval of Component 2 and its subsequent stay.  
2 As Dr. Haffer testified, at the time of the stay, OMB was on  
3 track to begin the collection of Component 2 information in  
4 just a few months, in January 2018. It is difficult for the  
5 Court to figure out why Dr. Haffer did not at least review this  
6 work either during or after the stay.

7 Turning to the time period between the Court's summary  
8 judgment decision in March of this year and today, during this  
9 time period, the EEOC has not finalized the contract with NORC,  
10 provided a reason why it has not yet alerted employers that they  
11 will be required to submit Component 2 data by September 30,  
12 2019 at the latest, has not issued a Federal Register Notice to  
13 alert regulated entities that the stay has been lifted, it has  
14 not restored the prior Component 2 guidance from its website,  
15 and it has not revisited the internal work it did to implement  
16 the Component 2 data collection in the period before the  
17 unlawful stay.

18 Additionally, in the event the collection is not completed  
19 by September 30, 2019, the Government has been unable to make  
20 any satisfactory commitments that it would collect Component 2  
21 data beyond that date.

22 In sum, this factual background reflects that the  
23 Government has not demonstrated a commitment to efficiently  
24 collect the Component 2 pay data, and over the course of several  
25 months has affirmatively left both the Court and Plaintiffs to

1 labor under the misimpression about when and how the Government  
2 could collect this information.

3 The first issue for the Court to deal with is the timing  
4 of the collection of the calendar year 2018 data.

5 Based on Dr. Haffer's testimony, Plaintiffs have withdrawn  
6 their request for the Court to order that Component 2 data be  
7 collected by May 31, 2019. This concession is based on  
8 Dr. Haffer's testimony that NORC at the University of Chicago  
9 informed him that it would, in quotes, "walk away" if it was  
10 asked to collect the data any quicker than September 30.

11 As Plaintiffs note in their summation, they did not have  
12 the opportunity to depose Dr. Haffer or officials at NORC, or  
13 to conduct any other type of discovery to challenge his factual  
14 assertion by NORC as testified to by Dr. Haffer. As stated  
15 earlier, the Court recognizes that Plaintiffs are in a very  
16 tough position because time is of the essence and discovery on  
17 this matter would further delay these proceedings to Plaintiffs'  
18 detriment.

19 Nonetheless, for current purposes, Plaintiffs are assuming  
20 the accuracy of Dr. Haffer's representation about NORC's  
21 position that it needs until September 30, 2019, to collect the  
22 data. The Court will do the same, even though the Court harbors  
23 its own doubts that it is impossible for NORC or EEOC to collect  
24 the data any sooner.

25 However, because Plaintiffs are agreeing to delay the

1 collection of the Component 2 data until September 30, the  
2 Court must impose safeguards to ensure the completeness of the  
3 collection. These orders are even more pressing and necessary  
4 because, as I have laid out, the Government does not have clean  
5 hands in this case.

6 The second issue that I must decide is how many years of  
7 Component 2 data EEOC must collect. When this Court ordered the  
8 vacatur of OMB's stay of the data collection, EEOC was required  
9 to collect two years' worth of pay data. The Government has  
10 conceded this point in their pleadings.

11 However, the Government now contends that the Acting Chair  
12 has the authority to forgo the collection of calendar year 2017  
13 data. This position conflicts with this Court's summary  
14 judgment order: Two years of pay data must be collected.

15 The EEOC is required to collect a second calendar year  
16 of Component 2 data in addition to calendar year 2018 data.  
17 The Government may collect 2017 pay data or 2019 pay data,  
18 and the Court will get into the details of this further.

19 The Court is not convinced that EEOC is unable to collect  
20 Component 2 data for calendar year 2017 this year. While  
21 Dr. Haffer expressed concerns -- both in his Declaration and  
22 during his testimony -- that collecting 2017 data could decrease  
23 response rates and increase errors in the collection process,  
24 the Court views these concerns as speculative, generalized, and,  
25 at times, unsubstantiated.

1 Dr. Haffer did not state that it would be impossible to  
2 collect 2017 Component 2 data for this collection period or that  
3 EEOC would be unable to resolve its concerns through various  
4 means such as additional contracting support or extending the  
5 period for employers to comply.

6 While it seems that EEOC would prefer to collect only 2018  
7 Component 2 data for this year's collection period, the Court  
8 still believes that if diligent and best efforts -- and I should  
9 add "prompt" -- diligent and best efforts are made, EEOC would  
10 be able to collect 2017 pay data during this year's collection  
11 period.

12 Nevertheless, Plaintiffs have agreed that their summary  
13 judgment relief would be satisfied if EEOC collected 2019  
14 calendar year pay data during next year's reporting period  
15 and, the record is clear, that this option would pose none  
16 of the concerns raised about collecting 2017 data this year.

17 In response to a question from the Court, Dr. Haffer  
18 testified that if EEOC collected 2019 data in 2020, that  
19 scenario would resolve any concerns he had from a reliability-  
20 and-validity-of-the-data perspective.

21 Therefore, the Court will be ordering and declaring that  
22 the summary judgment opinion and order require the collection  
23 of the missing two years of Component 2 pay data.

24 The Court will also be ordering EEOC to immediately take  
25 all steps necessary to complete the Component 2 data collection

1 for calendar years 2017 and 2018 by September 30, 2019.

2 The Court will also be ordering that EEOC may satisfy the  
3 Court's order requiring two years of data by collecting EEO-1  
4 Component 2 data for -- excuse me -- EEOC Component 2 data for  
5 2019 during the 2020 EEO-1 reporting period.

6 The Court will be ordering that if EEOC determines to  
7 exercise the option to collect EEO-1 Component 2 data for 2019  
8 instead of 2017, it must notify the Court and Plaintiffs of that  
9 decision by May 3, 2019.

10 Next, the Court must deal with the tolling issue. In its  
11 submission in response to the Court's questions during the March  
12 19, 2019 status conference, ECF No. 54, although directed to by  
13 the Court, the Government did not state its position or  
14 challenge Plaintiffs' contention that the illegal stay tolled  
15 the expiration of the three-year authorization of the Component  
16 2 data collection.

17 Although this omission was pointed out by Plaintiffs in  
18 their opposing pleading, again the Government was silent on the  
19 issue in its reply pleading, ECF No. 63. As this Court stated  
20 at the last hearing, the Court considers this issue conceded.

21 Notwithstanding the Court's statement that it viewed  
22 this issue as conceded, for the first time, in its summation  
23 pleading, the Government takes a position that there is no legal  
24 basis for tolling the expiration of the authorized period for  
25 collecting Component 2 pay data.

1           Assuming for purposes of argument that the Court has  
2 not already treated the issue as conceded, the Government is  
3 still legally and equitably incorrect. OMB's stay tolls the  
4 three-year approval period. This ruling is supported by the  
5 text and purpose of the Paperwork Reduction Act.

6           First, focusing on the statutory language, 44 U.S.C.  
7 § 3507(g) expressly states that the director of OMB "may not  
8 approve a collection of information from a period in excess of  
9 3 years." The three-year limitation is tied to OMB's actions.  
10 When OMB stayed its approval authority, it stayed the running  
11 of the three-year period.

12           The purpose of the Paperwork Reduction Act also supports  
13 this Court's ruling on tolling. The PRA has twin aims: to  
14 minimize the burden to the public of information collection  
15 while maximizing the utility of information collected. Tolling  
16 the three-year time period does not increase the burden on  
17 filers beyond the initial three-year approval, and the  
18 Government will collect the same amount of information as  
19 OMB originally approved.

20           Moreover, this Court has the power to fashion a remedy  
21 that extends beyond a statutory lapse date. And I'll cite to  
22 *Burr v. Ambach*, 863 F.2d 1071, from the Second Circuit;  
23 *Connecticut v. Schweiker*, 684 F.2d 979, from the D.C. Circuit;  
24 and *Andrulis Residential Corporation v. U.S. Small Business*  
25 *Administration*, No. 90-2569, 1990 WL 169318, in the District

1 Court of the District of Columbia.

2 Finally, on this point, it is important not to lose track  
3 of the fact that the Government is in this position because of  
4 its own actions, including the Government's unlawful stay, the  
5 agency's failure to engage in a review during this stay, EEOC's  
6 failure to prepare any type of contingency plan for Component 2  
7 data collection, and the incorrect and incomplete information  
8 regarding timing for compliance provided by the Government to  
9 Plaintiffs and to the Court.

10 As mentioned earlier, it is apparent to the Court, on the  
11 record before it, that no meaningful review of Component 2 pay  
12 data was conducted during the stay. It also appears that EEOC  
13 did not take any action in response to the Rao Memorandum's  
14 directive that it prepare a new information-collection package  
15 for OMB to review.

16 Finally, on the tolling issue, the Court is concerned  
17 about the incentives for both the Government and employers if  
18 the Court did not rule that the time was tolled. The Government  
19 would have an incentive to further slow-roll the collections  
20 this year, and employers that did not want to submit pay data  
21 would have the incentive to delay reporting in the hopes of not  
22 complying at all.

23 The Court has a responsibility to fashion an order that  
24 ensures that EEOC completes the Component 2 data collection.  
25 Since the Court's March 4 summary judgment order and opinion --



1 with numerous filings and court appearances -- the Court does  
2 not yet have adequate assurances from the Government that it  
3 will complete Component 2 data collection. Therefore, the Court  
4 finds it necessary to order additional ancillary relief.

5 As stated earlier, I will order EEOC to immediately take  
6 all steps necessary to complete the Component 2 data collection  
7 by September 30, 2019.

8 Component 2 data collection will not be deemed complete  
9 until the typical numbers of EEO-1 reporters submit the required  
10 Component 2 reports. Plaintiffs suggest -- and the Court finds  
11 it to be a reasonable suggestion -- that "typicality" be defined  
12 as when the percentage of EEO-1 reporters that have submitted  
13 their required EEO-1 Component 2 reports equals or exceeds the  
14 mean percentage of EEO-1 reporters that actually received EEO-1  
15 reports in each of the past four collection years.

16 The Court will also order the Government to provide regular  
17 reports to Plaintiffs and to the Court.

18 Additionally, the Court is troubled as to why the EEOC has  
19 not provided a date when it will notify EEO-1 reporters about  
20 their obligation to submit Component 2 pay data no later than  
21 September 30, 2019, and also why EEOC has not issued a Federal  
22 Register Notice to alert the regulated community that the stay  
23 has been lifted.

24 Therefore, the Court will be ordering that by April 29,  
25 2019, EEOC must issue a statement on its website and submit the

1 same for publication in the Federal Register, notifying EEO-1  
2 filers that they should prepare to submit Component 2 data no  
3 later than September 30, 2019. The Court is not convinced that  
4 an increase in questions from the regulated community warrants a  
5 delay on this front.

6 Finally, the Government still has not provided an adequate  
7 plan for collecting Component 2 pay data after September 30,  
8 2019. While the EEOC has stated that it anticipates completing  
9 collecting the Component 2 information by September 30, 2019,  
10 this is far from an adequate assurance.

11 In fact, in the Government's summation, it stated, and I  
12 quote, "If circumstances arise whereby the scheduled opening  
13 of the Component 2 pay data collection is seriously delayed,  
14 the EEOC could request an emergency extension of the EEO-1 PRA  
15 approval from OMB in order to allow sufficient time to conduct  
16 the collection of pay data from 2018." Taken from ECF No. 69.  
17 This is far from a commitment that it would.

18 Moreover, the Government has not explained how it would  
19 affirmatively act to secure compliance by employers beyond  
20 September 30. While Dr. Haffer testified that EEOC could accept  
21 data if employers chose to submit it, he also testified that  
22 EEOC would take no steps after September 30 to retrieve the data  
23 from employers who are not in compliance.

24 The Court will next deal with Plaintiffs' request that the  
25 Court order, in the event that EEO-1 Component 2 pay data

1 collections for calendar years 2017 and 2018 are not complete  
2 by September 30, 2019, or if the EEOC determines to collect  
3 calendar year 2019 data in lieu of calendar year 2017 data,  
4 that Defendants must exercise all authorities to provide for  
5 emergency extensions of these data collections until the data  
6 collections are complete.

7 The Court is going to hold this request in abeyance.  
8 At this point, based on the limited briefing on the issue,  
9 the Court believes that its ruling on the tolling issue is  
10 sufficient to protect Plaintiffs' remedy. However, the Court  
11 is willing to revisit this issue if Plaintiffs wish to submit  
12 additional briefing later.

13 Finally, for all the relief just discussed, the Court  
14 has the authority to order such relief to ensure the Government  
15 complies with the Court's summary judgment order.

16 The Court will cite to *United States Bank National*  
17 *Association v. Poblete*, No. CV 15-00312, an opinion written by  
18 Chief Judge Howell, 2017 WL 4736712; *Kramer v. Secretary of*  
19 *Defense*, 39 F.Supp 2d 54; *National Venture Capital Association*  
20 *v. Duke*, Civil No. 17-1912, decision written by Judge Boasberg  
21 of this court; *Mendoza v. Perez*, 72 F.Supp.3d 168.

22 Despite the Government's contention, nothing about the  
23 EEOC's Acting Chair's statutory authority alters this Court's  
24 conclusion. The EEOC is subject to the summary judgment  
25 decision -- the EEOC has always been a defendant in this case --

1 and it must comply with court orders.

2 Moreover, the Acting Chair's authority is limited by EEOC's  
3 regulation, which requires that employers file the operative  
4 version of the EEO-1 form annually, and that's at 29 C.F.R.  
5 § 1602.7. The current EEO-1 form includes the Component 2 data  
6 collection. The Acting Chair cannot waive this requirement for  
7 a reporting year.

8 For the reasons discussed, the Court will be issuing  
9 the following order today with potential slight modifications:

10 • ORDERED and DECLARED that the Court's summary judgment  
11 opinion and order, ECF Nos. 45, 46, require that Defendant EEOC  
12 collect EEO-1 Component 2 pay data for calendar years 2017 and  
13 2018.

14 • ORDERED that in lieu of collection of Component 2 data  
15 for calendar year 2017, the EEOC may satisfy the Court's order  
16 requiring two years of data by collecting EEO-1 Component 2 data  
17 for 2019 during the 2020 EEO-1 reporting period. If the EEOC  
18 determines to exercise the option to collect EEO-1 Component 2  
19 data for 2019 instead of 2017, it must notify the Court and  
20 Plaintiffs of that decision by May 3, 2019.

21 • It is ORDERED that Defendant Office of Management and  
22 Budget's August 29, 2017 stay of its approval of the revised  
23 EEO-1 form tolled the three-year period of that approval for the  
24 duration of the stay, which lasted 553 days. Accordingly, the  
25 Court DECLARES that, barring further interruptions of the

1 approval or extensions, the Paperwork Reduction Act approval for  
2 the revised EEO-1 form, including Component 2 pay data, OMB  
3 Control No. 3046-0007, shall expire no later than April 5, 2021.

4 • It is FURTHER ORDERED that the EEOC must immediately  
5 take all steps necessary to complete the EEO-1 Component 2 data  
6 collection for calendar years 2017 and 2018 by September 30,  
7 2019. If the EEOC exercises its option to collect EEO-1  
8 Component 2 data for 2019 in lieu of 2017, that collection must  
9 occur in the 2020 EEO-1 reporting period.

10 • It is ORDERED that by April 29, 2019, the EEOC must issue  
11 a statement on its website and submit the same for publication  
12 in the Federal Register notifying EEO-1 filers that they should  
13 prepare to submit Component 2 data no later than September 30,  
14 2019.

15 • ORDERED that beginning on May 3, 2019, and continuing  
16 every 21 days thereafter, the EEOC must provide reports to  
17 Plaintiffs and the Court of notice of all steps taken to  
18 implement the EEO-1 Component 2 data collections since the prior  
19 report, notice of all steps to be taken during the ensuing  
20 three-week period and indicating whether the EEOC is on track  
21 to complete the collection by September 30, 2019.

22 • It is FURTHER ORDERED that the EEO-1 Component 2 data  
23 collections will not be deemed complete, for the purpose of  
24 this order, until the percentage of EEO-1 reporters that have  
25 submitted their required EEO-1 Component 2 reports equals or

1 exceeds the mean percentage of EEO-1 reporters that actually  
2 submitted EEO-1 reports in each of the past four reporting  
3 years.

4 • It is FURTHER ORDERED that the Court will retain  
5 jurisdiction over this matter for the purposes of enforcing  
6 its March 4, 2019 summary judgment opinion and order as well  
7 as this Order.

8 I do have a clarifying question for Plaintiffs and the  
9 Government. As currently worded, by April 29, 2019, the  
10 Government must issue a statement on its website and submit the  
11 same for publication in the Federal Register notifying EEO-1  
12 filers that they should prepare to submit Component 2 data no  
13 later than September 30, 2019.

14 However, the Government has until May 3 to determine if it  
15 wants to exercise the option to collect EEO-1 Component 2 data  
16 for 2019 instead of 2017. This means that on April 29, 2019,  
17 EEOC may not know what to tell employers about the collections  
18 of data other than 2018.

19 So, Plaintiffs, do you want to give your position or  
20 clarify on that point?

21 MS. THURSTON: Yes, Your Honor. That's a fair  
22 question. We think that, at a minimum, by the 29th it would be  
23 appropriate for the EEOC to notify employers that they will be  
24 submitting some Component 2 data by September 30, at least the  
25 2018 calendar-year information. If the EEOC has decided by then

1       which of the other calendar years to require, they could provide  
2       that notification as well.  Otherwise, I think it would be  
3       acceptable for the EEOC to notify employers that they will  
4       provide additional information about which of the second  
5       calendar years would be required to be submitted by May 3.

6               THE COURT:  All right.  Ms. Moore?

7               MS. MOORE:  That sounds reasonable to us.

8               THE COURT:  All right.  Thank you.  That was easy.

9       All right.  Thank you all.

10       (Proceedings adjourned at 11:42 a.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne  
BRYAN A. WAYNE